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Guide to Agent Introductions

March 2017



Introduction | Content



Introduction

Real estate investors often receive unsolicited introductions to real estate assets from property agents. Often more than one agent will introduce the same property which creates a risk of multiple claims for commission arising on a single transaction. This short guide is intended to provide an introduction to the relevant law in all jurisdictions where CMS has offices. It also contains practical tips to help to minimise the risk of multiple claims for commission arising.

One principle is applicable to all of the jurisdictions covered by this guide:

Commission will only be payable to an agent if the investor has entered into a contractual obligation to pay it. The problem is that, in some jurisdictions, it is all too easy to enter into contractual obligations unintentionally. It is therefore vital to understand how contractual obligations to pay commission are created in the jurisdictions in which you operate.

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When is commission payable?

Pursuant to Austrian law, a commission is payable for real estate transactions if the agent:

- Introduces the opportunity to purchase or sell a property;
- Performs other services, which facilitate the conclusion of the contract. Such services are required to be in a causal and appropriate relationship to the conclusion of the contract, i.e. a commission may not be claimed for services of negligible significance.

A written agreement between the agent and their client is not required, unless the client is a consumer. In general, Austrian courts broadly assume tacit agreements between an agent and their client, e.g. acquiescence to the repeated provision of information concerning a property may constitute a tacit agreement. In the absence of an explicit agreement on the commission fee, the statutory rate will apply (usually 3–4% of the transaction value).

If multiple agents provide their services to one client, the client is only liable to pay commission once. Unless one agent's services were distinctly more significant for the conclusion of the contract, the commission is to be split in relation to the significance of the services each agent provided (in case of doubt: in equal parts).

Practical tips on receipt of a new introduction

If you do not intend to engage the agent, respond immediately and state so explicitly.

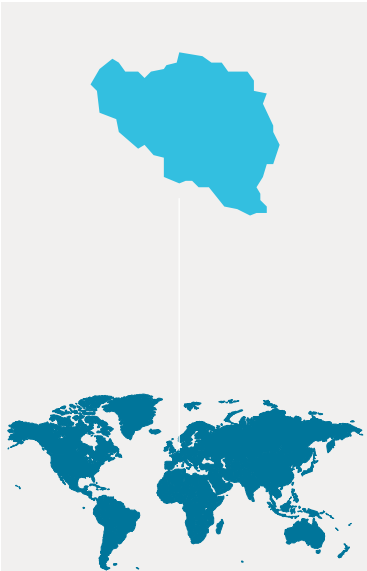
If you intend to explore the opportunity presented, ask for the agent's terms and conditions; issues to consider are:

- Mark all correspondence with the agent "subject to contract" before accepting the agent's terms and conditions.
- Entering into an exclusive agency agreement will prohibit you from engaging any other agents over the specified period of time.
- Bear in mind that the commission can also become payable if a similar transaction is entered into with the same or another party.

Timing of commission payments

Generally, the commission is payable upon signing of the transaction. However, if the contract is entered into subject to a condition precedent, by law, the commission will only be payable if the condition is fulfilled.

If the client is at fault for the transaction not being closed (e.g. frustration in bad faith) or the transaction being held void or for the rescission from the contract, the agent may still be entitled to commission.



When is commission payable?

In Belgium, the Agents' Code of Ethics provides that the mandate must be in writing, clear and complete and must specify the amount or determinable amount of the commission.

However, despite this code, there is a long-standing practice of verbal and tacit agreements, which are recognized as valid by courts. Additionally and according to case law, the agent is allowed, in the absence of prior agreement on the calculation method of the commission, to unilaterally adopt the amount of the commission in accordance with market practices. Even in the absence of a written contract, the commission remains payable if (i) the purchaser has been introduced by the agent and (ii) the sale occurs within a reasonable period after the term of the mandate (usually 6 months).

Where no written agreement is in place, it is therefore important to ensure your conduct does not inadvertently establish a contractual relationship. Whether or not a contractual relationship has been created by conduct will depend on the facts of each case. In general terms the more you interact with an agent in relation to an investment opportunity the greater the risk of the agent becoming entitled to commission.

It is also possible to inadvertently accept the terms of a written agreement that an agent has attempted to impose on you. Often property agents will attach or refer to their standard terms and conditions in the letter or email introducing a property. If you ask the agent to take further action in connection with the property there is a risk of creating a deemed acceptance of those terms and conditions. You must therefore take great care over the form and content of your response to any initial introduction.

Unless otherwise provided by the agreement, the services provided by the agent must have contributed decisively to the conclusion of the purchase agreement. The key test in that respect is to determine if the sale would have occurred under the same conditions without the contribution of the agent. An investor will usually be able to show that an introduction did not contribute to the conclusion of a purchase agreement where, at the time of the introduction, the investor already had prior relevant knowledge of the investment opportunity, or prior contacts with the seller.

The agent's mandate can be exclusive, co-exclusive or non-exclusive. In the case of an exclusive mandate, the commission could be payable even if the exclusive agent has not contributed to the conclusion of the purchase agreement. As a result, if more than one agent has been involved in a transaction, there is a risk of more than one agent being entitled to commission. The same risk applies in the case of non-exclusive mandates. In the case of a co-exclusive mandate, the different agents usually agree between them in which proportion the commission will be allocated to each of them.



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Practical tips on receipt of a new introduction

If you do not intend to proceed with the agent you have two options:

- Do not respond to the introduction; or
- Respond only to confirm that you do not intend to instruct the agent.

In either case no contract will arise and no commission will become payable to the agent even if you go on to purchase the property directly from the seller or via a different property agent. In essence do not ask the agent to take any further action in connection with the property unless you want to instruct them.

If you do intend to explore the investment opportunity with the agent:

- Consider the agent's terms and conditions before responding (if attached or referred to);
- Attach your own terms and conditions to your response and make clear that you have not accepted the agent's terms and conditions; and
- Until written terms and conditions have been agreed, minimise communication with the agent and mark all correspondence with the agent 'subject to contract'.

In addition to that, if you have worked with the same agent several times in the past, it must be kept in mind that the contractual conditions (including financial conditions) of the previous agreements can automatically apply as 'practices between the parties', in the absence of a new agreement. In such a case, it is even more important to make clear that the previous conditions will not apply before giving any instruction.

Timing of commission payments

Unless otherwise provided by the contract, the agent will only be entitled to commission if the sale is deemed as definitive, even if the legal completion of the purchase of the property has not yet occurred. For instance, the sale of a property in Belgium generally leads to a two-step procedure: a private sale agreement between the parties and then, after completion of several formalities necessary, an official deed before a public notary. The private sale agreement usually provides that the transfer of ownership will occur upon execution of the notarial deed. However, if the private sale agreement is not subject to a condition precedent, the sale is immediately deemed as definitive and as a result, the agent's commission becomes payable immediately. If the contract entered into is subject to a condition precedent, the commission will only be payable if the condition is fulfilled.

It is therefore important to review the terms of any contract provided by a property agent carefully to ensure that the timing of any commission payment is in line with your expectations.



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When is commission payable?

Commission is payable to an estate agent once that agent has achieved the results specified in the contract, i.e. usually once the parties introduced by the agent execute the sale and purchase deed and register the deed in the competent real estate registry office.

There is no need for the agency agreement to be in writing. If the party accepted the provision of agency services by the agent (even if acceptance was only implicit) and if the deal verifiably took place because of the agent's introduction, commission is payable.

Commission will be due even if either the seller or buyer, having exchanged contracts and set a date for completion, decides to rescind from the contract for no plausible reason.

If the deal is completed with the intermediation of more than one agent, commission will be paid to all in equal parts, unless otherwise agreed.

If the deal is arranged and concluded from start to end between the parties directly, no fee shall be payable to the agent. However, if the agency agreement includes an exclusivity clause, the agent will have the right to full payment even if the deal was completed without their mediation — unless it can be proved that the agent was inactive or lazy.

Practical tips on receipt of a new introduction

Brazil is a very litigious country and court proceedings can be very time consuming and run for years. To minimise the scope for disputes about whether or not the agency contract was entered into in the first place and what its terms were, it is advisable that the relevant party confirms in writing any arrangements made by telephone.

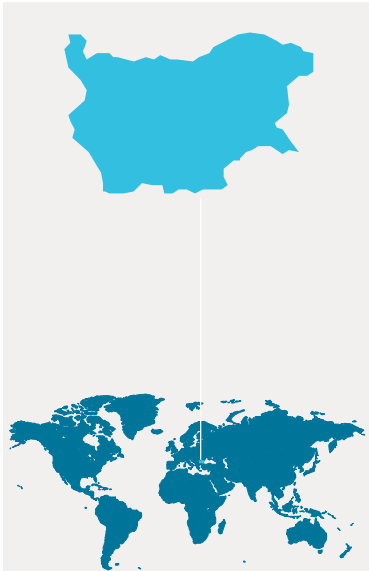
Additionally, to reduce the risk of a dispute arising over the amount of the agent's fee, it is highly recommended that the agency agreement sets out the amount of the agency fee (which in some States is determined by the agents' union for that State). Otherwise, the agency fee will be set in accordance with the "nature of the business" and "local customs", both of which are vague terms and provide no certainty to either party.

Payment of multiple commissions may be due if the same buyer is shown the property by different agents and the sale takes place. Apart from this very specific scenario, and unlike in many other countries, payment of multiple commissions is not viewed as problematic, as the commission will actually be proportionally shared between the agents involved, rather than paid twice or three times, etc., as the case may be.

Timing of commission payments

Generally, commission is payable following completion of the sale.

However, as mentioned above, if either the seller or buyer, having exchanged contracts, decides to rescind from the contract for no good reason, commission will be payable following the withdrawal.



When is commission payable?

Under Bulgarian law the services provided by real estate agents are not specifically regulated. The obligation to pay a commission fee to an agent may arise under a contract concluded both in a verbal or written form or with implied consent manifested by actions. Where both parties to a contract are commercial entities who have established a lasting commercial relationship, if an offer has been made by either party and not rejected immediately by the other, such offer shall be deemed accepted.

The general practice in Bulgaria is that the agent should suggest a written contract which stipulates in detail the specific instructions towards the agent, the rights and obligations of both parties and the amount of the commission fee. Where the agent's contracts are based on general terms and conditions, these should be accepted in writing by the investor, or (if the investor is a commercial entity) the agent should be able to prove that they knew or should have known them and has not objected thereto.

A common scenario is an agent contacts the investor via e-mail or phone introducing a property. In such case, the investor risks becoming bound by a contractual relationship with the agent (and, by an obligation for paying a commission), if the investor (i) responds to an e-mail/letter to which the agent has attached their general terms and conditions (ii) and/or the investor views the introduced property.

Practical tips on receipt of a new introduction

When you answer a communication sent by agents introducing a property:

- Do not provide details regarding the type of investment you are interested in, unless you want to instruct the agent;
- If you do not want to instruct the agent, you should either not respond, or explicitly state that you are not interested to instruct the agent;
- Do not view properties introduced by an agent, and/or enter into communication (especially in writing, by e-mails, fax) if you do not intend to instruct them.

If you look for real estate agents/agencies, it is recommended to contact those which have provided on their official web pages detailed information for their fees and terms and conditions of dealing. In Bulgaria there is no official register of real estate brokers/agents and agencies, so you should be careful about fraudulent proposals.

You should always sign a written contract with expressly stated instructions towards the agent. It is recommended to give instructions and to enter into a contract with only one agent/ agency, otherwise you risk more than one agent being entitled to a commission.

It is always important to review the agent's terms and conditions carefully in advance to ensure that the timing of the commission payment and the other terms are acceptable.



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Timing of commission payments

Usually the agent's contracts provide that commission should be paid at the time of signing of the preliminary contract for the purchase of the property. Alternatively, the commission can be due at the time of the final completion of the transaction (i.e. the signing of the notary deed).

In Bulgaria the commission fee offered by agents is usually between 1 % to 3 % of the transaction value (purchase price). The established practice is that the commission in a transaction is due by both parties — the seller and the purchaser. If both parties are serviced by the same agent (or agency), the latter shall be entitled to a commission from both parties.



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When is commission payable?

In the People's Republic of China ("PRC"), a contractual agreement can be concluded in writing, verbally or tacitly. This also applies to an agency agreement. However, according to Article 426 of the PRC Contract Law, generally, the client shall pay the agency commission in accordance with the terms of the contract if the agent has facilitated the establishment of the main contract. This means that the agency commission only needs to be paid if the conclusion of the main contract was caused by the agent's services.

If the agency agreement does not include a stipulation on the agency commission or such stipulation is unclear, or if it cannot be determined by a supplemental agreement between the parties or in accordance with the relevant clauses of the contract or trade practices, the remuneration shall be determined reasonably according to the services rendered by the agent. If the establishment of the main contract has been facilitated by the services rendered by the agent, unless agreed otherwise, the remuneration to be paid to the agent shall be borne equally by the parties to the main contract and the expenses for the intermediate activities shall be borne by the agent.

According to Article 427 of the PRC Contract Law, in case the agent fails to facilitate the conclusion of the main contract, the agent may not require the payment of a commission, but may request the client to reimburse the necessary expenses for the agency activities. Also according to Article 19 of the Administration Measures for Real Estate Brokerage, if a real estate agent fails to complete the tasks specified in the real estate agency agreement, or its services do not meet the standards stipulated in the real agency agreement, the agent shall not charge any commission. Accordingly, unless the main contract is successfully concluded due to the efforts of the real estate agent, no commission needs to be paid. Further, if multiple agents jointly undertake the same real estate transaction, the commission for such transaction will be shared between the agents involved and no additional fees may be collected from the client.

Practical tips on receipt of a new introduction

According to Article 21 of the Administration Measures for Real Estate Brokerage, before signing a real estate agency agreement, the relevant real estate agent shall explain to the client the relevant details of the real estate agency agreement, the purchase and sale agreement or the lease agreement, and inform the client about certain matters in writing, including the fee standard for the agency service and the time of payment. It is recommended to carefully review such written explanation in order to be aware of fee standards and the time of the payment of the commission.

Timing of commission payments

Due to the above, in general, the agency commission only has to be paid after the main contract has been successfully concluded. Accordingly, in practice, the client is entitled to refuse payment of the agency commission if the real estate agent requests payment of the commission in the case of an unsuccessful introduction or before the main contract has been concluded. Nevertheless, in such case, the client may be required to reimburse the agent's expenses incurred for the agency activities, but they do not need to pay any agency commission.



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When is commission payable?

In Croatia, a contract with a real estate agent needs to be entered into in writing (i.e. a verbal or tacit agreement is not valid) and for a limited period of time (if the contract validity period is not explicitly agreed upon in the contract, it is deemed that the contract has been entered into for the period of 12 months).

Croatian law is friendlier towards investors than the laws of some of the other European countries. Namely, the underlying law explicitly states that the commission (the amount of which can be freely agreed upon in the agreement) is to be paid only if the agreement brokered by the agent is concluded, unless the client and the agent have agreed that the commission is to be paid also if a pre-contract is entered into.

The client is obliged to pay for the additional costs solely if this was specifically agreed upon between the parties.

In addition, should the agreement brokered by the agent be entered into within 12 months after the expiry of the agency agreement, the agent is also entitled to a commission.

Practical tips on receipt of a new introduction

If the client does not intend to proceed with the agent, there are two options:

- Not to respond to the introduction; or
- To respond only to confirm that there is no interest to instruct the agent.

However, if the agreement for the property introduced by the agent is nevertheless entered into at a later time, it will be necessary to evaluate in each individual case whether the conclusion of the transaction was in any way the consequence of the agent's prior actions.

If the client does intend to proceed with the agent who approached them, they should:

- Make sure that the written contract is entered into and that provisions contained therein (duration of the contract, commission amount, exclusivity clauses, etc.) are in accordance with their will and the law;
- Pay attention that the agent is licensed (the respective registry is publicly available) and has an insurance policy;
- Inspect the agent's terms and conditions which all agents are obliged to have.

Timing of commission payments

As already outlined above, the commission is only payable if the agreement in question is actually concluded. It is possible to agree that the commission is payable when (and if) the pre-contract is concluded.

As regards the expenses — the client would be obliged to pay for the expenses exceeding usual agency costs solely if this obligation was explicitly agreed upon.



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When is commission payable?

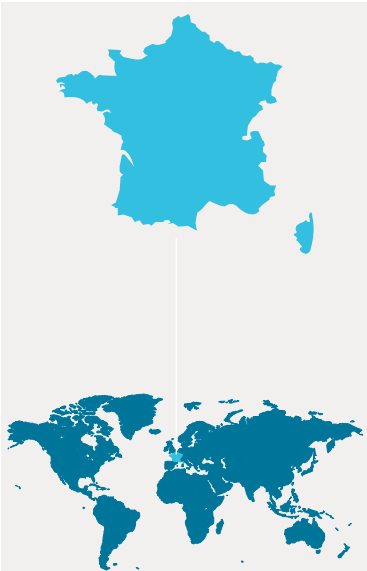
In the Czech Republic a contractual agreement between the investor and the agent does not have to be in writing. It is therefore important to ensure that the investor's conduct does not establish a contractual relationship as tacit and verbal agreements are also binding. In general if you ask the agent to take further action upon introduction of the property there is a risk of creating a tacit acceptance of the agent's terms and conditions and creating a binding contract. However, it is market practice to prefer written agreements.

Practical tips on receipt of a new introduction

If you do not intend to proceed with the agent it is safer not to respond to the agent's offer at all or directly reply that you do not intend to use the agent's services. If you do intend to use their services, it is advisable to read the agent's terms and conditions before responding and limit the interaction with the agent until you reach a written agreement.

Timing of commission payments

Generally the agent is entitled to commission upon legal completion of the transaction. However, it is also possible to agree contractual terms which provide for the payment of the commission prior to legal completion.



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When is commission payable?

In France the activities of real estate agents are principally regulated by the public order provisions ('dispositions d'ordre public') of the 'Hoguet Law' n° 70-9 dated 2 January 1970 and the decree n° 72-678 dated 20 July 1972 (together the 'Regulations'). The Regulations contain strict requirements as to the form and content of the mandate by which an investor appoints a real estate agent. Notably they provide that the mandate must be in writing, must be signed by both parties and must specify the amount or determinable amount of the commission. In the absence of a written mandate which complies with the Regulations the agent will not be entitled to any commission.

Practical tips on receipt of a new introduction

Although the risk of inadvertently entering into a tacit or verbal agreement with an agent in France is lower than in the other jurisdictions, it would be good practice to adhere to the following practical tips:

If you do not intend to proceed with the agent you have two options:

- Do not respond to the introduction; or
- Respond only to confirm that you do not intend to instruct the agent.

In either case no contract will arise and no commission will become payable to the agent even if you go on to purchase the property directly from the seller or via a different property agent. In essence do not ask the agent to take any further action in connection with the property unless you want to instruct them.

If you do intend to explore the investment opportunity with the agent:

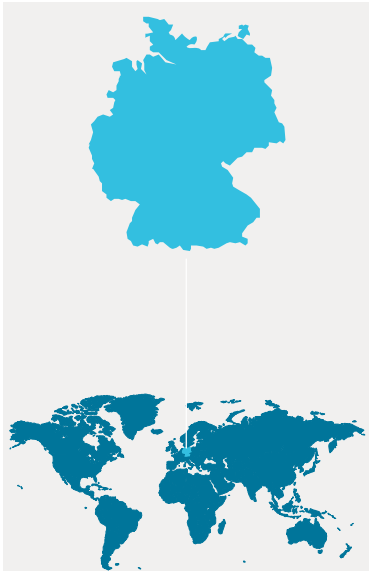
- Consider the agent's terms and conditions before responding (if attached or referred to);

- Attach your own terms and conditions to your response and make clear that you have not accepted the agent's terms and conditions; and
- Until written terms and conditions have been agreed, minimise communication with the agent and mark all correspondence with the agent 'subject to contract'.

To ensure that any written agreement you put in place with an agent complies with the requirements of the Regulations you should seek legal advice on a case by case basis. Note that to secure their commission, property agents in France will press for the signing of a mandate at the outset and before negotiations with the seller take place.

Timing of commission payments

Generally the agent will only be entitled to commission if legal completion of the purchase of the property actually occurs. However the Regulations allow parties to agree contractual terms which provide for the payment of commission prior to legal completion. It is therefore important to review the terms of any contract provided by a property agent carefully to ensure that the timing of any commission payment is in line with your expectations.



When is commission payable?

Under German law, there are two relevant categories of agency services:

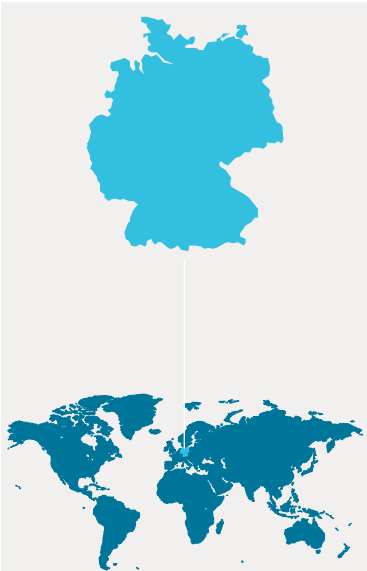
- Introduction Services: Introducing the opportunity to purchase a property to an investor. Normally this involves the agent providing details of the property and the current owner. At the time the information is provided, the owner of the property must be willing to sell the property.
- Negotiation Services: Negotiating the terms of purchase and/or influencing the selling party to sell (even a minor impact can be sufficient).

Agents are entitled to commission for either category of service. Usually the same agent provides both services but if the property is introduced by more than one agent or if one agent introduces the property and a different agent is instructed to negotiate the transaction, an investor could find itself subject to multiple claims for commission.

There is no requirement for a written agreement between the investor and agent for commission to become payable. Tacit and verbal agreements are also binding. Tacit agreements are deemed to exist where the agent has performed tasks which it would only be expected to perform for remuneration. In most circumstances it would be normal to expect commission to be paid for both Introduction Services and Negotiation Services so it is relatively easy for an investor to become bound by tacit agreements.

The test for whether or not commission is payable under a tacit agreement is one of causality. As a result, if more than one agent has been involved in a transaction and contributed to its fulfilment there will always be a risk of more than one agent being entitled to commission.

It is also possible to inadvertently accept the terms of a written agreement that an agent has attempted to impose on you. Often property agents will attach their standard terms and conditions in the letter or email introducing a property. If you ask the agent to take further action in connection with the property there is a risk of creating a deemed acceptance of those terms and conditions. You must therefore take great care over the form and content of your response to any initial introduction.



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Practical tips on receipt of a new introduction

If multiple agents introduce an investment opportunity, a log of the time and date of each introduction should be kept and any prior knowledge of the investment opportunity should immediately be notified to each agent.

There may be sound commercial reasons to instruct an agent that was not the first to introduce the investment opportunity but this will automatically expose you to multiple commission claims. In this situation you should engage with your preferred agent and the agent that first introduced the investment opportunity and agree to split the commission between them or obtain a release from one of them. In most cases the agent you intend to use to negotiate the transaction will speak with the agent who first introduced the property to you to find a solution.

Once you have identified the agents you need to engage with:

- a) Consider their terms and conditions before responding (if attached or referred to explicitly);
- b) Make clear that you have not accepted the agent's terms and conditions;
- c) If your commission payment needs to be apportioned between multiple agents check that payment provisions of your own standard terms are appropriate before sending them to the relevant agents; and
- d) Until written terms and conditions have been agreed minimise communication with the agent and mark all correspondence with the agent 'subject to contract'.

For any agents that you do not want to instruct (other than the first agent to introduce the property to you with whom you will need to engage) you should respond only to confirm that you do not intend to instruct them and to notify them of your prior knowledge of the investment opportunity. Do not ask the agent to take any further action in connection with the property.

Timing of commission payments

Generally contracts with agents provide for commission to be paid when legal completion of the purchase of the property actually occurs.

If the contract is entered into subject to a condition precedent, by law, the commission will only be payable if the condition is fulfilled (section 652(1) German Civil Code). Contractual terms between the agent and the investor can override this if the term was individually agreed but not if the term is contained within 'terms and conditions'.



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When is commission payable?

Whilst estate agents are regulated by the Estate Agent Act 1979 (and some other statutes and secondary legislation) the entitlement to commission will depend on the contractual terms agreed between the parties. As with some other jurisdictions (such as Spain) a contract — both under English law and Scots law — can be written or verbal and can be created by exchange of correspondence and potentially inadvertently by accepting terms and conditions “offered” by the agent.

Where there is only one agent acting under a written contract it will usually provide for the timing of payment. Where there are multiple agents and/or no written contract and/or no express term dealing with this the Court will seek to imply terms into the contract and/or imply a contract. Case law has held that an agent is entitled to commission payments if they are the “effective cause” of the sale. To establish this the Court will ask what would have happened if the agent wasn’t instructed, or if the second agent wasn’t instructed. If the answer is that the sale wouldn’t have happened but for that instruction (on the particular facts of the case) then they are likely to be entitled to commission.

Practical tips on receipt of a new introduction

Due to the risk of inadvertently accepting terms and conditions “offered” by the agent and creating a contractual relationship we advise that you:

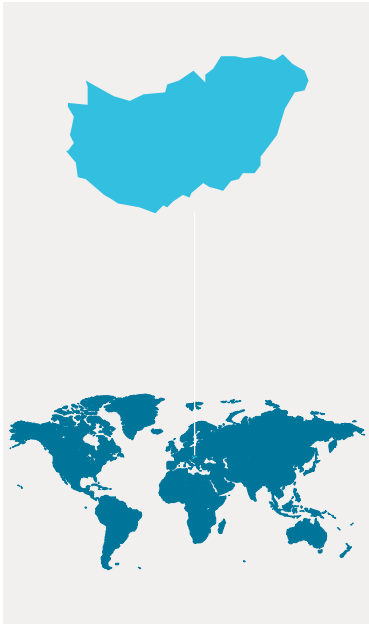
- Try to avoid written communication as it is harder to establish a verbal contract
- Only correspond with the agent if you wish to instruct them
- If you do wish to instruct them mark all correspondence (including any attachments) “subject to contract” until a written contract is agreed although bear in mind that the position is not as settled in Scots law as in English law and you should carefully consider the particular circumstances and not just automatically rely on that wording
- Make sure any written contract is on your terms and conditions and send those across with any email to the agent and expressly refer to them as presiding in that communication
- Enter into a formal written contract at the earliest stage possible — it is easier, and less costly, to amend a contract at a later stage than to argue about whether one was created at all

Timing of commission payments

This will depend on the terms of the contract but it is usual for the trigger event to be specified as one of the following:

- Completion;
- Exchange of contracts; or
- The introduction of a buyer to a seller

Where there is no contract it is usual for a claim to commission for an introduction to arise following sale of the property.



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When is commission payable?

In Hungary Sections 6:288 to 6:301 of Act V of 2013 on the Hungarian Civil Code regulate the activities of estate agents. According to these, a contractual agreement to pay commission to an agent can be written, verbal or tacit. The Hungarian supreme court ruled in its relevant judgements that the agent's commission for the agent's Introduction Services becomes payable at the time of the execution of the agreement. Negotiating the terms of the purchase is not a mandatory element of the agent's services. Unless otherwise agreed upon, the completion of the executed agreement shall have no effect on the agent's entitlement for its commission fees.

Practical tips on receipt of a new introduction

In Hungary an agent maybe commission with or without exclusivity in a transaction.

Due to the risk of inadvertently creating a contractual relationship we advise that you:

If you do not intend to proceed with the agent you have two options:

- Do not respond to the introduction; or
- Respond only to confirm that you do not intend to instruct the agent.

In case the mandate of the agent is non-exclusive and the property has been introduced by other agents or you have identified the property by yourself respond only to notify the agent that you do not intend to instruct the agent and that you already have knowledge of the investment opportunity.

The amount of the commission fee depends on the type of the agreement. The market average commission is approximately 3 % of the property value, if the agreement grants exclusivity to the agent, and 5 % without exclusivity.

It is important to review the terms of the agreement and check whether the agent requires any additional fees, e.g. fees for visiting the property or showing it to potential purchasers. The client should be careful with these incalculable fees and where possible should make clear that other than the success fee, no payment obligation shall exist under the agency agreement.

Timing of commission payments

Generally, commission fees are payable at the time of the execution of the sale, but the parties may override this in their agreement. Thus, the due date of the commission fee shall be reviewed before signing the agreement. Due dates before the purchaser is bound by an agreement should not be accepted.



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When is commission payable?

In Italy, the activities of real estate agents are regulated by Art. 1754 of the Italian Civil Code, Law n° 39 dated 3 February 1989 and by Art. 1, Paragraphs 46 to 49 of the so called Financial Law 296/2006, stating precise rules for the exercise of the profession of agents. Agents have to be entered in a special register, held at the Chamber of Commerce.

The agency mandate does not require the conclusion of a written agreement: the mandate may be considered even valid if conferred orally, with a simple verbal assignment by the person who intends to sell, buy or lease a real estate property.

The mandate of the agency — with the consequent obligation to pay the commission — can only derive from a contract that is made by the tacit acceptance of the participation of the agent when looking for the purchaser or in the negotiations of the contract. The mandate out of a verbal contract is revocable while one out of a written agreement expires or may be revoked in accordance with the stipulations of the agreement.

If the parties have reached an initial agreement, formalized in the so-called preliminary agreement the agent is entitled to the payment of commission which is usually calculated as a percentage of the transaction value. Therefore the commission is due even if the parties, for whatever reason, afterwards decide to cancel the preliminary agreement and do not proceed to signing the final contract.

Practical tips on receipt of a new introduction

In order to avoid the risk of inadvertently entering into a tacit/verbal mandate with an agent in Italy, it would be good practice to adhere to the following practical tips:

If you do not intend to proceed with the agent you have two options:

- Do not respond to the introduction; or
- Respond only to confirm that you do not intend to instruct the agent.

In either case no contract will arise and no commission will become payable to the agent even if you go on to purchase the property directly from the seller or via a different property agent. In essence do not ask the agent to take any further action in connection with the property unless you intend to instruct them.

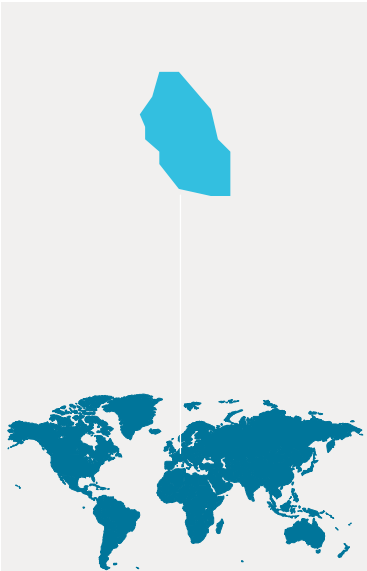
If you do intend to explore the investment opportunity with the agent:

- Consider the agent's terms and conditions before responding (if attached or referred to);
- Attach your own terms and conditions to your response and make clear that you have not accepted the agent's terms and conditions; and
- Until written terms and conditions have been agreed, minimise communication with the agent and mark all correspondence with the agent 'subject to contract'.

The Financial Law 296/2006 provides, in order to prevent tax evasion, that the parties must indicate in the sale and purchase agreement a detailed description of the beneficiary of the commission (i.e. the agent), the method of payment and its amount. Administrative sanctions apply if these declarations are missing, incomplete or misleading, ranging from EUR 500 to EUR 10,000.

Timing of commission payments

The agent is entitled to commission when the deal is concluded because of their services, by the execution of a sale and purchase agreement or, at least, a preliminary sale and purchase agreement. In addition, a transaction can be considered concluded when the parties come to a stage that, if one of them rescinds from the contract the other one can take legal action to obtain the judicial execution of the agreement (this is usually the case when the preliminary agreement is breached by one of the parties).



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When is commission payable?

In Luxembourg, a contractual agreement regarding the activity of an agent can be in writing, verbal or even tacit. In the absence of a formal agreement, a judge may assume a contractual relationship from the context. It is also possible to inadvertently accept the terms of a written agreement that an agent has attempted to impose. Often property agents will attach their standard terms and conditions in the letter or email introducing a property. If you ask the agent to take further action in connection with the property there is a risk of creating a deemed acceptance of those terms and conditions. You must therefore take great care over the form and content of your response to any initial introduction.

If the commission to be paid exceeds EUR 2,500 and the client is a consumer, the agent who is not in possession of a written agreement, will generally not be able to prove their right to a commission in conformity with Luxembourg law.

Practical tips on receipt of a new introduction

When a business relationship with an agent is not wanted, any contact with the said agent should be avoided to prevent the assumption of an agreement by a judge in a possible court proceeding. When the introduction is in relation to a specific property, it may be advisable to formally refuse any kind of business relationship. On the contrary, if you intend to enter into a business relationship with the agent, the scope of their instructions should be as precise as possible (e.g. the kind of properties requested or the granting of a power of attorney). The amount of the commission and the effective date of its payment should also be set out. Parties should also agree on the allotment of the commission if the investment were proposed by several agents.

Timing of commission payments

If the parties did not agree on other terms, the agent will be entitled to a commission upon conclusion of a private agreement between the purchaser and the seller. The refusal to execute an authentic deed before the notary would not deprive the agent of their right.



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When is commission payable?

Under the Montenegrin law, an agency agreement can be written, verbal or tacit. When a written agreement is not in place it is therefore important to ensure your conduct does not inadvertently establish a contractual relationship. In general terms, the more you interact with an agent in relation to an investment opportunity the greater the risk of the agent becoming entitled to commission. It is also possible to inadvertently accept the terms of a written agreement that an agent has attempted to impose on you. Often property agents will attach or refer to their standard terms and conditions in the letter or e-mail introducing a property and if you ask the agent to take further action in connection with the property there is a risk of creating a deemed acceptance of those terms and conditions. You must therefore take great care of the form and content of your response to any initial introduction.

The agent is entitled to payment of the commission even if the commission has not been agreed between the parties. In such cases, i.e. if the commission is not determined in the agent's terms and conditions nor in contract or any other document, the commission is determined by a court by taking into account the agent's service and effort put into it. The agent is entitled to compensation of costs incurred only if explicitly agreed between the parties.

Practical tips on receipt of a new introduction

If you do not intend to proceed with the agent you have two options:

- Do not respond to the introduction; or
- Respond only to confirm that you do not intend to instruct the agent.

In either case no contract will arise and no commission will become payable to the agent even if you go on to purchase the property directly from the seller or via a different property agent. In essence do not ask the agent to take any further action in connection with the property unless you want to instruct them.

If you do intend to explore the investment opportunity with the agent:

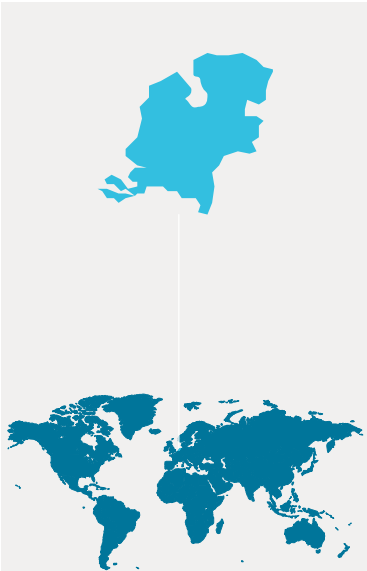
- Consider the agent's terms and conditions before responding (if attached or referred to);
- Attach your own terms and conditions to your response and make clear that you have not accepted the agent's terms and conditions; and
- Until written terms and conditions have been agreed, minimise communication with the agent and mark all correspondence with the agent 'subject to contract'.

Timing of commission payments

Generally, the agent will only be entitled to commission when the contract of purchase of the property is signed.

If the contract signed is subject to a condition precedent, the agent will be entitled to commission only once the condition is fulfilled. In the case where the contract concluded is subject to a resolute condition, the fulfilment of the condition will not have impact on the agent's right to the commission.

The parties may also agree that the agent will be entitled to commission even if the contract is not concluded.



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When is commission payable?

In the Netherlands a contractual agreement to pay commission to an agent can be written, verbal or tacit. When a written agreement is in place it is therefore important to ensure your conduct does not inadvertently establish a contractual relationship. In general terms, the more you interact with an agent in relation to an investment opportunity the greater the risk of the agent becoming entitled to commission. It is also possible to inadvertently accept the terms of a written agreement that an agent has attempted to impose on you. Often property agents will attach or refer to their standard terms and conditions in the letter or e-mail introducing a property and if you ask the agent to take further action in connection with the property there is a risk of creating a deemed acceptance of those terms and conditions. You must therefore take great care of the form and content of your response to any initial introduction.

A recent court case provided an insight into the type of conduct which might create a tacit contract in the Netherlands. The judgment found that a tacit contract between an investor and agent had been created by:

- A meeting taking place between the investor and agent;
- The agent showing the investor properties at the investor's instruction; and
- The investor instructing the agent to approach values.

This example is included simply to illustrate the ease with which tacit contracts can arise unintentionally. In practice whether or not a tacit contract has been created will depend on the specific circumstances of each case.

Practical tips on receipt of a new introduction

If you do not intend to proceed with the agent you have two options:

- Do not respond to the introduction; or
- Respond only to confirm that you do not intend to instruct the agent.

In either case no contract will arise and no commission will become payable to the agent even if you go on to purchase the property directly from the seller or via a different property agent. In essence do not ask the agent to take any further action in connection with the property unless you want to instruct them.

If you do intend to explore the investment opportunity with the agent:

- Consider the agent's terms and conditions before responding (if attached or referred to);
- Attach your own terms and conditions to your response and make clear that you have not accepted the agent's terms and conditions; and
- Until written terms and conditions have been agreed, minimise communication with the agent and mark all correspondence with the agent 'subject to contract'.

Many Dutch agents will seek to use the general terms and conditions for professional parties of the NVM (i.e. the Dutch society of real estate agents). These require investors to pay commission even if the sale and purchase agreement is not in conformity with the instruction given to the agent or if it is not negotiated by the agent. It is therefore especially important to review the terms of any contract provided by a property agent carefully to ensure that the payment obligations are in line with your expectations.

Timing of commission payments

Generally contracts with agents provide for commission to be paid when legal completion of the purchase of the property actually occurs. However parties can agree contractual terms which provide for the payment of commission prior to legal completion. It is therefore important to review the terms of any contract provided by a property agent carefully to ensure that the timing of any commission payment is in line with your expectations.



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When is commission payable?

Under Polish law a real estate agency agreement must be concluded in writing in order to be valid. The agreement regulates all matters concerning the agent's responsibilities and the payment of the agent's remuneration (commission).

Practical tips on receipt of a new introduction

Since the contractual agreement has to be in writing there is no risk to enter into an agreement by accident.

Timing of commission payments

As agreed in the written contract.



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Content

When is commission payable?

EU Directive 2006/123/EC has been implemented in Portugal by Decree-Law n.º 15/2013, of February 8, in relation to real estate brokerage services. Pursuant to this law, a real estate agency agreement must be concluded in writing and one mandatory item is the commission payable to the agent.

When selling (or letting) an investment property, owners should beware of exclusivity clauses in the agreement used to appoint their agent. If an exclusivity clause is included the owner will be required to pay commission to its agent in the event that it unilaterally withdraws from a transaction without good cause. Commission can therefore become payable by a seller (or landlord) even when a transaction does not complete. It is therefore important for property owners to ensure that the agency agreements they enter into do not include exclusivity clauses.

When buying an investment property there is no such risk. Even if the parties agree an exclusivity clause, unless there is express wording to the contrary, that exclusivity clause will not require the buyer to pay commission if it pulls out of a transaction.

Practical tips on receipt of a new introduction

Since the agency agreement has to be in writing there is no risk of entering into an agreement verbally or tacitly through exchange of correspondence.

Timing of commission payments

Portuguese market practice is that the commission, usually amounting to 5% of the purchase price — plus VAT if applicable — shall be paid to the agent in proportionally equal installments to the purchase price installments payable to the seller. For instance, if the seller receives 10% of the purchase price at signing of the promissory purchase agreement, both the buyer's and seller's agent will also receive 10% of the commission due to each of them. The remainder of the commission is paid later when further installments of the purchase price become payable, usually on execution of the final sale deed. Most commonly the entire purchase price is paid on completion of the final deed and so the whole of the commission is most commonly paid at that point.



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When is commission payable?

In Russia the services rendered by real estate agents as well as the commissions payable for such services are governed by the provisions of the Russian Civil Code. Under these provisions real estate services, which can vary from simple marketing and consulting in respect of the property to full commercial, legal and other support in the property sale-and-purchase transaction, can fall either within the framework of agency contracts or within more general services contracts.

If not otherwise explicitly provided by a real estate agent and a client, according to the law their mutual contractual obligations under the agency or services contract, including obligation to render the relevant services and obligation to accept them and pay the fee, arise as soon as the parties achieve an agreement on the scope of services with each other. The agreement can be achieved in any form (e-mail exchange, letters, fax etc.) confirming that the offer submitted by one of the parties is accepted by another.

As for the real estate agency fee payable by the client for the agreed services, pursuant to the law, its amount can be determined on the basis of the conditions usually applicable to similar services on the market, even if the agreement achieved between the real estate agent and the client contains no provisions on such fee.

Practical tips on receipt of a new introduction

If the client does not intend to instruct the agent, it should either not respond to the agent's introduction in any form, or respond only for explicitly rejecting the agent's offer for real estate services.

In case the agent takes proactive and obtrusive approach by trying to perform certain services related to the property in advance, such as providing market analysis and commercial advice to the investor, the client not willing to proceed with the agent should never accept the results of such services and should explicitly confirm that they do not wish to receive such information.

Timing of commission payments

In the absence of an agreement to the contrary, the commission is payable to the agent after the real estate services, the scope of which has been agreed by the parties, are completed in full by the agent and accepted by the client. Fulfilment of the real estate services is usually confirmed by signing the acceptance act by both parties or through approval by the client of the agent's report. However, since Russian law provides for rather extensive freedom of the parties to determine any terms and conditions of the agency and services contracts, the agent and the client can agree that the agency fee is payable before full completion and acceptance of the real estate services or impose additional conditions for payment of such fee besides mere fulfilment of the services.



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When is commission payable?

In Serbia, the activities of agents are regulated by a specific law. Under that law, a contract between a real estate agent and an investor has to be in written or in an electronic form in accordance with the law governing electronic commerce. Given that the above-mentioned form is mandatory, the agent will be entitled to a commission only if the contract is concluded in the prescribed form.

If the contract between the agent and investor is cancelled and the investor subsequently concludes the purchase contract as a direct result of services provided by the agent within a period not longer than a month from the day of cancellation of the contract, the agent is entitled to the entire agreed amount of commission, unless it was agreed differently.

Also, the agent is entitled to a proportional amount of commission after the termination of the contract between agent and investor, if the investor concludes the purchase contract which is verifiably the result of services provided by the agent, unless it was agreed differently.

The agent's general terms and conditions should contain the amount of the commission or the determinable amount of the commission. If they do not, the agent will still be entitled to commission, and the amount of commission will be determined by a court by taking into account the agent's service and effort put into it.

The agent will be entitled to charge the costs of additional services related to the mandate if agreed by the parties.

Practical tips on receipt of a new introduction

If you do not intend to proceed with the agent you have two options:

- Do not respond to the introduction; or
- Respond only to confirm that you do not intend to instruct the agent.

If you do intend to explore the investment opportunity with the agent:

- Consider the agent's terms and conditions before responding (if attached or referred to);
- Attach your own terms and conditions to your response and make clear that you have not accepted the agent's terms and conditions; and
- Until written terms and conditions have been agreed, minimise communication with the agent and mark all correspondence with the agent 'subject to contract'. However, it is important to carefully review the general terms and conditions and any draft contract provided by an agent to ensure that the amount and timing of commission payment is in line with your expectations.

Timing of commission payments

A commission is payable when the contract of purchase of the property is concluded.

If the contract signed is subject to a condition precedent, the agent will be entitled to commission only once the condition is fulfilled. In the case where the contract concluded is subject to a resolute condition, the fulfilment of the condition will not have impact on the agent's right to the commission.

The parties may also agree a commission to be payable prior to the conclusion of the contract, i.e. in the moment of conclusion of the preliminary contract.



When is commission payable?

In Slovakia, brokerage agreements relating to the negotiation of real estate purchases are governed by two different statutory regimes: the Commercial Code (Act No. 513/1991, Coll.) or the Civil Code (Act No. 40/1964, Coll.). Both codes adopt a slightly different approach to the basic rights and obligations of the contractual parties and to issues such as limitation periods, civil liability and contractual penalties. Agreements concluded under either law may be concluded in writing, orally or tacitly.

- The Commercial Code applies to brokerage agreements concluded between an agent and a client who are both commercial entities dealing within their area of business. Such brokerage agreements must have a cash element.
- The Civil Code applies when (i) one of the parties is not a commercial entity; or (ii) the parties are not dealing within their area of business and they do not wish to apply the Commercial Code. In brokerage agreements under the Civil Code, the parties may agree that the agent shall not be entitled to any commission.

In respect of agreements concluded under the Commercial Code, the moment when commission becomes payable depends on the scope of activity agreed with and carried out by the agent.

- If the objective of the agent's services is to negotiate the conclusion of a contract, the commission is payable on conclusion of the contract.
- If the objective is to provide an opportunity to conclude a contract, the commission is payable once such an opportunity is provided (in practice this is understood to be the moment a meeting with a potential seller / buyer is arranged).
- The parties may also agree that the commission is payable once the obligations of a third party, resulting from the negotiated contract, are fulfilled.

In agreements concluded under the Civil Code, commission is payable only if a contract is concluded as a result of the agent's activity

However, the parties may agree on a specific date when it shall be payable.

Under both the Commercial Code and the Civil Code, agents are entitled to reimbursement of their costs relating to the negotiations only if this is explicitly agreed between the parties. A right to such reimbursement may arise once the right to commission arises.

Practical tips on receipt of a new introduction

If more than one agent is involved and no written agreement is concluded, there will always be a risk that more than one agent will claim commission.

To avoid possible negative consequences of the involvement of multiple brokers, it is advisable to:

- Read carefully all terms and conditions received from agents;
- Either not respond to offers by agents, or to explicitly reject their offers (if you do not wish to cooperate with the agent);
- Consider carefully the content and form of responses to offers by agents;
- Propose your own clear terms and conditions governing the relationship between you and the agent (if you wish to cooperate with the agent);
- Ensure that each agent has an obligation to notify you within a certain period of time after they fulfil their agreed commitment (conclusion of a contract or providing you with an opportunity to conclude a contract);
- Once the goal of the negotiation has been achieved, inform the other agents in writing that their further cooperation is not necessary; and
- Explicitly stipulate in the agreement that the entitlement for reimbursement of the agent's costs does not form a separate right and that the commission includes all costs borne by the agent.





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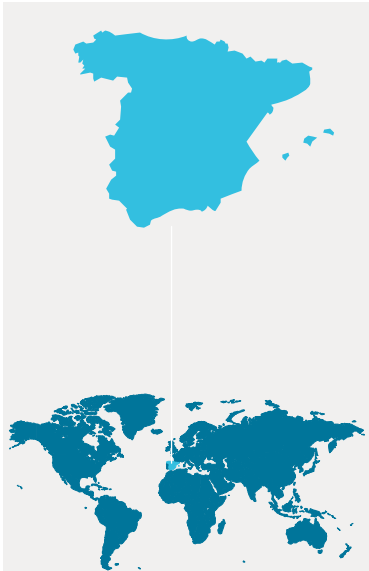
Timing of commission payments

In respect of agreements concluded under the Commercial Code, the moment when commission becomes payable depends on the scope of activity agreed with and carried out by the agent.

- If the objective of the agent's services is to negotiate the conclusion of a contract, the commission is payable on conclusion of the contract.
- If the objective is to provide an opportunity to conclude a contract, the commission is payable once such opportunity is provided (in practice this is understood to be the moment a meeting with a potential seller / buyer is arranged).
- The parties may also agree that the commission is payable once the obligations of a third party, resulting from the negotiated contract, are fulfilled.

In agreements concluded under the Civil Code, commission is payable only if a contract is concluded as a result of the agent's activity. However, the parties may agree on a specific date when it shall be payable.

Consumers with agreements concluded under the Civil Code may petition the court to deem certain provisions invalid if they meet the criteria of so-called "unacceptable conditions". There is no such option for commercial entities with brokerage agreements concluded under the Commercial Code.



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When is commission payable?

In Spain a contractual agreement to pay commission to an agent can be written, verbal or tacit. Where no written agreement is in place it is therefore important to ensure your conduct doesn't inadvertently establish a contractual relationship. Whether or not a contractual relationship has been created by conduct will depend on the facts of each case. In general terms the more you interact with an agent in relation to an investment opportunity the greater the risk of the agent becoming entitled to commission.

It is also possible to inadvertently accept the terms of a written agreement that an agent has attempted to impose on you. Often property agents will attach or refer to their standard terms and conditions in the letter or email introducing a property. If you ask the agent to take further action in connection with the property there is a risk of creating a deemed acceptance of those terms and conditions. You must therefore take great care over the form and content of your response to any initial introduction.

Practical tips on receipt of a new introduction

If you do not intend to proceed with the agent you have two options:

- Do not respond to the introduction; or
- Respond only to confirm that you do not intend to instruct the agent.

In either case no contract will arise and no commission will become payable to the agent even if you go on to purchase the property directly from the seller or via a different property agent. In essence do not ask the agent to take any further action in connection with the property unless you want to instruct them.

If you do intend to explore the investment opportunity with the agent:

- Consider the agent's terms and conditions before responding (if attached or referred to);
- Attach your own terms and conditions to your response and make clear that you have not accepted the agent's terms and conditions; and
- Until written terms and conditions have been agreed, minimise communication with the agent and mark all correspondence with the agent 'subject to contract'.

Timing of commission payments

Supreme Court judgments in Spain have confirmed that, in the absence of an agreement to the contrary, commission will become payable when contracts for the sale and purchase of a property are exchanged. It is therefore important to agree express terms providing that the payment of commission is conditional on legal completion of the purchase.



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When is commission payable?

A commission can only become due if an agency agreement has been concluded. Swiss law does not provide for a mandatory form of such agreement, i.e. it can be entered into in writing, verbally or tacitly.

However, if there is no written agreement, it could become difficult for the agent to prove that an agreement was entered into. The hurdle regarding a tacit agreement is set quite high by Swiss courts. Thus, the agent's behaviour has to be sufficiently clear so that the client's silence can be interpreted without a doubt as consent to an agency agreement.

Example: after the contractual term of an agency agreement has elapsed, the client tolerates that the agent continues its activities. This could possibly be construed as a tacit agency agreement.

Practical tips on receipt of a new introduction

If you do not intend to proceed with the agent you have two options:

- Do not respond to the introduction; or
- Respond only to confirm that you do not intend to instruct the agent.

In either case no contract will arise and no commission will become payable to the agent even if you go on to purchase the property directly from the seller or via a different property agent. In essence do not ask the agent to take any further action in connection with the property unless you want to instruct them.

If you do intend to explore the investment opportunity with the agent:

- Consider the agent's terms and conditions before responding (if attached or referred to);
- Attach your own terms and conditions to your response and make clear that you have not accepted the agent's terms and conditions; and
- Until written terms and conditions have been agreed, minimise communication with the agent and mark all correspondence with the agent 'subject to contract'.

Timing of commission payments

Unless otherwise agreed, the commission becomes due when the purchase agreement regarding the property has been notarised and all conditions precedent have been fulfilled. However, the parties can agree contractual terms which provide for the commission to be paid only after the transfer of ownership. It is also possible to agree that the commission becomes due irrespective of whether the property is actually sold (so called commission guarantee).

Expenses such as advertising, printing and travel costs, are only compensated if this is explicitly agreed between the parties.



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Content

When is commission payable?

The Turkish Code of Obligations No. 6098 explicitly indicates that written form is a validity condition for brokerage agreements. In other words, in the absence of a written agreement between you and the agent, the agent will not be entitled to any fee.

Practical tips on receipt of a new introduction

Due to the written form condition of Turkish law, as long as you do not sign an agreement with multiple agents, you will be able to avoid multiple agency fees.

Once you have identified the agent you want to engage with, you should examine:

- The general terms and conditions of the brokerage agreement, especially the ones which provide for a fee to the agent regardless of the execution of the sale and purchase agreement,
- The official tariff, and make sure that you do not pay a higher commission fee than it is stipulated in the respective tariffs.

Timing of commission payments

In principle, the commission will be payable only if the agreement regarding which the agent has acted as an intermediary is signed. Nevertheless, as ruled by the Turkish Court of Appeals, if there is a duly concluded brokerage agreement, once the sale agreement is signed, the agent will be entitled to commission even in the cases where:

- One of the parties rescinds the purchase agreement;
- The sale agreement is not notarised as required; or
- The deed transferring the property is not implemented.

However, the above rule which subjects payment of the commission to the conclusion of the sale and purchase agreement, is a not mandatory provision; it can be agreed otherwise. Moreover, if agreed in the brokerage agreement, the agent will be reimbursed for expenses regardless of whether or not the agreement for the real estate is concluded.

However, if such agreement is subject to a condition precedent, the agent will be entitled to the commission when the respective condition is fulfilled.



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