

POST-CONTRACTUAL NON-COMPETE CLAUSE IN COMMERCIAL AGENCY CONTRACTS

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SEBASTJAN KERČMAR

Dr. Kerčmar & Partners Law Firm, Nova Gorica, Slovenia,
sebastjan@odvetnik-kerckmar.si

CORRESPONDING AUTHOR

sebastjan@odvetnik-kerckmar.si

Abstract This paper deals with the legal regime governing post-contractual non-compete clauses in commercial agency contracts, analysing Slovenian legislation and its compliance with Directive 86/653/EEC. The Slovenian Obligations Code (OZ) requires the mandatory payment of compensation for compliance with a non-compete clause only in cases where the contract is terminated for reasons attributable to the principal. The author stresses that such a regime may lead to a restriction of contractual freedom without adequate compensation, which is not in line with the spirit of the Directive. Based on a review of the regimes in respect of non-compete clauses after the termination of a commercial agency contract in various European countries, including Croatia, the author finds that the regimes vary considerably between countries. The paper also focuses on the impact of non-compete clauses on indemnity, as the OZ requires such clauses to be taken into consideration in determining the amount. The author draws attention to the need for a fair balance of interests and for legislation to be revised to ensure that agents are protected against disproportionate restrictions without adequate compensation.

Keywordscommercial agent,
indemnity,
commission,
post-contractual non-
compete clause,
monthly compensation
for post-contractual non-
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1 Introduction

One of the most important provisions of the legal regime governing commercial agents is certainly the provision on indemnity. Likewise, the most important provision of the Commercial Agents Directive¹ is undoubtedly its Article 17, which provides that upon termination of an agency contract, a commercial agent is entitled to an indemnity under the ‘German model’ (Article 17(2) of the Commercial Agents Directive) or compensation for damages resulting from the termination of the contract (compensation for clientele) under the ‘French model’ (Article 17(3) of the Commercial Agents Directive).²

The Commercial Agents Directive was one of the first attempts to harmonise the legal frameworks of private law in the Member States (McKendrick, 2006, Engelmann, 2017). The aim of the Commercial Agents Directive is the approximation of Member States' rules governing commercial agency to the extent required for the proper functioning of the common market, in order in particular to ensure a minimum level of social protection for commercial agents, to ensure the security of commercial transactions, and to remove obstacles to cross-border commercial agency arrangements.³

This paper also focuses on the highly important topic of restriction of the contractual freedom of commercial agents after the termination of their contractual relationship with a principal, i.e. on post-contractual non-compete clauses in commercial agency contracts, which in the Slovenian legal regime also deviates from comparative foreign legal regimes and affects the determination of the commercial agent's indemnity as well as the commercial agent's contractual freedom after the termination of his contractual relationship with the principal.

2 Post-contractual non-compete clauses

¹ Commercial Agents Directive, OJ L 382, 31.12.1986. The abbreviated title Commercial Agents Directive is the most common and customary among international authors: e.g. Jan Engleman (Engelmann, 2017), Till Fock (Fock, 2001) and numerous others, and is also used by Patricija Rot (Rot, 2016), while Friedl uses the abbreviated title EU Agents Directive (Friedl, 2018).

² See Judgement of March 23, 2006, *Honyvem Informazioni Commerciali*, C-465/04, para. 20, Evaluation of the Council Directive on the coordination of the laws of the Member States relating to self-employed commercial agents (Directive 86/653/EEC)/REFIT Evaluation of 16 July 2015, 9-10.

³ See the Opinion of Advocate General L. A. Geelhoed in C-3/04, *Poseidon Chartering*, para. 25.

A non-compete clause is valid only if and to the extent that it is made in writing and relates to the geographical area or to the group of customers in the geographical area entrusted to the commercial agent and to the kind of goods covered by his agency under the contract, subject to such a non-compete clause being effective for no more than two years after the termination of the agency contract.⁴ However, the Commercial Agents Directive leaves it to national laws to impose other restrictions on the validity or application of non-compete clauses or to provide for the possibility for courts to reduce the obligations of the parties arising from such an agreement.⁵ In international trade, where Slovenian law may be applicable, it is important to be aware of what a commercial agent and principal should expect after the termination of their contractual relationship, including potential non-compete obligations, both in terms of the legal regime and in terms of potential alternative contractual arrangements of their relationship.

For the sake of convenience, the provision of Article 836 of the OZ,⁶ which regulates this aspect in the Slovenian legal system, is quoted below:

(1) A contract may provide that the agent may not, after the termination of the contract, carry on any activity that would compete with that of the principal.

(2) Such a provision is valid only if made in writing and if it relates to the same geographical area, the same persons and the same goods as set out in the contract.

(3) Where the contract was terminated for reasons attributable to the principal, such a provision is binding on the agent only if the principal pays the agent an appropriate indemnity upon termination and appropriate monthly compensation for the effective period of the non-compete clause in an amount equal to the average monthly commissions earned in the last five years of the contract or throughout the duration of the contract if it was effective for less than five years.

(4) Such a provision is binding on the agent for a maximum of two years after the termination of the contract.

(5) If the contract was terminated by the agent on the grounds of misconduct by the principal and a post-contractual non-compete clause was agreed in the contract, the agent may, by written statement, notify the principal no later than one month after termination that he will not comply with the non-compete clause.

⁴ Article 20(2) and (3) of the Commercial Agents Directive.

⁵ Article 20(4) of the Commercial Agents Directive.

⁶ Obligations Code [Obligacijski zakonik], Official Gazette of the Republic of Slovenia Nos. 97/07 – official consolidated text, 64/16 – Constitutional Court decision, and 20/18 – OROZ631 (hereinafter referred to as the “OZ”).

(6) The provisions of this article may not be varied by contract to the detriment of the agent.

The Slovenian legislature opted for a narrower approach, one more favourable to the commercial agent, i.e. applicability to the customers in the geographical area entrusted to the commercial agent and, in parallel, to the kind of goods covered by his agency under the contract. In addition, in cases where the contract was terminated for reasons attributable to the principal, such a provision is binding on the agent only if the principal pays the agent an appropriate indemnity upon termination and appropriate monthly compensation for the effective period of the non-compete clause in an amount equal to the average monthly commissions earned in the last five years of the contract or throughout the term of the contract if it was effective for less than five years. Furthermore, in cases where the contract was terminated by the agent on the grounds of misconduct by the principal and a post-contractual non-compete clause was agreed in the contract, the agent may, by written statement, notify the principal no later than one month after termination that he will not comply with the non-compete clause. All of the above constitute additional restrictions under Slovenian law in favour of the commercial agent. On the other hand, and in particular in the light of the position taken in the commentary to the OZ (Zabel in Plavšak, 2004: 533, Zabel in Plavšak, 2021: Section 25.21.3.1.) a non-compete clause may in certain cases be binding on a commercial agent without the commercial agent being compensated equitably, or even at all, which is certainly unfavourable for the commercial agent and may ultimately lead to non-compliance with the Commercial Agents Directive.

However, it should be noted that Article 836(2) of the OZ is inconsistent in expressly referring only to goods, resulting in further confusion as well as undue differentiation between commercial agents. While the Commercial Agents Directive limits its scope to products,⁷ the OZ defines a commercial agent and a commercial agency contract much more broadly and does not limit its scope to products, but also applies to services.⁸ However, the OZ, like the Commercial Agents Directive, expressly limits the applicability of non-compete clauses to products.⁹ On the face of it, and applying a literal interpretation of Article 836(2) of the OZ a non-compete clause for services might be deemed unlawful. On the other hand, given the overall

⁷ Article 1(2) of the Commercial Agents Directive.

⁸ See Article 807 of the OZ.

⁹ See Article 836(2) of the OZ.

legal regime for commercial agents, this provision could be expanded to apply analogously to services. However, such an expansion of the statutory provision might be considered to be to the detriment of commercial agents dealing with services, who are excluded from non-compete clauses under the present literal interpretation. Therefore, we do not consider it appropriate to apply the non-compete clause by analogy also to services. Moreover, the Commercial Agents Directive does not make non-compete clauses mandatory, but merely allows them to be regulated by member states, and only to the extent allowed by the Commercial Agents Directive.¹⁰ This, however, may give rise to the further issue of the constitutionality of such differentiation between commercial agents and ultimately the constitutionality of such non-compete clauses.

2.1 Restriction of contractual freedom without payment of adequate compensation

It follows in particular from the provision of Article 836(3) of the OZ that in certain cases the law also allows a non-compete clause, subject to the quoted conditions of Article 836(1) and (2) of the OZ, that is binding on the commercial agent without any compensation being agreed for the commercial agent's compliance with the non-compete clause. The OZ provides for the mandatory balancing of interests only in cases where a contract is terminated for reasons attributable to the principal. In addition, in cases where the contract is terminated by the agent on the grounds of misconduct by the principal, the commercial agent may, by written statement, notify the principal no later than one month after termination that he will not comply with the non-compete clause (Article 836(5) of the OZ). If the agent fails to deliver such a statement within one month, he is, according to Article 836(3) of the OZ, nevertheless not bound by the non-compete clause if the principal fails to pay him an adequate monthly compensation or does not pay him an adequate indemnity upon termination of the contract.

In view of the interpretation given by the commentary to the OZ, namely that ordinary termination of the contract by the principal cannot be considered to be within the statutory scope of termination for reasons attributable to the principal (Zabel in Plavšak, 2004: 533, Zabel in Plavšak, 2021: Section 25.21.3.1.), the non-compete clause will therefore apply even in the absence of any compensation for the

¹⁰ See Article 20 of the Commercial Agents Directive.

agent in all other cases, for instance in the case of the expiry of the term of the contractual relationship, ordinary termination of the contract by either party, or termination of the contract for reasons attributable to the commercial agent.

Even with the regularly agreed expiry of the contractual relationship, a post-contractual non-compete clause in the absence of adequate compensation may be unfair and detrimental to the commercial agent. This is all the more true in cases where the principal terminates the commercial agency contract without serious reasons attributable to the commercial agent. Article 832 of the OZ refers to serious reasons justifying the termination of a contract without notice, while Article 836(3) of the OZ refers only to reasons attributable to the principal. In our view, the ordinary termination of a commercial agency contract by the principal could in itself be regarded as a reason attributable to the principal that led to the termination of the commercial agency contract.¹¹ Furthermore, even if the principal were obliged to compensate the commercial agent for compliance with a non-compete clause in cases of ordinary termination of a commercial agency contract by the principal, there are still other cases of termination of commercial agency contracts where, if no compensation is agreed or the agreed compensation is inadequate, the terms are detrimental to the agent. At the very least, this is the case where a contract terminates at the end of the contractually agreed term.

The Supreme Court of the Republic of Slovenia gave its view on this issue in 2001, finding that such non-compete clauses in the absence of any agreed compensation are permissible. The Supreme Court held that such a restriction on the constitutional right to free choice of employment and freedom to conduct a business is permissible because those rights are limited by the rights of another as provided for in the Constitution of the Republic of Slovenia¹² and the law (Article 15(3) of the Constitution). Specifically, the Constitution prohibits acts of unfair competition (Article 74(3) of the Constitution), which includes conduct in violation of a non-compete clause. The Supreme Court further held that in the case of an agency contract, i.e. a contract between equal parties, if no compensation is agreed, then it is of no legal relevance and any discussion of its amount has no legal effect.¹³

¹¹ See also Ljubljana Higher Court, no. I Cpg 74/2024 of October 21, 2024.

¹² Constitution of the Republic of Slovenia [Ustava Republike Slovenije], Official Gazette of the Republic of Slovenia Nos.33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99, 75/16 – UZ70a in 92/21 – UZ62a (hereinafter referred to as the “Constitution”).

¹³ Supreme Court of the Republic of Slovenia, no. II Ips 565/2000 of June 14, 2001.

Although the judgment was delivered before the entry into force of the OZ, it can be deemed to apply *mutatis mutandis*, yet it could potentially be problematic in certain cases in the light of the Commercial Agents Directive. Nevertheless, the general provisions of the OZ, in particular the principles of conscientiousness and fairness, the principle of equality and other principles, might remain available to the potentially injured party, although it is a fact that the Slovenian legislature has expressly provided that any non-compete clause should be taken into consideration in determining the indemnity.

2.2 Comparative regimes

While the Commercial Agents Directive does not provide a direct answer to the question of whether a commercial agent may be bound by a non-compete clause after the termination of his contractual relationship with the principal, in particular for reasons that are not attributable to the commercial agent, in the absence of (adequate) compensation, the very purpose of the Commercial Agents Directive might lead to the conclusion that such a situation cannot be permissible *per se*, and not in all cases.

Contrary to the Slovenian legislature, the Austrian legislature decided that any agreement under which a commercial agent would be restricted in his work after the termination of his contractual relationship with a principal is invalid (Article 25 of the HVertrG).¹⁴

Germany takes a slightly different approach to the regulation of post-contractual non-compete clauses. They must be in writing and limited to no more than two years after the termination of the commercial agency contract and may apply only to the geographical area or customer base in or with which the commercial agent worked and, in both cases, only to goods and services in respect of which the commercial agent acted or transacted business on behalf of the principal, with the principal being required to pay the commercial agent reasonable compensation for the duration of the non-compete clause. The principal may waive the non-compete clause up until the termination of the contract, to the effect that, after the expiry of a six-month period following such waiver, the principal is released from the obligation to pay compensation. Where either party terminates the contract for serious reasons due to

¹⁴ Bundesgesetz über die Rechtsverhältnisse der selbständigen Handelsvertreter of February 11, 1993, BGBl. Nr. 88/1993, with last amendments of June 2, 2016, BGBl. I Nr. 29/2016 (hereinafter referred to as: the “HVertrG”).

misconduct by the other party, such party may declare not to be bound by the non-compete clause by means of a written statement within one month of such termination (Article 90a(1), (2) and (3) of the HGB).¹⁵ Divergent agreements to the detriment of the commercial agent are not permitted (Article 90a(4) of the HGB). In all cases where a non-compete clause is or remains in effect, the German regime therefore imposes an obligation on the principal to pay the agent reasonable compensation for the duration of the non-compete clause.

Denmark has implemented the provision of Article 20 of the Commercial Agents Directive in its law, with the agent not being entitled to any compensation for accepting a post-contractual non-compete clause. However, in accordance with Article 36 of the Danish general act governing contracts,¹⁶ a non-compete clause may be declared invalid if and to the extent that the party bound by it would be unreasonably restricted in the exercise of his profession and/or the restriction goes beyond what is necessary to protect the beneficiary from competition (Gregersen, 2022: 8).

As of June 1, 2000, the Italian Civil Code¹⁷ provides for the payment of compensation for compliance with a post-contractual non-compete clause, which does not apply to contracts executed before that date. However, the Court of Cassation has also taken the view in recent decisions that the parties remain free to contractually derogate from such a statutory provision, since the provision is not mandatory and does not provide that a contract is null and void if such compensation is excluded, nor is there any general public interest to be protected by the statutory provision (Bortolotti and Bortolotti, 2022: 11-13).¹⁸

In Croatian law, this topic is regulated in Article 834 of the ZOO.¹⁹ Prior to that, both Slovenia and Croatia, each with its own amendments, applied the 1978 Obligations Act,²⁰ which did not contain such or a similar provision in the

¹⁵ *Handelsgesetzbuch* of May 10, 1897, BGBl. Nr. III. 4100-1, with last amendments of December 27, 2024, BGBl. 2024 I Nr. 438 (hereinafter referred to as: the “HGB”).

¹⁶ *Bekendtgørelse af lov om aftaler og andre retshandler på formuerettens område* of August 26, 1996, Act No. 781 with last amendments of December 15, 2015, Act No. 1565.

¹⁷ *Codice Civile*, approved by Royal Decree of March 16, 1942, No. 262, and as amended by Decree of December, 7, 2016, No. 291.

¹⁸ Referring to Judgement of the Italian Supreme Court [Corte Suprema di Cassazione], of June 11, 2015, No. 12127, Judgement of August 22, 2016, No. 17239, and Judgement of May 31, 2017, No. 13796.

¹⁹ Civil Obligations Act [Zakon o obveznim odnosima], Official Gazette, no. 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22, 155/23 (hereinafter referred to as: the “ZOO”).

²⁰ Obligations Act [Zakon o obligacijskih razmerjih], Official Gazette of the Socialist Federal Republic of Yugoslavia Nos. 29/78, 39/85, 45/89 – Constitutional Court decision, and 57/89.

context of the regulation of commercial agency contracts. Croatia regulates non-compete clauses in Article 834 of the ZOO in a similar manner to the OZ, with minor derogations. The OZ makes the validity of a non-compete clause conditional upon it being in writing and applying to the same geographical area, the same persons and the same goods as set out in the contract,²¹ meaning that all these conditions must be satisfied cumulatively (Zabel in Plavšak, 2004: 532). In Croatia, however, in addition to written form, validity is subject only to the satisfaction of any of the other three conditions, i.e. same geographical area, same persons or same goods.²² The ZOO allows for a broader range of contractual arrangements regarding non-compete clauses, which could certainly be to the detriment of the commercial agent and contrary to the provisions of the Commercial Agents Directive, which only allows national laws to impose additional restrictions on the validity or application of non-compete clause, but not to expand them in any way.²³ Like the Slovenian OZ, the ZOO makes it possible for a commercial agent to be left without compensation or to be inadequately compensated in certain cases, including the expiry of a fixed-term contract, even if the agent is bound by a non-compete clause. The regimes, therefore, clearly vary considerably. From the Austrian regime, which strictly prohibits any post-contractual non-compete clauses without exception, to the German regime, which requires reasonable compensation for compliance with a post-contractual non-compete clause, to the Italian regime, which, despite the different statutory regime, allows for contractual agreements for a non-compete clause in the absence of compensation, the Danish regime, which does not provide for the payment of compensation for compliance with a non-compete clause and limits such agreements to the general provisions of contract law, and the Slovenian and Croatian regimes, which require, on a mandatory basis, the payment of compensation for compliance with a post-contractual non-compete clause in certain cases of termination of the contractual relationship as provided by the law. In contrast to the Italian regime, where the parties may contractually exclude the statutory compensation for compliance with a non-compete clause, Slovenian and Croatian law do not provide for such a possibility, as the provisions requiring the payment of compensation are mandatory and cannot be varied to the detriment of the commercial agent.

²¹ Article 836(2) of the OZ.

²² Article 834(2) of the ZOO: “Such a contractual provision will be valid if it is in writing and if it applies to the same geographical area, the same persons or the same goods as the commercial agency contract.”

²³ Article 20(4) of the Commercial Agents Directive.

3 Impact of a non-compete clause on indemnity

The Slovenian regime in Article 833 of the OZ which regulates indemnity, deviates significantly, whether intentionally or unintentionally, from comparable regimes, including the Croatian regime; as this has already been the subject of much writing (Kerčmar, 2024a, Kerčmar, 2024b, Kerčmar in Repas, 2024: 123-158), we will only briefly discuss these differences below in order to facilitate the understanding of the impact of a post-contractual non-compete clause on the indemnity.

3.1 Commercial agent's indemnity

A commercial agent is entitled to an indemnity if and to the extent that the agent has acquired new customers for the principal or significantly increased the principal's volume of business with existing customers and the principal continues to derive substantial benefits from business with such customers and the payment of such compensation is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers. However, member states may provide for these circumstances to also include the application or non-application of a restraint of trade clause in accordance with Article 20 of the Commercial Agents Directive,²⁴ which defines a restraint of trade clause as an agreement restricting the business activities of a commercial agent following termination of the agency contract. A restraint of trade clause is valid only if and to the extent that it is made in writing and 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 his agency under the contract, and may be valid for no more than two years after the termination of the agency contract.²⁵

Both the Slovenian²⁶ and the Croatian regime²⁷ provide that in determining the amount of the indemnity, due account must be taken of the commission received by the commercial agent for contracts executed after the termination of his relationship with the principal and of any non-compete clause applicable after the termination of

²⁴ Article 17(2)(a) of the Commercial Agents Directive.

²⁵ Article 20(2) and (3) of the Commercial Agents Directive.

²⁶ Article 833(2) of the OZ.

²⁷ Article 830(3) of the ZOO.

the relationship with the principal. The comparative German²⁸ and Austrian laws²⁹ do not specifically mention the commission received by the agent for contracts executed after the termination of his relationship with the principal, nor any non-compete clause applicable after the termination of his relationship with the principal. The Italian³⁰ and Danish³¹ regimes discussed in this paper contain no such express provision either.

In order to facilitate the understanding of the regime for the commercial agent's indemnity and the issue discussed in this paper, Article 833 of the OZ is quoted below:

- (1) Upon termination of a contract, an agent is entitled to an appropriate indemnity if and to the extent that the agent acquired new customers for the principal or significantly increased the principal's volume of business with existing customers and the principal continues to derive substantial benefits from such customers after the termination of the contract, or if an indemnity is necessitated by special circumstances, in particular by the loss of commissions on business with such customers.
- (2) In determining the amount of the indemnity, due account shall also be taken of the commission received by the agent for contracts executed after the termination of the relationship with the principal and of any non-compete clause applicable after the termination of the relationship with the principal.
- (3) The amount of the indemnity under paragraphs 1 and 2 of this Article cannot exceed the average annual commission over the last five years or a corresponding shorter period from the execution of the contract.
- (4) Where a fixed-term contract is terminated before the expiry of its term, or where an indefinite-term contract is terminated before the expiry of a period of five years from the date of its execution, an agent is entitled to an appropriate indemnity equal to the difference between the costs incurred by the agent in bringing the product to market and any other costs incurred by the agent in connection with the performance of the contract, and the income received by the agent through the performance of the contract and the income that would likely have been received by the agent until, in the

²⁸ Article 89b of the HGB.

²⁹ Article 24 of the HVertrG.

³⁰ Article 25 and 26 of the Danish Act on Commercial Agents (*Lov om handelsagenter og handelsrejsende* of May 2, 1990, Act no. 272).

³¹ Article 1751 of Italian Civil Code.

case of a fixed-term contract, the expiry of its term or, in the case of an indefinite-term contract, the expiry of a period of five years from its execution.

- (5) An agent is entitled to an indemnity under the preceding paragraph even if he is not entitled to an indemnity under paragraph 1 of this Article, as well as if the appropriate indemnity under paragraph 1 of this Article would be lower than the appropriate indemnity under the preceding paragraph.
- (6) The payment of an indemnity does not preclude an agent's right to compensation for damages.

The ZOO was adopted four years after the adoption of the Slovenian OZ, it being clear from the structure and substance of the provisions governing commercial agency contracts that the Croatian legislature drew upon Slovenian laws. However, the Slovenian legislative inconsistency in Article 833(1) of the OZ, which was most likely unintentional, was not replicated by the Croatian legislature in Article 830(1) of the ZOO. Namely, there are already two different paths to severance pay under Article 833(1) of the OZ, and it appears based on the legislative drafting materials that the Slovenian legislature intended for paragraphs 1, 2 and 3 to implement the indemnity provided for in Article 17(2) of the Commercial Agents Directive, but fell short in achieving that goal. It follows from the text that the words 'or if', placed after the punctuation mark (comma), were clearly intended to denote an alternative, as discussed in Stabej's opinion (Stabej, 2020), Rot's master's thesis (Rot, 2016) and the judgment of the Ljubljana Higher Court,³² most likely resulting from a misinterpretation of the wording of the Commercial Agents Directive (Kerčmar in Repas, 2024: 134-135) and the German regime as providing for entitlement to indemnity under each indent, or point, separated by the conjunction 'and', and not merely cumulatively subject to the satisfaction of all the indents, or points, connected by the conjunction 'and'. This may be the most reasonable explanation as to why this anomaly in the Slovenian regime came to be; otherwise, attention would certainly have been drawn at the time of the adoption of the OZ, or after its adoption, to the fact that the indemnity regime under Article 833(1) in conjunction with Article 833(2) and (3) of the OZ deviates from the Commercial Agents Directive, as was pointed out, for instance, during the legislative process itself as well

³² Ljubljana Higher Court, no. I Cpg 924/2016 of April 24, 2018, para. 19.

as in the first commentary to the law with regard to the indemnity regime under Article 833(4) and (5) (Kerčmar in Repas: 134-135).

The ZOO likewise did not reproduce the second anomaly in the Slovenian regime under Article 833(4) and (5) of the OZ, introduced in Slovenian law by an amendment proposed by a deputy group³³ in the second reading of the OZ, which newly added paragraphs 4³⁴ and 5 to Article 833 of the OZ. The legislature sought to provide an additional right in certain cases to commercial agents not entitled to an indemnity under paragraph 1.³⁵ As further explained by the authors of the amendment, the new paragraph 5³⁶ sets out the relationship between the indemnity under paragraph 1 and the indemnity under paragraph 4 to make it clear that an agent cannot cumulate the two indemnities. Therefore, as provided in Article 833(5) of the OZ, an agent is entitled to an indemnity under paragraph 5 even if he is not entitled to an indemnity under paragraph 1, as well as if the appropriate indemnity under paragraph 1 would be lower than the appropriate indemnity under paragraph 4. In particular, the use of the word “even” in the paragraph 5 may give rise to different interpretations (Kerčmar in Repas, 2024: 151).

3.2 Impact of a post-contractual non-compete clause and impact of the commission received by the agent for contracts executed after the termination of the relationship with the principal

In accordance with the provisions of Article 833(2) of the OZ, in determining the amount of the indemnity under Article 833(1) of the OZ, due account must also be taken of the commission received by the agent for contracts executed after the termination of the relationship with the principal and of any non-compete clause

³³ Amendment to Article 833 by Deputy Group (Potrč Miran) of June 28, 2001, EPA 1544.

³⁴ Where a fixed-term contract is terminated before the expiry of its term, or where an indefinite-term contract is terminated before the expiry of a period of five years from the date of its execution, an agent is entitled to an appropriate indemnity equal to the difference between the costs incurred by the agent in bringing the product to market and any other costs incurred by the agent in connection with the performance of the contract, and the income received by the agent through the performance of the contract and the income that would likely have been received by the agent until, in the case of a fixed-term contract, the expiry of its term or, in the case of an indefinite-term contract, the expiry of a period of five years from its execution.

³⁵ Amendment to Article 833 by Deputy Group (Potrč Miran) of June 28, 2001, EPA 1544.

³⁶ An agent is entitled to an indemnity under the preceding paragraph even if he is not entitled to an indemnity under paragraph 1 of this Article, as well as if the appropriate indemnity under paragraph 1 of this Article would be lower than the appropriate indemnity under the preceding paragraph.

applicable after the termination of his relationship with the principal. A virtually identical provision is contained in Article 830(3) of the ZOO.

The principle of equity is derived from the second indent of Article 17(2)(a) of the Commercial Agents Directive, which provides that the payment of that indemnity must be equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers. In the same indent, the Commercial Agents Directive also allows member states to provide for such circumstances to also include the application or non-application of a restraint of trade clause within the meaning of Article 20 of the Commercial Agents Directive. The Slovenian and Croatian legislatures decided to include any non-compete clause applicable after the termination of the relationship with the principal as a relevant circumstance, providing for that circumstance in Article 833(2) of the OZ and Article 830(3) of the ZOO, respectively, as one of the two circumstances³⁷ to be duly taken into account.

The Commercial Agents Directive and, *inter alia*, the German (Article 89b(2)(1) of the HGB) and Austrian (Article 24(1)(3) of the HVertrG) laws, only expressly mention, among an unspecified number of possible relevant circumstances, lost commissions from business transacted with customers who were acquired for the principal by the commercial agent or the principal's volume of business with whom was significantly increased by the commercial agent. This is one of the circumstances assessed in the context of the principle of equity.³⁸ No other circumstances are expressly mentioned.

The commentary to the OZ states that the economic purpose of the indemnity is to balance the benefits and detriments and adds in this respect that the agent's position will be more difficult if he is subject to a post-contractual non-compete clause (Zabel in Plavšak, 2004: 516, Zabel in Plavšak, 2021: Section 25.20.1.2.). In the event of early termination for reasons attributable to the principal, the principal is required to pay the agent an indemnity and, if a post-contractual non-compete clause is agreed, monthly compensation. As regards the relationship between the two, Zabel merely states that the function of each of the two forms of compensation must be taken into consideration (Zabel in Plavšak, 2004: 533, Zabel in Plavšak, 2021: Section 25.21.3.1.).

³⁷ In addition to the commission received by the agent for contracts executed after the termination of the relationship with his principal.

³⁸ In Germany's case since the amendment of the HGB in 2009 as a result of the Judgement of March 26, 2009, Semen, C-348/07, ECLI:EU:C:2009:195.

Given the explicit wording of the Slovenian law, any post-contractual non-compete clause should certainly be duly considered and taken into account in determining the amount of the indemnity, but a high degree of caution is required in this respect. The question arises as to how to take due account of a non-compete clause in determining the indemnity, this of course being relevant only in the case of indemnity under Article 833(1) of the OZ. This depends on a number of factors, which again need to be considered in a reasonable and appropriate manner in each specific situation. For instance, if a commercial agent is bound by a non-compete clause and, under Article 836(3) of the OZ, the principal is required to pay him appropriate monthly compensation for the entire period of the non-compete clause at a rate equal to the average monthly commissions for the last five years of the contract, or during the term of the contract, this does not imply *per se* that the commercial agent's indemnity could be zero in such a case. Such a fact is to be assessed in the context of all the other circumstances relevant in determining the amount of the indemnity, in particular the duty to comply with the non-compete clause without compensation or subject to compensation whose amount is not equitable, being excessive or insufficient.

If the compensation payable by the principal to the agent for compliance with a post-contractual non-compete clause is deemed appropriate, or balanced and equitable in terms of its amount given the circumstances, then such compensation should not in any case have any bearing on the assessment of the indemnity. Where it would be inequitable and unbalanced for the agent not to receive compensation, or where the amount of such compensation is inequitable, this should be taken into consideration in determining the amount of the indemnity and the indemnity should be adjusted downwards or upwards accordingly.

Following such an interpretation, the non-compete regime would certainly be more balanced as a whole.

Nevertheless, there may be situations where a commercial agent would not be entitled to an indemnity or where the indemnity itself would not be able to adequately take into account the commercial agent's disadvantage due to the post-contractual non-compete clause. However, if the conditions prescribed by law are satisfied, the general provisions of the law of obligations,³⁹ which allow for the

³⁹ E.g. Article 8 of the OZ (Principle of Equal Value of Reciprocal Obligations), Article 118 of the OZ (Manifest Disproportion Between Reciprocal Obligations), Article 119 (Usurious Contract), etc.

rectification of potential imbalance between the contractual parties, remain available in such cases for any necessary correction.

Attention should also be drawn in this regard to the other circumstance to be taken into account in accordance with the OZ in determining the amount of the indemnity, namely the commission received, or to be received, by the agent for contracts executed after the termination of his relationship with the principal, i.e. the commission resulting from the commercial agent's work during his contractual relationship with the principal, which, in accordance with Article 823(4) of the OZ or Article 819(5) of the ZOO, is due to the agent in any case. The agent is entitled to such commissions as a result of his efforts and work up to the moment of termination of his contractual relationship with the principal, and not in any way as a result of the termination of his contractual relationship with the principal, it being unclear why this might have such a significant impact on the commercial agent's right to indemnity as to be specifically mentioned in the law. The question, therefore, arises as to why any distinction should be made between commissions, all of which the agent is entitled to solely and entirely due to his efforts during his contractual relationship with the principal. Zabel argues that any commissions paid to the agent after the termination of the contractual relationship pursuant to Article 823(4) of the OZ must be deducted from the amount of indemnity to be paid by the principal (Zabel in Plavšak, 2004: 520, Zabel in Plavšak, 2021: Section 25.20.4.). It is our view that such an interpretation of this contractual provision is not appropriate in all situations. The underlying principle must be that the rights of the commercial agent must not be diminished and, conversely, that the agent must not be unjustly enriched. In our view, if the customers from whom the commercial agent received commissions after the termination of the contractual relationship in accordance with Article 823(4) of the OZ were not taken into account in determining the indemnity, more specifically in the estimation of the principal's future benefits, such commissions should not be deducted from the indemnity, since the customers were not taken into account in the calculation of the future benefits of the principal on whose basis the commercial agent's indemnity was determined.⁴⁰ Unlike the OZ and the ZOO, the Commercial Agents Directive does not specifically mention these commissions in relation to indemnity.

3.3 Comparative regimes

⁴⁰ Conversely, that such commissions should be deducted in all cases, e.g.: Küstner and Thume, 2014: 740.

Unlike the Slovenian and Croatian regimes, the other regimes discussed in this paper do not specifically include a non-compete clause applicable after the termination of the relationship with the principal among the relevant circumstances when determining indemnity. A post-contractual non-compete clause may also be taken into consideration as a circumstance in the assessment of equity, although it is not addressed in this context in the German legal system due to its different regime for non-compete clauses.

German jurisprudence takes the view that any contractually agreed non-compete clause should not be included and does not affect the indemnity, as any disadvantages relating to the non-compete clause are compensated separately and on a different basis (Meier, in Herresthal, Henssler, Paschke, 2020: para. 89b of the HGB, recital no. 123, Emde, 2014, para. 89b of the HGB, recital no. 198, Balke and de Groot, 2010: 1551-1556). In Germany, a post-contractual non-compete clause, therefore, cannot be taken into account even in applying the principle of equity as regards indemnity. Moreover, the focus is entirely different, as the indemnity is based on the past activity of the commercial agent, whereas compensation for a non-compete clause is based on future damages (Meier, in Herresthal, Henssler, Paschke, 2020: para. 89b of the HGB, recitals no. 208-211).

Belgian law, for instance, creates the legal presumption that the principal enjoys significant benefits in the case of a contractual non-compete clause. Of course, this presumption is rebuttable.⁴¹ In Austrian law, on the other hand, there can be no effect on the indemnity in any case, as any agreement under which the agent would be subject to a non-compete clause after the termination of his contractual relationship with the principal is null and void.⁴²

4 Conclusion

In Germany, both jurisprudence and case law are indeed opposed to taking any non-compete clause into consideration in determining the amount of indemnity. However, the situation in Slovenia is quite different, as the regime for post-contractual non-compete clauses differs from the German regime. Namely,

⁴¹ Article X.18(4), Book X, Chapter 1, of the Code of Economic Law [Code de droit économique] of March 29, 2013, Moniteur belge no. 2013A11134.

⁴² Article 25 of the HVertrG.

Slovenian law provides for the possibility of a commercial agent being bound by a post-contractual non-compete clause in certain cases despite not being entitled to compensation. In addition, the OZ expressly provides that due account is to be taken of any non-compete clause after the termination of the relationship with the principal in determining the severance payment.

Therefore, unless this Slovenian regime is found to be incompatible with the Slovenian Constitution or the Commercial Agents Directive, in cases where a commercial agent is bound by a non-compete clause and is not compensated or receives compensation that is inequitable (excessive or inadequate) in the light of the circumstances, this will have to be taken into consideration in determining the indemnity. In any case, it is our view that the compensation should not simply be deducted from the indemnity due to the commercial agent.

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Povzetek članka v slovenskem jeziku (abstract in Slovene language):

Članek obravnava pravno ureditev konkurenčne klavzule po prenehanju pogodbe o trgovskem zastopanju, v okviru katere analizira slovensko zakonodajo in njeno skladnost z Direktivo 86/653/EGS. Slovenski Obligacijski zakonik (OZ) zahteva obvezno plačevanje odmene za spoštovanje konkurenčne klavzule zgolj v primerih, ko je pogodba prenehala zaradi razlogov na strani naročitelja. Po mnenju avtorja takšna ureditev lahko vodi v omejitev pogodbene svobode brez ustreznega plačila, kar ni v skladu z duhom direktive. Na podlagi pregleda ureditev konkurenčne klavzule po prenehanju pogodbe o trgovskem zastopanju v različnih evropskih državah, tudi na Hrvaškem, avtor ugotavlja, da se ureditev po posameznih državah zelo razlikuje. Avtor se osredotoča tudi na vpliv konkurenčne klavzule na odpravnino, saj OZ zahteva njeno upoštevanje pri določanju višine. Opozarja tudi na potrebo po pravičnem ravnotežju interesov in prilagoditvi zakonodaje, ki bi zagotavljala zaščito zastopnika pred nesorazmernimi omejitvami brez primerneга nadomestila.