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Myerson **Business**

Commercial Agents: Possible extension of commercial agent's rights to sellers of software

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Welcome

We understand the complexities of modern life and the importance of taking care of your business interests. So it's a deep source of satisfaction that so many Commercial Agents choose Myerson as their trusted adviser

Why Myerson?

At Myerson, we are the leading legal Commercial Agency firm outside of London, and we have years of experience in advising agents and principles.

We are proud to be ranked as '**Top Tier**' in the prestigious international directory **The Legal 500** and commended by The Times '**Best Law Firms 2024**'. So, you can be certain that you will be receiving the highest quality legal advice and that we can advise you on complex copyright issues.

Myerson is retained as an expert adviser to the members of Agentbase and the Association of Professional Sales Agents. Our litigation team has acted in agency disputes against companies based in Ireland, Germany, the Netherlands, Spain, France, Belgium, Italy and the USA, and are experienced in complex disputes.

Possible extension of commercial agent's rights to sellers of software.

This guideprovides an update on the possible extension of commercial agents' rights to sellers of software.

The Commercial Agents Regulations apply to agents who sell or purchase goods in Great Britain on behalf of their principals.

What are "goods"?

The Regulations do not define what is meant by "goods". Generally, goods are tangible items an agent buys or sells for a principal under an agency arrangement.

There is not always a bright line between what are classed as goods and what are not. Services are not goods for the purposes of the Regulations nor are items sold on commodity exchanges - for example rough diamonds.

However, gas and electricity supplies are goods. Things become more complicated when an agent sells software delivered digitally or in electronic form to a principal's customers.

Software as "goods"?

Under UK agency law, software sold on its own (for example downloaded or delivered electronically) is not currently considered to be goods, but software bundled and sold within physical hardware or discs can be.

This position was brought into question in 2016, when the High Court in the case of Software Incubator Ltd v Computer Associates Ltd [2016] EWHC 1587 ruled that an agent negotiating the supply of software (delivered electronically) was involved in the sale of goods and therefore was afforded protection of the Regulations.

However, that decision was overturned by the Court of Appeal in 2018. The case is now being reconsidered by the Supreme Court.

Guidance from Europe

As the UK Commercial Agents Regulations originate from the EU Commercial Agents Directive, the Supreme Court has asked for guidance from the European Court of Justice (ECJ) on whether software supplied to a principal's customers electronically (as opposed to being contained in physical hardware) is "goods"; and also, whether a licence of software is a "sale" under the Directive.

The ECJ has not published its decision yet, but Advocate General Tanchev proposed on 17 December 2020 that the ECJ should answer the questions referred by the Supreme Court as follows:

- A copy of computer software which is supplied to a principal's customers electronically, and not on any tangible medium, constitutes "goods" within the meaning of Article 1(2) of the Directive.

- Computer software which is supplied to a principal's customers by way of a grant to the customer of a perpetual licence to use a copy of the computer software for an unlimited period in return for payment of a fee corresponding to the economic value of that copy, constitutes a "sale" within the meaning of Article 1(2) of the Directive.

Conclusion

The Software Incubator case arose while the UK was still a member of the EU. As the UK has now officially left the EU, the UK Courts are no longer bound by decisions of the ECJ.

Nevertheless, the Regulations will remain in force in the UK (for now) as "retained EU law".

Therefore, if the ECJ adopts the Advocate General's proposal, then it seems likely that the Supreme Court will adopt the same approach when deciding the Software Incubator case.

If that happens, the practical implication for UK agents will be that software delivered other than on hard media will be considered as "goods" and agents that sell such software will benefit from the protection of the Regulations, including the right to claim 'pipeline' commissions and compensation payments after termination of their agencies.

You're in safe hands!

If you would like further information about how we can help you or if you have any questions, please don't hesitate to contact a member of our **Commercial Litigation Team** today.

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