Newsletter Commercial

Issue 2 2023

unyer GLOBAL ADVISORS

Content

Dear Readers,

Just in time for the beginning of the summer break, we are pleased to provide you with our holiday reading and send you our second newsletter in 2023.

In this edition of our newsletter, we have once again attached great importance to the topicality and relevance of the topics covered. Dr Christoph von Burgsdorff, LL.M. (Essex) and Christina Göbel discuss the possibilities of price adjustment clauses and value protection when drafting contracts. Frank Gutsche and Paul Herter also address rising prices and present the legal situation regarding indexation clauses in leases. Dr. Johannes Teichmann and Rebecca Romig present the EU Commission's proposed directives on goods repair and environment-related advertising claims. Dr Christoph von Burgsdorff, LL.M. (Essex), Robert Burkert and Luisa Kramer give an overview of non-fungible tokens (NFT) and how to deal with NFT in B2C contracts. Finally, Dr Johannes Teichmann and Sonja Dettling report on the latest ECJ ruling on the calculation of commercial agent compensation for one-off commissions.

As usual, if you have any questions or need advice on these and other topics, please do not hesitate to contact us. We wish you new insights from reading these articles and a relaxing summer!

Dr Steffen Gaber, LL.M. (Sydney)
Head of Commercial

Dr Paul Derabin
Legal Content Coordinator

Commercial.Contract: Price Clauses and Value Protection throughout the Supply Chain

Protection against the economic challenges of the future begins with contract drafting!

A look at a receipt in a supermarket or the price displayed at a petrol station confirms the obvious: everything has become more expensive. The costs of living and the costs for businesses in Germany and abroad have risen massively in the past few years. While shopping in the supermarket is usually wrapped up in a few minutes, for businesses, there are often weeks or months, sometimes even years, between them receiving an order and them manufacturing and delivering a product. The cost of providing the contractually owed service and its relationship with the agreed purchase price can fluctuate significantly, meaning that the profits originally calculated do not materialise in the end.

The Coronavirus pandemic, the Ukraine conflict, the resulting supply bottlenecks and, of course, the energy crisis are the main causes of the current inflation. In March 2023, prices in Germany were up 7.4% on the same month last year.

Recent years and months have shown how suddenly and unexpectedly bottlenecks can occur and individual cost factors can skyrocket, or how unexpectedly long-standing business partners can change their hitherto loyal and transparent behavior due to economic and political developments.

Challenge for Businesses

The bad news is that similar developments will also occur in the future, the scope and consequences of which cannot be estimated beforehand. Manufacturers and sellers bear the risk of not receiving supplies themselves, or of their costs turning out to be higher than calculated at the time the contract was concluded. It is therefore crucial for a business's success that it finds a way to respond to such developments by adjusting its prices for customers.

There is not usually an option to unilaterally set new prices for contractual partners. Rarely will business partners voluntarily accept higher prices without being contractually obliged to do so. Recourse to statutory provisions, such as the **disturbance of the basis of the contract** under Section 313 BGB (Bürgerliches Gesetzbuch – German Civil Code), is not often promising. This statutory provision is only relevant if an **unreasonable disproportion** between performance and counter-performance arises which was not foreseeable at the time the contract was concluded. Conversely, this means: if the contracting parties had known when concluding the contract about the circumstances that would occur later, they would have concluded the contract on different terms.

In addition, every contract involves typical obligations for the parties, which in turn entail the risks to be expected in the fulfilment of the obligation. The occurrence of a contractually assumed risk cannot automatically mean there is an unreasonable situation which justifies an adjustment of the contract. For example, a buyer typically bears the risk of having to pay the agreed purchase price. At the same time, a seller or manufacturer bears the risk of having to procure or produce the object of purchase, make it available to the buyer and transfer ownership of it under the agreed terms.

What helps? Foresight in Contract Drafting

The good news is that there are many ways for businesses to arm themselves against future changes by drafting their contracts cleverly. Businesses that commit themselves to their contractual partners for the long term (for example in the form of **framework supply agreements**) should place particular emphasis on agreeing effective price (adjustment) mechanisms. Cost increases or bottlenecks that are not foreseeable today but have a profound impact on a business's profitability do not have to be fully compensated by the business itself in this way, but can be passed on along the supply chain to customers and in turn to their customers.

Drafting effective contractual provisions that link the adjustment of prices to developments and cost increases not foreseeable at the time the contract was concluded is not always easy. The goal should be to exhaust all legal possibilities without risking exceeding the strict regulatory limits. The **Preisklauselgesetz** (Price Clause Act) must be observed in particular. It imposes extremely strict requirements when it comes to the precision and transparency of price clauses. The provisions on **general terms and conditions** under Sections 305 et seq. BGB also limit the contract drafting options.

Which Price Clause is Suitable? More Options than Expected!

Selecting the appropriate price clause is key. When doing so, the characteristics of the contracting parties, the contractual products, the duration of the business relationship but also the specific design of the manufacturing and delivery processes must be taken into account. What is relevant is which factors and how many of them are considered in pricing and in what way do they influence the price and its adjustment. This large number of variables often makes it difficult to select the appropriate control mechanism.

As an alternative to a **negotiation clause or price reservation clause**, contracting parties can agree on a "**rise or fall clause**", which serves to keep a price in constant relation to a comparative value. In addition, "**cost element clauses**" are particularly popular. These allow different production factors or indices to be used cumulatively to enforce price adjustments. The more dynamic the pricing of a contractual product and the more factors this pricing incorporates, the more appropriate the agreement of a **dynamic price** can be.

Summary – Better Safe than Sorry

There are many ways for businesses to agree on price clauses with their contractual partners, be it through a framework agreement, general terms and conditions or a subsequent amendment agreement. It therefore makes sense to seek expert legal advice in good time in order to take appropriate precautions and to face future developments with legally secure solutions.

Authors

Dr Christoph von Burgsdorff, LL.M. (Essex)

Luther Rechtsanwaltsgesellschaft
Hamburg

Christina Göbel

Luther Rechtsanwaltsgesellschaft
Hamburg

Commercial.Compliance: Indexation Clauses in Rental Contracts – a Driving Force for Inflation?

Background

According to a press release issued by the Federal Statistical Office on 13 June 2023, the inflation rate in Germany – measured as the change in the Consumer Price Index (CPI) compared to the same month of the previous year – was +6.1% in May 2023. The high inflation rate of the past few months has led, inter alia, to numerous trade unions now demanding drastic salary increases for their members. However, it is still to be seen how employers' associations will react to these demands in light of frequent and, in some cases, aggressive strikes. In this regard, economic experts have repeatedly warned of the risk of a possible "salary-price-spiral" as well as the hyperinflation that could follow.

While this risk is repeatedly pointed out in the field of labour law, it seems to be of less importance in other fields of law. In the field of tenancy law, so-called indexation clauses have been common practice for many years. These clauses are generally accepted, and no one warns of a possible "indexation-price-spiral".

Currently, however, tenant protection associations are calling for at least a cap on such indexation clauses in rental contracts in order not to overburden tenants economically in these times of substantial price increases. Other voices refer however to the fact that tenants did with the agreement of such indexation clauses in the last twenty years usually economically better than in the case of rent adjustments to to the respective local comparison rent – "the tables have simply turned now".

Whether and how the legislator will react to these demands also remains to be seen.

Principles

The Preisklauselgesetz (PrKG – Price Clause Act) has been in force since 14 September 2007. This Act removed the previous approval system and converted it into a system of legal exceptions.

One of the main objectives of this act is to ensure price stability. Since price clauses can have an inflationary effect, the German legislator – taking into account the regulations preceding the PrKG – has been of the opinion for more than sixty years that price clauses should be strictly regulated. This initially took place under the impression of dramatic inflation, later out of – possibly exaggerated – stability concerns.

According to Section 1 (1) PrKG, the amount of debt may not be directly and automatically determined by the price or value of other goods or services that are not comparable with the agreed goods or services. Subsequently, however, the PrKG provides for explicit exceptions to this prohibition.

Section 1 (3) PrKG, for example, explicitly clarifies that, for price clauses in residential rental contracts, Section 557b BGB (Bürgerliches Gesetzbuch – German Civil Code) contains a special and conclusive provision. This states that the parties to a residential rental contract may agree in writing that the rent be determined by the price index for the standard of living of all private households in Germany set by the Federal Statistical Office, i.e. by the Consumer Price Index.

For clauses in non-residential rental contracts, on the other hand, there is no comparable special provision, which means that the PrKG remains applicable. Price clauses are permissible in such commercial rental contracts if the landlord is bound to the contract for at least ten years. Such a binding can be established, on the one hand, by a contract with a fixed term of at least ten years (Section 3 (1) 1d) PrKG) and, on the other, by the landlord waiving the right of ordinary termination for a period of at least ten years or granting an option right in the tenant's favour to unilaterally extend the rental period to at least ten years (Section 3 (1) 1e) PrKG). Section 3

(1) PrKG again specifies the Consumer Price Index as the source of permissible reference figures for price clauses in such cases. Finally, price clauses in commercial rental contracts must fulfil the general admissibility requirements laid down in Section 2 PrKG. Therefore, they must, on the one hand, be sufficiently specific (Section 2 (1) and (2) PrKG), and, on the other, must not unreasonably disadvantage any contracting party (Section 2 (1) and (3) PrKG).

Contracting Parties Responsible for Reviewing the Admissibility of Price Clauses

With the abolishment of the previous approval system, the Federal Office for Economic Affairs and Export Control no longer reviews and approves price clauses. Instead, the contracting parties must review the admissibility of price clauses under the PrKG on their own responsibility. If it only becomes apparent after a number of years that a price clause violates the prohibition of clauses, however, the legislator considers it unreasonable to regard the clause as null and void from the beginning and to reverse all payments based on it. For this reason, Section 8 PrKG states that the invalidity of a clause only occurs at the time of the legally established violation of the prohibition of price clauses, provided that the contracting parties have not agreed on earlier invalidity.

Thus, the legislator has surprisingly thrown overboard, for the most part, its decades-old fears regarding price stability. However, it is uncertain whether the legislator will continue on this course in light of the drastic increase of inflation.

Outlook and Practical Tip

It cannot be ruled out that the legislator will tighten up the PrKG in the near future. After all, even outside of currency crises there have been many cases in the past in which the legislator has subsequently restricted even effectively agreed price clauses.

The surprisingly strong rise in inflation could now lead to the legislators devoting more attention to ensuring price stability again. In particular, this could also result in a tightening of the PrKG, for example in the form of caps on potential price adjustments.

For this reason, in addition to compliance with the PrKG, particular care must be taken when drafting indexation clauses to include clear provisions in the contract for the event that the price clause becomes null and void or is subsequently restricted by law.

Authors

Frank Gutsche
Luther Rechtsanwaltsgesellschaft Stuttgart

Paul Herter
Luther Rechtsanwaltsgesellschaft Stuttgart

Commercial.Compliance: EU Commission publishes Proposals for Directives on the Repair of Goods and Green Claims

Introduction

On 22 March 2023, the European Commission published the following two new proposals for directives:

- Directive on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394, Directives (EU) 2019/771 and (EU) 2020/1828 (**"Directive on Promoting the Repair of Goods"**)
- Directive on substantiation and communication of explicit environmental claims ("**Green Claims Directive"**).

The proposals are part of the EU's "Green Deal" concept, which seeks to make the EU climate-neutral by 2050. The two proposals aim to drive forward the achievement of this goal by standardising sustainable production within the EU and promoting the circular economy. Furthermore, they intend to support consumers in the green transition by enabling them to make informed and environmentally friendly purchasing choices.

Proposal for a Directive on Promoting the Repair of Goods

The new proposal for a Directive on Promoting the Repair of Goods aims to provide consumers with an easy and inexpensive way of repairing goods to prevent damaged products from being thrown away instead of repaired. The proposal seeks to combat the throwaway society and promote a more sustainable approach to products.

In accordance with the Directive on the Sale of Goods (Directive (EU) 2019/771), the rules would be fully harmonised, in other words the member states have no leeway to deviate from the provisions of the directive.

The directive sets out the following obligations for manufacturers, sellers and member states:

- Within the scope of supplementary performance under sales law, sellers are obliged to repair the product instead of replacing it, unless the repair would cost more than a

replacement product.
- In addition to the obligation of supplementary performance under sales law, manufacturers are also obliged to repair a product (either against payment or free of charge) if the product is technically repairable (products are defined in the annex to the directive, e.g. washing machine, vacuum cleaner). The obligation to repair aims, on the one hand, to promote the development of more sustainable products and, on the other hand, to give consumers a point of contact for the repair of their goods.
- Manufacturers are obliged to inform the consumer in a clear and comprehensible manner about the manufacturers' obligation to repair goods.
- Each member state has to provide a national "matchmaking platform" to help consumers find local repairers and sellers of repaired goods.
- Repairers are obliged to provide a cost estimate and the conditions of repair to the consumer upon request using the standardised European Repair Information Form to ensure more transparency and enable consumers to easily compare different quotes.
- European quality standards for repair services are to be developed so that consumers can identify high-quality repairers.

Green Claims Directive

The Green Claims Directive is intended to supplement the Unfair Commercial Practices Directive (Directive 2005/29/EC) with requirements concerning information obligations and the substantiation of green claims in B2C relationships. In particular, "greenwashing" (advertising that gives a business an environmentally friendly image without sufficient basis for this) and the use of non-transparent sustainability labels are to be stopped.

The proposal for this directive applies to all voluntary advertising claims made by companies, in text form or on an eco-label, aimed at consumers in the EU and referring to the environmental impacts, aspects or performance of the company's products, services or organisation (e.g. "T-shirt made from recycled plastic bottles", "climate-neutral shipping", "packaging made from 30% recycled plastic" or "ocean-friendly sunscreen").

In the future, advertising claims must be substantiated, and this substantiation verified in advance. The proposal also stipulates the minimum requirements for the substantiation and communication of such green claims and eco-labels.

However, the directive is not intended to apply to green claims covered by existing or future EU legislation (e.g. EU Ecolabel).

The Green Claims Directive sets out the following in particular:

- Traders shall substantiate their explicit green claims. For example, they must:
  - demonstrate whether or not the claim refers to the whole product or only parts of it,
  - rely on recognised scientific evidence, use accurate information and take into account relevant international standards,
  - demonstrate that the environmental impacts, aspects or performance covered by the claim are significant in terms of the product life cycle.

- The claims must also be communicated in a manner that is to the point. Claims that constitute a blanket assessment of the overall environmental impact of the product will no longer be allowed. Comparative claims comparing the sustainability performance of a product with that of a competitor will also only be permitted under certain conditions. For example, product comparisons must be based on equivalent information and data.
- The information on which the environmental claim is based must be made available to the public in physical form or in the form of a weblink, QR code or equivalent.
- The substantiation and communication of green claims must be verified by third parties before the green claim is published or the label affixed. The member states shall appoint independent verifiers.
- Eco-labels will face stronger regulation. New public certification schemes and the corresponding labels may only be used if they have been developed at EU level. For private certification schemes to be valid, these must have been approved and their goals must be more ambitious than those of existing schemes.

In terms of enforcement, the proposal provides that infringements can be enforced by, among others, consumer organisations through collective action, in order to protect the collective interests of consumers.

Furthermore, the member states are to introduce rules on fines to sanction non-compliance with the provisions of the directive appropriately and effectively. The maximum amount of fines should be dissuasive and set at least at the level of 4% of the trader's total annual turnover in the member states concerned. Such fines would be the first of their kind in German law regarding the fair trading.

Next steps

The Commission's proposals for the directives are now before the Council and the European Parliament for review. If they agree to the proposals and adopt them, the directives will be transposed into national law by the member states.

Companies should follow the development of the proposals in the legislative process and review their products, product information and advertising claims to make sure they are in line with the directives. If they are not, companies should adjust them accordingly for the future. In particular when developing new products that are technically repairable, the companies should avoid planned wear and tear in order to make these products more sustainable.

Authors

Dr Johannes Teichmann
Luther Rechtsanwaltsgesellschaft
Frankfurt a.M.

Rebecca Romig
Luther Rechtsanwaltsgesellschaft
Frankfurt a.M.

Commercial.Contract: Digital Assets: Managing Non-Fungible Tokens in B2C-Contracts

Crypto values have been experiencing a massive increase in market capitalisation for years and are therefore also one of the emerging applications in blockchain technology in the financial sector in Germany.

The European Parliament is already aiming for an international legal framework for the regulation of crypto assets with the draft Regulation on Markets in Crypto Assets and Amendment of Directive (EU) 2019/1937 ("MiCA-Regulation") and is thus attempting to create a level playing field for all participants across the EU. It also aims to improve legal certainty for consumers and investors and to further develop the innovation and competitive potential of digital finance. The MiCA-Regulation is expected to enter into force as early as the beginning of 2024.

In addition, the Federal Ministry of Finance and the Federal Ministry of Justice have launched a draft bill for a law on financing future-proof investments, the Future Financing Act ("ZuFinG"). This is intended in particular to advance the digitalisation of the capital market by opening up German law for electronic shares and crypto securities.

Crypto assets: Fungible vs. Non-Fungible Tokens

In the case of crypto assets that are decentrally organised and based on blockchain technology, a fundamental distinction is made between fungible tokens and non-fungible tokens. Both fungible tokens such as Bitcoin or Ethereum and non-fungible tokens ("**NFTs**") have become central terms in the international financial world as crypto assets and have also been massively represented in consumer financial markets for several years. In particular, fungible tokens such as Bitcoin have become indispensable as common crypto currencies that serve as a public currency transaction database and are also to be covered by the MiCA-Regulation.

Even more unclear than the legal framework of fungible tokens is the legal classification of NFT, which poses major challenges for the trade and distribution of NFT in particular. Especially in the drafting of contracts and general terms and conditions ("GTC"), particularly for consumer contracts (B2C), numerous pitfalls loom due to the unclear legal framework. In order to avoid these, the central questions in connection with NFT must not be left open and require detailed examination and regulation. This article offers initial starting points in this regard.

Legal classification of Non-Fungible Tokens

NFTs are non-exchangeable digital certificates ("**tokens**") that refer to any digital or haptic asset (e.g. digital or analogue image, music file) ("**reference object**" or "**asset**") and perpetuate this assignment based on blockchain technology. The creation of an NFT takes place through the connection of token and reference object, the so-called "*minting*". Each NFT exists only once and can therefore be assigned to exactly one "holder". The respective owner and the entire transaction

history are recorded on the blockchain and can thus be derived from the respective token at any time.

The NFT is only a kind of token in the form of a data record, not the value itself; this results solely from the asset. However, according to prevailing opinion, data are not independent legal subjects, i.e. they are not things in the sense of Section 90 of the German Civil Code, which makes the legal classification and thus the allocation of the applicable legal framework under German law considerably more difficult. A property-law ownership position and also the application of property law are ruled out. In the absence of a human author and the required level of personal intellectual creation, an NFT probably also does not constitute a work protected by copyright. As a rule, NFTs also do not meet the requirements for a crypto security, since NFTs are not issued.

A corresponding application of existing regulations, e.g. property law, also seems questionable.

The provisions of the "digital sales law", Sections 327 ff., 453 of the German Civil Code, which regulate "digital contents" and thus allow a qualification of NFTs according to sales law and tort law, are more appropriate. However, this legal framework is very limited and leaves numerous questions unanswered for practice. As a result, the legal classification of NFTs cannot be conclusively clarified on the basis of the current legal framework, which poses considerable risks, especially when drafting contracts.

Sale of NFTs – Smart Contracts

Furthermore, NFTs are based on so-called "Smart Contracts". Smart Contracts are (contractual) conditions for the execution of transactions within the blockchain that are defined in the data record of the NFTs and are executed automatically when a specific condition occurs, e.g. securing the rights of use of the owner of the NFTs or the resale rights of the "mintender".

The acquirer is entered in the blockchain as the holder or "owner" upon sale. However, the transfer of the NFT does not necessarily include the transfer of the reference object. This means that in case of doubt, the owner does not receive the rights of use to the reference object, which is regularly protected by copyright. The legally secure use of the asset associated with the NFTs therefore also requires the transfer of the rights of use to the reference object, which usually takes place through the deposited Smart Contract. As a rule, the reference object itself is not transferred.

In addition, the Smart Contracts often provide that the creator of the reference object and or the creator of the NFT automatically receives a monetary participation in the respective sales amount with each further transfer of the NFT, so that they profit from the further sale of the NFT.

General Terms and Conditions for the sale of NFTs

It is already clear from the two above-mentioned essential aspects of NFTs that the contractual design of the sale of NFTs involves considerable legal challenges. But beyond that, there are numerous other legal questions which, without detailed contractual regulations, harbour considerable risks for all parties involved, e.g.

1. When is the time of the conclusion of the contract? There are numerous possible points in time during the minting and selling process, e.g. whitelisting of the customer for the minting process, connection of the customer's wallet, start of the minting process, allocation of the mined NFT. To avoid disadvantages for the seller, the conclusion of the contract must be regulated in detail.
2. Warranty rights? The de facto separation of NFTs from the actual asset and the impossibility of reversing an entry on the blockchain make subsequent performance in connection with NFTs particularly difficult. Here, too, a corresponding provision should be included in order to avoid liability risks.
3. Rights of withdrawal in consumer transactions? In principle, these also exist in the sale of NFTs, which entails risks for the seller due to the difficult reversal and the costs of transferring crypto assets and currencies. Rights of withdrawal should therefore be excluded as far as possible.
4. Payment with "crypto currencies"? This can be particularly problematic in consumer transactions, as this payment method does not involve an official currency and is usually not free of charge for the consumer.
5. Rights to the NFT itself? The rights associated with the NFT, e.g. rights of use and resale, copyrights and rights in rem, should also always be regulated in detail.

These are just a few examples of the aspects to be considered when drafting B2C-contracts. In addition, not every sales process of NFTs is the same in practice. For example, the owner of the NFTs is not necessarily also the author of the reference object. In addition, the minting of the NFT may already be part of the sales process or an upstream service. GTC for the sale of NFTs should therefore be drafted taking into account the numerous modalities for the respective sales

process and should be included in the contracts with consumers. Rights and obligations of the parties should be fully regulated in a legally secure manner.

Conclusion

The legal classification of NFTs is currently in flux. The MiCA-Regulation and the German Future Financing Act could create further legal certainty in connection with crypto assets. Whether this will be the case, however, remains to be seen until they come into force. In general, crypto assets raise a multitude of legal questions. Due to the legal uncertainty that currently still exists, there is a need for comprehensive contractual regulations to create the necessary legal framework. GTC should be regularly reviewed against the current legal regulations as a matter of principle, but especially during the dynamic legal situation surrounding NFTs. We face these challenges together with our clients and ensure that they are well advised on all legal issues around digital content in their competitive environment.

Authors

Dr Christoph von Burgsdorff, LL.M. (Essex)
Luther Rechtsanwaltsgesellschaft
Hamburg

Robert Burkert
Luther Rechtsanwaltsgesellschaft
Hamburg

Luisa Kramer
Luther Rechtsanwaltsgesellschaft
Hamburg

Commercial.Distribution law: Calculation of the commercial agent's indemnity in the case of one-off commission payments

Introduction

In March 2023, the European Court of Justice ("ECJ") was once again given the opportunity to comment on the calculation of the indemnity to which the commercial agent is entitled under Article 17(2)(a) and (b) of Directive 86/653/EEC (the "Directive") (ECJ, Judgment of 23 March 2023 – C-574/21). The decision concerned, in particular, the question of what losses of commission must be taken into account in determining the *"commission lost by the commercial agent*". The national courts had already developed conflicting case law in this respect. According to German case law, the "commission lost" was the commission which the commercial agent would have received from future transactions if the agency contract had been continued. The Czech courts rejected this understanding and calculated the indemnity taking only into account the commission lost by the commercial agent in respect of transactions already concluded prior to the termination of the agency contract.

The ECJ essentially had to decide on the following questions:

1. Does the indemnity have to be determined taking into account the commission which the commercial agent would have received in the event of a hypothetical continuation of the agency contract in respect of transactions which would have been concluded after the termination of that agency contract with new customers which the commercial agent brought to the principal before that termination, or with customers with whom the commercial agent significantly increased the volume of business before that termination ("hypothetical commission")?
2. If such hypothetical commission has to be taken into account as a general rule for the purpose of the indemnity, does this also apply where one-off commission payments have been agreed?

Facts

The facts before the ECJ concerned a dispute between O_2Czech Republic and a Czech commercial agent. The commercial agent procured contracts for O_2Czech Republic in the Czech Republic regarding the provision of telecommunications services and the sale of mobile phones. The commercial agent received a one-off commission payment for each contract entered into by O_2Czech Republic and procured by the commercial agent. Upon termination of the agency contract, the commercial agent demanded to be paid an indemnity for the customers procured by the commercial agent, in addition to the one-off commission payments contractually agreed upon for the period up until the date of termination. When bringing an action to enforce the claim, the commercial agent was faced with two hurdles. Firstly, according to Czech case law, the basis for the indemnity to which the commercial agent might be entitled was formed exclusively by the transactions already concluded before the termination of the agency contract. Hypothetical commission for transactions not entered into until after the termination of the agency contract did not constitute

"commission lost by the commercial agent", according to Czech law, and as a result was not taken into account. The second hurdle concerned the agreed one-off commission payments, which possibly constituted already sufficient indemnity for the purposes of Article 17(2) of the Directive.

Calculation basis

The ECJ put the calculation basis for determining the indemnity at the beginning of its decision. Article 17(2) of the Directive provides for an examination in three stages. The aim of the first stage is to quantify the benefits accruing to the principal (Article 17(2)(a), first indent). The aim of the second stage is to check whether the amount so determined is equitable, having regard, in particular, to the *"commission lost by the commercial agent"* (Article 17(2)(a), second indent). Finally, in the third stage, the amount is measured against the maximum limit defined in Article 17(2)(b) of the Directive (average annual commission over the preceding five years).

Hypothetical commission to be taken into account as a general rule

Especially the first question referred for a preliminary ruling concerns fundamental issues: Does the principal have to pay an indemnity for benefits derived after the termination of the contract from business transacted with customers brought by the commercial agent? The ECJ has answered this question in the affirmative, rejecting the Czech courts' interpretation of the law. Hypothetical commission must be taken into account in the calculation, as Article 17(2) of the Directive specifically serves the purpose of providing for an indemnity for benefits that continue to accrue to the principal. The aim is for the commercial agent to participate in the profits earned by the principal after the termination of the agency contract on the basis of the work carried out by the commercial agent.

The ECJ has based its interpretation of the Directive primarily on the following considerations: Article 17(2)(a), first indent, of the Directive expressly refers to "substantial benefits" which the principal "continues to derive" from business generated by the commercial agent. This means benefits that continue to exist on the part of the principal following the termination of the contract. After the agency contract has ended, the principal continues to benefit from the customers brought by the commercial agent inasmuch as the principal continues the business relations and regularly uses, or can use, those relations to transact further business. The indemnity therefore regards business transacted with the customer base after the termination of the contract in which the agent is no longer involved. To the extent that the *"commission lost by the commercial agent"* is to be taken into account in the check which is to be performed in the second stage of the calculation to determine whether the indemnity is equitable, such commission must, conversely, be the commission which the commercial agent would have received from business transacted with the customers brought by the commercial agent if the agency contract had been continued.

Calculation in the event of one-off commission payments being agreed

The second question referred for a preliminary ruling is based on the consideration of whether the benefits which the principal continues to derive after the termination of the agency contract from customers brought by the commercial agent are already fully included in the one-off commission payment, with the result that there is no scope for an additional indemnity.

In the case underlying the decision, the situation was, however, as follows: the one-off commission constituted flat-rate remuneration for each new contract, including contracts entered into with existing customers. This form of one-off commission differs from the one-off commission that is granted exclusively as flat-rate remuneration for bringing a new customer – which is the German understanding of this term – and whose amount is thus independent of the further duration and development of the business relationship with that customer. With such one-off commission payments, no commission can be lost by the commercial agent after the termination of the agency contract for future transactions with the customer brought by the commercial agent. By contrast, in the case dealt with by the ECJ, if the agency contract had been continued, the commercial agent could have received commission payments for transactions with customers brought by the commercial agent whose loss upon termination of the agency contract was not covered by the commission already received. Consequently, the ECJ rightly answered the second question referred for a preliminary ruling in the affirmative with regard to cases where the one-off commissions correspond to flat-rate remuneration for each new contract.

In the course of its preliminary ruling, the ECJ also made some comments on one-off commission regardless of the specific terms and conditions. The Court made it clear that the entitlement to an indemnity is not automatically excluded by an agreement on one-off commission. The entitlement to an indemnity has been designed such that the "commission lost" is only one of several factors that have to be taken into account

in the check to be performed to determine whether an indemnity is equitable. At the same time, the ECJ's answer to the second question referred for a preliminary ruling shows that there may indeed by cases where the payment of one-off commission results in hypothetical commission payments not being taken into account in the calculation of the indemnity. The decisive criteria in this respect are benefits accruing to the principal after the termination of the agency contract and the commercial agent's consideration for those benefits. Any remuneration paid in consideration of future benefits must in any case be taken into account in the aforesaid check to be performed to determine whether an indemnity is equitable.

Concluding remarks

It remains to be seen whether the ECJ will be given another opportunity in the future to comment on the calculation of the indemnity in the case of one-off commission, in particular, one-off commission designed exclusively as flat-rate remuneration for the transfer of a new customer. Even though, after the amendment of Section 89b(1) of the German Commercial Code in response to the ECJ's decision of 26 March 2009 – C-348/07 ("Semen/Tamoil"), the indemnity no longer concentrates primarily on the commission lost, with the result that an entitlement to an indemnity may exist even without a loss of commission, this does not change the situation that the remuneration for the benefits accruing to the principal after the termination of the agency contract is regularly already included in the one-off commission. The absence of any loss of commission ultimately means that an indemnity would not be equitable and that the relevant claim must, therefore, be reduced to zero. If, in exceptional cases, the commercial agent wants to demonstrate the existence of circumstances believed to justify an indemnity, the commercial agent will be faced with the problem of how to quantify the benefits accruing to the principal. The method of calculation recognised by the courts, which is based on the commission lost, will not be available.

Authors

Dr Johannes Teichmann

Luther Rechtsanwaltsgesellschaft
Frankfurt a.M.

Sonja Dettling

Luther Rechtsanwaltsgesellschaft
Frankfurt a.M.

■ GENERAL INFORMATION

Authors of this issue

Dr Steffen Gaber, LL.M. (Sydney)
Lawyer, Partner,
Head of Commercial
Stuttgart
T +49 711 9338 19192
steffen.gaber@
luther-lawfirm.com

Dr Christoph von Burgsdorff, LL.M. (Essex)
Lawyer, Certified Specialist in Commercial and Corporate Law
Partner
Hamburg
T +49 40 18067 12179
christoph.von.burgsdorff@
luther-lawfirm.com

Christina Göbel
Lawyer, Associate
Hamburg
T +49 40 18067 20944
christina.goebel@
luther-lawfirm.com

Frank Gutsche
Lawyer, Partner
Stuttgart
T +49 711 9338 19194
frank.gutsche@
luther-lawfirm.com

Paul Herter
Lawyer, Associate
Stuttgart
T +49 711 9338 10749
paul.herter@
luther-lawfirm.com

Dr Johannes Teichmann
Lawyer, Partner
Frankfurt a.M.
T +49 69 27229 26475
johannes.teichmann@
luther-lawfirm.com

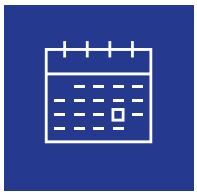
Rebecca Romig
Lawyer, Counsel
Frankfurt a.M.
T +49 69 27229 10794
rebecca.romig@
luther-lawfirm.com

Robert Burkert
Lawyer, Senior Associate
Hamburg
T +49 40 18067 14837
robert.burkert@
luther-lawfirm.com

Luisa Kramer
Lawyer, Associate
Hamburg
T +49 40 18067 18792
luisa.kramer@
luther-lawfirm.com

Sonja Dettling
Lawyer, Associate
Frankfurt a.M.
T +49 69 27229 17383
sonja.dettling@
luther-lawfirm.com

Events, publications and blog



You will find an overview of our events here.

You will find a list of our current publications here.

You will find our blog here.

Legal information

Published by: Luther Rechtsanwaltsgesellschaft mbH
Anna-Schneider-Steig 22, 50678 Cologne, Germany
Telephone +49 221 9937 0
Fax +49 221 9937 110, contact@luther-lawfirm.com
Responsible for the content (V.i.S.d.P.): Dr. Steffen Gaber, LL.M. (Sydney) Luther Rechtsanwaltsgesellschaft mbH Lautenschlagerstraße 24, 70173 Stuttgart, Telefon +49 711 9338 19192
steffen.gaber@luther-lawfirm.com

Disclaimer

Although this newsletter has been carefully prepared, no liability is accepted for errors or omissions. The information in this newsletter does not constitute legal or tax advice and does not replace legal or tax advice relating to individual cases. Our contact persons at the individual locations are available for this purpose.

Luther.

Bangkok, Berlin, Brussels, Cologne, Delhi-Gurugram, Dusseldorf, Essen, Frankfurt a.M., Hamburg, Hanover, Ho Chi Minh City, Jakarta, Kuala Lumpur, Leipzig, London, Luxembourg, Munich, Shanghai, Singapore, Stuttgart, Yangon

You can find further information at:
www.luther-lawfirm.com
www.luther-services.com

unyer GLOBAL ADVISORS