

Client Alert

23 October 2013

Commercial Agreements in Europe: REFIT in progress

By Alistair Maughan and Sarah Wells

The European Union has a reputation in many quarters for creating red tape and bureaucracy that help to stifle business growth. The European Commission's Regulatory Fitness and Performance Programme ("REFIT") aims to review EU legislation and provide for a simpler, clearer, more stable and predictable regulatory framework.

While much of the focus of REFIT is on environmental regulations, the Commission is quietly also addressing other regulations that affect commercial agreements between businesses operating in the EU and with EU-based customers. The Commission has recently announced that the regime governing the appointment and compensation of "commercial agents" will be one of the first to be evaluated.

BACKGROUND TO REFIT

In recent years, EU legislation has been accused of being too voluminous and interfering in nature. A particular criticism is that it imposes a large variety of requirements on businesses which stifle innovation and growth – particularly detrimental to small businesses seeking to expand in an already tough economic climate.

In December 2012, in line with overarching public opinion, the Commission launched its REFIT initiative. REFIT aims to review EU legislation and provide for a simpler, clearer, more stable and predictable regulatory framework. "Smart regulation" is the goal, which means delivering EU policies and laws that bring the greatest possible benefits to people and businesses in the most effective way. Through REFIT, the Commission is evaluating EU legislation and regulation for burdens, gaps and inefficiencies and, if appropriate, proposing revisions to laws or repeal of some legislation.

On 2 October 2013, the Commission set out the results of the initial screening undertaken under REFIT. This included the announcement of 23 new legislative initiatives with the aim of simplifying and reducing EU regulation. The Commission's plan is that this streamlining process should include areas where legislation can be simplified, amended and consolidated (e.g., a proposal for a standard VAT declaration in all Member States) as well as areas where evaluations and fitness checks are to be carried out to assess what further legislation requires changing.

The recent Communication on the initial work under REFIT highlights results so far, by policy area, and next steps where the Commission plans to simplify, revise, withdraw or evaluate EU laws, with a view to reducing regulatory burdens.

Client Alert

COMMERCIAL ARRANGEMENTS

One of the key aims of REFIT is to reduce the regulatory burden on small and medium-sized enterprises (“SMEs”). The laws already identified in the initial consultation as being the most burdensome for SMEs concern the following areas: the management of VAT; consumer product safety; health and safety in the workplace; the ability of qualified professionals to work across the EU; the movement and treatment of waste without damaging the environment; access to major public procurement markets; road transport of goods, and the data protection directive. In many of these areas, actions to address EU legislation are already underway.

In terms of commercial arrangements, the Commission has announced that it plans to evaluate the Commercial Agents Directive (86/653/EC) (the “Directive”). In REFIT terminology, “evaluation” is an EU process to assess whether legislation is fit for purpose and includes considering the potential for simplification and reduction of regulatory costs and burdens.

The Commission is also considering the consolidation of the key consumer rules under the Unfair Terms Directive (1993/13/EC), the Sales and Guarantees Directive (1999/44/EC), and the Unfair Commercial Practices Directive (2005/29/EC), although this is stated to be subject to a “fitness check”. A fitness check is an EU process to review a sector to see if its regulatory framework is fit for purpose, including identifying excessive administrative burdens, overlaps, gaps, inconsistencies and obsolete measures.

COMMERCIAL AGENTS DIRECTIVE AND REGULATIONS

The Directive was adopted with the aim of harmonising law across the EU in respect of contractual relations between commercial agents and principals. As a directive is not directly applicable in the 28 EU Member States, each Member State is required to enact/pass its own legislation to give effect to that directive. So, for example, the legislation passed by the UK Government to give direct effect to the Directive in the UK was the Commercial Agents (Council Directive) Regulations 1993 (the “Regulations”), potentially leading to consolidation and merger of such legislation.

The Directive sets out the concept of a “commercial agent”. This is defined as a self-employed intermediary who has continuing authority either (i) to negotiate the sale or purchase of goods on behalf of another person (the principal); or (ii) to negotiate and conclude such transactions on behalf of and in the name of that principal. The Directive goes on to set out minimum standards for contractual relationships between principals and their commercial agents, covering subjects such as remuneration, term and termination of the commercial agency contract, and indemnities or compensation payable to the commercial agent by the principal upon termination of that contract.

DISTRIBUTION VS. AGENCY

Both EU and non-EU Businesses are often confused as to whether a particular relationship is an agency relationship or a distribution relationship. The distinction has important consequences for the regulatory regime that might apply to the planned relationship.

In an agency relationship, the agent’s role is to represent a supplier or manufacturer (its principal) in its dealings with actual and potential customers in a specific region or territory. But, importantly, the agent exists simply to

Client Alert

allow the principal to create direct contractual relationships with its customers in that specific territory. So, any eventual sales contract will be a direct contract between the principal and its eventual customer.

By contrast, in a distribution arrangement, the distributor will be more of a “middleman” and will acquire goods and services direct from the supplier, and then re-sell those goods or services on its own behalf to customers further down the retail chain. Therefore in a distribution arrangement, the supplier will not have a direct contractual relationship with the customer. A distribution arrangement has the advantage that a supplier – especially one outside the EU – is not required to supervise the distributor to the same level as in an agency relationship and, furthermore, is not directly liable in contract to consumers for the products being sold by the distributor (in contrast to an agency relationship where the principal remains contractually liable to its customers).

These two types of relationship have been addressed in different ways in EU legislation. For example, agency agreements are seen as less conducive to antitrust problems, and under EU competition law the resale price maintenance prohibition, which applies in cases of distribution agreements, generally does not apply to agency agreements. The main legislative issue with commercial agency has been the protection of agents against principals who may be tempted to terminate agreements early in order to avoid paying commission on future sales sourced by an agent. The Directive therefore contains particular requirements on termination of a commercial agency relationship, including with regard to notice and the payment of post-termination compensation to the agent in some cases.

It is not yet clear what the evaluation process will involve in relation to the Directive. However, the aim of such an evaluation is to assess the relevant legislation and see whether it is able to be streamlined such that the policy goals of the EU can be met, but in a less costly and burdensome manner. It would be nice to think that the Commission would have sufficient confidence in the contracting process and parties' ability to negotiate mutually successful commercial agency agreements to think that the need to impose compensation requirements is no longer necessary.

CONCLUSION

REFIT is a rolling programme and the Commission has made it clear that updates will be provided on the new measures to be implemented as well as on the progress of initiatives which are already in place. We will continue to be alert to the outcomes REFIT has on consumer regulation and commercial contracts and, in particular, if and how the laws applicable to commercial agency are amended as a consequence of the streamlining process.

Contact:

Alistair Maughan
44 20 7920 4066
amaughan@mofo.com

Sarah Wells
44 20 7920 4167
swells@mofo.com

Client Alert

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for 10 straight years, and *Fortune* named us one of the “100 Best Companies to Work For.” Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.