

# The Agency Contract: AUSTRIA



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# 1 Indemnity and Compensation by Austrian Law

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## 1.1 Introduction

The relationship between the principal and the commercial agent is governed by the **Trade Agents Act 1993** (hereinafter referred to as “TAA”, Handelsvertretergesetz). The TAA was set into force on March 1st, 1993 and replaced the former TAA 1921. The TAA transformed the Directive 86/653/EEC (EC Directive on Commercial Agents, hereinafter referred to as “Directive”) into Austrian law.

According to the TAA the **commercial agent** is a natural or legal person, who: procures or concludes transactions that are commercial transactions, legal transactions or transactions referring to movables, rights or workmanship; is entrusted by a principal with the procurement or conclusion of transactions; performs this activity on a continuous basis; acts in the name and for the account of the principal and performs this activity independently and as a trade.

## 1.2 Claims of the agent after termination of the contract

According to the Directive the Member States have to implement regulations ensuring that after termination of the agency contract (hereinafter referred to as “contract”) commercial agents are indemnified as stipulated in Article 17 (2) of the Directive and/or compensated for damages as stipulated in Article 17 (3) of the Directive.

The agent’s right to **indemnity** is stipulated in Section 24 of the TAA. The regulation set out in Section 24 of the TAA is in accordance with Article 17 (2) of the Directive.

Section 23 of the TAA stipulates that either party of the contract is entitled to compensation for damages if the contractual relationship was terminated due to improper behaviour by the other party. According to this regulation the agent and the principal may claim **compensation for damages**.

Furthermore, following Section 454 of the Commercial Code (Handelsgesetzbuch) an agent may be entitled to **compensation for certain investments**.

## 2 Conditions of indemnity and compensation

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### 2.1 Indemnity

#### Termination of the contract

Whether the agent is entitled to indemnity according to Section 24 of the TAA or not depends on the reasoning the contract is terminated.

In case **the agent terminates the contract**, he is only entitled to indemnity if the termination is based on **good reason** caused by the principal. This reason(s) must exist at the time the agent terminates the contract, however the agent is not obliged to mention the concrete reason(s) in the notice of termination. According to the Austrian Supreme Court (OGH, Oberster Gerichtshof) the agent is not even obliged to declare that he terminates the contract due to good reason. The agent may mention the good reason(s) in course of the legal proceedings first. .

In case the **principal terminates** the contract the agent is principally entitled to indemnity. Only if the agent has given **sufficient cause** by negligent conduct for the principal to terminate the contract prematurely, he forfeits his right to indemnity. For the principal sufficient causes for premature termination of the contract are e.g. violation of essential contractual provisions by the agent, personal assaults against or severe defamation of the principal by the agent (see Sec 22 (2) TAA).

## 2. Conditions of indemnity and/or compensation

### 2.1.1 Termination of the contract

The agent is entitled to indemnity if a contract concluded for a **definite period of time** runs out or if the agency contract is **terminated in consent** by the parties as well. Provided the contract is terminated in consent, it does not matter which party initiated the termination in the first place. Whether the agent has or has not the right to indemnity when he terminates the contract with regular period of notice and the parties decide to terminate the contract in consent later on within the termination period (e.g. to shorten the termination period), is discussed controversial.

If the agent terminates the contract because of reaching the retirement **age** or because of **illness** he still has the right to indemnity. In case the agent dies his heirs are entitled to indemnity.

The agent is not entitled to indemnity if he, the agents principal and a third party agreed that the rights and duties of the contract are **assigned to the third party** (because the third party usually pays a certain amount of money in return for the assignment).

### 2.1.2 Acquiring new clientele and benefits for the principal

Whether the agent is entitled to indemnity or not, does not depend on the way the contract is terminated, only.

In addition, the agent has to **acquire new customers or essentially extend existing business relationships** to meet the requirements as set out in Section 24 of the TAA. A customer is regarded as a new customer if the business relationship between this customer and the principal is related to the work of the agent. An existing business relationship is regarded as extended if the turnovers with the relevant customer are increased essentially. Minor increases of the turnovers are no relevant extension of business relationships.

Finally, the **principal has to benefit** from the business relationships acquired or extended by the agent, e.g. it is possible for him to make new deals with the clientele the agent had acquired). The possible benefit for the principal is sufficient, he does not necessarily have already benefited from the business relationship.

## 2. Conditions of indemnity and/or compensation

### 2.1.3 Preclusion period

The agent has to assert his claim for indemnity within a period of 1 year after the termination of the contract; otherwise his right to indemnity is precluded

### 2.1.4 Modification by contract

Statutory law as set out in Section 24 of the TAA is compulsory and cannot be modified to the disadvantage of the agent. In particular it is not allowed to exclude or even reduce the right to indemnity as long as the contract is still in force.

### 2.2 Compensation for damages

According to Section 23 the agent is entitled to compensation for damages if he has terminated the contract prematurely because of improper behaviour of the principal: e.g. non-payment or undue reduction of commission, breach of essential contractual provisions by the principal or personal assaults against or severe defamation of the agent by the principal (see Sec 22 (3) TAA), or if the principal has terminated the contract without valid reason or if the principal has terminated the contract at an unreasonable time.

### 2.3 Compensation for investments

In addition to the compensation provided by the TAA the agent is entitled to claim compensation for investments according to Section 454 of the Commercial Codes provided the investments enhance the uniform appearance of the distribution system of the principal.

Whether the agent is entitled to compensation for investments depends on reason and the way the contract has been terminated, too. The respective rules stipulated in Section 454 of the Commercial Code are thereby similar to the rules stipulated in Sec 24 TAA (see above at 2.1.1)

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## 3 Calculation of indemnity and compensation



### 3.1 Indemnity

#### 3.1.1 Two-step scheme

For the calculation of indemnity the Austrian Supreme Court (*OGH*) has implemented a two-step scheme which is based on a scheme developed by the German Supreme Court. In the first step the presumable losses of commissions are estimated for a forecast-period. The estimated amount is called **“Rohausgleich”**. In a second step the average amount of the remunerations of the agent during the last 5 years preceding the termination of the contract, the so called **“Höchstbetrag”**, is calculated. The **“Höchstbetrag”** is the maximum the agent may only receive, if the **“Rohausgleich”** exceeds the **“Höchstbetrag”**. Thus, the **“Höchstbetrag”** caps a potential towering **“Rohausgleich”** .

In the following the calculation of the indemnity is described in detail.



## 3 Calculations of indemnity and compensation

### 3.1.2 Calculation of the "Rohausgleich"

The calculation of the "Rohausgleich" is based on the assumption that the losses of commissions suffered by the agent are equal to the benefits of the principal. The basis for the calculation is the **commission the agent has received within the year (12 months) preceding the termination of the contract**. In case the contractual relationship lasts less than one year, the duration of the contract is considered. If the turnover of the relevant year was - in comparison with the turnovers the years before - extra-ordinary high or low the calculation can exceptionally be based on the average amount of commission of a longer period of time.

Commissions are taken into account just if the agent received them for procuring or concluding transactions for the principal but not if he got them for e.g. doing administrative work for the principal. Furthermore, commissions for business made with customers who have not been acquired by the agent and which whom the agent has not extended the business are excluded.

After computing the basis for the calculation of the losses of commissions as mentioned above you have to decide how long the **forecast** period should be. The duration of the forecast period depends on the economic life of the products the agent distributes. Usually the forecast period is up to 5 years, but if the economic life of a product is much longer the forecast period may exceed 5 years.

As next step you have to determine the **migration rate** (Abwanderungsquote), i.e. the rate of customers who will terminate the business relationship with the principal during the forecast period. You have to estimate the migration rate, in doing so you may use the data of the preceding years as basis for you estimation.

Given the relevant commissions in the year preceding the termination of the contract are EUR 100.000,00, the migration rate is 25 % per year and the forecast-period is 4 years the losses of commissions are calculated as follows:

Year 1:	EUR 100.000,00	* 75 % (100% - 25 % migration rate):	EUR 75.000,00
Year 2:	EUR 75.000,00	* 75 %	EUR 56.250,00
Year 3:	EUR 56.250,00	* 75 %	EUR 42.187,50
Year 4:	EUR 42.187,50	* 75 %	EUR 31.640,30

The losses of the commissions during the forecast period have to be discounted. The interest rate you use depends on the interest rate at financial markets. Given an interest rest of 5 % the commissions losses of Year 1 are discounted from EUR 75.000 to EUR 71.250,00 (EUR 75.000,00 \* 95 %).

To compute the "Rohausgleich" you have to add up the losses of commission of the several years of the forecast period.

As final step of the calculation of the "Rohausgleich" you may adjust the sum of the losses of commissions during the forecast period for **reasons of equity**. Various reasons may be taken into account.

## 3 Calculations of indemnity and compensation

For example, if the principal has paid **contributions to a pensions funds** in favour of the agent this may reduce the “Rohausgleich” in the extent of the value of the pensions funds at the date of termination of the contract.

The “Rohausgleich” may also be reduced by a certain rate (e.g. 20 %), if the principal uses a **trademark** which is very attractive to the customers (“Sogwirkung der Marke”). The “Rohausgleich” is reduced because the popularity of the trademark makes it much easier for the agent to acquire new customers.

In case the agent is **working for a competitor of the principal, benefits from the acquired customers** to his own or even entices customers away after the termination of the contract, the “Rohausgleich” may be reduced for reasons of equity as well.

### 3.1.3 Calculation of the “Höchstbetrag” (maximum)

The maximum of indemnity is calculated on basis of the average yearly remunerations received by the agent during the **5 years preceding the termination of the contract**. If the contractual relationship did not last 5 years or more, the entire duration of the relationship is considered.

Different to the calculation of the “Rohausgleich” all remunerations the agent has received by the principal has to be taken into account, not just the commissions for procuring or concluding transactions.

Finally you have to compare the “Rohausgleich” with the maximum. If the “Rohausgleich” exceeds the maximum the indemnity is equal to the maximum otherwise the indemnity is equal to the “Rohausgleich”.

### 3.1.4 Calculation of indemnity in certain business sectors

The scheme for calculating the indemnity as presented above can be used in many business sectors but it is not suitable to all business sectors.

According to the Austrian Supreme Courts the rules on indemnity of Sec 24 TAA also applies to **insurance agents**. Insurance agents usually procure unique transactions on products (insurances) and do not create business relationships like other agents. For example, a customer who concludes a contract on a life insurance will probably not conclude a similar contract in the following years. Therefore the principal does not benefit from the business relationships acquired by the agent by making new deals with these customers. Instead the principal may benefit from insurance contributions paid from a customer acquired by the agent for a long time after concluding the insurance contract. As long as the contract between the insurance company and the agent is in force the agent usually receives subsequent commissions. If the agent does not receive subsequent commissions after the termi-

## 3 Calculations of indemnity and compensation

nation of the contract with the insurance company you may argue that the loss of these subsequent commissions has to be taken into account if calculating the indemnity. There are many open questions regarding this matter and within the scope of this summary we can only point out the problem but not present solutions.

Furthermore, a different way of calculating the indemnity is used for car distributors. The indemnity for **car distributors**, to whom the rules of Sec 24 TAA applies by analogy (for Details see below at 4.), has been calculated in several cases by the courts as follows:

In a first step the average sum of the trade margins of one year was computed on the basis of the trade margins of the 5 years preceding the termination of the contract.

his sum was reduced by certain percentage rates because of different reasons, e.g.:

- migration rate
- attractiveness of the trademark of the principal
- costs of distribution paid by the principal

According to the latest legal practice of the Austrian Supreme Court turnovers made by selling spare parts should not be taken into account for the calculation of the indemnity.

### 3.2 Compensation for damages

To calculate the compensation for damages according to Sec 23 TAA you have to assume that the contract would have lasted until the first day the contract could have been terminated according to the statutory or contractual terms of termination.

In particular you have to estimate the remunerations the agent would have received if the contract would have been terminated regularly, reduced by

(1) the amount of money the agent has saved by not working for the principal anymore and

(2) the amount of money he earns by working or doing other business during this time.

### 3.3 Compensation for investments

To calculate the compensation for investments you have to reduce the costs of the investments by the rate these investments have already been amortised and by the amount of money the agent may receive by selling the investments (or the value of these investments if the agent can use them further on).

## 4. Indemnity for distributors and franchisee?



According to the Austrian Supreme Court the rules of Sec 24 TAA applies to distributors by analogy, if the distributor is integrated into the distribution organisation of the principal similar to an agent and the distributor is obliged to leave the data of the customers to the principal at the termination of the contract at the latest.

The distributor is integrated into the distribution organisation like an agent if his legal position is similar to the legal position of an agent. Therefore you have to check, if the distributor, e.g.

*is not allowed to distribute products of a competitor*

*is obliged to order a minimum charge of products*

*is obliged to maintain a customer service*

*is obliged to maintain a stock for spare parts*

*has to report to the principal on a regularly basis*

*has to follow directives issued by the principal*

## 4. Indemnity for distributors and franchisee?

In addition, the agent has to be obliged to leave the data of the customers to the principal, according to the Austrian Supreme Court it is sufficient the distributor enables the principal de facto to use the data of the clientele acquired by the distributor.

Since a distributor does not receive commissions the trade margins are used to calculate the indemnity of the distributor. For details to the calculation of the indemnity of car distributors see above at 3.1.4.

Furthermore, according to the Austrian Supreme Court lessees of a petrol station may also be entitled to indemnity according to Sec 24 TAA by analogy if there legal position is similar to the position of an agent.

Whether a franchisee is entitled to indemnity according to Sec 24 TAA by analogy or not depends on the specific legal framework of the relationship between franchisor and franchisee. You have to consider the same factors as described above regarding to distributors.



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