

Indemnity Commercial Agents

A legal comparison on the interpretation of the understanding 'termination on the grounds of age'.

IUCAB EDINBURGH 2017

October 13, 2017

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Introduction

The focus point of this report is the good will compensation for commercial agents on grounds of age. Specifically, there will be a legal comparison on what the understanding 'age' means. First, does termination of the contract on grounds of age mean that the agent can terminate his contract(s) when he reaches the legal retirement age? Second, does an agent, to successfully claim indemnity, terminate all contracts at once or can he gradually reduce his activities?

The countries that are being discussed are the UK, Germany, France, Spain, Italy, The Netherlands, Finland, Sweden, Denmark and Norway.

The UK

Does 'age' equal the national legal retirement age?

In the UK, the only known case about the meaning of the understanding 'age' for commercial agents is the Abbott versus Condici Limited case. In this case mister Abbott, who had been an agent for 43 years, wanted to retire at the age of 65. Although his physical condition still allowed him to continue his activities as an agent, he was of opinion that the European Agency Directive provided for the option of terminating his contracts at the legal retirement age in the UK. Condici, however, said that the directive spoke of 'age' and not of 'retirement age'. According to Condici, that meant that the customer compensation or indemnity would only be payable when the agent could not reasonably be required to continue his activities, because of his age.

The Country Court judge argued in favor of mister Abbott. The judge stated that, when reaching the legal retirement age of 65, an agent could not reasonably be required to continue his activities. However, the agent has to announce the termination of the contract on the grounds of age one year prior to his retirement, to successfully claim indemnity.

At the time of the judgment, there still was a 'forced retirement age' of 65 in the UK. Nowadays, forced retirement is abolished in the UK. It is therefore conceivable that a judge nowadays would argue different on the matter.

Can an agent gradually reduce his activities and still claim indemnity?

Unfortunately, there is no case law in the UK about the gradual decline of the agent's activities. However, it is arguable that an agent can only claim indemnity, when he stops his activities all at once.¹

How does the tax system work, concerning indemnity & pension?

Since the forced retirement age in the UK is abolished, an agent can keep working after his retirement.

Basic UK taxes include income taxes, property taxes, capital gains taxes, UK inheritance taxes and Value Added Tax (VAT).

In the UK, all individuals are subject to the same tax rate regardless of their residency status. However, residency status does dictate what sources of income must be included in your taxes. An individual who is a UK resident for tax purposes will be taxed on his or her worldwide income, with allowances given to

¹ Source: Larry Coltman.

prevent double taxation from certain countries. Non-UK residents, on the other hand, are taxed only on income earned within the UK.

An agent is a UK resident if he meets the following conditions:

- He lives in the UK for most of the year (183 days).
- He has bought a house in the UK.
- He works in the UK (365 days with no sufficient break).
- He has sufficient ties with the UK (family residence, work, etc.)

Residency status determines what a person must include as 'income' when determining his or her tax band. Non-UK residents are only taxed on income earned within the UK, including capital gains, rental income and dividends. This includes the indemnity earned in the UK. Individuals who are residents of the UK for tax purposes are taxed on their worldwide income, including foreign investments and savings interest, rental income on overseas properties and income from foreign pensions or a UK pension for those retiring in the UK. This concludes 'all' indemnity and pension.

Germany

Does 'age' equal the national retirement age?

In Germany there is no absolute age limit. Neither German law, nor German jurisprudence stipulate a concrete age limit. Nevertheless, courts have very often accepted the claim for indemnity by commercial agents, when they have reached the legal retirement age (now 67 years).² So, one can say that in Germany a commercial agent is entitled to terminate the contract when he reaches the legal retirement age, without losing his claim for indemnity. There can be cases, however, where the agent can terminate the contract earlier (without losing his right to indemnity) because of age. Usually, this is the case if the agent grows old and becomes infirm at the same time.³

Can an agent gradually reduce his activities and still claim indemnity?

The question whether the (“elderly”) agent can slowly reduce his activities has not been decided by German courts.

How does the tax system work, concerning indemnity & pension?

When an agent wants to receive a retirement state pension, but wants to keep working, he firstly has to fulfill the criterium of ‘Wartezeit’ (65 years and 3 months). Secondly, his income can not exceed a certain limit (‘Hinzuverdienstgrenze’). An agent only has the right to a full retirement state pension, when his additional earnings do not exceed the limit of €6.300 a year. When the income of the agent exceeds this limit, he has a right to partial retirement pension.

Everyone working or running their own business pays income tax. In Germany, all pensions are considered taxable income and subject to German income tax rates. Profits are taxed at the personal tax rate, with a tax-free personal allowance for a single person at EUR 8,130. The taxable profit is the total income realised from carrying on business activities, and includes the distributed profit shares of general and limited partnerships, as well as profits earned by sole proprietors. The taxable profit therefore includes indemnity.

² OLG (Higher Regional Court) Düsseldorf, 11.05.2001, AZ.: 114/00.

³ Source: Marta Zelewska.

Italy

Does 'age' equal the national retirement age?

In Italy, the understanding 'age', concerning grounds of termination for agents, equals the national retirement age.⁴ This means that an agent in Italy can terminate his or her contracts and still claim indemnity, at the age of 66 (when the agent is a man) or the age of 62 (when the agent is a woman).

Can an agent gradually reduce his activities and still claim indemnity?

Unlike many other countries, agents in Italy can gradually reduce their activities and still claim indemnity. It is therefore not necessary to terminate all contracts at once to successfully claim indemnity.

How does the tax system work, concerning indemnity & pension?

The age at which employees or self-employed can draw a seniority pension is currently being slowly raised from 57 years to 62 years by 2014.

Italian individual income tax is called impostasulredditodellepersonefisiche, or IRPEF. If you're a foreign resident working in Italy, you're only taxed on the income earned in Italy. However, if you're an Italian resident (spend more than 183 days a year in Italy), and your "center of economic interest" (i.e. your business and investments) is in Italy, your worldwide income is subject to IRPEF.

The following income is considered to be produced within Italy:

- Income from employment and self-employment derived from services performed in Italy.
- Income from capital paid by the state or an establishment in Italy.
- Business income from a permanent establishment in Italy.
- Pensions paid by the state or by an Italian company.
- Income from patents, trademarks, and know-how if paid by the state or by Italian residents.

The indemnity derived from services performed in Italy and the Italian old-age pension are subject to the Italian income tax (IRPEF). If an agent meets the two aforementioned criteria, his worldwide income (including pension, additional earnings and indemnity) is subject to IRPEF.

France

Does 'age' equal the national retirement age?

In France, article L134-13 2 ° Code de Commerce speaks of termination by the agent, on the grounds of age as a result of which the continuation of the agent's activities can no longer be reasonably required. The French law, just like in other countries, does not speak of 'retirement' or the 'legal retirement age'. The general view in France is that reaching the legal retirement age on itself is not enough to successfully claim indemnity.⁵ There has to be an infirmity or illness, due to the agent's age, causing that he cannot reasonably continue his activities.

Can an agent gradually reduce his activities and still claim indemnity?

The question whether the ("elderly") agent can slowly reduce his activities has not been decided by French courts.

How does the tax system work, concerning indemnity & pension?

There are three main types of personal taxes in France: French income tax (impôt sur le revenu); social security contributions (charges sociales/cotisations sociales); and tax on goods and services (taxe sur la valeur ajoutée TVA, or VAT in France). Once a resident in France, an agent is liable to pay taxes in France on his income worldwide and will need to file a French tax return as an expat. Non-residents usually pay tax on their France-sourced income at a minimum French tax rate of 20 percent.

The same rules apply in France as in many other countries. This means an agent probably is a French resident, when:

- France is his main place of residence or home – if his spouse and children live in France and he work abroad, he may still be considered a French tax resident.
- He is resident in France for more than 183 days in a calendar year – not necessarily consecutively.
- His main occupation is in France.
- His most substantial assets are in France.

Official residents pay French taxes on worldwide income, which includes earnings from employment, investments, dividends, bank interest, pensions and property. This also includes an indemnity or bonuses.

⁵ Source: Patricia Keltner.

Spain

Does 'age' equal the national retirement age?

The Spanish law refers to age and disability as grounds for the agent to not continue his activities. The law does not specifically mention 'retirement age', but the Spanish courts do interpret the age as retirement.⁶ Therefore, an agent can claim indemnity when he or she reaches the minimum legal retirement age (65 or 67). Nevertheless, agents can retire at later ages.

Can an agent gradually reduce his activities and still claim indemnity?

At this moment there are no Spanish judgments that are in favor of 'partial retirement' of agents.

How does the tax system work, concerning indemnity & pension?

The Spanish taxable income is the income left after deductions for contributions to social security in Spain, pension, personal allowance, professional costs, etc. This includes the indemnity. If you register as a freelancer or self-employed person living in Spain, you will pay taxes at the same rates as everyone else.

Under Spanish tax rules, your income is split into two main categories: income from general activities and income from savings. The total income from each category is classed as the base, after which deductions and allowances can be made. Spanish tax residents will be taxed on all worldwide income which is not included as part of the savings income. This includes income from employment (i.e. salary), pension, rent and potentially income from gambling. This system is merely the same as the Italian system: if you are a Spanish resident, you pay tax on your total income (including pension, additional earnings and indemnity). If you are not, you only pay tax on your 'Spanish income'.

Personal income tax in Spain is called 'Impuesto de Renta sobre las Personas Físicas' or IRPF. Spanish income taxes are split between state and region and while the state has reduced taxes and simplified income tax bands, this has not happened right across Spain. Each region sets its own Spanish tax bands and rates of income tax, so how much income tax you pay depends on where you live.

The Netherlands

Does 'age' equal the national retirement age?

In the Netherlands an agent can claim indemnity, when he terminates the contract on grounds of age (article 7:442(4)(b) BW).

There is no Dutch case law on the meaning of the understanding 'age'. However, the general view on this subject has always been that a contract does not automatically end when the agent reaches the legal retirement age. Therefore, parties to the contract sometimes insert a proviso that states that the agent has the right to terminate the contract, when he or she reaches the legal retirement age. However, in literature it is nowadays increasingly accepted that an agent can terminate the contract(s) when he reaches the legal retirement age of 67. When an agent wants to retire early, for example at the age of 65, and still wants to claim indemnity on grounds of age, he has to make specific agreements on the indemnity.

Can an agent gradually reduce his activities and still claim indemnity?

Unfortunately, there is no case law or literature on the view that an agent can gradually reduce his activities and still claim indemnity. However, in practice it is common that agents can reduce their activities and still claim indemnity.

How does the tax system work, concerning indemnity & pension?

In the Netherlands, an agent can continue some of his activities next to his old-age pension. Old-age pension is not shortened when a commercial agent continues some of his activities, after he has reached the legal retirement age. Continuing some of his activities after reaching the legal retirement age, however, has consequences for the amount of payroll tax he has to pay. Wage tax credit may not be applied to the additional earnings. This means that a commercial agent has to pay a higher tax on his income (pension, additional earnings and indemnity).

If an agent has demonstrable ties to the Netherlands (for instance, he lives there, he works there, or his family is based there) he is generally regarded as a 'resident taxpayer' from day one. As a resident taxpayer he is taxed on his assets worldwide. This means income from profits, employment (pension and indemnity) and home ownership. This includes wages, pensions, social benefits, company car, and WOZ value of owner-occupied property.

If the agent lives abroad but receives income that is taxable in the Netherlands he is generally a 'non-resident taxpayer'. This means he has to pay tax on the income earned in the Netherlands.

Denmark

Does 'age' equal the national retirement age?

At this moment, there is no Danish case law on the meaning of the understanding 'age', concerning the grounds of termination for an agent. However, it is likely that the retirement age does not equal the understanding 'age' in the directive. European and Danish law do not specifically mention the terms 'retirement' or 'pension'. This could be a clue that an agent cannot claim indemnity, when he reaches the legal retirement age, but he's still physically capable of continuing his activities as an agent.⁷ Since there is no case law in Denmark about the subject, it is not certain how a judge would rule about the subject.

Can an agent gradually reduce his activities and still claim indemnity?

Unfortunately, there is no case law in Denmark about the gradual decline of the agent's activities.

How does the tax system work, concerning indemnity & pension?

Everybody who lives and works in Denmark and who has an income is liable to pay tax. This also applies if, for instance, if a person:

- Has its own business
- Is unemployed and receives benefits from his unemployment fund (daily benefits) or from the state (social assistance benefits).
- Is a student and receives state education grants.
- Is retired and receives pension(s).
- Works abroad or has income from abroad while living in Denmark.

Among OECD countries, Denmark has the highest income tax rate as a percentage of total tax revenue. An agent must declare and pay tax of the entire business in Denmark. If an agent has an income from Denmark without living here, he may be subject to limited tax liability. When an agent is subject to limited tax liability, he is only taxed on certain income and according to certain rules. This implies that he is taxable on his Danish income but that he remains fully tax-liable in another country. The income may be in the form of, for example, pay or fees for work performed in this country, fringe benefits or pensions. This includes indemnity.

Finland

Does 'age' equal the national retirement age?

For the time being, the retirement age in Finland is 65, for those who were born before 1995. In order to claim indemnity, an agent has to terminate the agreement with notice period. The prevailing age to do so is 65.⁸ Under Finnish law it is therefore likely that an agent can claim indemnity when he terminates his contract(s) when he reaches the legal retirement age.

Can an agent, to successfully claim indemnity, gradually reduce his activities?

An agent can claim indemnity continuing some of his activities, when he has made a specific agreement on the matter. However, there is no specific case law about the gradual reduction of activities and the indemnity.

How does the tax system work, concerning indemnity & pension?

The taxation system in Finland is quite complex as people are required to pay various different taxes. These include national income tax, municipal tax and church tax.

Finnish taxation is based on a schedular system, in which earned income and capital income are taxed separately. Earned income includes:

- Wages.
- The proportion of entrepreneurial income defined as earned income.
- Pension income.
- Other taxable welfare benefits.

Earned income includes indemnity.

⁸ Source: Antii Palmujoki.

Sweden

Does 'age' equal the national retirement age?

The legal retirement age in Sweden is 65. In the government bill that lead up to the Swedish Commercial Agency Act it is stated that the word "age" in general should be interpreted as "above the general retirement age". Unfortunately, there is no case law on whether the agent can claim indemnity when he is 65 years and one day old, or if this means that he should be older.⁹

Can an agent gradually reduce his activities and still claim indemnity?

There is no clear answer to the abovementioned question. Neither the law itself nor the government bill mentioned above states anything regarding this question. The issue will be up to the courts to decide and so far it has not been tried before any court.

How does the tax system work, concerning indemnity & pension?

In Sweden persons pay different taxes, including national income tax, municipal tax and church tax. Tax is payed on a person's earned income. This includes indemnity.

Resident taxpayers are taxed on global income while foreign taxpayers are taxed only on the profits they make in Sweden. A company is considered resident if it is incorporated under the Swedish Companies Act. An individual is considered resident if he or she regularly lives or resides in Sweden, or maintains essential ties with Sweden.

Norway

Does 'age' equal the national retirement age?

The starting point under section 30 of the Agency Act is that entitlement to severance pay is lost if the agent himself terminates the agreement. However, it follows from paragraph 2 of the provision that this does not apply if the background for termination is "age, illness or similar relationship" means that "it is not reasonable to require the agent to continue his business".

The Norwegian law does not state that reaching the legal retirement age in itself means that an agent can claim indemnity. Under Norwegian law, an agent has a right to indemnity when, on the grounds of age, continuing his activities cannot reasonably be expected from him. This implies that it is necessary to do an individual and concrete assessment whether this is the case. Achieving the legal retirement age (67) is not sufficient to claim indemnity.¹⁰ However, roughly speaking, it may be added that if the resignation is due to the fact that, as a result of age, it is no longer able to fulfill its obligations under the agreement in a sufficient manner, it should indicate that the agent can claim indemnity. Unfortunately, there is no case law on this issue.

Can an agent gradually reduce his activities and still claim indemnity?

The question whether an agent can claim indemnity in case of termination of all or a few contracts also has to also be assessed on an individual base. The same criteria apply to this situation, namely: can the agent reasonably continue with all of his activities? The assessment of whether it is reasonable to require the agent to continue his business must be linked to the individual agreement. If the agent is doing fine with 50% of his activities, it is reasonable that he cannot claim indemnity. However, when the agent is maxed out when continuing with half of his activities, it is reasonable that he can successfully claim indemnity on grounds of age.

How does the tax system work, concerning indemnity & pension?

A commercial agent can continue his activities next to the old-age pension in Norway. The pension will not be shortened if there are any additional earnings.

¹⁰ Source: Henrik Renner Fredriksen.

The Norwegian tax system has two bases of income. The ordinary income base is a net base. In addition, we have the personal income base. This is a gross base for taxation. The top tax and the social security contributions for employees and self-employed are based on this.

The same tax percentages for residents are applicable for non-residents. In principle, all types of remuneration and benefits received by an employee for services rendered in Norway constitute taxable income, regardless of where paid. This includes indemnity.

Conclusion

In this report there has been a legal comparison between different countries and their ruling on indemnity for commercial agents.

Firstly, there is very few case law on the meaning of the understanding 'age' when it comes to commercial agents. However, some countries do have little case law on the matter. For example, in the UK a judge stated that the retirement age is sufficient for a successful claim on indemnity. Also in Germany there is case law that states that an agent can claim indemnity when he has reached the legal retirement age. Other countries do not have a concrete ruling on the matter. Those countries are Spain, Italy, the Netherlands and Finland. Although there is no specific court decision on the matter, the general view in these countries nowadays is that the agent can claim indemnity when he terminates the contract, because he has reached the legal retirement age. Since there is no case law on the matter it is possible that a judge would argue otherwise.

In Norway, Denmark and France, however, there is a different view on the claim on indemnity when terminating the contract(s) on the grounds of age. In both countries the dominant view is that an agent can terminate his activities, when continuing his activities cannot reasonably be expected from him. This stands apart from reaching the legal retirement age. Whether the aforementioned is the case, has to be examined on an individual basis. Since there is no case law on the matter it is possible that a judge would argue otherwise.

Secondly, there is little to no case law on the gradual decline of the agent's activities and his successful claim on indemnity.

In the UK and Spain the predominant opinion is that an agent can only claim indemnity if he terminates all contracts at once. This is contrary to the general view in Italy and the Netherlands, where it is possible for an agent to claim indemnity and still continue some of his activities. In Norway the right to indemnity probably has to be examined on an individual basis. This is also the case in Finland, where an agent can successfully claim indemnity and still continue some of his activities, when he has made agreements about this. France, Denmark, Sweden and Germany remain silent on the matter.

Thirdly, there has been a short legal comparison between different countries and their tax systems, with regard to indemnity. Herefrom the conclusion can be drawn that indemnity usually falls under the 'income tax'.