# EVOLUTION OF THE COMMERCIAL AGENT

## *qui facit per alium, facit per se*: the Evolution of the Commercial Agent

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> The growth of the law of agency, both in volume and sophistication, has sought to keep pace with the expansion and development of contemporary commerce. [1]

### A INTRODUCTION

The law of agency has had for centuries a special place in the Law as one of the only exceptions to the sacred doctrine of privity. According to basic notions of contract law, a contract cannot confer rights or impose obligations on any legal or natural person not a party to it. While in theory this would be an ideal concept, the commercial world is immensely complex and the doctrine of privity can be restrictive in modern commercial practice.

It is for this reason that the use of agency agreements has become a common and contemporary solution to growing business demands. However, while the use of agents has grown, so too have the laws surrounding agency. From the common law in the UK and Ireland to new European ideologies, the law of agency, in a strictly commercial context, has seen a dramatic shift in its fundament components.

This article seeks to address the evolution of the law relating to commercial agents from their humble beginnings in the common law. It will include the rights and obligations of agents and the strictly implied duties imposed upon them and the requirements of authority. A comparison is then made with the law at present as altered by the introduction of the European Communities (Commercial Agents) Regulations 1994[2] and 1997, [3] passed to implement the EC Directive on Self Employed Commercial Agents. [4]

The implementation of the Regulations transformed how the law of agency operates within a commercial context. The common law theme of freedom of contract was no longer a priority in commercial agency agreements[5] and new ideologies based on French[6] and German law[7] were introduced to harmonise the common market[8] within the European Union.

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[1] Markesinis & Mundy, An outline of the Law of Agency, 4th ed, (London: Butterworths, 1998) at p.5

[2] SI No. 33 of 1994 [hereinafter 'the Regulations']

[3] SI No. 31 of 1997

[4] 86/653/EEC [1986] OJ L 382/17 (hereinafter 'the Directive')

[5] Reynolds, Bowstead & Reynolds on Agency, 17th ed, (London: Sweet & Maxwell, 2001) at p.582

[6] Randolph and Davey, A guide to commercial Agents' regulations, (Oxford: Hart, 2002) at p.123–138

[7] *ibid.* at p.107 - 121

[8] See: Article 1(1) of the Directive

Agents were seen as those needing protection within the commercial world and the Regulations allowed for their facilitation and assimilation as such. [9] This article further seeks to address the new rights and obligations on the part of the agent and principal, as set out in the Directive, while also examining a modest body of case law which attempts to reconcile exactly what a commercial agent is and who can avail of the protection that this status provides.

While on the face of it, this would appear to be a positive development for the law of agency, some aspects of it are not beyond criticism. Commercial agents undoubtedly facilitate trade and are an essential necessity in the world of commerce; the Directive has ultimately changed the parameters of this practice. Moreover, diverse case law in the UK, Ireland and Europe has left the Directive somewhat inconsistent in its exact application. It is this evolution of agency from its common law past to its harmonised present that forms the basis of this article.

## B THE COMMON LAW AGENT

### 1 Defining an Agent under the Common Law

A clear common law definition of an agent has never been strictly made available by the courts. [10] While the scope of common law agency has the potential to be quite extensive, Friedman's definition can provide some assistance:

> Agency is the relationship which exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property. [11]

Historically, the power of an agent to affect the legal position (via third parties) of his principals has always been met with suspicion and apprehension. Because of this, strict fiduciary duties[12] were introduced at common law and imposed on agents. Since it is not necessary that agency agreements be evidenced in writing, if the agent could prove he possessed an adequate level of authority, [13] he was considered as being within an agency agreement and could, in turn, be exempt from any liability under the contract[14] (provided the agent preformed all contractual obligations without breach or incident).

While this article is mainly concerned with the advent and evolution of the "commercial agent", it is important to recognise at the onset that there are a variety of forms of agency within the common law. The definition of the

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[9] *Page v. Combined Shipping* [1997] 3 All ER 656
[10] Compared to the definition contained within Article 1(2) of the Directive
[11] Fridman, The Law of Agency, 7th ed, (London: Butterworths, 1996) at p.11 as taken from White, *infra*. at n.16, p.78
[12] Bradgate, Commercial Law, 3rd ed, (London: Butterworths, 2000) at p.188 – 206
[13] *infra*. n.23-27
[14] See e.g. *Hely Hutchinson v. Brayhead Ltd* [1968] 1 QB 549

term "agent" can differ significantly between its common usage and that of an agent in law. For example, an estate agent is called an agent, but may not in fact have the authority to legally bind his/her client. Distinguish this from agents in law, such as:

(a) General/Special agents – A general agent is one who has the authority, on behalf of another, to do various acts in the ordinary course of his trade, business or profession. [15] Special agents are authorised to do only one particular act.[16]
(b) Mercantile agents – Include both factors[17] (those with possession of the principal's goods) as well as brokers[18] (those who do not have possession of the goods). Both act as negotiators between the parties in the course of the commercial transaction.
(c) *Del credere* agents – A *del credere* agent negotiates contracts on behalf of the principal, but in return for an additional sum (commission) guarantees that he will indemnify the principal in the event the third party fails to pay what is due under the contract.
(d) Commission agents – As Bradgate notes: "A commission agent acts to buy or sell on behalf of a principal, but is not authorised to create privity of contract with the third party with whom he deals." [19]
(e) Commercial agents[20] – A classification arising out of the European Directive. Providing the agent can meet the strict requirements set out in the Directive, a greater degree of statutory protection will apply. [21]

Within the UK and Ireland, agents firstly are not obligated to register with any particular national body[22] and secondly are not, at common law, required to have all contracts evidenced in writing. The courts, without always having solid evidence, must then consider many factors when deciding whether a true agency agreement exists.

In order to classify one party as an agent, one of the following types of authority must be proved to have existed between the parties, these include:

(a) actual authority (either express or implied) [23]
(b) apparent authority[24]
(c) usual authority[25]
(d) ratification by the principal[26]

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[15] Fridman, The Law of Agency, 6th ed, (London: Butterworths, 1990) at p.33; See further: *Swiss Air Transport Co. Ltd v. Palmer* [1976] 2 Lloyd's Rep 604
[16] White, Commercial Law, (Dublin: Thomson Round Hall, 2002) at p.83
[17] For a definition of Goods, See: Sale of Goods Act, 1893. s62(1)
[18] *supra*. n.16, p.37
[19] *ibid*. at p.133
[20] To be discussed *infra*.
[21] See further: White, "Commercial Agents in Irish Law: A Privileged Position " [2001] 8 CLP 259
[22] As is the case in EU Member States such as France or Italy.
[23] *Hely Hutchinson v. Brayhead Ltd* [1968] 1 QB 549
[24] *Freeman & Lockyer v. Buckhurst Park Properties Ltd.* [1964] 2 QB 480
[25] *Watteau v. Fennick* [1893] 1 QB 346
[26] *Barclays Bank v. Breen* [1962] 96 ILTR 179

(e) authority arising out of necessity[27]

When the existence of one of the aforementioned types of authority can be proved, a valid agency agreement can be assumed and both parties will be responsible for the obligations conferred upon them while equally availing of the benefits.

**2 Rights and Duties of the Agent**

As mentioned above, if a valid agency agreement exists, the agent has the ability to affect his principal's legal position and in turn will not be subject to any liability or prevailing obligations under the contract.[28] Due to this "perceived" weakness on the part of the principal, the common law imposed a number of contractual and fiduciary duties on the part of the agent, which are instantly implied into all agency agreements. These include a duty to:[29]

(a) obey instructions
(b) exercise reasonable care
(c) personal performance (not to delegate duties without authorisation)
(d) avoid conflicts of interest
(e) not make a secret profit from his position
(f) not accept a bribe
(g) to account

In contrast, the duties imposed on principals have historically been minimal and limited. Prior to the Directive (to be discussed below), agency agreements were regulated by contract or the common law.[30] The potential rights of the Agent include:

(a) the right to remuneration[31]
(b) the right to an indemnity[32]
(c) the right to a lien[33]

It should be noted that the right to an indemnity at common law is instantly implied into any contractual relationship between the parties (so long as the agent had the authority to perform the act). If the agency was gratuitous, the right to be indemnified is restitutionary;[34] the other rights to remuneration (either by retainer or commissions) and the right to a lien are both rights which need to be expressly contracted for.

As Goode points out:

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[27] Brown, "Authority and Necessity in the Law of Agency", [1992] 55(3) MLR 414
[28] This statement does not take into account the rules and consequences of disclosure. See: Goodhart & Hamson, "Undisclosed Principals in Contract", [1932] 4 CLJ 320
[29] *supra*. n.12, p.188 - 206
[30] *supra*. n.21, p.260
[31] *Henehan v. Courtney* [1967] 101 ILTR 25; Alpha Trading v. Dunshaw-Pattern [1981] QB 290
[32] *Re Parker* [1882] 21 ChD 408 (C.A); *Adamson v. Jarvis* [1824-1834] All ER 120
[33] *Re Barret Apartments Ltd.* [1985] IR 350
[34] *supra*. n.16, p.152

> English law has been reluctant to imply terms other than in relation to [the agent] remuneration and security for payment of it, and the case law has for the most part been concerned with such questions as whether [the agent] has done what is necessary to entitle him to his compensation and whether the principal owes [his agent] a duty to avoid steps which would prevent [the agent] from earning his commission.[35]

For these reasons, European developments were largely welcomed by those operating as agents within the commercial world.

### C THE INTRODUCTION OF THE COMMERCIAL AGENT

> What has been introduced is an animal which has no like, it seems, in common law and is a statutory creation imported from the continent.[36]

#### 1 Background to the Directive

According to Bowstead and Reynolds, in 1977, the English Law Reform Commission reported rather hysterically that the proposed European Directive would offend the basic principles of the English law of agency.[37]

The new directive undoubtedly has significant differences from what had, for centuries, been the norm for commercial agents. In *Imballaggi Plastici SRL v. Pacflex Ltd*,[38] Lord Justice Gibson described the concept of the "commercial agent" as "alien" to English law. The Directive, based largely on the German and French civil codes, sought to provide firm protection for commercial agents. It has arguably established this with the introduction of guaranteed rights, including but not limited to: the right to commission,[39] compensation[40] and information.[41] While these practices are common place within civil law jurisdictions, implementation of such principles into the UK and Ireland was far more of a strenuous process. Because of this, the common law countries were given additional time by the European Commission to implement the Directive.[42]

#### 2 Definition of a Commercial Agent

Article 1(2) of the EC Directive on Commercial Agents as implemented by the 1994/97 Regulations is stated as:

> A *self-employed intermediary* who has *continuing authority* to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called "the principal," or to *negotiate and conclude* such transactions *on behalf of and in the name of that principal*. (Emphasis added.)

The key components of the definition include:

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[35] Goode, Commercial Law, 3rd ed, (London: LexisNexis, 2004) at p.174
[36] Per Bowers HHJ, *Barret McKenzie v. Escada* (UK) Limited [2001] EuLR 567 at 572
[37] *supra*. n.5, p.582
[38] [1999] 2 All ER (Comm) 249 at p.255
[39] Articles 7-8 of the Directive
[40] Articles 17-19 of the Directive
[41] Article 12 of the Directive
[42] Article 22(3) of the Directive

(a) a self-employed intermediary
(b) who has continuing authority
(c) to negotiate and conclude
(d) on behalf of and in the name of the principal

Seemingly these requirements do resemble similarities to the common law position. It is essential to point out at the onset of this topic that for an agent to avail of the benefits of the Directive, he must be able to satisfy the criteria within Article 1. As will be discussed shortly, the term "negotiate and conclude" has led to a modest amount of controversy and litigation, and has shaped the use of the European Directive by expanding its applicability and availability to agents.

As Directives permit flexibility within their implementation, thereby allowing for synchronisation with the existing national laws, one option allowed for within the Directive was found in Article 2(2). It permitted the exclusion of those commercial agents whose activities are considered secondary by the law of the Member State. In the UK, the option to exempt secondary agents was permitted under the UK Regulations.[43] The schedule accompanying the implementing UK Regulations sets out something of a guideline on how to distinguish secondary activities. For example, where customers normally select the goods for themselves and merely place their orders through the agent;[44] or where promotional material is supplied directly to potential customers,[45] these agents will not be able to avail of the benefits conferred upon them by the legislation.

### 3 An Agent's Rights under the Directive

(a) Commission

As was stated earlier, at common law, an agent is required to expressly contract for the amount of remuneration which is to be earned. Where the agent is engaged to bring about a result, the transaction is required to be the result of the agent's actions, or as case law has prescribed, the agent's actions must be the "effective cause" of the transaction.[46] Moreover, if (regardless of efforts made by the agent) the transaction failed to reach agreement, no commission under common law was legally owed.

With the introduction of the 1994/97 Regulations, the right to commission became an automatic payment due to the agent in certain circumstances. Commission became a compulsory right in a much larger and more structured variety of situations, for example:

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[43] The Commercial Agents (Council Directive) Regulations 1993, S.I. 1993/3053 as amended, Reg 2(3)
[44] Commercial Agents (Council Directive) Regulations 1993, SI No.3053 (as amended), Sch 1, s.4(c)
[45] Commercial Agents (Council Directive) Regulations 1993, SI No.3053 (as amended), Sch 1, s.4(a)
[46] *Judd v. Donegal Tweed Co. Ltd* [1935] 69 ILTR 117

(i) where the transaction has been concluded as a result of the agent's actions;[47]
(ii) where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.[48]

The Directive also stipulates that a commercial agent is further entitled to commission on transactions concluded during the period covered by the agency contract either where he is "entrusted with a specific geographical area or group of customers" or where the agent has an exclusive right to a specific geographical area or group of customers."[49] Member States had the option of implementing either of the two aforementioned scenarios. The Irish Government opted for the latter of the two, requiring commission to be payable in circumstances where the agent has an exclusive right to a specific area.[50] Furthermore, under the Directive, an agent is also entitled to commission on transactions concluded after the agency contract has terminated if:

(i) the transactions is mainly attributable to his efforts during the period covered by the agency contract and if the transaction was entered into within a reasonable period[51] after the contract terminated[52]
(ii) in accordance with Article 7, if the order of the third party reached the principal or the commercial agent before the agency contract concluded.[53]

(b) Compensation

The EC Directive set out in Article 17 that Member States had the option to select either an indemnity or compensation for damage, to be paid following the termination of the agency agreement. Since the purpose of the Directive, as set out in the preamble, was to harmonise the laws of the Member States, this was one of the few areas left to the discretion of the National Legislatures.[54] It has been argued that allowing for options such as these defeats the Directive's harmonisation purpose.[55]

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[47] Article 7(1)(a) of the Directive
[48] Article 7(1)(b) of the Directive
[49] Article 7(2) of the Directive
[50] For a European example of the ECJ interpreting the extent to which Article 7 can be applied, see: *Georgios Kontogeorgas v. Kartonpak*, Case C 104/95, [1996] ECR I-6643
[51] While the Directive did not define "reasonable period", a recent decision of the English Courts in *Tigana v. Decoro*[2003] EWHC 23 (QB) at para.65, provides something of an example when Davis J. found a period of nine months following the termination of an agency agreement, was a reasonable period for the Agent to collect commission from orders placed after termination.
[52] Article 8(a) of the Directive
[53] Article 8(b) of the Directive
[54] For a discussion of this, see: the Italian case of *Centrosteel Srl v. Adipol GmbH* Case C 456/98, [2000] 3 C.M.L.R. 711, where the ECJ in a preliminary reference restated that the directive allowed the Member States enough room to maneuver, so that enforcing further restrictions was not allowed. Furthermore, the directive is to be interpreted in light of the national law and further restrictions could not be imposed by the National courts or legislatures.
[55] *supra*. n.16, p.162

The concept of an indemnity is based largely on German law and deals with the possibility and reality of future loss. In contrast, the notion of compensation, based primarily on French law, regards past expenses while considering damage done.[56]

Whilst in the United Kingdom, parties can choose between either an indemnity or compensation (with compensation being the default, should no agreement to the contrary be provided),[57] Ireland in fact, did not include Article 17 in the original 1994 implementing Regulations, and only opted for the French method of compensation in the 1997 Regulations, following pressure from the European Commission.[58]

At present, there has been no litigation on the area within Ireland, but decisions of the national courts and the ECJ are available to provide some guidance on the effects of Article 17.[59] Because compensation can equate to a substantial figure, it is of great importance that an agent can satisfy the requirements set out in Article 1 of the Directive. As was discussed above, under common law, damages were calculated to compensate the agent for loss due to a contractual breach by the principal, but under the Directive, compensation is payable for loss of interest in the agency.[60]

It should be noted that the element of a right to compensation (under the Directive) is not meant to alter how the breach of a contract is remedied, but rather to make compensation from a principal compulsory. Cases such as *Tigana v. Decoro*,[61] *King v. Tunnock*,[62] and most recently the English Court of Appeal ruling *in Lonsdale v. Howard & Hallam Ltd*[63] have grappled with the issue of when to award compensation and how much (if any) is due. While a number of possibilities have been put forth and could prove to be persuasive to the Irish courts, the case law would suggest thus far that upon the termination of a commercial agency contact, the agent appears to become more like an independent contractor rather than an employee and as such, upon termination, would be compensated more as a quasi-partner.[64] Therefore, compensation could be thought of as equal to the loss of future benefit in a business the agent helped to develop. However, it is essential to reiterate that there has yet to be a definitive statement on Articles 17-19 of the Directive by the Irish courts.

(c) Right to Information

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[56] See: *supra*. n.16, p.167 where calculating compensation is suggested to be more of a "backwards looking" exercise.
[57] The Commercial Agents (Council Directive) Regulations 1993, S.I. 1993/3053 as amended, Reg 17
[58] Article 17(3) of the Directive, 1997 Regulations
[59] See generally: *King v. Tunnock* [2000] EuLR 531, Druffen v. Frabo Spa [2000] EuLR 167
[60] Higgins, "Commercial Agents and Compensation" [2004] 9 (4) BR 145 at 147
[61] [2003] EWHC 23 (QB) at para. 89
[62] [2000] EuLR 531
[63] [2006] ICR 584
[64] *supra*. n.21, at p.260

Unlike any right under common law, Article 12 of the Directive gives agents the right to inspect any records (belonging to their principal) which would provide information regarding the amount of remuneration owed to them. Furthermore, Article 13 provides that each party shall be entitled to receive from the other, on request, a signed written document setting out the terms of the agency contract including any terms subsequently agreed. While the option was available to Member States to take advantage of Article 14 and require that all agreements be evidenced in writing, Ireland decided against this.

### D THE SCOPE OF NEGOTIATION UNDER ARTICLE 1 OF THE DIRECTIVE

Until recently and due to conflicting European case law, the scope to which the Directive applied within Ireland was debatable. This was of particular concern because of the nature of the Directive and its implications for agency agreements, both with respect to the benefits incurred by agents and the potential detriments to their Principals. While the ECJ had taken a perceivably liberal view of the definition of commercial agent as defined in Article 1 of the Directive,[65] the significant differences between the pre Directive national laws of the Member States on the continent and the common law precedent within the UK and Ireland left the situation in need of clarification.

#### 1 The English Prospective

As was discussed above, the UK Government chose not to include the activities of agents deemed secondary by law as those who could be included within the Directive. Ireland, on the other hand, did not opt for this exemption and it is this important distinction which would pave the way for very different applications of the Directive. The cases of *Parks v. Esso Petroleum Co. Ltd.*[66] and the Irish case of *Kenny v. Ireland IROC Ltd.*[67] exemplify this distinction.

The plaintiff in *Parks v. Esso* was a licensee of a self-service petrol station. The plaintiffs argued the definition of the term "negotiate" as found within Article 2 of the Directive should be given a broad interpretation. They relied upon the definition found within the Oxford English Dictionary. This gave a secondary definition as being "To deal with, manage or conduct (a matter, affair, etc., requiring some skill or consideration.)" The plaintiffs also relied on the wording used in the German version of the Directive,[68] where a wider translation of the word "negotiate" was specifically used. While the court expressly rejected the latter argument; they did agree that negotiation could be regarded in the wider sense.[69]

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[65] See *Bellone v. Yokohama SpA*, Case C 215/97, [1998] 3 C.M.L.R. 975
[66] [1999] TrL.R. 232
[67] [2005] IEHC 241 (hereinafter *Kenny v. IROC*)
[68] Article 84, German Commercial Code
[69] For criticism of the Judgment in *Parks v. Esso*, see: Sellhorst & O'Brian, International Business Lawyer, July/Aug 2000, at p.320; see also: Randolph and Davey, "A guide to commercial Agents' regulations", (Oxford: Hart, 2002) at p.47

On appeal, Morritt LJ provided a very useful explanation for the reasoning behind their decision. He stated:

> This definition does not require a process of bargaining in the sense of invitation to treat, offer, counter offer and finally acceptance, more colloquially known as a haggle. But equally it does require more than the self-service by the customer followed by payment in the shop of the price shown on the pump, which is how the system operates nowadays. In my view the motorist would be astonished to be told that when he inserted the nozzle of the pipe into the top of his petrol tank, that he was "negotiating" with the site operator. In my view it is quite plain that there is no process of negotiation involved. To revert to the Oxford English Dictionary definition Mr. Parks relied on, Mr. Parks did not "deal with, manage or conduct" the sale of petrol to his customers, for he took no part in the customer's choice and self-service. Insofar as the definition indicated the need for skill or consideration, Mr. Parks provided none.[70]

So while the Courts did accept the meaning of "negotiate" (as per the Directive) as having a broad meaning; and while Mr. Parks was able to satisfy the requirements of being a self-employed intermediary, possessing the authority required and indeed working on behalf of another, he was not by law a commercial agent under the European Directive and as such could not avail of it benefits.

Thus, while England was grappling with the applicability of exactly how far the Directive could and should apply, the Irish courts were subsequently to decide on the preliminary issue as well in the later case of *Kenny v. IROC*.[71]

### 2 Certainty in Ireland?

Prior to the decision in *Kenny v. IROC*, the only decision within the Irish jurisdiction to consider the meaning of the term "commercial agent" was in the case of *Cooney & Company v. Murphy Brewery Sales Ltd*.[72] The matter which came before the courts concerned an interlocutory injunction sought by the plaintiff after learning of the defendant's intentions to terminate the longstanding contract between them. The decision is significant because, while not the central issue, Costello P. was asked to consider the meaning of the word "negotiate" with respect to Article 2 of the Directive, and in taking a similar view to the Court of Appeal in *Parks v. Esso*, held the process of negotiation extended further than simply "haggling."[73] Moreover, it is because of this wide interpretation that it was not unforeseen that in the case of *Kenny v. IROC*, the High Court came to a similar conclusion.

In the judgment of *Kenny v. IROC*, Clarke J strongly distinguished the English case of *Parks v. Esso*, namely on the basis that he found Mr. Kenny

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[70] *Kenny v. Ireland IROC Ltd.* [2005] IEHC 241 at para. 4.8
[71] *ibid.*
[72] (Unrep, HC, Costello P, 30th July, 1997)
[73] *supra.* n.71, para. 5.2

had a far greater influence on the running of the business and the potential to increase profits. Conspicuously, the facts in both cases were similar. Like Mr. Parks, Mr. Kenny was also a licensee of a self service petrol station, also operated an attached shop and car wash and also had had commercial dealing with the defendant company for many years. What differed between the two cases was that in *Parks v. Esso*, the plaintiff operated the shop and car wash for his own benefit; the licensing agreement between Mr. Parks and Esso related solely to motor fuel. Distinguish this from *Kenny v. IROC*, where the petrol sales, shop and car wash were included within the licensing agreement and not only to the benefit of the plaintiff.

Thus, the central issue of the cases was the proper interpretation of the word "negotiate" as per Article 1 of the Directive. Clarke J. emphasised in his decision that the way in which a particular good is sold, should not exclusively rule out the potential status as a commercial agent. He noted:

> A purely automatic process to which the person concerned brings no material expertise is not, properly, regarded as negotiation. It is also clear that the skill or consideration must be, in some matter, brought to bear on the sale or purchase.[74]

He later went on to explain the evolution of the relationship between the two parties, as summarised in his conclusion:

> ... Mr. Kenny had a significant opportunity to influence the overall volume of sales of all products (including motor fuels), likely to be sold at the Martello Service Station by the exercise of skill in relation to identifying new or different product lines which might usefully be added to those on sale. He also had the opportunity to enhance the overall volume of sales of all such products by means of the manner in which the station as a whole was operated and in particular the attractive presentation of the station and its product lines to potential customers. In all those circumstances I am satisfied that the arrangements, as they operated,... were such as allowed for the exercise of Mr. Kenny of a significant level of "skill or consideration" in relation to "dealing with, managing or conducting" the purchase and sale of products on behalf of IROC.[75]

Taking into account this widened interpretation of Article 1, Clarke J. established a somewhat helpful test to be used when considering the nature of a potential commercial agency agreement. He affirmed the test to be as follows:

> Whether it may be said that [the potential agent] brought a material level of skill or consideration to conducting, managing or otherwise dealing with the sale or purchase of products on behalf of [the principal].[76]

So long as the agent can meet the aforementioned requirements as set out in Article 1 of the Directive and can satisfy the newly formed test in *Kenny*

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[74] *ibid*. at para. 5.5
[75] *ibid*. at para. 18.2-18.3
[76] *ibid*. at para. 6.2

*v. IROC*, under Irish Law, the agent can avail of the rights legislatively entitled to him, under the Directive.[77]

## E CONCLUSION

As was set out in the preamble, the purpose of the Directive was to harmonise and coordinate the laws of each member state, providing more certainty and efficiency within the single market and to provide protection for the commercial agents who assist in facilitating that environment. Taking into consideration the nature of the Directive, Randolph and Davey argue the result has been to put a vast strain on the usage and desirability of agency agreements as, according to them, the Regulations have seemingly amounted to an "unavoidable additional burden" and resulting costs which need to be taken into account.[78] In his paper pessimistically entitled "The demise of Commercial Agents,"[79] Davis, following the implementation of the Directive in England, critically analyses the "agent friendly" and protective nature behind the Directive. He ultimately states that the only possible response to the Directive is through the

> careful drafting of the agency contract... [enabling] the principal sensibly to continue with agency arrangements rather than terminate all existing arrangements and opt for the in-house sales force or distribution arrangements.[80]

While it is questionable that the Directive has had the negative effects to the extent as quoted above; namely that the additional rights, provided for within the Directive have equated to a vast strain on the usage and desirability of agency agreements within the UK and Ireland. It is difficult to be certain of its impact, largely due to the fact that within this jurisdiction, there are no official means for determining how many agency agreements are in place, and therefore it is impossible to determine the extent to which the Regulations have deterred the use thereof.

Prior to *Parks v. Esso* and the recent decision of *Kenny v. IROC*, it was argued by academics and practitioners that the definition of a commercial agent, insofar as the Regulations permitted, was quite narrow in its applicability.[81] However, in light of the recent development in case law, both within the UK, Ireland and on the continent, it seems that this is untrue. By taking an expansive approach to the definition of "negotiate and conclude", the Irish High Court has increased the applicability of the Directive and therefore potentially decreased the enthusiasm of (commercial) principals to engage in agency type arrangements, for the reasons mentioned above.

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[77] For a discussion of *Kenny v. IROC*, see generally: Gibson, "Commercial Agents and the Article of Negotiation" [2006] 2 Irish Business Law Quarterly 5; See also: Gardiner, "The meaning of Negotiate under the Commercial Agents Directive - Just who is a Commercial Agent?" [2006] 13 CLP 106
[78] *supra*. n.6, p.5
[79] Davis, "The demise of commercial agents" [1994] 144 New L. J. 388
[80] *ibid*. at p.395
[81] O'Callaghan, "An Agent's Windfall for the Sale of Goods – The Measure of Recovery", [1999] 6 CLP 45 at p.45-46

Due to Ireland's choice not to avail of Article 1(2) of the Directive, excluding those persons whose activities are deemed secondary within the particular Member State (as was utilised by the English Courts and used as something of restraint on the Directive's applicability), there are now potentially three outcomes to the *Kenny v. IROC* judgment. Firstly, the use of agency agreements within the commercial context could remain unaffected and equate only to a vast benefit for all agents involved; secondly, future judgments relating to Article 1 of the Directive could seek to restrict the decision in *Kenny v. IROC*; or lastly, principals may potentially seek other means for facilitating their business arrangements, as was suggested by Davis.[82]

It seems, in the opinion of this author, paradoxical that a piece of legislation which sought to protect a certain category of persons, could now in effect, achieve a completely different result. While the decision in *Kenny v. IROC* had been granted leave to appeal to the Supreme Courts on behalf of the defendants, it was settled prior to the appeal hearing and the appeal was withdrawn. Therefore, the decision in *Kenny v. IROC* stands and only time and new litigation will determine the true achievements and/or deficiencies of this European Directive and its effect on the law of agency

[82] *supra*. n.79, p.395.