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ANALOGOUS APPLICATION OF THE AUSTRIAN ACT ON COMMERCIAL AGENTS TO FRANCHISEES

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In the absence of specific franchise legislation, the Austrian Supreme Court has held that in certain circumstances the legislation governing commercial agency agreements can be applied to franchise relationships by analogy. This approach is relevant in particular to provisions relating to the termination of an agreement for good cause and compensation payable upon termination.

Legal notion of franchising in Austria

The Austrian legislation does not provide for a separate and specific national franchise law, other than applying the Block Exemption Regulation 2790/99 (EC) also in purely national circumstances. However, the Austrian Supreme Court has held that, under certain conditions, the provisions of the Act on Commercial Agents ("*Handelsvertretergesetz*", HVertrG) relating to the payment of compensation after termination of an agreement are applicable by way of analogy to franchise relationships.

Concept of analogous application of laws in Austria

Although the Austrian legal system is based on codified law and not on case law, these codified laws, in particular Article 7 of the Austrian Civil Code, specifically allow for "legal gaps" to be filled. A gap in the law is by definition an unintentional incompleteness within a field of law when compared with the intentions and purposes of a specific law or of the legal system as a whole. However, not every legal gap may be remedied; only such circumstances which have not – without any possible doubt – been

taken into consideration by the legislative body, may constitute a gap which may be remedied. Any gap which was created deliberately has to remain. An unintentional gap on the other hand can be remedied by way of analogous application of the legal provisions which govern facts and circumstances comparable to those for which one has established the existence of an unintentional gap in the law. The justification is that the legislative body is well aware of its inability to create rules for specific and unknown circumstances which may emerge in the future, and one therefore allows the courts to judge equal or similar circumstances in an equal or similar way – even in the absence of a specific law – in order to preserve the uniformity of the principles of the Austrian legal system.

Analogous application of the Austrian Act on Commercial Agents to franchisees

As mentioned above, there are no legal provisions in Austria for franchise relationships, thus creating a gap in the law. The Austrian Supreme Court has held that, under specific circumstances, the position of a

“... franchise relationships have to be assessed on a case-by-case basis in terms of their similarity to a commercial agent relationship.”

franchisee may be so close to the legal status of a commercial agent that an unequal treatment is considered unjustified. Franchise relationships were, however, not the first field where agency law was applied by analogy. Austrian courts began already in the late 1980s (as German courts had started to do in the late 1970s) to apply by analogy different provisions of the Commercial Agents Act to distributor relationships, and in particular the post termination compensation provisions, when two conditions were fulfilled:

- Integration of the distributor into the principal's sales network in the way an agent usually is; and
- Principal profits from the business relationships built by its former distributor even after termination of the contract.

The Austrian Supreme Court applied the same principle to franchise agreements for the first time in 1991. Further to this case law the following circumstances may be considered as a sign of the full integration of a franchisee into a franchisor's sales network:

- Assignment of a contract territory by the franchisor, even if it is not exclusive;
- Obligation to operate an efficient sales and service organisation;
- Obligation to buy and promote the contractual goods on an ongoing basis;
- Obligation to promote and market new goods;
- Obligation to keep a minimum quantity of the goods in stock;
- Obligation to purchase a minimum amount of goods;

- Provision of warranty and after sale services according to the directions of the franchisor;
- Obligation to participate in regional/national advertising campaigns;
- Non-competition clause;
- Duty to report;
- Franchisor's right to inspect the franchisee's books and accounts;
- Franchisor's right of access to the franchisee's premises

However, it has to be pointed out that the degree of accumulation of the above-mentioned criteria for the analogous application of the Austrian Act on Commercial Agents has not yet been determined. It is obvious that most of the criteria mentioned are typically found in any franchise agreement. Nevertheless, franchise relationships have to be assessed on a case-by-case basis in terms of their similarity to a commercial agent relationship.

The Austrian Supreme Court until now has held in particular sec. 22 and 24 of the Austrian Act on Commercial Agents to be applicable to franchisees:

- Sec. 22 relates to the termination of a commercial agency agreement for good cause;
- Sec. 24 relates to the compensation (“*Ausgleichsanspruch*”) payable to the commercial agent after termination.

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