



SCHELLENBERG WITTMER  
Attorneys-at-Law

## The Swiss Federal Supreme Court grants compensation for clientele upon termination of distribution agreements

In a recent landmark decision, the Swiss Federal Supreme Court ruled that, under certain circumstances, exclusive distributors have a mandatory compensation claim for clientele upon termination of the distribution agreement (ATF 134 III 497). This decision is of considerable practical relevance and marks a change in the Federal Supreme Court's practice, since so far the Federal Supreme Court had refused, as a rule, to apply by analogy the agent's mandatory claim for clientele compensation to distribution agreements. The new Federal Supreme Court's decision is also applicable to existing distribution agreements.

### 1 Requirements for compensation

Pursuant to the decision of the Swiss Federal Supreme Court, an exclusive distributor (hereinafter "distributor") will have a mandatory compensation claim for clientele when it can establish the following four conditions:

#### 1.1 Integration in the supplier's distribution system

The distributor is integrated in the supplier's distribution system and due to its limited economic freedom its position is similar to that of an agent. This would be the case, for example, if the supplier has far reaching control and decision making authority. Examples of situations that would evidence such an integration may include the following:

- | the distributor has an obligation to purchase a minimum quantity of products;
- | the supplier has a right to unilaterally change the prices and the terms of supply;
- | the supplier has the sole right to approve new points of sale;
- | the supplier has a right to cease producing and distributing the products;
- | the distributor has an obligation to allocate each year certain amounts to marketing activities;

- | the distributor must retain a minimum quantity of products in stock;
- | the distributor has certain reporting obligations, such as the obligation to submit sales reports and to keep the supplier informed about competitor activities;
- | the distributor has an obligation to disclose its accounting records upon request of the supplier; and
- | the distributor has an obligation to disclose information on its turnover and the names of its customers to the supplier.

#### 1.2 The distributor has increased the supplier's customer base

The second condition for a clientele compensation claim is that the distributor – through its marketing activities – has either established or significantly increased the supplier's customer base. This would be the case, for example, if at the beginning of the term of the distribution agreement the branded product was virtually unknown in the distributor's territory and the distributor's activities substantially increased the brand awareness.

#### 1.3 The supplier benefits from the customer base established by the distributor

The third condition is that after expiration of the distribution agreement, the customers acquired by the distributor remain loyal to the product and, therefore, the supplier substantially benefits from the customer base established or increased by the distributor. This condition could be met under the following circumstances:

- | if the distributor is under a contractual obligation to hand over its customer list to the supplier as this enables the supplier, upon termination of the distribution agreement, to take over the customer base acquired by the distributor; and/or
- | if branded products are the object of the distribution agreement since customers generally remain loyal to the brand (and not to the distributor). This is particularly true with regard to premium brands.



#### 1.4 The compensation must not be inequitable

The fourth and final condition is that after taking all relevant circumstances into account, a compensation for clientele must not be inequitable. For example, compensation could be found to be inequitable if:

- I the distributor's conduct caused the termination of the distribution agreement or if the distributor terminated the agreement without cause; and/or
- I the term of the distribution agreement and the distributor's profits made during such term militate against an additional compensation. Clearly, the longer the term and the more a distributor has been in a position to actually benefit from the customer base he had acquired, the less likely it will be that sufficient grounds could be established to support an additional compensation claim upon termination of the agreement.

#### 2 Calculation of the compensation

With respect to the calculation of the clientele compensation, the Federal Supreme Court refers, in general terms, to the Swiss Code of Obligations provision governing an agent's right to clientele compensation. According to the pertinent article, a claim for compensation shall not exceed an agent's net earnings for one year derived from the contractual relationship, computed on the average of the last five years. Alternatively, if the relationship has not existed for so long, on the average of the actual term (Article 418u para. 2 of the Swiss Code of Obligations). Unfortunately, the Federal Supreme Court did not consider that an agent's net commission earnings cannot be equated to a distributor's net profit margin because the net profit margin (i.e., the difference between sale and purchase price) does not only relate to the distributor's efforts in increasing the customer base but also to the business risks borne by the distributor who purchases and resells the products in its own name and on its own account. The prevailing view in legal doctrine is therefore that, as a rule of thumb, a distributor's compensation for clientele should be limited to a maximum amount corresponding to one third of its average yearly net profit margin. Accordingly, the portion of the net profit margin which has no relation to the distributor's efforts to increase the customer base should not be considered in the calculation of the compensation.

Regrettably, in its decision the Swiss Federal Supreme Court did not calculate the compensation and remanded the case to the lower court for calculation. It thus remains to be seen whether the lower court will take into account the economic differences between an agent's net commission earnings and a distributor's net profit margin. However, the Federal Supreme Court did hold, again in general terms, that a relevant factor to be taken into consideration when calculating compensation for clientele is whether or not the product's brand was already well known in the territory at the beginning of the distribution term. Therefore, if a distributor benefited from a brand that was already established, such advantage must be taken into consideration. Similarly, it must be determined to what extent the supplier benefited from the increase of the customer base and also to what extent such increase was due to the distributor's

marketing activities, to other circumstances, such as the strength of the brand or to the supplier's own marketing activities.

#### 3 Mandatory claim

If the above referenced conditions are met, a distributor has a mandatory claim for clientele compensation, i.e. the claim for clientele compensation cannot be waived in the distribution agreement. Accordingly, since the new jurisprudence developed by the Federal Supreme Court in this decision also applies to existing distribution agreements, any waiver in such agreements may prove invalid and without effect.

Nevertheless, parties are always free to contractually agree on the criteria for calculation of compensation, provided however that they do not thereby undermine the mandatory claim for clientele compensation. Indeed, in light of this Federal Supreme Court decision it will now be incumbent upon the parties to define reasonable criteria for the calculation of the compensation in a distribution agreement, if the position of the exclusive distributor is similar to that of an agent.

One further matter not decided by the Federal Supreme Court in this decision is whether the newly developed principles apply only to distribution agreements or whether they will also apply to franchise agreements. However, since franchise agreements usually meet the criteria discussed supra one may reasonably infer that franchisees will also in the future raise clientele compensation claims upon termination or expiration of a franchise agreement.

#### Contacts

The content of this Newsletter does not constitute legal or tax advice and may not be relied upon as such. Should you seek advice with regard to your specific circumstances, please contact your Schellenberg Wittmer liaison or any of the following persons:

##### I In Zurich:

ANDREA MONDINI  
andrea.mondini@swlegal.ch

PATRICK ROHN  
patrick.rohn@swlegal.ch

##### I In Geneva:

YVES JEANRENAUD  
yves.jeanrenaud@swlegal.ch

JEAN JACQUES AH CHOON  
jean-jacques.ahchoon@swlegal.ch

15bis, rue des Alpes  
P.O. Box 2088  
CH-1211 Geneva 1  
Tel. +41 (0) 22 707 8000  
Fax +41 (0) 22 707 8001

Löwenstrasse 19  
P.O. Box 1876  
CH-8021 Zurich  
Tel. +41 (0) 44 215 5252  
Fax +41 (0) 44 215 5200

www.swlegal.ch