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Q&A on Agency Agreements

Part 1: Introduction

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

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

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

Part 2: Legislative framework

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

a. *Legislative framework:*

Act No. 89/2012 Sb., the Civil Code, as amended (the "Civil Code"), Book four, Title II, Chapter 5, Division 5 – Commercial Agency constitute the transposition of the Directive into the Czech Agency Law.

Other rules relevant to answering the questions below:

- The Civil Code, in particular:
  - Book one, Title I, Chapter 1 – Private Law (contains in particular the basic principles of civil law);
  - Book one, Title V, Chapter 1, Division 3 and 6 – Form and Invalidity of Juridical Acts;
  - Book one, Title V, Chapter 3, Division 1 – Statute of Limitations;
  - Book four, Title I, Chapter 2 – Contract;
  - Book four, Title I, Chapter 7 – Extinction of Obligations;

- Book four, Title III, Chapter 1 – Compensation for Pecuniary and Non-pecuniary Harm;
- Book four, Title IV, Chapter 1 – Unjust Enrichment.

- Act No. 170/2018 Sb., on the Distribution of Insurance and Reinsurance (the "ADIR").

Act No. 216/1994 Sb., on Arbitration and Enforcement of Arbitral Awards, as amended (the "Act on Arbitration").

b. Link(s) to official publication:

The Civil Code (linked here): Since the Official Collection of Laws of the Czech Republic does not contain consolidated texts of laws, amendments should be consulted separately. An unofficial consolidated version is available here.

The ADIR (linked here): Amendments should be consulted separately. An unofficial consolidated version is available here.

The Act on Arbitration (linked here): Amendments should be consulted separately. An unofficial consolidated version is available here.

c. Link(s) to English translation:

An English translation of The Civil Code is available here. Please note that this translation does not include amendments to the Civil Code.

An English translation of the ADIR is not available.

An English translation of the Act on Arbitration is not available.

Part 3: Scope

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

No. The definition of commercial agency as set forth in Art. 2483(1) Civil Code extends the scope of the rules applicable to commercial agency under Article 1(2) of the Directive not only to the sale and purchase of goods but also to the provision of services. Additionally, it also includes the requirement of a commission paid by the principal to the commercial agent.

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

No.

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

No. Czechia did not make use of this option and therefore the commercial agency regulation also applies to commercial agents whose activities as commercial agents are only of a secondary nature compared to their primary activities (such as activities of an independent distributor). This approach avoids the problems otherwise associated with distinguishing between secondary and primary activities.

Part 4: Contractual phase

A. Form of agency agreements

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

No. The Czech Agency Law does not provide for such obligation. However, Czechia made use of the possibility provided for in Article 13(2) of the Directive and imposed a mandatory written form of commercial agency agreements in Art. 2483(2) Civil Code.

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

Yes. See, Art. 2483(2) Civil Code. The Czech Agency Law requires that the agency agreement is concluded in writing in order to be valid and enforceable.

B. Content of agency agreements

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

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

- to look after his principal's interests and to act dutifully and in good faith;
- to make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of;
- to communicate to his principal all the necessary information available to him;
- to comply with reasonable instructions.

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

Yes. The obligations of a commercial agent are stipulated in Art. 2489-2494 Civil Code and meet the minimum standard in the Directive, either explicitly or by means of interpretation of the individual provisions of the Civil Code.

The obligations to act dutifully and in good faith are not explicitly included among the obligations of a commercial agent, since according to Art. 6 Civil Code, everyone is obliged to act fairly in legal relations. Fairness and good faith are presumed, under Art. 7 Civil Code, for everyone who acts in a legal sense, i.e., for both parties to the commercial agency agreement.

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

Yes. Art. 2489(1) Civil Code imposes an obligation on the commercial agent to act with professional care. Professional care is a higher category of care (basically, the extent of knowledge and proficiency) that is necessary for a party's activity and that the Civil Code presupposes for his/her activity. Thus, the commercial agent is expected to have a higher degree of professional business proficiency in the industry in comparison to a regular natural party neither acting as an entrepreneur, nor as a qualified party in the field in which the commercial agency is concluded. The obligation to act with professional care implies, for example, that the commercial agent must seek out parties interested in concluding transactions with the principal, who are expected to properly perform their obligations under a potentially concluded contract. If no such expectation is given, the commercial agent acting with professional care should not recommend the principal enter into such a transaction.

Pursuant to Art. 2489(2) Civil Code, the commercial agent is obliged to provide the principal with information on market developments and all other circumstances relevant to the legitimate interests of the principal, particularly for its decision-making related to the conclusion of business transactions.

According to Art. 2490 Civil Code, where the right of a commercial agent to conclude business transactions on behalf of the principal has been stipulated, the commercial agent is obliged to conclude such business transactions under the standard commercial terms determined by the principal, unless the principal agrees to a different procedure. This also applies to pricing conditions (subject to compliance with competition law rules).

If it would be contrary to the interests of the principal, the commercial agent may not, based on Art. 2491 Civil Code, disclose to a third party information which the commercial agent obtained from the principal or use such information for himself/herself or other parties, unless approved by the principal. The same applies to information which the commercial agent did not learn directly from the principal, but in the performance of the commercial agent’s obligations under the contract, and the use of which could cause harm to the principal. These obligations of the commercial agent continue even after the end of the commercial agency.

Art. 2492 Civil Code provides for a so-called *del credere* clause. For details, see, Q42 and Q43 below.

According to Art. 2493 Civil Code, if a commercial agent obtains documents which may be relevant to the protection of the legitimate interests of the principal, the commercial agent is obliged to keep them for the necessary period. The specific period is not further defined, as it follows from the determination of the obligation in question. Thus, the necessary period is determined with regard to the documents which are relevant to protect the legitimate interests of the principal (e.g., for the purpose of determining the legal obligations of the parties, in case of a potential legal dispute).

If the commercial agent is unable to carry out his/her activities, he/she is, under Art. 2494 Civil Code, obliged to inform the principal without undue delay.

In accordance with Art. 2519 Civil Code, the parties to a commercial agency agreement may derogate from the provisions of Art. 2490-2494 Civil Code.

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

Yes. The Civil Code neither provides for nor excludes the possibility of appointing a sub-agent. Hence, the parties are entitled to address the issue of the appointment of sub-agents in their agency agreement as they see fit. This follows from the general principle of civil law enshrined in Art. 1(2)Civil Code according to which unless it is expressly prohibited by law, parties can stipulate rights and obligations in derogation from the law (only stipulations contrary to good morals, public order or the law relating to the status of persons, including the right to protection of personality, are prohibited).

Thus, unless it is contractually excluded, the commercial agent may appoint one or more sub-agents who should also be protected as commercial agents, either directly vis-à-vis the principal or vis-à-vis the commercial agent acting as the principal vis-à-vis them.

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

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

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

Yes. The obligations of a principal are stipulated in Art. 2495-2498 Civil Code and meet the minimum standard in the Directive, either explicitly or by means of interpretation of the individual provisions of the Civil Code.

The obligations to act dutifully and in good faith are not explicitly included among the obligations of a principal, since according to Art. 6 Civil Code, everyone is obliged to act fairly in legal relations. Fairness and good faith are presumed, under Art. 7 Civil Code, for everyone who acts in a legal sense, i.e., for both parties to the commercial agency agreement.

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

Pursuant to Art. 2496(2) Civil Code, a principal is obliged to hand over to a commercial agent all documents and things necessary for the performance of the commercial agent's obligations (e.g., leaflets, brochures, samples of goods). The documents and things handed over remain in the ownership of the principal. The commercial agent is obliged to return them to the principal after the end of commercial agency, unless, given their nature, they are consumed during the commercial agency.

In accordance with Art. 2519 Civil Code, the parties to a commercial agency agreement may derogate from this provision.

B.2 - LEVEL AND CALCULATION BASIS OF REMUNERATION

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

Yes. The specific rules set out in the ADIR apply in relation to the freedom of the parties to fix the level of the remuneration in the context of commercial agency in insurance and reinsurance.

Art. 48(b) ADIR provides, among other things, that an insurance company, a reinsurance company and an independent intermediary are obliged to establish, maintain, and apply rules for the remuneration of independent intermediaries, tied agents and supplementary insurance intermediaries (who usually act as commercial agents) appropriately to the nature, scope, and complexity of its business. These rules must not encourage non-compliance with obligations under the ADIR, other laws, or directly applicable EU laws governing insurance and reinsurance distribution and must not encourage the recommendation of particular insurance products to customers to the detriment of other products that are better suited to the customers' needs.

Under Art. 49(1) ADIR, an insurance company and an insurance intermediary must not require a party who is or is to be involved in the distribution of insurance (including in the form of commercial agency) to make initial or other similar payments as a precondition for the payment of a future remuneration for that activity.

Pursuant to Art. 49(2) ADIR, the insurance company and the insurance intermediary must not make the remuneration for the distribution of insurance (including in the form of commercial agency) dependent on the acquisition of other parties for this activity by the remunerated party. This priovision aims at the undesirable

practices of MLM companies conditioning the renumeration for the distribution of insurance on bringing other sales representatives into its corporate structure.

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

Yes. See, Art. 2499(1) Civil Code.

Please note that the Civil Code confuses the concepts of remuneration and commission when applying the abovementioned rule only to commission (as defined in Article 6(2) Directive, or Art. 2483(3) Civil Code – see, Q15 below) and not to remuneration as a broader concept (also a payment which may not be commission in nature, e.g., a lump sum payment for a certain period of the commercial agency, reimbursement of additional costs incurred, etc.). Based on an interpretation of Art. 2499(1) Civil Code in compliance with the Directive, we believe that for the purposes of this provision, the term “commission” should be read as “remuneration”.

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

Yes. See, Art. 2499(3) Civil Code.

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

No. The definition of commercial agency in Art. 2483 Civil Code implies that the principal must always provide the commercial agent with a commission. We believe that in terms of the Directive, this setting is incorrect, as the Civil Code also confuses the terms commission and remuneration in this provision. In order for the relevant provisions of the Civil Code on commercial agency (Art. 2483 et seq.) to apply to the relationship, the commercial agent must be remunerated for his/her activities, regardless of the name of such financial or other remuneration (see, Art. 2520(1) Civil Code). Therefore, in our opinion, the remuneration does not always have to be in the form of a commission as defined in the Directive or Art. 2499(3) Civil Code. This conclusion can also be reached by an interpretation of Art. 2483 Civil Code in conformity with EU law (the Directive). Thus, although this issue has not yet been covered by case law and legal doctrine on the matter is divided, we believe that when reading Art. 2483 Civil Code, the term “commission” needs to be replaced with “remuneration".

We assume that an interpretation, which would include only the commission (not the remuneration in general) among the essential elements of the contract, would be incorrect, as it would mean that the mandatory provisions of the Civil Code governing the commercial agency would be excluded in cases where only a remuneration that is

not a commission would be agreed. In such cases, even the Directive would not be properly implemented in Czech law. We believe that neither of these was the intention of the Czech legislator (see reference to compulsory remuneration in Art. 2520 Civil Code).

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

Yes. Under Art. 2499(2) Civil Code, if the basis for the calculation of commission is the scope of obligations fulfilled by a third party, the basis also includes performance unrealised for reasons attributable to the principal. According to the case law and legal doctrine, this is a mandatory provision for a principal, i.e., the principal cannot release himself/herself from his/her obligation under this provision. In our opinion, this provision correctly refers to commission, i.e., remuneration, the amount of which varies according to the number and value of business transactions concluded, which can be influenced by the scope of obligations fulfilled by the third party or not fulfilled as a result of the principal's actions. In our view, this is in line with Articles 10 and 11 of the Directive.

Pursuant to Art. 2500 Civil Code, it is presumed that a commercial agent's commission also includes and covers costs associated with the commercial agency, unless it has been stipulated that a principal pays these costs to a commercial agent in addition to a commission. In the latter case, the commercial agent becomes entitled to be reimbursed for the costs if he/she also becomes entitled to a commission. However, the parties may contractually derogate from this provision and may determine that the right to reimbursement of costs arises separately from the right to commission. This provision is Czech-specific and has no basis in the Directive.

The Civil Code does not expressly prohibit a unilateral change in the amount of the commission, or remuneration. According to legal doctrine, such unilateral change is permissible subject to the conditions of Art. 1752 Civil Code, i.e., the principal concludes agency agreements in the ordinary course of business with a number of parties and such contracts oblige the parties to provide a long-term recurrent performance of the same kind with reference to the standard commercial terms, and the nature of the obligation already indicates in the course of the contract negotiations that subsequent changes thereto will be reasonably necessary. In such a case, the parties may agree that a principal may amend the standard commercial terms to an appropriate extent. Art. The parties must agree in advance how the principal notifies the changes to the commercial agent and the commercial agent must be entitled to refuse the changes and, as a result, terminate the obligation with a notice period sufficient to procure similar performances from another principal. Any stipulation that links the termination to a special obligation for the commercial agent will be disregarded.

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

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

- where the transaction has been concluded as a result of his action; or

- where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.

Are both cases reflected in the Czech Agency Law?

Yes. See, Art. 2501(1) Civil Code. The parties may derogate from this provision.

Regarding the second bullet point, the Civil Code refers to a transaction concluded with a third party that the commercial agent has acquired for the purpose of carrying out this specific transaction before the effective date of the contract. However, legal doctrine is of the opinion that this provision should be interpreted in accordance with Article 7 of the Directive, i.e., it is sufficient that the third party has been acquired by the commercial agent before the commercial agency was established for transactions of the same kind.

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

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

Which option has been retained in the Czech Agency Law?

Option 2 and another option also has been retailed.

See, Art. 2487 Civil Code. The parties may derogate from this provision, i.e., they may agree, for example, that in cases where the principal concludes transactions covered by an exclusive commercial agency without the participation of the commercial agent, the commercial agent is not entitled to a commission.

Beyond the above, pursuant to Art. 2501(2) Civil Code, in the case of an exclusive commercial agency, a commercial agent is also entitled to a commission for business transactions executed with a third party coming from a geographical area, or from a group of parties, which are not covered by the exclusive commercial agency. It follows from the nature of the provision that this is conditional upon the commercial agent's participation in such a transaction. The parties may derogate from this provision.

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

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

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

or

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

Are both cases reflected in the Czech Agency Law?

Yes. See, Art. 2501(3) Civil Code. The parties may derogate from this provision.

Legal doctrine suggests that the rule contained in letter (b) above also applies to the orders relating to the transactions covered by an exclusive commercial agency (regardless of the level of participation of the commercial agent), even though this is not expressly provided by Paragraph 2501(3). In this respect, the Civil Code must be interpreted in accordance with the Directive.

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

No.

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

Yes. See, Art. 2502 Civil Code. The parties may derogate from this provision.

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

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

Are these circumstances reflected in the Czech Agency Law?

Yes. See, Art. 2504(1) Civil Code. The parties may derogate from this provision.

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

Yes. A prerequisite to the application of the rules in Art. 2504(1) Civil Code (see, above Q.22) is that the parties have not agreed that a commercial agent would only arrange for the principal an opportunity to conclude a business transaction with a certain content. Otherwise, the commercial agent would be entitled to a commission already upon arranging such an opportunity (see, Art. 2503 Civil Code). The parties may derogate from these provisions.

Q24. The Directive (Art 10(2)) provides that the commission shall be due at the latest when the third party has

executed his part of the transaction or should have done so if the principal had executed his part of the transaction, as he should have. Does the Czech Agency Law apply the same deadline?

Yes. See, Art. 2504(2) Civil Code. However, according to the same Art., if a third party is to discharge its obligations only after more than six months after the conclusion of the business transaction, the commercial agent is entitled to remuneration upon the conclusion of the business transaction.

Arrangements which derogate from Art. 2504(2) Civil Code to the detriment of the commercial agent are disregarded (see, Art. 2519(2) Civil Code). This also applies to the rule regarding third-party performance more than six months after the conclusion of the transaction.

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

Yes. See, Art. 2505 Civil Code.

Please note that the date on which the commission is to be paid at the latest is referred to in Czech terminology as the due date. The time when the right to commission "became due" in the terminology of the Directive means in the Czech context the time when the right to commission arose. Thus, under Art. 2505 Civil Code, the commission is due no later than by the last day of the month following the end of the quarter in which the right to the commission arose.

Q26. The Directive (Art 10(4)) stipulates that parties cannot by agreement derogate from the principles included in Art 10(2) and 10(3) to the detriment of the commercial agent. Does the Czech Agency Law impose the same restriction on the parties?

Yes. See, Art. 2519(2) Civil Code according to which such an arrangement is disregarded.

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

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

Does the Czech Agency Law impose these cumulative conditions?

Yes. See, Art. 2507 Civil Code.

Compared to Article 11 of the Directive, Art. 2507 Civil Code does not link the fulfilment of the above conditions to the extinguishment of the right to commission, but states that the right to commission does not even arise in such a case.

Thus, if it later turns out that the business transaction cannot be executed pursuant to Art. 2507 Civil Code and

the commission has already been paid, the commercial agent should return the commission paid (unless otherwise agreed), as in that case the commission was a consideration without a just cause. The general provisions on unjust enrichment (Art. 2991 *et seq.* Civil Code) would then apply.

Arrangements which derogate from Art. 2507 Civil Code to the detriment of the commercial agent are disregarded (see, Art. 2519(2) Civil Code).

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

Yes. Pursuant to Art. 2508 Civil Code, the commercial agent is not entitled to remuneration and the stipulated reimbursement of costs if, in concluding a business transaction, the commercial agent acted for both parties as a commercial agent or broker.

The wording of the provision refers to a remuneration, not a commission. However, legal doctrine holds that the provision refers to a commission as interpreted in the preceding provisions of the Civil Code (in particular Art. 2499(3) Civil Code).

Even in this case, if the conditions of Art. 2508 Civil Code are met, the right to commission will not arise.

The parties may derogate from this provision.

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

Yes. The commission which the commercial agent has already received must be returned, as it was obtained without a just cause and is therefore unjust enrichment for the commercial agent. The general provisions on unjust enrichment apply (Art. 2991 *et seq.* Civil Code).

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

Yes. See, Art. 2506(1) Civil Code.

According to legal doctrine, Art. 2506(1) Civil Code incorrectly (contrary to the Directive) links the time limit therein to the time at which the commission becomes due at the latest as stated in Art. 2505 Civil Code. To be compliant with the law of the European Union, this inconsistency should be bridged by an interpretation in line with the Directive. In such a case, the time at which the right to a commission arises at the latest as defined in Art. 2504(2) should be relevant for the beginning of the time limit for supply of the statement. The purpose of Art. 2506(1) Civil

Code is to ensure that the commercial agent receives, no later than the commission payment, a statement from which he/she can at least generally verify the accuracy of the commission calculation

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

Yes. See, Art. 2519(2) Civil Code according to which such an arrangement to be disregarded.

Q32. Does the Czech Agency Law impose any additional requirements with regard to the statement of the commission due?

No.

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

Yes. See, Art. 2506(2) Civil Code. Arrangements which derogate from Art. 2506(2) Civil Code to the detriment of the commercial agent are disregarded (see, Art. 2519(2) Civil Code).

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

No.

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

Yes. See, Q16 above.

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

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

Non-solicitation clause

The Civil Code does not contain an explicit regulation of non-solicitation clauses. However, according to case law, a non-compete clause may also contain a non-solicitation clause.

Minimum sales quota

Pursuant to Art. 2512(1) Civil Code where an exclusive commercial agency has been stipulated, each party has the right to terminate the commercial agency if the volume of business transactions in the previous twelve months did not reach the volume specified in the contract. If the volume of business transactions has not been stipulated, the volume appropriate to the business transaction potential is decisive. This provision is relevant only in the case of an exclusive commercial agency stipulated for a fixed term(an exclusive commercial agency for an indefinite

period can be terminated by notice without giving any reason, see, Art. 2510 Civil Code). The provisions of Art. 2510 and 2511 apply mutatis mutandis (in particular, in relation to the length of the notice period). The parties may derogate from any of the referenced provisions.

Specific sectors

As for the specific regulation in the insurance sector, Art. 50(1) ADIR provides that if life insurance is terminated within 5 years of the date of its start for any reason other than because of an insured event, the insurance intermediary (this also applies to the agent) is entitled to no more than a proportionate part of the agreed remuneration for the first 5 years of the duration of the insurance. This does not apply if the insurance is terminated for reasons attributable to the principal – see, Art. 50(5) ADIR which provides that Art. 2507 Civil Code, the part of the sentence after the semicolon, applies mutatis mutandis. The method of determining the proportionate part of the remuneration is set out in Art. 50(2) ADIR. The above rules (Art. 50(1) and (2) ADIR) do not apply if a single insurance premium is agreed or if an insurance intermediary's remuneration is agreed as a flat annual rate for the duration of the insurance.

B.5 - NON-COMPETE CLAUSE

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

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

Does the Czech Agency Law impose these cumulative criteria?

Yes. See, Art. 2518 Civil Code.

The Civil Code does not expressly provide for the obligation of a written form of the non-compete clause in the commercial agency agreement. However, the written form is mandatory for any commercial agency agreement (see, Art. 2483(2) Civil Code) and therefore applies also to non-compete clause contained therein. This also follows from the interpretation of Art. 2518 Civil Code in accordance with Article 20(1)(a) of the Directive.

Although Art. 2518 Civil Code does not expressly state so, legal doctrine holds that the determination of the geographical area or the group of customers in such area to which the non-compete obligation applies must correspond to the geographical area or group of customers with respect to whom the commercial agent has been authorized to act under the commercial agency agreement. Also, the prohibited competitive activity must be directly related to the activities of the commercial agent for the principal under the commercial agency agreement (the Civil Code refers to the activity of a commercial agent for the principal only demonstratively). Both conclusions are based on an interpretation of the Civil Code consistent with the Directive.

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

No.

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

Yes. See, Art. 2518 Civil Code.

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

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

Does the Czech Agency Law impose any such restrictions?

Yes, for the second category. According to the Art. 2518(2) Civil Code, if a non-compete clause limits a commercial agent more than the necessary level required for the protection of the principal, a court may restrict the non-compete clause.

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

No. If stipulated, the violation of the non-compete clause may be penalised by a contractual penalty pursuant to Art. 2048 *et seq.* Civil Code. Under Art. 2051 Civil Code, the court may reduce an unreasonably high contractual penalty at the debtor's application, considering the value and importance of the secured obligation. The contractual penalty may be reduced up to the amount of the damage caused by the breach of the obligation to which the contractual penalty relates up to the time of the decision. The aggrieved party is entitled to damages (if the right to them arises later) up to the amount of the contractual penalty.

Unless the parties agree otherwise, if no contractual penalty is stipulated (see, Art. 2950 Civil Code), damages may be claimed for breach of the contractual obligation (see, Art. 2913 Civil Code). Both actual damage and loss of profits are covered.

B.6 - LIABILITY

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

Yes. See, Art. 2492 Civil Code.

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

Yes. Under Art. 2492 Civil Code, the commercial agent is liable as a surety for the fulfilment by a third party of

obligations following from a business transaction the conclusion of which the commercial agent proposed to the principal or which the commercial agent concluded on behalf of the principal, provided that the commercial agent undertook to do so in writing and a special consideration was stipulated for the assumption of the suretyship. In the context of such an assumption of commercial risks, for the purposes of competition law, it will have to be examined on a case-by-case basis whether the agent is still a commercial agent at all or rather an independent distributor.

In accordance with Art. 2519 Civil Code, the parties to a commercial agency agreement may derogate from the provision.

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

No.

C. Term and termination

C.1 - TERM

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

Yes. See, Art. 2509(2) Civil Code. In accordance with Art. 2519 Civil Code, the parties to a commercial agency agreement may derogate from the provision..

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

Yes. Under Art. 2509(1) Civil Code, if the period of commercial agency has not been stipulated, and if it does not even follow from the purpose of the contract (e.g., a commercial agency for a promotional event only), the commercial agency is presumed to have been stipulated for an indefinite period. In accordance with Art. 2519 Civil Code, the parties to a commercial agency agreement may derogate from the provision.

C.2 - TERMINATION BY NOTICE

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

Yes. See, Art. 2510(1) Civil Code. In relation to this first sentence of Art. 2510(1) Civil Code, opinions of legal doctrine diverge as to whether or not the parties may derogate from this provision and exclude the termination of a commercial agency agreement of indefinite duration by notice.

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

Yes. Art. 2510(1) Civil Code. A stipulation on a shorter notice period is disregarded.

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

No. The Czech legislature did not use the possibility to set longer notice periods in the event of a longer duration of commercial agency.

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

No.

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

Yes. In the case of a commercial agency agreement for an indefinite period, the notice periods of 1, 2, or 3 months specified in Art. 2510(1) Civil Code apply. This also applies to a commercial agency converted from a fixed term to an indefinite period under Art. 2511 Civil Code.

In the case of a commercial agency agreement for a fixed term, if the parties have not agreed on the possibility of its termination by notice, they cannot terminate the contract in this way at all (see, Art. 1998(1) Civil Code), subject to Art. 2512 concerning the termination of an exclusive commercial agency (including the one for a fixed term) for failure to meet minimum sales quotas. In such a case, unless agreed otherwise, the notice periods of 1, 2, or 3 months specified in Art. 2510(1) Civil Code apply.

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

Yes. See, Art. 2510(1) Civil Code.

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

Yes. See, Art. 2510(2) Civil Code.

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

Yes. There is no specific provision for notifying the termination of the commercial agency agreement to the other party. Therefore, the general rules on termination by notice as the means of extinguishing an obligation apply.

Termination by notice is an addressed unilateral legal act. Thus, it cannot take effect before the addressee has had the opportunity to become acquainted with it, i.e., before it has entered the sphere of its addressee (typically by letter, personal communication, but also by means of a lawsuit, etc.). Under Art. 570(1) Civil Code, the legal act is effective with respect to a party that is not present from the moment when the expression of will reaches the party; if the party deliberately prevents the expression of will reaching it, it is deemed to have duly reached that party. Pursuant to Art. 573 Civil Code, a consignment which has reached the destination, and which was dispatched using a postal service operator is presumed to have reached the destination on the third working day after it was dispatched. However, if it was dispatched to an address in another country, it is presumed to have reached the destination on the fifteenth working day after it was dispatched.

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

Yes. See, Art. 2511 Civil Code. Opinions of legal doctrine diverge as to whether or not the parties may derogate from this provision.

C.3 - TERMINATION FOR CAUSE

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

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

Are both termination grounds reflected in the Czech Agency Law?

No. Pursuant to Art. 2513 Civil Code, an exclusive commercial agency agreement (regardless of whether it was stipulated for a fixed term or indefinite period) may be terminated without a notice period (i.e., immediately) by

- the commercial agent, if the principal uses another commercial agent;
- the principal, if the commercial agent performs for other parties the same activity as that to which the commercial agent is obliged with respect to the principal. Termination by the principal under this provision is to be treated as a termination of the commercial agency agreement for reasons that would otherwise justify withdrawal from the contract within the meaning of Art. 2517(a) Civil Code (see, Q67 below). Thus, in such a

case, the commercial agent is not entitled to any special remuneration.

The parties may derogate from this provision, e.g., by attaching a right of withdrawal to the breach of exclusivity (instead of termination without a notice period), in which case, the obligation is rescinded from the outset.

Under Art. 2002(1) Civil Code, if a party materially breaches the contract, the other party may withdraw from the contract without undue delay. A material breach means such a breach of which the breaching party, at the conclusion of the contract, knew or should have known that the other party would not have concluded the contract if it had foreseen such a breach.

According to Art. 2002(2) Civil Code, a party may withdraw from a contract without undue delay after the conduct of the other party undoubtedly indicates that the party is about to commit a material breach of the contract and if it fails to provide a reasonable security after being requested to do so.

Art. 1977 and 1978 Civil Code provide for the right to withdraw from the contract because of default by the other party. If, by its default, a party materially breaches its contractual obligation, the other party may withdraw from the contract if it notifies the party in default accordingly without undue delay after learning of the default. If a default of one of the parties constitutes a non-material breach of its contractual obligation, the other party may withdraw from the contract after the defaulting party fails to fulfil its duty within a reasonable additional time limit (grace period) expressly or implicitly provided by the other party. If a creditor notifies the debtor that he/she grants him/her an additional time limit to perform and that there will be no extension thereof, he/she is conclusively presumed to have withdrawn from the contract upon the expiry of the additional time limit within which the debtor fails to perform.

Unlike termination by notice, upon withdrawal from the contract, the obligation is rescinded from the outset (subject to certain exceptions – e.g., in relation to withdrawal with prospective effects only in the case of contracts involving continuous or repeated performance; see, Art. 2004 and 2005 Civil Code).

The parties may agree on different conditions for withdrawal, or exclude withdrawal altogether, unless this is excluded by the Civil Code in specific cases.

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

Yes. See, Art. 2512 Civil Code regarding the minimum sales quota – see, Q36 above.

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

No. The provisions of the Civil Code specifically governing commercial agency from which the parties may not derogate or may not derogate to the detriment of the commercial agent, are set forth in Art. 2519 Civil Code. Art. 2512 and 2513 Civil Code governing the specific regime on termination for cause in the case of commercial

agency are not listed among the provisions in Art. 2519 Civil Code. Thus, the parties may derogate from that.

The same applies to the general withdrawal provisions under Art. 1977, 1978 and 2002 Civil Code (see, Art. 1(2) Civil Code – also see, Q59 below).

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

Yes. The parties are at liberty to include other grounds for termination in the commercial agency agreement. Pursuant to Art. 1(2) Civil Code, unless expressly prohibited by law, the parties can stipulate rights and obligations in derogation from the law. Stipulations contrary to good morals, public order or the law relating to the status of persons, including the right to protection of personality, are prohibited.

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

No.

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

No.

C.4 - INDEMNIFICATION

Q62. The Directive (Art 17(2)(a)) provides that the commercial agent is entitled to an indemnification if and to the extent that he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers. Does the Czech Agency Law provide for this criterion?

Yes. See, Art. 2514(1)(a) Civil Code.

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

Yes. See, Art. 2514(1)(b) Civil Code.

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

Yes. See, Art. 2514(1)(b) Civil Code.

Q65. Other than the criteria set forth in Art. 17(2)(a) of the Directive, are there any specific rules or precedents

derived from the Czech case law on the basis of which the indemnification is calculated?

No.

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

Yes. See, Art. 2515 Civil Code. Beyond the rules set out in Article 17(2)(b) of the Directive, Art. 2515 Civil Code provides that if the commercial agency lasted less than a year, the special remuneration may not exceed the sum of all commissions paid throughout its entire duration.

Arrangements which derogate from Art. 2515 Civil Code to the detriment of the commercial agent are to be disregarded (see, Art. 2519(2) Civil Code).

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

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

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

Yes. See, Art. 2517 Civil Code. Arrangements which derogate from Art. 2517 Civil Code to the detriment of the commercial agent are to be disregarded (see, Art. 2519(2) Civil Code).

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

Yes. According to Art. 2516 Civil Code, the right to special remuneration is lapsed if it is not asserted within one year from the end of the commercial agency. The provision does not explicitly state how the claim should be asserted. However, an assertion of the entitlement in the form of its notification to the principal should be sufficient, i.e., it is not necessary to bring an action in court within the set time limit. This notification may be made in any form, i.e., also in another form than in writing.

Arrangements which derogate from Art. 2516 Civil Code to the detriment of the commercial agent are to be disregarded (see, Art. 2519(2) Civil Code).

C.5 - ADDITIONAL COMPENSATION

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

Yes. The special remuneration is not compensation for damages, i.e., the existence of a breach of any obligation of the principal is not required for entitlement to it. However, if such a breach of an obligation on the part of the principal occurred in connection with the termination of the commercial agency, claims arising out of such a breach of obligation are also available, including claims for damages (see, Art. 2913 Civil Code), in addition to a claim for special remuneration. However, the claim for damages must relate to a different negative impact on the commercial agent's assets than that caused by the loss of commissions, which is already covered by the special remuneration.

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

No.

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

No. Czechia has opted for the solution included in Article 17(2) of the Directive.

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

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

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

Czechia has opted for the solution included in Article 17(2) of the Directive.

Q73. Are there any other specific rules or precedents, than the criteria set forth in Art. 17(3) of the Directive,

derived from case law on the basis of which the compensation is calculated?

No.

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

Yes. See, Art. 2514(2) Civil Code.

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

Yes. See, Art. 2514-2517 in connection with Art. 2519(2) Civil Code..

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

No.

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

Yes. According to Art. 2516 Civil Code, the right to special remuneration is lapsed if it is not asserted within one year from the end of the commercial agency. For details, see, Q68 above.

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

No.

Part 5: Dispute resolution

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

No.

Q80. Can the parties opt for arbitration?

Yes.

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

For an arbitration agreement (clause) to be valid and enforceable, it must comply with the general rules set out in

the Act on Arbitration. In particular, the arbitration agreement must be in writing and can only be concluded on the subject matter of the dispute, which is of a proprietary nature and on which the parties could reach an amicable settlement (see, Art. 2 in conjunction with Art. 3 Act on Arbitration).

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

The length of a limitation period is three years from the date on which the right could be asserted for the first time (general subjective limitation period). A right may be asserted for the first time once the entitled party became aware of the circumstances decisive for the start of the limitation period or when he/she should and could have learnt thereof (see, Art. 629(1) in conjunction with Art. 619 Civil Code).

Circumstances decisive for the commencement of a limitation period for a right to

- compensation for damage include knowledge of the damage and the party liable to provide the compensation for the damage (see, Art. 620(1) Civil Code);
- restitution of unjust enrichment includes knowledge of the occurrence of the unjust enrichment and of the party obliged to surrender it (see, Art. 621 Civil Code).

A property right becomes time-barred no later than after ten years from the date on which it became due (general objective limitation period), unless a statute specifically provides a different limitation period (see, Art. 629(2) Civil Code).

Art. 636 and 638 Civil Code provide for special objective limitation periods for the right to compensation for damage or other harm, or restitution of unjust enrichment, respectively. These rights become time-barred no later than ten years after the date the damage or harm was incurred, or the unjust enrichment occurred. Where damage or harm has been caused, or unjust enrichment was acquired intentionally, the right to compensation becomes time-barred no later than fifteen years after the date on which the damage or harm, or the unjust enrichment, occurred.

Under Art. 639 Civil Code, if a debtor acknowledged his/her debt, the right becomes time-barred ten years after the date on which the debt was acknowledged. However, if the debtor specifies in the acknowledgement a period within which he/she will discharge his debt, the right becomes time-barred ten years after the last day of the period specified.

Under Art. 630 Civil Code, the parties may agree on a shorter or a longer limitation period commenced from the date on which the right could have been asserted for the first time than that provided for by the Civil Code, but with a minimum duration of one year and a maximum duration of fifteen years. A shorter limitation period in relation to a right arising from a wilful breach of obligation shall be disregarded.