

Success Profit Approach
Concept Regulation
Franchise
Law
Global Growth
Consulting Market
Agreement
Investment

INTERNATIONAL
FRANCHISE
HANDBOOK
1st EDITION



Editor
BridgehouseLaw Germany Rechtsanwaltsgesellschaft mbH
Habsburgerring 2 – WESTGATE –
50674 Cologne
Germany
Phone: +49 (0)221 5340 980
Fax: +49 (0)221 5340 9828
cologne@bridgehouselaw.de

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AUSTRIA

Except for the European Block Exemption Regulation (Commission Regulation (EU) No 330/2010), there is neither a codified franchise law, nor a legal definition of the term “franchise” in the Austrian legal framework. Yet, as an effusion of personal autonomy, the conclusion of franchise agreements is admissible. Due to that fact also neither specifics for the implementation, offer or granting/sale of foreign franchise systems in

Austria nor other special restrictions regarding franchise agreements exist. However, general law principles have to be observed.

Various types of legal entities – such as the form of a sole proprietor, a partnership or a corporation – are suitable for both a franchisee and a franchisor. When choosing a legal form, accounting and tax issues as well as aspects of rising and maintenance of capital have to be taken into account. In addition to that also the liability of the stakeholders is an essential aspect for the

decision on the legal form (e.g. a stock corporation or a LLC provide for a limitation of the liability of the shareholders).

The Austrian Consumer Protection Act (Konsumentenschutzgesetz – KSchG) is applicable to legal transactions concluded between a person, for that the respective transaction belongs to the operation of its business, and a person, for that the transaction does not do so. Preparatory actions prior to the start of business of a natural person do not belong to the operation of business. This also applies to the conclusion of a franchise agreement. Therefore franchisor should be carefully when looking for a new franchisee in Austria and when concluding a franchise agreement.

In addition to that under Austrian law a franchise agreements can constitute a cartel in the sense of the Austrian Antitrust Law (Kartellgesetz – KartG), if they cause a prevention, restriction or corruption of competition (e.g. in the case of an ascertainment of prices). Furthermore, franchise systems can also be subject to the Austrian Competition Law (Bundesgesetz gegen den unlauteren Wettbewerb 1984 – UWG), as there is usually a competitive relationship between different franchisees of the same franchisor; moreover, also a franchisee and a franchisor can compete in particular cases. For this reason typical clauses of franchise agreements (e.g. minimum prices or fixed sale prices, absolute territory restriction, purchase obligations regarding other products than the main subject of the franchise contract and prohibition of cross-delivery or the use of internet-trade) shall be double under checked under competition law aspects.

According to the Austrian Supreme Court, a franchisee is a self-dependent businessman acting on his own behalf and account (OGH 4 Ob 321/87). This definition is opposed to the risk of the establishment of a labor contract between

franchisee and franchisor; yet, in the light of German jurisdiction (Regional Court Düsseldorf 20.10.1987, NJW 1988, 725ff), such risk cannot be eliminated entirely. Moreover, depending from the exact contractual arrangement, a franchisee can be a person similar to an employee (OGH 4 Ob 68/79; arbeitnehmerähnliche Person). Important consequences of such a qualification are the competence of labor courts, the applicability of the Act on Employee's Liability (Dienstnehmerhaftpflichtgesetz) as well as the obligations of the franchisor to pay social security contributions for the franchisee.

A franchise agreement is usually similar to the agreement concluded with an authorized dealer or a commercial agent. The Austrian Supreme Court affirmed the possibility to analogously apply the compensatory claim of the commercial agent for loss of clientele (Section 24 Austrian Commercial Agents Act [Handelsvertretergesetz] to a franchise agreement (9 ObA 8, 9/91). In order to avoid the applicability of the compensatory claim, the legal position of the franchisee should be structured as independent as possible.

As to personal income tax (Einkommenssteuer), persons domiciled or habitually resident in Austria are subject to unlimited tax liability. Other persons, who (are unlimited tax liable in another country, but) achieve some income also in Austria, are subject to limited tax liability, i.e. limited to such income in Austria. The Austrian corporation tax (Körperschaftsteuer) correspondingly applies to corporations (such as LLC's and Stock Corporations) having their general management or place of business in Austria. Austrian corporations are subject to a corporate income tax rate of 25 %. Please note that various double-tax treaties (which Austria is a party to) counteract a possible multiple taxation. Goods and services provided by an entrepreneur in Austria for remuneration are subject to sales tax/VAT (Umsatzsteuer). Finally, franchise agreements containing elements

of tenancy agreements can be subject to stamp duties (Rechtsgeschäftsgebühren).

The trademark of a franchisor can be protected as a national trademark by registration with the Austrian patent office, as a community trademark or (based on a national trademark) as an international trademark. A special form is the registration of a trademark person (franchisee) committed to preserve commercial interests of another person (franchisor) (trade mark registered in the name of an agent). The trade name and facilities can be protected not also by trade mark law, but also by competition law. Moreover, the firm of a company also enjoys the protection of commercial- and naming right law. Please note that the precise graphic presentation of a franchisor and a franchisee can be copyrighted, if such presentation and appearance constitutes a work in the sense of the Austrian Copyright Act (Urheberrechtsgesetz).

Prior to signing a franchise agreement, information of the franchisee about relevant legal and economic issues is essential. The International Institute for the Unification of Private Law issued a non-binding so-called Model Franchise Disclosure Law. Apart from this, when potential contracting parties start negotiations, a pre-contractual obligation accrues; its specific content has to be determined depending on the details of each individual case. A violation of pre-contractual duty of care can justify claims for damages (culpa in contrahendo).

Regarding the amount of franchise fees no specific legal restrictions are in place. Such fees can be agreed upon in line with general applicable law (e.g. usury and violation of bonos mores). According to most franchise agreements, the franchisor has to pay a non-refundable one-time entry fee as well as an ongoing monthly fee (e.g. based on the sales of the franchisee). In case of late payment default interest of in the amount

of 9,2 % over the base rate of the European Central Bank.

A franchise agreement is a contract containing continuing obligations similar to a service contract; hence, the contracting parties are bound by mutual fiduciary duties, including an obligation of confidentiality. In addition to that general principle franchise agreements normally contain an explicit confidentiality clause, which is/can be combined with a penalty which is payable in case of non-compliance.

As franchise agreements are usually stipulate a continuing obligation (Dauerschuldverhältnis), which can be terminated by each party subject to terms and dates as agreed upon (ordinary termination). In addition such agreements can also be terminated with immediate effect for good cause (extraordinary termination). The Austrian law does not provide for an obligation of a franchisor to renew a franchise agreement, unless such obligation is agreed.

Any transfer of a franchise agreement requires an assignment agreement, hence a trilateral agreement between the franchisor, the resigning and the entering franchisee. Some franchise agreements contain already the approval of the franchisor that the franchisee is transfers its rights and obligations under the franchise agreement to a third party (its legal successor). Apart from that, a transfer of the business of or the shares in the franchisee is possible. Such transfer is permissible in general, however can be restricted by change of control clauses in the franchise agreement.

Disputes arising in the context of franchise agreements are usually settled by the Commercial Court competent for the defendant. Subsequently, at most two appeal stages stand open (Higher Regional Court, Supreme Court). Laws concerning international jurisdiction can be waived by the parties of a franchise agreement and

jurisdiction as well as arbitration clauses may be agreed upon. Inter alia, arbitration clauses bring about the advantage of the relieved execution of arbitral awards in all member countries of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Irregardless of the choice of law agreement, according to the Convention on the Law Applicable to Contractual Obligations (Convention 80/934/EWG), for franchise agreements usually the law of such country is relevant, in which the franchisee has his main residence. Moreover, it

should be taken into account that the CISG can be applicable (yet can be excluded) on goods or works supply agreements. As a consequence, in the course of franchise agreements with foreign elements the applicable law should be agreed. Both, the Convention on the Law Applicable to Contractual Obligations and the Austrian Laws of Conflict state the primacy of a choice of law by contracting parties.

Dr. Stefan Schermaier; Dorian Schmelz

TSM Tonninger Schermaier Maierhofer & Partner Rechtsanwälte

Rilkeplatz 8
1040 Wien
Austria

Phone main: +43 (0)1 218 44 40
Fax: +43 (0)1 218 44 40-88
schermaier@tsm-law.at
schmelz@tsm-law.at
www.tsm-law.at