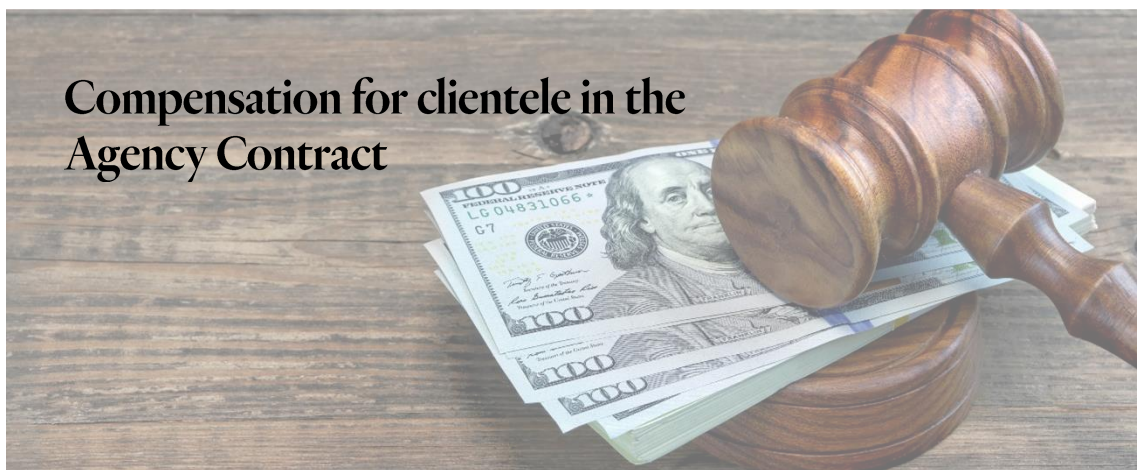


RocaJunyent Informs

Civil Litigation Department
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Sentence of the Court of Justice of the European Union of 23 March 2023 on compensation for clientele in the agency contract

This recent sentence of the Court of Justice of the European Union (CJEU) determines, according to Directive 86/653 on independent commercial agents, what is to be understood as "lost commissions" after the termination of the agency contract, for the purpose of compensation for clientele.

The Supreme Court of the Czech Republic submitted a question to the CJEU for a preliminary ruling on a claim for **compensation for clientele brought by a commercial agent following the termination of his contract with a mobile telephone operator**. The Czech courts dismissed the agent's claim because, although he had brought in new clients and had developed the transactions with pre-existing clients, they considered that it was not equitable to award him a compensation for clientele, insofar as the

so-called "lost commissions" —those that the agent could no longer collect because the employer had terminated the contract— had already been received through the one-off commissions they had agreed upon in return for the agent's services.

It should be remembered that **in order for the agent to be entitled to client indemnity upon termination of the contract, all of the following circumstances must be present:**

- ☐ The agent has brought **new customers** to the employer or **has significantly increased transactions** with the pre-existing clientele.
- ☐ The reasonable possibility that the **agent's activity may continue to produce substantial advantages** for the employer.
- ☐ **The payment of compensation should be equitable**, taking into account the existence of non-competition agreements, **loss of commissions** or other circumstances.

The CJEU recalls in this latest Sentence **that the compensation system is divided into three phases:**

1st phase → Calculating the advantages that the business owner obtains from the operations with customers provided by the commercial agent.

2nd phase → Verifying whether the amount of compensation is equitable taking into account all the circumstances of the case, in particular, **the loss of commission suffered by the commercial agent**, and the existence of covenants limiting competition.

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According to the Spanish Supreme Court, it is not a matter of imposing on the agent a diabolical proof of the effectiveness of the advantages that the business owner will continue to obtain, but a reasonable forecast, in a purely potential assessment, is sufficient

3rd phase → The amount obtained must not exceed the annual average of the remuneration received by the agent in the last 5 years, or if it has been for a shorter period, the average of that period. **According to the Spanish Supreme Court**, this calculation **must take into account the entire period during which the relationship between the agent and the company lasted, and not only the last fixed-term contract they signed** (even if in each of the concatenated contracts the compensation for clientele corresponding to the terminated contract has been waived).

“The recent Spanish Supreme Court ruling of 11/07/2022 confirms the doctrine according to which, for the calculation of compensation for clientele, when a variety of services to be provided by the agent are established, not only the fixed or percentage commissions must be taken into consideration, but also, as established in Art. 28.3 of the Agency Contract Law, all remuneration must be taken into account, i.e. the totality of the amounts received by the agent for the performance of their activity (the total remuneration package, i.e. the total remuneration received by the agent for the performance of their activity)

In response to the question submitted for a preliminary ruling, the CJEU states that **commissions earned on commercial transactions concluded after the termination of the contract, but which are due to the activity carried out by the agent while the contract was in force, are commissions due, which are charged as remuneration and are therefore not the "lost commissions" used to determine compensation.** For that reason, it cannot be understood that the inclusion of “lost commissions” in the customer indemnity means that they are duplicated, since they are not the same as commissions due. **It also states that the payment of one-off commissions** —or flat-rate remuneration for each new contract concluded by the agent— **does not exclude “lost commissions” from the calculation of the compensation for clientele**, since the one-off commissions do not cover the commissions which the agent loses after the termination of the contract, for the new transactions which the principal will conclude with the clientele brought in or retained by the agent, and which would have given rise to the receipt of new commissions.

This latest Sentence of the CJEU on the interpretation of the Commercial Agents Directive is a **good opportunity to recall its previous rulings on compensation for clientele:**

- ☐ Sentence (Fourth Chamber) of 21 November 2018: **The scope of protection of the Directive extends to commercial agents who carry out their activity on the principal's premises, provided that this does not affect the agent's independence vis-à-vis the former.**

- ☐ Sentence (Fourth Chamber) of 19 April 2018: **Compensation and damages** for termination of the agency contract **are also applicable** when such termination occurs **during the probationary period** stipulated in the agency contract.
- ☐ Sentence (Fourth Chamber) of 7 April 2016: Customers acquired by a commercial agent in respect of goods the sale of which has been entrusted by the business owner **are to be considered as new customers for the purposes of compensation for termination of the agency contract, even if those customers already had commercial relations with the business owner in respect of other goods, provided that the sale of the first goods by the agent required the establishment of a specific commercial relationship.**
- ☐ Sentence (Fourth Chamber) of 3 December 2015: **Compensation for damages** is not conditional on proving that there was culpable conduct attributable to the business owner in a causal relationship with the alleged damage, although **it does require that the damage not be the same as that which is repaired with the compensation for clientele.**
- ☐ Sentence (First Chamber) of 28 October 2010: The commercial agent may not be deprived of their right to compensation when the principal discovers, after having notified them the termination of the contract with a prior notice, the existence of a breach which could justify the termination of the contract without prior notice, although this may be taken into account in determining the equitable nature of the compensation.
- ☐ Sentence (First Chamber) of 26 March 2009: Where the employer belongs to a **group of companies, the advantages obtained by the companies of that group** do not, in principle, form part of the principal's advantages and, consequently, **do not necessarily have to be taken into account for the calculation of the compensation for clientele.**
- ☐ Sentence (First Chamber) of 17 January 2008: The commercial agent in charge of a particular geographical sector is not entitled to commission for transactions concluded between customers in that sector and a third party, without the direct or indirect intervention of the business owner.
- ☐ Sentence (Fifth Chamber) of 9 November 2000: **The rules governing customer indemnity must be applied where the commercial agent has carried on their activity in a Member State, even if the business owner is established in a non-member country and the contract is governed by the law of that country by virtue of one of its clauses.**

☐ Sentence (Fifth Chamber) of 12 December 1996: **A commercial agent who is in charge of a geographical sector is entitled to commission** on transactions concluded with customers belonging to that sector, **even if they were carried out without their intervention. The concept of “customer belonging to that sector”, where the customer is a legal person, is determined by the place of actual business activity.** Where the company carries out business in several places or where the agent operates in several territories, other elements may be taken into account to determine the centre of gravity of the transaction concluded, in particular the place where the negotiations with the agent took place or where they should normally have taken place, the place where the goods are delivered, as well as the place where the establishment which made the order is located.