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Austrian and European cartel law aspects of franchise agreements

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Abstract

Despite the relevance of franchise agreements in practice and their nature, which regularly entails certain restrictions on the franchisees, there are hardly any cases dealing with competition lawaspectsof franchise agreements. This article first has a closer look at the term "franchise agreements" in the views of the competent competition authorities. It then discusses the applicable competition laws in general and goes on to analyse the (in-)admissibility of certain typical clauses in franchise agreements.

Text

1) The term "franchise agreement"

Neither Austrian nor Europeanlaw contains a statutory definition of the term "franchise" or "franchise agreement". In practice, franchise systems are very diverse in nature. (FN [1])

Fußnoten

Well known examples can be found in the fast food industry but also in many other economic areas - see the great number of franchise systems listed, for instance, on the website of the Austrian Franchise Association (ÖFV) www.franchise.at/html_seiten/vorstellung_mitglieder/systeme.php.

Various attempts have been made to define or at least describe what franchise normally consists of; here, the views of the bodies enforcing competition law are of particular interest: (FN [2])

Fußnoten

However, it should also be noted that the Austrian Supreme Court (OGH), for instance, has in its decision 4 Ob 321/87 (concerning civil rather than cartellawaspects) described franchise agreements as having characteristics of tenancy and license agreements as well as of dealership agreements. The ÖFV even provides an "official definition" on its website www.franchise.at/html_seiten/franchising/faq.htm. For an overview of the various definition

attempts (up to March 2002) see Liebscher/Petsche, Franchising in Öserreich, 2. Auflage [2002], 12 et seq.

According to the statement on franchise agreements which the Federal Competition Authority (FCA) (FN 3) has published on its website, (FN 4) franchise agreements contain licenses of intellectual property rights (IP rights) for the use and distribution of goods or services. During the term of the agreement, the franchisees also receive commercial and technical assistance from the franchisor. In the view of the FCA, the license and the assistance are integral components of any franchise.

Fußnoten

Bundeswettbewerbsbehörde (BWB).

www.bwb.gv.at/bwb/service/standpunkte/franchise.htm.

The description of franchise agreements by the FCA is almost word by word taken from the European Commission's Guidelines on Vertical Restraints (vGuidelines). (FN 5) In addition to what the FCA says, the European Commission makes it clear that the licenses normally relate to trade marks or signs and know-how. The European Commission also gives examples for the assistance typically offered by the franchisor, namely procurement services, training, advice on real estate and, financial planning. Moreover, it explains that the franchisor is, in general, paid a franchise fee by the franchisee for the use of the particular business method. (FN 6)

Fußnoten

Commission Notice, OJ 2000/C 291/01, para 199.

vGuidelines, para 42 and 199.

In its leading *Pronuptia* judgment, the European Court of Justice (ECJ) has distinguished three different varieties of franchise agreements: (FN 7)

Fußnoten

Case 161/84, Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgalis [1986] ECR 353 (Pronuptia Case), para 13. Cf. also Hoffer, Kartellgesetz Kommentar [2007], 47.

- **service franchises**, under which the franchisee offers a service under the business name or symbol and sometimes the trade-mark of the franchisor, in accordance with the franchisor's instructions;
- **production franchises**, under which the franchisee manufactures products according to the instructions of the

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franchisor and sells them under the franchisor's trade-mark; and

- **distribution franchises**, under which the franchisee simply sells certain products in a shop which bears the franchisor's business name or symbol.

The ECJ described distribution franchise in more detail as being "*a way for an undertaking to derive financial benefit from its expertise without investing its own capital*". According to the Court, distribution franchises give traders, which do not have the necessary experience, access to methods which they could not have learned without considerable effort and allow them to benefit from the reputation of the franchisor's business name. In the opinion of the ECJ, distribution franchises differ in that regard from dealerships or contracts which incorporate approved retailers into a selective distribution system, which do not involve the use of a single business name, the application of uniform business methods or the payment of royalties in return for the benefits granted. (FN 8)

Fußnoten

Pronuptia Case, para 14.

Most importantly for the following discussion, the European Commission states in the vGuidelines: "*In addition to the provision of the business method, franchise agreements usually contain a combination of different vertical restraints concerning the products being distributed, in particular selective distribution and/or non-compete and/or exclusive distribution or weaker forms thereof*." (FN 9)

Fußnoten

vGuidelines, para 199.

To sum up, franchise agreements usually contain the following three groups of clauses:

- provisions on the licensing of trade marks and know-how;
- clauses on the continuing assistance by the franchisor; and
- vertical restraints ensuring, *inter alia*, the common identity and reputation of the franchise network, etc.

2) Applicable AustrianandEuropean competition law

In its statement, the FCA generally qualifies franchise agreements as vertical restraints coming within the scope of the AustrianCartel Act. (FN 10)

Fußnoten

The FCA's statement was written against the background of the meanwhile abolished Cartel Act 1988. However, the new Cartel Act 2005 is still applicable to vertical restraints (even though it does no longer contain a legal definition of vertical restraints and does not require their notification). It can, therefore, be assumed that the FCA is still of the opinion that franchise agreements generally come within the scope of (Austrian) cartellaw. On the application of the old Cartel Act 1988 to franchise agreements see also Liebscher/Petsche, Franchising in Öserreich, 2. Auflage [2002], 34 et seq.

The FCA goes on to state that, since the Cartel Act does not lay down specific rules on vertical restraints, it would refer to the Commission Regulation on Vertical Agreements (vBER) (FN 11) and the vGuidelines. (FN 12)

Fußnoten

Commission Regulation (EC) No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ 1999/L 336/21.

The FCA also refers to a regulation of the Austrian Minister of Justice (BGBl 2002 II/486), which, in essence, provides that vertical restraints fulfilling the conditions of the vBER are not prohibited under Austriancartellaw.

It follows that even if a particular franchise system is not capable of appreciably affecting trade between Member States and thus (only) Austrianlaw applies, (FN 13) the franchise agreements have to be ascertained (primarily) in the light ofEuropean competition law. (FN 14)

Fußnoten

In general, the effect on trade criterion enshrined in Article 81 para 1 EC Treaty defines the scope of application ofEuropean competition law; it is not applicable to agreements and practices not capable of appreciably affecting trade between Member States - cf. Commission Notice on the Effect on Trade Concept, OJ 2004/C 101/07, para 12.

In any case, the effect on trade concept is construed rather broadly; for instance, the ECJ has held that franchise agreements are capable of appreciably affecting trade between Member States even if they are entered into by undertakings established in the same Member State, in so far as they prevent franchisees from establishing themselves in another Member State - Pronuptia Case, para 26. Moreover, in practice, recourse is regularly taken to EC law also in mere national competition

cases as often there is little or no guidance under national law but rich case lawand "soft law" such as notices from the Commission at EC level.

Strictly speaking, obviously, it should be noted that where the effect on trade criterion is not met, the exceptions provided for in the Cartel Act (FN 15) apply (if any). In particular, one would have to look at the *de minimis* rules of the Cartel Act (FN 16) rather than at the European Commission *de minimis* Notice (FN 17) to ascertain whether or not a franchise system appreciably restricts competition (not to be confused with the effect on trade criterion), etc.

Fußnoten

Section 2 para 2 sub-para 1 to 5 Cartel Act 2005 and, strictly speaking, also the exemption in Section 2 para 1 Cartel Act 2005, which resembles Article 81 para 3 EC Treaty.

Section 2 para 2 sub-para 1 Cartel Act 2005.

Commission Notice on Agreements of Minor Importance which do not Appreciably Restrict Competition, OJ 2002/C 368/07.

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Nevertheless, the relevant yardstick for ascertaining the material (in-)admissibility of (clauses in) franchise agreements would, particularly in the light of the FCA's statement and the almost complete absence of specific published Austrian case law, (FN 18) appear to be primarily European competition law.

Fußnoten

The Cartel Court has, as far as can be seen, only once dealt with a case where contracts were qualified as a franchise system and it was held that also such contracts may lead to appreciable restrictions of competition; in particular, territorial protection in Coca Cola bottling contracts could not be justified as important for protecting the trade mark image and value - Kt 169/75, confirmed by the OGH in Okt 4/77. In 2 Kt 373/92, confirmed by the OGH in 16 Ok 8/95 (see also Wollmann, ecolex [1996], 687), the applicant claimed the existence of a franchise system; however, the application was rejected for procedural reasons. In 26 Kt 369/96, the applicant also argued that a franchise system was in place; however, the Cartel Court did not consider this question relevant.

What is the relevant European competition law? First and foremost, there is Article 81 para 1 EC Treaty prohibiting (horizontal and vertical) agreements and concerted practices between undertakings, which have as their object or effect the (appreciable) prevention, restriction or distortion of competition. (FN 19) Under Article 81 para 3 EC Treaty, agreements and practices can be exempted if they meet certain conditions. (FN 20) Most importantly for the present discussion, the European Commission has in the vBER set out detailed rules on how Article 81 para 3 EC Treaty applies to vertical restraints (as can be commonly found in franchise agreements). (FN 21) Moreover, it has issued the vGuidelines, which explain in more detail how vertical restraints are to ascertained in the light of Article 81 EC Treaty and the vBER. Last but not least, the case lawof the European Institutions has to be mentioned.

Fußnoten

Section 1 para 1 Cartel Act 2005 contains an almost identical prohibition.

Again the Cartel Act 2005 contains with its Section 2 para 1 an almost identical provision.

For the sake of completeness, it is to be mentioned that the European Commission has also issued other block exemption regulations such as the Commission Regulation (EC) No. 1400/2002 on Vertical Agreements in the Motor Vehicle Sector, OJ 2002/L 203/30. Before the new set of block exemption regulations came into effect, franchise agreements were dealt within a specific block exemption, namely Commission Regulation (EEC) No. 4087/88 on Categories of Franchise Agreements, OJ 1988/L 359/46; for an overview of the (slight) differences under this and the new

vBER see Schultze/Pautke/Wagener, Die Gruppenfreistellungsverordnung für vertikale Vereinbarungen, Praxiskommentar [2001], Art 4, para 530 et seq.

Before the (in-)admissibility of typical clauses in franchise agreements will be analysed against this legal background, the consequences of an infringement ofAustrian or European competition law shall be briefly summarized:

The main consequences of infringing Austrian or European competition law do, in principle, not differ from each other: prohibited agreements are unenforceable and, at least in theory, fines of up to 10 % of the worldwide group turnover might be imposed. (FN [22]) However, in practice, the consequences vary depending on the authorities prosecuting the infringement. While in Austria the level of fines used to be moderate , fines are becoming more and more severe (the highest fine so far amounted to EUR 7 million; a decision by the Cartel Court to impose a fine of EUR 75,40 million on five undertakings is not yet legally binding). The European Commission regularly imposes very high. (FN [23]) For the sake of completeness, it should also be mentioned that competition law infringements may trigger what is called "private enforcement" (ie private damage claims, etc). (FN [24])

Fußnoten

Article 81 para 2 EC Treaty and Section 1 para 3 Cartel Act 2005; Article 23 para 2 Council Regulation (EC) No. 1/2003 and, for Austria, Section 29 sub-para 1 in conjunction with Section 22 sub-para 1 Cartel Act 2005.

16 Ok 4/07 (Europay); as regards the EC, see the Commission's table on the ten highest cartel fines per undertaking since 1969 www.ec.europa.eu/comm/competition/cartels/statistics/statistics.pdf .

Cf. the Commission's Green Book on Damages Actions COM(2005) 672 and the just published White Paper COM(2008) 165 final.

3) (In-)Admissability of typical clauses in franchise agreements

In the following, recourse will often be taken to the vBER. It is, therefore, appropriate to have a closer look at the general conditions for the applicability of the vBER: (i) The agreement in question must qualify as a vertical agreement within the meaning of Article 2 para 1 vBER. (FN [25]) Franchise agreements typically qualify as such vertical agreements. (FN [26]) (ii) The subject matter of the vertical agreement must not fall within the scope of any other block exemption regulation, e.g. the Commission Regulation (EC) No. 1400/2002 on Vertical Agreements in the Motor Vehicle Sector, OJ 2002/L 203/30 (or that other regulation but not the vBER

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may apply). (FN [27]) (iii) Franchisor and franchisee must not be competitors; (FN [28]) if they are, the vBER only applies if the agreement is non-reciprocal (meaning that the franchisor must not also distribute products of the franchisee) and either the franchisee's yearly turnover does not exceed EUR 100 million or does not also produce the products. (FN [29]) (iv) The market share held by the franchisor (or the supplier nominated by it) does not exceed 30 % of the relevant market on which it sells the contract goods or services. (FN [30]) In the case of exclusive supply obligations (meaning that the franchisor must only sell to the franchisee), the market share held by the franchisee is relevant and must not exceed 30 % of the relevant market on which it purchases the contract goods or services. (FN [31]) (v) The franchise agreement in question must not contain a so called "hard core restriction" within the meaning of Article 4 vBER. (FN [32])

Fußnoten

Article 2 para 1 vBER defines such agreements or concerted practices as "vertical agreements" that are entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.

Cf. the FCA's statement on franchise agreements.

Cf. Article 2 para 5 vBER. In the context of franchise agreements, particularly the mvBER may also be relevant, which is somewhat similar but in its conditions not identical to the vBER. In the following, only the vBER will be looked at more closely.

According to Article 1 lit a vBER, "competing undertakings" are actual or potential suppliers in the same product market; the, product market including goods or services which are regarded by the buyer as interchangeable with or substitutable for the contract goods or services.

Article 2 para 4 vBER.

Article 3 para 1 vBER.

Article 3 para 2 in conjunction with Article 1 lit c vBER.

Typical hard core restrictions are fixed minimum sale prices or the restriction of so called "passive sales" (to unsolicited costumers).

Depending on the particular clause in question, additional specific conditions may have to be fulfilled. These conditions will be dealt with when discussing the respective clauses.

3.1 Provisions relating to licensing

As mentioned, the licensing of IP rights and know-how constitutes an integral component of franchise systems. For the Commission, franchise agreements are even the most obvious example "*where know-how for marketing purposes is communicated to the buyer*". (FN 33) Moreover, the European Commission states that the more important the transfer of know-how, the more easily vertical restraints in franchise agreements fulfill the conditions for exemption. (FN 34)

Fußnoten

vGuidelines, para 42 and 199.

vGuidelines, para 200.

The terms "IP rights" and "know-how" are defined in the vBER. According to Article 1 lit e vBER, the former term includes industrial property rights, copyright and neighbouring rights. According to Article 1 lit f vBER, "know-how" means a package of non-patented practical information, resulting from experience and testing by the supplier (franchisor), (FN 35) which is secret (meaning that the know-how, as a body or in the precise configuration and assembly of its components, is not generally known or easily accessible), substantial (meaning that the know-how includes information which is indispensable to the buyer for the use, sale or resale of the contract goods or services) (FN 36) and identified (meaning that that the know-how must be described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality).

Fußnoten

Since the definition refers to "experience and testing by the supplier", it would not appear to be sufficient that it has been done by someone independently of the franchisor; however, it would seem that know-how acquired by (independent) agents, management consultants and market researchers working for the franchisor can qualify as know-how for the purposes of the vBER - cf. Goyder, EU Distribution Law, 3. Auflage [2000], 179.

Where the franchisee has already experience in the business concerned, it might be questionable whether any know-how is "indispensable" to the franchisee - cf. Metzlaff in Metzlaff (Publ), Praxishandbuch Franchising, 3. Auflage [2003], § 26, para 19.

In general, provisions relating to licensing contained in franchise agreements are covered by the vBER if the following four (special) conditions are fulfilled (always provided that also the general conditions for application of the vBER are met - see above): (FN 37) (i) The licensed rights must be assigned to or for use by the franchisee. (ii) The licensing must not constitute the primary object of the agreement. (iii) Moreover, it must be directly related to the use, sale, or resale of goods or services by the franchisee or its customers. (iv) Finally, the licensing provisions, in

relation to the contract goods or services, must not contain restrictions of competition having the same object or effect of vertical restraints which are not exempted under the vBER.

Fußnoten

As long as the restrictions do not go beyond what is anyway foreseen by law as the content or effect of a certain IP right, competition is not restricted - cf. Jestaedt in Langen/Bunte (Publ), Kommentar zum deutschen und europäischen Kartellrecht II, 10. Auflage [2006], Art 81 Fallgruppen, para 249 and, for Austria, Okt 4/77, Coca-Cola - and there is thus, strictly speaking, no need for an exemption.

The European Commission is of the opinion that franchise agreements (with licensing provisions) usually meet these conditions as, under most franchise agreements, the franchisor provides goods and/or services, in particular commercial and technical assistance services, to the franchisee; the licensed rights typically help the franchisee to resell the products supplied by the franchisor (or by a supplier desig-

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nated by it) or to use those products and sell the resulting goods or services. (FN [38]) However, particularly production franchising will often focus on IP rights and would thus appear to be not covered by the vBER. The same could be true of service or distribution franchises involving IP rights where the franchisor does not supply itself goods or materials to the franchisee. (FN [39])

Fußnoten

vGuidelines, para 43.

Cf. Goyder, EC Competition Law, 4. Auflage [2003], 216.

In any case, the European Commission states in the vGuidelines that it would treat franchise agreements, which only or primarily concern licensing of IP rights (and for this reason are not covered by the vBER), "*in a way similar*" to franchise agreements covered by the vBER. (FN [40])

Fußnoten

vGuidelines, para 43.

The European Commission goes on to list seven types of typical obligations related to licensing, which they would generally consider necessary to protect the franchisor's IP rights and/or know-how and, to the extent they fall under Article 81 para 1 EC Treaty, (FN [41]) would also be justified (exempted under the vBER); these are: (FN [42])

Fußnoten

Where there is not even an appreciable restriction of competition, there is, strictly speaking, no need for an exemption. For instance, the ECJ held that provisions which are "strictly necessary in order to ensure that the know-how provided by the franchisor do not benefit competitors" do not constitute restrictions of competition in the first place - Pronuptia Case, para 27.

vGuidelines, para 44.

- obligations on the franchisee not to engage, directly or indirectly, in any similar business; (FN [43])

Fußnoten

Without such prohibition, the franchisor runs the risk that, in particular, the know-how it communicated to the franchisee benefits competitors (in this case, the franchisee as competitor to be if he were allowed to do similar business). These clauses are closely related to non-compete obligations, dealt with below.

- obligations on the franchisee not to acquire financial interests in competing undertakings such as would give the franchisee the power to influence the economic conduct of such undertakings; (FN [44])

Fußnoten

In essence, this prohibition serves the same purposes as obligations on the franchisee not to engage, directly or indirectly, in any similar business. See also IV/32.034 Computerland, OJ 1987/L 222/12 (Computerland Case), where the Commission required an absolute non-compete clause to be amended so as to allow franchisees to acquire financial interests in the capital of competing undertakings, although not to the extent that such participation would enable them to control those undertakings.

- obligations on the franchisee not to disclose to third parties the know-how provided by the franchisor as long as this know-how is not in the public domain;

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- obligations on the franchisee to communicate to the franchisor any experience gained in exploiting the franchise and to grant it, and other franchisees, a non-exclusive licence for the know-how resulting from that experience;
- obligations on the franchisee to inform the franchisor of infringements of licensed intellectual property rights, to take legal action against infringers or to assist the franchisor in any legal actions against infringers;
- obligations on the franchisee not to use know-how licensed by the franchisor for purposes other than the exploitation of the franchise; and
- obligations on the franchisee not to assign the rights and obligations under the franchise agreement without the franchisor's consent. (FN [45])

Fußnoten

Without such prohibition, the franchisor again runs the risk that, in particular, the know-how it communicated to the franchisee benefits competitors (in this case, the successor of the franchisee). See also IV/31.697 Charles Jourdan, OJ 1989/L 35/31, where a clause giving the franchisor a right of first refusal was found in line with EC competition law.

3.2 Clauses on the continuing assistance by the franchisor

Like licensing, the continuing assistance by the franchisor constitutes an integral component of franchise systems. The risks attached to the provision of such technical and/or commercial assistance are, from the point of view of the franchisor, also similar to the risks of licensing. In particular, the franchisor runs the risk that the assistance given (indirectly) benefits competitors.

Therefore, the ECJ has held in the *Pronuptia* Case that certain clauses to avoid that risk are necessary and thus not restrictive of competition. It would follow that, *cum grano salis*, the same types of clauses, which can be justified as necessary for the protection of transferred know-how and IP rights may also be justified to avoid the risk that necessary assistance benefits competitors. (FN [46])

Fußnoten

Cf. Pronuptia Case, para 16.

3.3 (Other) vertical restraints ensuring, inter alia, the common identity **and** reputation **of** the franchise network, etc

Franchise agreements may contain all types of "other" (potential) vertical restrains. In the following, some of the most typical clauses are looked at more closely:

a) Obligation to apply the business methods developed by the franchisor **and** to use the know-how provided

Again in the *Pronuptia* Case, the ECJ has held that "*the franchisor must be able to take measures necessary for maintaining the identity and reputation of the network bearing his business name or symbol. It follows that provisions which establish the means of control necessary for that purpose do not constitute restrictions on competition*". (FN 47)

Fußnoten

Pronuptia Case, para 17. Cf. also Goyder, EU Distribution Law, 3. Auflage [2000], 165 et seq.

The Court expressly held that the franchisee's obligation to apply the business methods developed by the franchisor and to use the know-how provided does not constitute a restriction of competition. (FN 48)

Fußnoten

Pronuptia Case, para 18.

b) Obligation to sell the contract goods only from approved premises

The ECJ has held in the *Pronuptia* Case that obligations to only sell from approved premises can also be justified by the necessity to maintain the identity and reputation of the franchise network; the Court gives the following specific examples of justified clauses: (FN 49)

Fußnoten

Pronuptia Case, para 19.

- obligations to sell the goods covered by the contract only in premises laid out and decorated according to the franchisor's instructions;
- obligations to choose a certain location for the shop; and
- obligations to move the shop to another location only with the franchisor's prior approval.

c) Restrictions of the territory into or of the customers to which the franchisee may sell

To start again with the *Pronuptia* Case, the ECJ found a territorial exclusivity clause in combination with a location clause (sell goods only from a particular shop) problematic. (FN 50) However, it would appear that not only the combination can lead to an appreciable restriction of competition but that territorial exclusivity in franchise agreements by it self comes within the ambit of Article 81 para 1 EC Treaty. (FN 51)

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The European Commission has, for instance, in its famous *Yves Rocher* Case held that territorial exclusivity clauses require exemption (even in the context of very competitive markets). (FN 52)

Fußnoten

Pronuptia Case, para 14.

Cf. Goyder, EU Distribution Law, 3. Auflage [2000], 158 et seq. For Austria, see also Okt 4/77, Coca Cola.

IV/31.428 to 31.432, Yves Rocher, OJ 1987/L 8/49 (Yves Rocher Case), para 54.

Article 4 lit b vBER qualifies "*restriction of the territory into which, or of the customers to whom, the buyer may sell the contract goods or services*" as hard core restrictions (leading to the in-applicability of the vBER to the entire agreement). (FN 53) However, the following clauses are not blacklisted (but exempted under the vBER - provided all other conditions are met):

Fußnoten

See also Metzlaff in Metzlaff, Praxishandbuch Franchising [2003], § 26, para 5 et seq.

- restrictions on the franchisee not to actively sell into territories or to costumer groups the franchisor has reserved to itself or gave it exclusively to another franchisee, as long as sales by the costumers of the franchisee are not limited;
- restrictions of sales to end users by a franchisee operating at the wholesale level;
- restrictions of sales to unauthorized distributors by the franchisee provided the franchise system in question qualifies as a selective distribution system within the meaning of Article 1 lit d vBER. (FN 54)

Fußnoten

According to Article 1 lit d vBER "selective distribution systems" are those distribution systems where the supplier (franchisor) undertakes to sell the contract goods or services, either directly or indirectly, only to distributors (franchisees) selected on the basis of specified criteria and where these distributors (franchisees) undertake not to sell such goods or services to unauthorised distributors. It should be noted that some commentators argue that franchising (in general) does not qualify as selective distribution - see Liebscher/Petsche, Franchising in Öserreich, 2. Auflage [2002], 60 et seq.

- restrictions of the franchisee's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the franchisor.

In particular, where franchise agreements provide for absolute territorial (or customer group) exclusivity, they are not only not covered by the vBER but will in most cases fall foul of Article 81 para 1 EC Treaty (as usually also no other justification is available).

d) Obligations regarding the (re-sell) price

Like absolute territorial protection, price fixing constitutes a hard core restriction irrespective of whether or not it is part of a franchise or other agreement. (FN 55) Only price recommendations to the franchisees where there is no concerted practice or pressure for the actual application of such prices may not be caught by Article 81 para 1 EC Treaty. (FN 56) Moreover, the vBER exempts the setting of maximum sales prices.

Fußnoten

It is also prohibited price fixing to set minimum profit margins or maximum discounts the franchisee may grant - cf. Braun/Ritter, European Competition Law, 3. Auflage [2004], 323 et seq.

Pronuptia Case, para 27.

e) Non-compete obligations

Article 1 lit b vBER defines "non-compete obligations" as any direct or indirect obligation causing the buyer (franchisee) not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services (provided by the franchisor), or any direct or indirect obligation on the buyer (franchisee) to purchase from the supplier (franchisor) or from another undertaking designated by it more than 80 % of it's total purchases of the contract goods or services and their substitutes on the relevant market (calculated on the basis of the value of its purchases in the preceding calendar year).

While the vBER generally permits non-compete obligations only for a term of maximum five years, (FN 57) the vGuidelines recognize that non-compete obligations may be necessary to maintain the common identity and reputation of the franchise network; they may thus, according to the European Commission, be justified for the entire term of the franchise agreement. (FN 58)

Fußnoten

Article 5 lit a vBER.

vGuidelines, para 200. A justification is more difficult where the contract goods are (also) sold outside the franchise system - cf. Schultze/Pautke/Wagener, Die Gruppenfreistellungsverordnung für vertikale Vereinbarungen, Praxiskommentar [2001], Art 4, para 523.

Moreover, it would appear that non-compete obligations in franchise agreements may also be justified as necessary to protect conferred know-how. (FN 59) Know-how may not only have to be protected during the term of the franchise agreement (FN 60)) but also post-term. In the *Pronuptia* Case, the ECJ has, for instance, held that a prohibition to do similar competing business may even be justified for "*a reasonable period*" after

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the expiry of the franchise agreement. (FN 61)) The European Commission has more precisely specified the post-term period for which such obligations may be justified: In the *Computerland* Case, it found three year post-term restrictions excessive. (FN 62)) In the *Yves Rocher* Case, it held that a one year post-term restriction preventing the franchisee from opening a retail cosmetics store within its previous contract territory is in line with European competition law. (FN 63))

Fußnoten

Again, a justification due to the protection of know-how is more difficult where the contract goods are sold outside the franchise system - cf. Schultze/Pautke/Wagener, Die Gruppenfreistellungsverordnung für vertikale Vereinbarungen, Praxiskommentar [2001], Art 4, para 524.

Cf. vGuidelines, para 157.

Pronuptia Case, para 16; see also Bellamy/Child, European Community Lawof Competition, 5. Auflage [2001], 602.

Computerland Case, para 22.

Yves Rocher Case, para 48.

In this context, Article 5 lit b vBER should be noted, which will often benefit franchisors. (FN 64)) Pursuant to this provision, any direct or indirect obligation causing the buyer (franchisee), after termination of the agreement, not to manufacture, purchase, sell or resell goods or services is not exempted, unless (i) such obligation relates to goods or services which compete with the contract goods or services, (ii) it is limited to the premises from which the buyer (franchisee) has operated during the contract period, (iii) and is indispensable to protect know-how transferred by the supplier (franchisor), (iv) moreover, the restriction must not be imposed for more than one year post-term. (FN 65))

Fußnoten

In fact, franchise agreements might be the only type of agreements in respect of which the vBER exempts post-term non-compete clauses - cf. Goyder, EU Distribution Law, 3. Auflage [2000], 178.

Article 5 lit b vBER makes it also clear that the use and disclosure of know-how (not yet in the public domain) may be restricted for an indefinite period of time.

Notiz

Conclusion

The FCA and the European Commission have a clear opinion what franchise agreements are and consider them to generally come within the ambit ofcartellaw.

In fact, as the franchisor usually has an interest to protect its intellectual property, ensure uniformity of distribution, prohibit franchisees to purchase from other sources, establish some selective or exclusive distribution, etc, franchise agreements often contain clauses which may be restrictive of competition (vertical restraints).

However, many of the typical clauses in franchise agreements can be justified as being necessary to protect the franchisors intellectual property rights, the common identity and/or reputation of the system or as being in line with the vBER - always provided the franchise system is properly designed.

An appropriate design is crucial as the consequences of infringing Austrian or European competition law are severe: (clauses in) contracts may be unenforceable and fines of up to 10 % of the worldwide group turnover might be imposed. Moreover, competition law infringements may trigger private enforcement.

Zitiervorschlag

Meta-Daten

Rubrik(en)

Abhandlung

Rechtsgebiet(e)

Kartellrecht; Wettbewerbsrecht