



## Distribution Newsletter Switzerland

# Compensation for Clientele upon Termination of Distribution Agreements

### Overview

#### **Situation until 2009: No Compensation Claim upon Termination of Distribution Agreements**

Up until recently Swiss lawyers had to advise their clients that the Federal Supreme Court in its practice dating back to the early sixties had refused to apply by analogy the pertinent law on agency and to grant the distributor a mandatory claim for clientele compensation. It had to be added that the Federal Supreme Court never completely ruled out to apply by analogy other provisions of the statutory law on agency, such as for example the rules applicable to termination, but the Federal Supreme Court never had to adjudicate on such cases.

#### **The Landmark Decision of the Federal Supreme Court**

In 2009, the Federal Supreme Court changed its practice and awarded to a distributor a compensation for clientele upon termination of the agreement, in analogy to the agent's claim under art. 418u of the Swiss Code of Obligations ("CO").<sup>1</sup>

#### **Requirements for Compensation**

In the landmark decision referred to above, the Federal Supreme Court held that with regard to a distributor's right to clientele compensation there is a loop hole in the law. A distributor who is integrated in the supplier's distribution system in a way similar to an agent, and who notwithstanding its legal autonomy only disposes of limited economic freedom so that its situation is similar to that of an agent, shall be entitled to a mandatory claim for clientele compensation. The claim is subject to the same requirements as the agent's compensation claim.

### Calculation of the Compensation

With respect to the calculation of the compensation for clientele, the Federal Supreme Court referred to the provision governing the agent's right to clientele compensation. The Federal Supreme Court, however, did not calculate the compensation and remanded the case to the lower court for calculation. The case was remanded because the court of lower instance did not have established the relevant facts for calculation of the compensation, and the pertinent facts could also not be drawn from the parties' pleadings.

#### **Decision of the "Court de Justice de Genève"**

##### **Main Criteria for Calculation**

The court of lower instance, the "Court de Justice de Genève", rendered a decision on the calculation of the clientele compensation on 8 September 2009. It awarded a compensation of  $\frac{3}{4}$  of the net earnings for one year to the distributor.

In doing so, it mainly considered the following:

- the relatively long duration of the contractual relationship of 10 years;
- the fact that the customers would remain loyal to the branded products;
- the fact that the distributor had to report the customers' names and all the business with them on a continuing basis to the supplier so that the supplier after termination of the agreements had been put in a situation where it could seamlessly continue the business.

<sup>1</sup> ATF 134 III 487; Praxis 2/2009 no. 19



### **Calculation of the net earnings for one year**

With regard to the calculation of the net earnings for one year, the parties were only in dispute on the issue of whether or not the lease costs and the labour costs had to be taken into account.

The "Court de Justice" rightly affirmed that these costs had to be taken into consideration and, together with further costs for advertising and transports, it deducted these costs from the distributor's revenues. As a result, the Court calculated the net earnings for one year in the same way as it would do for an agent.

The Court de Justice did not consider that an agent's net commission earnings cannot be equated to a distributor's net profit margin. This is because the distributor's net profit margin also includes the business risks borne by the distributor, such as the risk of purchasing and reselling the products on its own account, the risks related to fluctuations in prices and currencies, the credit risks and the inventory costs.

The reason why the Court did not elaborate on this issue was that the supplier had failed to raise the argument that the distributor's net profit margin does not only relate to the distributor's efforts in increasing the customer base. In that case at hand, the distributor claimed in the alternative the amounts of CHF 65'000 and CHF 45'000, respectively, for the two territories he was responsible for. These amounts claimed in the alternative already considered a deduction of the lease costs and the labour costs, and they were therefore not disputed by the supplier.

It remains to be seen how other courts will take into account the economic differences between an agent's net commission earnings and a distributor's net profit margin.

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Dr. André Thouvenin

For further information please contact:

Dr. André Thouvenin ([a.thouvenin@thouvenin.com](mailto:a.thouvenin@thouvenin.com))

or

Dr. Patrick Rohn ([p.rohn@thouvenin.com](mailto:p.rohn@thouvenin.com))

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