

Austria

Sylvia Freygner

Sylvia Freygner, Attorney-at-law

Overview

1 What forms of business entities are relevant to the typical franchisor?

Franchisors are free to choose any form of business entity existing under Austrian law. The most common forms are:

- limited liability companies, such as a GmbH (private limited company) or an AG (public limited company); and
- partnerships, such as an OG (general commercial partnership) or a KG (limited commercial partnership).

The GmbH is typically used by franchisors as a business vehicle. Please see question 3 for further information.

An international franchisor located outside Austria is not required to form an entity under Austrian law for offering or selling franchises in Austria and is entitled to set up a branch office in Austria.

2 What laws and agencies govern the formation of business entities?

The Commercial Code (UGB) and Commercial Register Act (Firmenbuchgesetz) are prerequisites for the formation of all business entities (especially the formation and legal framework governing partnerships) and their registration in the commercial register. The formation and legal framework governing GmbHs is set out in the Act on Private Limited Companies (GmbH-Gesetz) and the formation and legal framework governing AGs is set out in the Stock Corporation Act (Aktiengesetz).

All business entities must be registered with the commercial register (Firmenbuch) of the respective commercial court at the seat of the business entity.

3 Provide an overview of the requirements for forming and maintaining a business entity.

The requirements depend on the form of the business entity chosen.

GmbH (private limited company)

Generally, the shareholders of a GmbH are not personally liable for the company (except for the shareholders in a GmbH, where there is personal liability for the obligation to pay capital contributions, whereby a shareholder will be liable for the other shareholders in the case of refunding capital contributions or serious undercapitalisation and insolvency).

The minimum share capital for a GmbH is €35,000. At least half of it (namely, €17,500) has to be contributed in cash prior to the registration of the GmbH with the commercial register. The articles of association – or, if there is only one founding shareholder, the declaration of the foundation of the company – must be in the form of a notarised deed and must be filed with the commercial register. A notarised assignment deed is required for the assignment of shares. A GmbH is represented by one or more managing directors (CEOs),

who are appointed by the shareholders. Managing directors must act with diligence and care in business. Otherwise, they are personally liable for any damage caused. The election of the supervisory board is voluntary (except in some circumstances). A GmbH must publish its annual accounts in the commercial register.

AG (Public limited company)

The minimum stock capital of an AG is €70,000 and is split into shares. At least 25 per cent has to be paid prior to the registration of the AG with the commercial register. The articles of association state, inter alia, the names of the founders, the nominal value per share or the number of non-par value shares, the issue price, the number and types of shares subscribed by each shareholder and the subscription of all shares by the shareholders. The procedure for the formation of an AG is much more costly than the formation of a GmbH in terms of the time and money involved. The corporate bodies of an AG are the shareholders' meeting, the management board and the supervisory board.

KG, OG (Partnerships)

An OG can be formed by two or more individuals or legal entities. Each partner is jointly and personally liable for the debts of the OG towards third parties. While not mandatory, the conclusion of articles of association is advisable (no specific form is required). A KG is generally subject to the same legal regime as an OG. Unlike an OG, a KG also has limited partners whose liability for the debts of the KG is limited to a certain amount. At least one partner of the KG has to be a partner with unlimited personal liability. In cases where this partner is a corporation, specific provisions apply.

Sole trader

In Austria, any person is free to engage in and carry out business as a single person. The Commercial Code regulates this area.

Business licence

Anyone wishing to conduct business in Austria, whether a sole trader or large company, needs a business licence that governs the activities in which it will be engaged. According to the Austrian Trade Regulation Act (Gewerbeordnung), restrictions exist, depending on the type of activity sought to be performed and the location of that specific business. 'Trade' is defined as any independent, continuous activity carried out for profit. Excluded from this definition are the exploitation of natural resources, artistic activities, liberal or freelance professions (for example, lawyers and physicians) and business activities governed by specific statutes (for example, banking and insurance). Notifiable trades constitute the vast majority of businesses and may be carried out subject to prior notification to the trade authority. They are subdivided into free trades and regulated trades. The free trades and regulated trades may be carried out if the businessperson has not been disqualified from trade (namely, for committing certain criminal offences or bankruptcy). Furthermore, regulated trades

require compliance with specific criteria (namely, age, qualification and experience). Regulated trades and free trades are registered in the trade register (Gewerberegister). Sensitive trades may only be carried out after a trade licence has been issued by the responsible public authority. Sensitive trades include master builders, wholesalers of pharmaceuticals, etc. Applicants for such a trade licence have to pass a mandatory reliability test.

Besides natural persons, legal entities such as corporations, partnerships and branches of foreign companies may carry out a trade, provided that they have appointed a business representative. The business representative, who can be a different person from the managing director but needs to be an employee of the company (with at least 50 per cent of normal working time, namely, 20 hours per week), is responsible for compliance with industrial trade law provisions.

4 What restrictions apply to foreign business entities and foreign investment?

There are no restrictions for shareholders of business entities in Austria and few restrictions for foreign investors (for example, special provisions regarding acquisitions of real property by foreign investors from non-EU countries). Imports and exports, other than those within the EU Member States, may be restricted by the Foreign Trade Act (Außenhandelsgesetz)

5 Briefly describe the aspects of the tax system relevant to franchisors. How are foreign businesses and individuals taxed?

Capital transfer tax

Equity contributions to a corporation by the shareholders, by way of increase or otherwise, are subject to capital transfer tax at the rate of 1 per cent.

Corporate income tax

Corporations are considered as Austrian tax residents if they have their legal seat in Austria or if their effective management is carried out in Austria. Corporate profits are subject to Austrian corporate income tax at a flat tax rate of 25 per cent. However, there is a minimum annual corporate income tax amounting to EUR 1,750 for GmbHs and EUR 3,500 for AGs.

Municipal tax

Municipal tax is levied on all entrepreneurs who employ staff in Austria and amounts to 3 per cent of the gross wages paid.

Personal income tax

Individuals who are permanently domiciled or residents (staying for more than six months) in Austria are taxable on their worldwide income. Non-residents may also be subject to Austrian income tax to the extent of the income generated in Austria. Austria has entered into more than 80 double taxation treaties with countries to avoid double taxation of income. The rate of income tax is progressive and can rise to 50 per cent of the annual gross income.

Real property transfer tax

A real property tax is generally levied inter vivos on the transfer of real property located in Austria and the amalgamation of a 100 per cent participation in a corporation holding properties with one person. It amounts to 3.5 per cent of the purchase price, or in the absence of consideration (for example, if real property is transferred by way of a merger), the rate is based on a multiple of a specific tax value.

Stamp duties

The conclusion of certain agreements in writing, including lease agreements and loan agreements, triggers stamp duty at a certain

percentage of the value of the agreement.

Value added tax (VAT)

VAT is levied on the supply of goods and provisions of services for consideration carried out in Austria by an entrepreneur, own consumption and import from non-EU countries. The standard VAT rate is 20 per cent of the consideration; in some cases reduced rates of 10 per cent and 12 per cent apply.

Companies whose revenues are subject to VAT are entitled to deduct, as an input VAT, the VAT that other companies have invoiced.

6 Are there any relevant labour and employment considerations for typical franchisors? What is the risk that a franchisee or employees of a franchisee could be deemed employees of the franchisor? What can be done to reduce this risk?

In Austria there is a risk that a franchisee could be treated as an employee or as a quasi-subordinate employee, with the result that all or significant obligations and duties of an employer apply to the franchisor (for example, competence of the labour court). The main distinction between independent entrepreneurs and employees is that employees, personally and economically, depend on the franchisor. Personal dependence can be in the form of being excessively bound to employers' instructions and directives regarding:

- the subject matter;
- the work method; and
- working time and place.

However, independent entrepreneurs bear the entrepreneurial risk and are mainly free to determine their activities. The risk of being qualified as an employee may be excluded if the franchisee is organised in the form of a business entity (for example, a GmbH).

7 How are trademarks and know-how protected?

In Austria trademark rights are protected by way of registration with the trademark register (Markenregister) at the Austrian Patent Office. Legal names of persons, company or commercial firm names, trade names, placement and layout of fixtures, external design and appearance – even where not expressly covered by copyright – fall under the protection of the Austrian Unfair Competition Act (Gesetz gegen den unlauteren Wettbewerb) and the Austrian Civil Code (ABGB). Registration of words, pictures and letters ensures their protection under the Austrian Trademark Act (Markenschutzgesetz). A registered trademark provides its holder with an exclusive right to use and transfer the trademark. Trademarks are protected for a renewable period of 10 years from the date of registration. In the event of an infringement, the trademark holder may claim damages and compensation for unjust enrichment, and may also request a preliminary injunction.

Alternatively, the franchisor can either register a trademark as a Community trademark, which has to be registered with the Office for Harmonisation in the Internal Market and which grants protection for all 27 EU countries, or apply for registration of an international trademark managed by the World Intellectual Property Organisation in accordance with the Madrid arrangement for Austria that grants protection for approximately 80 countries worldwide.

There is no legal definition of know-how in Austrian law. The EC Block Exemption Regulation No. 2790/1999 (BER) defines 'know-how' as follows:

'Know-how' means a package of non-patented practical information, resulting from experience and testing by the supplier, which is secret, substantial and identified: in this context, 'secret' means 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' means that the know-how includes information

which is indispensable to the buyer for the use, sale or resale of the contract goods or services; 'identified' means 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[.]

The safeguarding of the franchisor's know-how is subject to protection under the Austrian Unfair Competition Act. Know-how, as an aspect of intellectual rights, is confidential information and, as such, its protection is secured by means of contractual obligations.

The unauthorised use of business secrets is punishable by criminal sanctions and according to the Unfair Trade Practices Act (civil liability).

Engaging in activities that contravene or give the appearance of contravening standards of public decency or moral turpitude or both (for example, unfair commercial practices and misleading general trade practices) constitutes, in general, a violation of the Unfair Competition Act. Actions that may constitute unfair trade and have an adverse effect on another business entity in the market give rise to injunctive relief and a claim for damages and are also governed by the Unfair Competition Act.

8 What are the relevant aspects of the real estate market and real estate law?

In Austria there are no special franchise-related regulations concerning the real property market and real property laws.

Sale or purchase of real property

The general rules of the Austrian Civil Code apply. The assignment of ownership must be notarised and registered in the Austrian land register. Pursuant to legislation by the nine Austrian federal states concerning the acquisition of real property by foreigners, EU or EEA citizens usually need 'negative confirmation'; otherwise acquisition proceedings must be notified or are subject to approval. The competent authorities in each federal state shall give their consent to the acquisition of a property by non-EU residents. In general, such approval is granted if the real property acquirer is a resident of Austria or has a residence permit. Please also see questions 4 and 5 for further information.

Commercial leases

Commercial leases are often subject to the Austrian Civil Code and the Tenancy Act (Mietrechtsgesetz). Under Austrian law, it is essential to determine the regulatory tenancy scheme or regime according to which a certain property is classified: either according to the liberal regime of the Austrian Civil Code or – partly or fully – according to the restrictive regimes of the Tenancy Act. As regards properties that are fully governed by the Tenancy Act, the tenant enjoys a high standard of protection, including protection against rent increases beyond a regulated level. It is possible for the franchisor to ensure that they can adopt the lease agreement related to the franchisee's business premises should the franchise agreement be terminated by stating such provision in the franchise agreement and by the landlord's acceptance being stated in the lease agreement. As mentioned in question 5, the conclusion of a written lease agreement implies a stamp duty.

Laws and agencies that regulate the offer and sale of franchises

9 What is the legal definition of a franchise?

There is no specific legal definition of a franchise and no specific franchise law in Austria. Thus, franchise agreements are subject to general contract law and the principle of freedom of contracts.

Please note that certain provisions of the Commercial Agents Act (Handelsvertretergesetz) are applicable to franchise agreements

(for example, compensation claims). There is also no specific definition of franchising in the BER as the BER is applicable to all vertical agreements. Nevertheless, according to the Guidelines on Vertical Restraints (2000/C 291/01)(the Guidelines) that do not constitute statutory law, franchising agreements are described as follows:

Franchise agreements contain licences of intellectual property rights relating in particular to trademarks or signs and know-how for the use and distribution of goods and services. In addition to intellectual property rights, the franchisor usually provides the franchisee during the life of the agreement with commercial and technical assistance. The licence and the assistance are integral components of the business method. Franchising may enable the franchisor to establish, with limited investments, a uniform network for the distribution of his products. 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.

Please see Update and trends.

10 Which laws and government agencies regulate the offer and sale of franchises?

There are no specific laws or government agencies that regulate the offer and sale of franchises in Austria. The principle of freedom of contracts applies.

For offers and sales of franchises, besides the general provisions of contract law of the Civil Code, the following Austrian laws must be taken into consideration: the Consumer Protection Act, the Unfair Trade Practices Act and antitrust law.

Generally, according to the Austrian Civil Code, all potential contractual parties are obliged to ensure that the relevant facts have been clearly presented and that all necessary and relevant information regarding the envisaged agreement has been disclosed prior to the conclusion of an agreement (pre-contractual negotiations). The content and scope of this duty depends on the individual case, taking into account the experience and the knowledge of the franchisee. The franchisor shall provide all relevant information about how the franchise system works as well as his sales forecast. Any lack of information or any misleading information may entail liability for a breach of pre-contractual disclosure obligations.

The provisions of the Austrian Civil Code concerning general business terms are applicable. All standard form contracts are subject to a 'fair and reasonable' test. Of particular application are section 864a and section 879, paragraph 3 of the Austrian Civil Code. Section 864a applies to clauses which carry abnormally unusual content or matters which shock the party made subject to the terms; section 879, paragraph 3 addresses situations where one of the parties has received a 'raw deal', was discriminated against or was otherwise made subject to a bad deal. In these situations, regarding section 864a violations, the offending clause(s) lacks validity provided the affected party was not made aware of the content before becoming a signatory thereto. Regarding the violation of section 879, paragraph 3, such clauses are always invalid.

Further, the franchise agreement may not be contra bonos mores (against generally accepted standards of moral turpitude and public decency).

11 Describe the relevant requirements of these laws and agencies.

See question 10.

12 What are the exemptions and exclusions from any franchise laws and regulations?

See question 10.

- 13** Does any law or regulation create a requirement that must be met before a franchisor may offer franchises?

Under Austrian law, there are no specific laws or regulations regarding requirements to be met before a franchisor may offer franchises.

- 14** In the case of a sub-franchising structure, who must make pre-sale disclosures to sub-franchisees? If the sub-franchisor must provide disclosure, what must be disclosed concerning the franchisor and the contractual or other relationship between the franchisor and the sub-franchisor?

There are no pre-sale disclosure regulations regarding franchise agreements. However, the general rules of the Austrian Civil Code regarding pre-contractual negotiations apply. See question 10.

- 15** What is the compliance procedure for making pre-contractual disclosure in your country? How often must the disclosures be updated?

In Austria there are no statutory provisions for compliance procedures for pre-contractual disclosure.

- 16** What information must the disclosure document contain?

There are no legal provisions or regulations.

The Österreichische Franchise Gesellschaft, a franchise association, follows the UNIDROIT Model Franchise Disclosure Law, which recommends that the franchisor should disclose to their potential franchisees the following information in writing:

- legal name, legal form and legal address of the franchisor;
- trademark, trade name and business name of the franchisor;
- description of the franchise concept;
- information regarding the franchisor's intellectual property to be licensed to the franchisee;
- existence of a pilot business;
- initial and ongoing support by the franchisor;
- required capital and manpower for the franchisee's business;
- rights and obligations of the franchisee;
- any criminal convictions or any finding of liability in a civil action or arbitration involving the franchisee;
- any bankruptcy, insolvency or comparable proceeding involving the franchisor;
- information on the categories of goods and services that the franchisee is required to purchase or lease;
- a description of the general and local market of the products or services and the prospects for development of the market;
- accurate information on the profitability of the franchisee's business;
- actual number of franchisees; and
- pending lawsuits with an impact on the potential franchisee's business.

- 17** Is there any obligation for continuing disclosure?

There are no specific laws governing franchises or disclosure, nor regarding continuing disclosure. Prior to the conclusion of an agreement all relevant information should have been presented, but there is no duty for ongoing or continuing disclosure by law. Any lack of information or any misleading information may result in liability for a breach of pre-contractual disclosure obligations.

- 18** How do the relevant government agencies enforce the disclosure requirements?

Not applicable. See question 15.

- 19** What actions can franchisees take to obtain relief for violations of disclosure requirements? What are the legal remedies for such violations? How are damages calculated? If the franchisee can cancel or rescind the franchise contract, is the franchisee also entitled to reimbursement or damages?

In principle, the general provisions of contract law of the Austrian Civil Code apply. In the case of a violation of the franchisor's duty to present the relevant facts, the franchisee has the right to claim damages (*culpa in contrahendo*). The franchisor has to put the franchisee in the position he would have been in if the franchisor had fulfilled his disclosure obligation. If the franchisee agreed to the franchise agreement without full disclosure he may rescind the franchise agreement. The franchisor, therefore, can be ordered to consent to the cancellation of the franchise agreement, to pay all obtained franchise fees back to the franchisee and to reimburse the franchisee for all expenses incurred in connection with the franchised business. At the same time, income already earned from the franchise has to be deducted.

- 20** In the case of sub-franchising, how is liability for disclosure violations shared between franchisor and sub-franchisor? Are individual officers, directors and employees of the franchisor or the sub-franchisor exposed to liability? If so, what liability?

A sub-franchisor is solely liable for disclosure violations.

Directors, individual officers and employees of the franchisor are not deemed to be the franchisees' contractual partners and are therefore not liable on the basis of the agreement. Nevertheless, directors and employees can be held liable in case of a violation of their respective duties according to labour law.

- 21** In addition to any laws or government agencies that specifically regulate offering and selling franchises, what are the general principles of law that affect the offer and sale of franchises? What other regulations or government agencies or industry codes of conduct may affect the offer and sale of franchises?

See question 10.

- 22** Other than franchise-specific rules on what disclosures a franchisor should make to a potential franchisee or a franchisee should make to a sub franchisee regarding predecessors, litigation, trademarks, fees etc, are there any general rules on pre-sale disclosure that might apply to such transactions?

There is no specific law governing disclosure in Austria. In general, according to the Austrian Civil Code, prior to the conclusion of an agreement (pre-contractual negotiations), all potential contractual parties are obliged to ensure that the relevant facts have been clearly presented and all necessary and relevant information regarding the envisaged agreement has been disclosed. The content and scope of this duty depends on the individual case, taking into account the experience and the knowledge of the franchisee. The franchisor shall provide all relevant information about how the franchise system works and also a sales forecast. Any lack of information or any misleading information may lead to liability on the basis of a breach of pre-contractual disclosure obligations.

- 23** What actions may franchisees take if a franchisor engages in fraudulent or deceptive practices in connection with the offer and sale of franchises? How does this protection differ from the protection provided under the franchise sales disclosure laws?

See question 19.

Legal restrictions on the terms of franchise contracts and the relationship between parties in a franchise relationship

- 24** Are there specific laws regulating the ongoing relationship between franchisor and franchisee after the franchise contract comes into effect?

There are no specific laws regulating the ongoing relationship between the franchisor and the franchisee after the franchise agreement comes into effect. Generally, the principle of freedom of contracts applies.

- 25** Do other laws affect the franchise relationship?

Certain provisions of the Commercial Agents Act are applicable to franchise agreements (for example, compensation claims). By applying section 24 of the Commercial Agents Act by way of analogy, under certain circumstances a franchisee may be entitled to (good-will) indemnification if the agreement is terminated. The franchisee may be entitled to an indemnity if they have brought in new customers or has significantly increased the volume of business with existing customers and the franchisor continues to derive substantial benefit from the business with such customers. The payment of this indemnity has to be equitable having regard to all the circumstances. The amount of the indemnity may not exceed a figure equivalent to the franchisee's average annual revenue calculated on the basis of his income over the preceding five years.

The provisions of the Austrian Civil Code concerning standard form contracts may also be applicable. Besides the general provisions of contract law of the Austrian Civil Code, the following Austrian laws must be taken into consideration: the Consumer Protection Law, the Commercial Code, the Unfair Trade Practices Act, antitrust law, intellectual property regulations, tax law and data protection law.

In Austria the initial founder is protected by consumer protection law. Not all provisions of the Commercial Code may apply to the franchise agreement with the initial founder.

- 26** Do other government or trade association policies affect the franchise relationship?

The Österreichische Franchise Gesellschaft was a pioneer in drafting a regulation regarding the standardisation of franchise systems. Another industry organisation, the Österreichische Franchise Verband, has adopted a code of ethics for franchising. This code of ethics is not legally binding. No other government or trade association policies affect franchise relationships in Austria.

- 27** In what circumstances may a franchisor terminate a franchise relationship? What are the specific legal restrictions on a franchisor's ability to terminate a franchise relationship?

Generally, the circumstances of termination are specified in the franchise agreement.

Franchise agreements under Austrian law generally end through lapse of time, notice or amicable termination. The agreement can be terminated without notice in the case of good cause, which exists if there is a serious infringement of contractual duties (for example, a repeated breach of important rules of the franchise system). Such termination has to take place within a reasonable time after said cause.

- 28** In what circumstances may a franchisee terminate a franchise relationship?

Both the franchisor and the franchisee may terminate the franchise relationship if there is good cause or any other cause as stipulated in the franchise agreement. See question 25.

- 29** May a franchisor refuse to renew the franchise agreement with a franchisee? If yes, in what circumstances may a franchisor refuse to renew?

The principle of freedom of contract prevails. The renewal of a franchise agreement is exclusively subject to the agreement between the parties. Therefore, a franchisor may refuse to renew the franchise agreement without any justification for this decision. Nevertheless, under certain circumstances the franchisors' freedom of decision is limited concerning claims for damages (for example, preceding investments of franchisees).

- 30** May a franchisor restrict a franchisee's ability to transfer its franchise or restrict transfers of ownership interests in a franchisee entity?

Transfers of the franchise or restrictions of transfers of ownership interests in a franchise are subject to the principle of freedom of contract. A franchisor may restrict a franchisee's ability to transfer their franchise or restrict transfers of ownership interests in a franchisee entity in the franchise agreement. In particular, the transfer of the franchise is subject to the franchisor's prior written approval.

- 31** Are there laws or regulations affecting the nature, amount or payment of fees ?

There are no specific laws or regulations affecting the nature, amount or payment of fees. These issues are subject to negotiation between the parties. In practice, the franchisee can expect an initial franchise fee (to be paid upon conclusion of the agreement), a regular fee (principally depending on a percentage of the realised profits or turnover of the franchisee), a marketing fee, etc.

- 32** Are there restrictions on the amount of interest that can be charged on overdue payments?

For entrepreneurs, the rate of interest for overdue payments is 8 per cent above the base interest rate of the Austrian National bank unless otherwise agreed upon by the contractual parties.

- 33** Are there laws or regulations restricting a franchisee's ability to make payments to a foreign franchisor in the franchisor's domestic currency?

There are no such regulations in Austria. The franchisor and franchisee are free to agree on any currency for making payments.

- 34** Are confidentiality covenants in franchise agreements enforceable?

Confidentiality covenants in franchise agreements are enforceable in Austria. If a franchisee does not comply with their obligation to keep the know-how or business secrets confidential, the franchisor may request an injunction and claim damages from the franchisee.

- 35** Is there a general legal obligation on parties to deal with each other in good faith? If so, how does it affect franchise relationships?

In Austria the principle of good faith regulates the enforcement of existing rights – or, in other words, it requires that rights are exercised in good faith. Any contractual party has an obligation to deal with the other party in good faith. A breach of this obligation may be taken into account by a judge with respect to the parties' liability.

Update and trends

One hot topic regarding the legal aspects of European franchising is a possible (goodwill) indemnity for franchisees by way of analogy to section 24 of the Austrian Commercial Agents Act (Handelsvertretergesetz).

Briefly, under certain circumstances, a commercial agent shall be entitled to (goodwill) indemnification if the contract is terminated. The agent shall be entitled to an indemnity if he has brought new customers to the principal or significantly increased the volume of business with existing customers and the principal continues to derive substantial benefit from the business with such customers. The payment of this indemnity has to be equitable having regard to all the circumstances.

The German Federal Court took up the fundamental idea of the (goodwill) indemnity and applies section 89b of the German Commercial Code (Handelsgesetzbuch) by way of analogy. One main condition for such an analogy is the integration of the authorised dealers into the sales organisation of the principal in a manner similar to that of a commercial agent.

The Austrian Civil Supreme Court uses the same argument to affirm claims for indemnification of authorised distributors. The Court adopted the criteria and arguments developed by the German Civil Supreme Court nearly word for word. The Austrian Civil Supreme Court cites the German Civil Supreme Court in a considerable number of court decisions.

There have been two rulings issued by the Austrian Civil Supreme Court in which the court held that a (subordination) franchisee was entitled to (goodwill) indemnity under the same arguments as put forward for the indemnity of authorised distributors.

Although the German Civil Supreme Court was the first supreme court to apply the commercial agent's indemnity by analogy to authorised dealers, at present Austria seems to be the only country within the EU whose supreme court decided on the analogous application of the commercial agent's indemnification for goodwill

to franchisees. The Austrian Civil Supreme Court stated that the legal status of a franchisee is 'absolutely comparable' to that of the authorised dealer. Consequently, it applies the same arguments to franchisees that are used for authorised dealers both in German and Austrian case-law.

According to the Austrian Civil Supreme Court, the main criterion for justifying the analogy is 'an integration in the principal's distribution processes comparable to that of the commercial agent'.

The Austrian Civil Supreme Court developed a list of contract clauses which can indicate such an integration of the franchisee or distributor. This list only contains indications, which do not have to appear cumulatively. The most decisive factor is a general perspective, whereas the Austrian Civil Supreme Court seems to apply stricter standards on some indications, such as the non-competition clause.

Even section 27 paragraph 1 of the Commercial Agents Act is applied by way of analogy. Thus, the analogous indemnity is also compulsory and cannot be derogated to the detriment of the franchisee before expiry of the franchising contract.

Basically, the calculation of the franchisee's indemnity in Austria is similar to that of the commercial agent. However, before the franchisee's trade margin and the commercial agent's margin can be compared, the franchisee's trade commission has to be adjusted. One example for this adjustment would be that remuneration for administrative work must be deducted, as it is usually not part of the commercial agent's activity or is at least not compensated by the principal.

If there is a high degree of brand awareness, the practice of the courts usually makes deductions for what is referred to as the pull effect of the brand (*Sogwirkung der Marke*) for equitable reasons. Such a deduction for an authorised car dealer, for example, would range between 10 and 25 per cent. In contrast, there are no deductions if the franchise contract already takes into account the pull effect of the brand by granting the franchisee a lower trade margin.

- 36** Does any law treat franchisees as consumers for the purposes of consumer protection or other legislation?

In Austria the initial founders are protected by consumer protection law. Not all provisions of the Commercial Code may apply to the franchise agreement.

- 37** Must disclosure documents and franchise agreements be in the language of your country?

Austrian law does not require the franchisor to provide disclosure documents and franchise agreements in German. But if the franchise agreement foresees Austrian jurisdiction, a certified translation of the agreement will have to be provided in court proceedings.

- 38** What restrictions are there on provisions in franchise contracts?

Restrictions on provisions in franchise agreements follow Austrian and European antitrust law and consumer protection law. See questions 9, 10 and 25.

- 39** Describe the aspects of competition law in your country that are relevant to the typical franchisor. How are they enforced?

Austrian competition law is in line with European competition law. The latter is applicable as soon as trade between EU member states is affected.

All forms of competition restraints in distribution agreements, such as non-compete clauses, price-fixing and guaranteed exclusive areas, are in line with European antitrust law. It prohibits agreements between undertakings that may affect trade between member states and that have as their object or effect the prevention,

Sylvia Freygner, Attorney-at-law

Sylvia Freygner

Annagasse 6
1010 Vienna
Austria

Tel: +43 1 512 33 93
Fax: +43 1 512 33 93 50
office@freygner.com
www.freygner.com

restriction or distortion of competition within the common market. Except for hardcore restrictions such as price-fixing, under certain circumstances exemptions can be made on an individual basis or, if applicable, under a block exemption. Austrian law is in line with European antitrust laws, but Austrian antitrust law regarding the misuse of a dominant position is wider in scope since it allows for the existence of a dominant position if one party has a severe business disadvantage coupled with a reliance on the imposing (and therefore 'dominant') party.

Non-compete obligations often prohibit the franchisee, during the duration of the agreement, from running a competing business in the same market as the franchise. Such non-compete obligations are subject to competition law, as this implies the restriction of the franchisee's freedom of business activities and prevents other franchisors from distributing their products or services through the franchisee involved. Provisions in franchise agreements essential to protect the franchisor do not constitute competition restrictions on article 101 of the Treaty on the Functioning of the European Union. If a non-compete clause is not essential for the protection of the franchisor, the BER can still apply. In any such case, non-compete clauses for the duration of the agreement must not exceed a period of five years if the franchisor is the owner or lessor of the business premises. In contrast, non-compete clauses after the termination of an agreement may not exceed one year. These exemptions apply where the franchisor and the franchisee each have less than 30 per cent market share. If a franchise partner has a market share above 30 per cent, an individual self-assessment regarding whether such provision of the franchise agreement restricts competition on the respective market must be conducted.

According to the BER, post-term non-compete clauses are generally invalid. Non-compete clauses for one year are exempted if they apply to competing products or services only, are essential for the protection of know-how and are restricted to the franchisee's sites. It can always be agreed that the franchisee is not allowed to use the know-how provided by the franchisor after the term of the agreement, as long as the know-how is not publicly known.

There are no time restrictions for such clauses.

Every form of direct or indirect price-fixing is strictly prohibited by Austrian and European antitrust law. The franchisee must be free to determine the price of his or her products or services. Price-fixing clauses cannot be exempted by the BER. Nevertheless, the franchisor is allowed to set maximum retail prices and to issue non-binding price recommendations.

In general, a franchisor cannot be provided with an absolutely exclusive area. Nevertheless, franchisees may be prohibited from distributing actively outside of their exclusive areas. Active distribution consists of all forms of marketing where the franchisee is actively approaching potential customers. Passive distribution concerns all forms of marketing where the franchisee is not actively approaching potential customers. Passive distribution cannot be prohibited.

Consequently, a franchisee is always allowed to deliver goods or render services at the request of a customer, even if this customer is located outside of their area. Sales over the internet are a form of passive distribution.

Also, according to the BER, restrictions of cross-supplies between distributors are not allowed within a selective distribution system. Consequently, franchisees cannot be prohibited from acquiring cross-supplies from other franchisees, should the franchise system be in the form of a selective distribution system.

40 Describe the court system. What types of dispute resolution procedures are available relevant to franchising?

The ordinary Austrian courts are district courts, courts of appeal and the supreme court. They have jurisdiction over all civil law matters unless there is a special court for a particular area (for example, the Commercial Court in Vienna for commercial disputes).

The Austrian Civil Procedure Code (Zivilprozessordnung) defines procedural rules and regulations applicable to national and international arbitration

Franchisors and franchisees are also entitled to submit all or certain disputes to arbitration.

The most popular arbitration institution is the International Arbitral Centre of the Austrian Federal Economic Chamber (WKÖ) in Vienna.

41 Describe the principal advantages and disadvantages of arbitration for foreign franchisors considering doing business in your jurisdiction.

Among the advantages of arbitration is the ability to maintain privacy during dispute resolution: the issue will not be a matter of public record. Negative publicity and media coverage can adversely affect a franchisor's name and may serve to negatively influence the chances of a foreign franchisor receiving a good reception in new markets. Disadvantages are, sometimes, expenses incurred and the fact that the forum for arbitration may not always be convenient for the foreign franchisee.

42 In what respects, if at all, are foreign franchisors treated differently from domestic franchisors?

Generally, foreign franchisors are treated no differently from domestic franchisors. There are differences regarding the purchase of real property (see question 8).