

International **Comparative** Legal Guides



Franchise **2020**

A practical cross-border insight into franchise law

Sixth Edition

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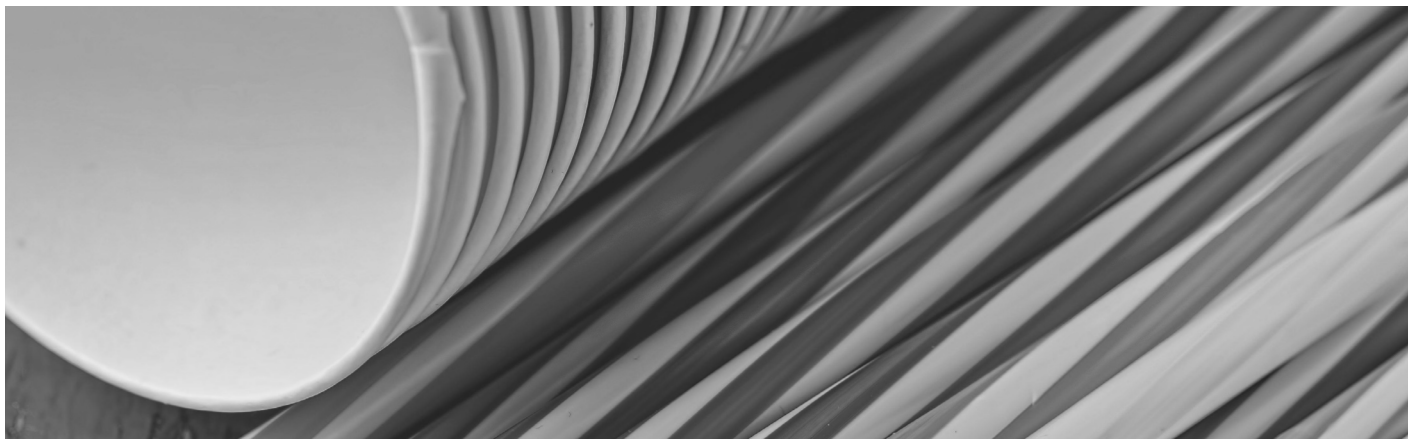
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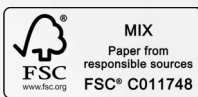
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Austria

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1 Relevant Legislation and Rules Governing Franchise Transactions

1.1 What is the legal definition of a franchise?

There is no legal or generally applicable definition of franchising in Austria.

With reference to the Franchising Code of Ethics of the European Franchise Federation (EFF), franchising is defined as follows by the Austrian Franchise Association:

Franchising is a distribution system through which goods and/or services and/or technologies are marketed. It is based on close and continuous cooperation between legally and financially independent companies, the franchisor and its franchisees. The franchisor grants his franchisees the right and at the same time imposes on them the obligation to operate a business in accordance with his concept. This right entitles and obliges the franchisee to use the franchisor's system name and/or trademark and/or service mark and/or other intellectual property rights and know-how, economic and technical methods and business system for a direct or indirect fee within the framework and for the duration of a written franchise agreement concluded for this purpose between the parties, with ongoing technical and commercial support from the franchisor.

The Austrian civil supreme court defines the franchise agreement as follows:

The franchise agreement establishes a continuing obligation relationship whereby the franchisor grants the franchisee the right, against payment, to distribute certain goods and/or services using the franchisee's name, trademark, equipment, etc., as well as the franchisor's commercial and technical experience and in compliance with the franchisee's organizational and advertising system developed by the franchisor, whereby the franchisor provides the franchisee with technical and sales assistance, advice and training and exercises control over the franchisee's business activities.

1.2 What laws regulate the offer and sale of franchises?

There are no specific laws, regulations or government authorities that regulate the offer and sale of a franchise in Austria. The principle of freedom of contract applies.

For offers and sales of franchises, besides European legislation (e.g. GDPR) and the general provision of contract law of the Civil Code, the following Austrian laws in particular must be taken into consideration: the Consumer Protection Act; the Act Against Unfair Competition; the Antitrust Law; the Corporate Code; the Trademark Protection Act; and the Copyright Law.

In addition, in most cases the provision of the Austrian Civil Code concerning general business terms may apply. All standard-

form contracts are subject to a "fair and reasonable" test. In particular, section 864a and section 879 paragraph 3 of the Austrian Civil Code may be applicable. 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) lack(s) 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.

The franchise agreement also may not be *contra bonos mores* (against generally accepted standards of moral behaviour and public decency).

Besides, the (non-binding) Code of Ethics of the Austrian Franchise Association may give directions and recommendations in some legal regards.

1.3 If a franchisor is proposing to appoint only one franchisee/licensee in your jurisdiction, will this person be treated as a "franchisee" for purposes of any franchise disclosure or registration laws?

In principle, the same legal regulations apply, regardless of whether a sole (or the first) franchisee begins or several franchisees start their business.

However, due to the lower experience rates, there may be differences in the pre-contractual clarification. For example, the franchisor must inform the franchisee in advance that the franchisee is the sole or first franchisee and that there is no or only limited experience.

1.4 Are there any registration requirements relating to the franchise system?

There are no legal or other obligations to register or otherwise make known a franchise system.

1.5 Are there mandatory pre-sale disclosure obligations?

There are no legal provisions or regulations stating exact pre-sale disclosure obligations. Neither is there comprehensive jurisdiction stating clear rules or guidelines in this regard.

Generally, according to the Austrian Civil Code, prior to the conclusion of a contract (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 contract is 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 its sales forecast. Any lack of information or misleading information that is relevant for the potential franchisee's business may lead to liability on the basis of a breach of pre-contractual disclosure obligations (*culpa in contrahendo*). In some cases, it may also lead to the franchisee's right to challenge the whole contract due to error.

Generally, the (non-binding) Code of Ethics of the Austrian Franchise Association recommends information on the following topics:

- Legal name, legal form and legal address of the franchisor.
- Trade mark, 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.
- Pending lawsuits with an impact on the potential franchisee's business.

As a guideline, franchisors are well advised to follow the additional recommendations of the (non-binding) Code of Ethics of the Austrian Franchise Association:

- Advertising for the acquisition of franchisees should be without ambiguity and without misleading information.
- All advertisements and promotional material for the purpose of franchisee acquisition that directly or indirectly address any future results, numbers or merits that may be expected from individual franchisees shall be factually accurate and unambiguous.
- In order to enable prospective franchisees to enter into any binding agreement in full knowledge of the facts, a copy of the current Code of Ethics or public access thereto will be provided to them within a reasonable time prior to the signing of that binding agreement and full and accurate written disclosure of all information and documents relevant to the franchise will be provided.

If the franchisee does not conclude the franchise agreement on behalf of a corporation, he may be classified as a consumer within the meaning of the Consumer Protection Act. In such a case, the franchisee may, under certain circumstances, have a right of withdrawal for at least 14 days in respect of the franchise agreement concluded by him. If the franchisee is not properly informed about this right of withdrawal, he can revoke the contract within one year and 14 days.

1.6 Do pre-sale disclosure obligations apply to sales to sub-franchisees? Who is required to make the necessary disclosures?

In case of sub-franchising, it is the sub-franchisor's obligation to fulfil pre-sale disclosure obligations. The general aspects and rules of pre-sale disclosure apply (see question 1.5). In addition, the sub-franchisor has to provide proper information about specialties related to the sub-franchising structure.

1.7 Is the format of disclosures prescribed by law or other regulation, and how often must disclosures be updated? Is there an obligation to make continuing disclosure to existing franchisees?

There is no specific format of disclosure prescribed by Austrian law or other regulation. As a guideline, franchisors are well advised to follow the recommendations of the (non-binding) Code of Ethics of the Austrian Franchise Association (see question 1.5), which ask for all relevant information to be provided in writing. Besides the latter, it is also highly advisable to have written proof of disclosures provided in case of court proceedings.

There is no general obligation for continuing disclosure to existing franchisees. Nevertheless, an obligation to provide the franchisee with updates relevant to his business can follow from the general principle of good faith and the mutual duty of loyalty under the franchise agreement. The obligation for disclosure to existing franchisees may also be relevant in case of relevant adaptations of the franchise structure in general or the franchisee's business specifically.

1.8 What are the consequences of not complying with mandatory pre-sale disclosure obligations?

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 up-front, the franchisee has the right to claim damages (*culpa in contrahendo*). The franchisor has to put the franchisee in the position it would have been in if the franchisor had fulfilled its disclosure obligation. If the franchisee agreed to the franchise agreement without full disclosure, it may rescind the franchise agreement. The franchisor, therefore, can be ordered to consent to the cancellation of the franchise contract, to pay all franchise fees obtained back to the franchisee and to reimburse the franchisee for all expenses incurred in connection with the franchise business. At the same time, income already earned from the franchise has to be deducted.

In very severe and exceptional cases, the franchisor could commit the criminal offence of fraud if he (intentionally) misleads the franchisee by deceiving him about relevant facts into signing the franchise agreement and causing the franchisee damages.

1.9 Are there any other requirements that must be met before a franchise may be offered or sold?

Under Austrian statutory law, there are no franchise-specific obligations that have to be met before a franchise may be offered or sold. The franchisor must comply with the general principles as described above. In addition, all marketing and advertising material shall comply with local advertising laws and standards and should not be misleading.

The (non-binding) Code of Ethics of the Austrian Franchise Association states the following obligations:

- The franchisor must have successfully operated a business concept in the relevant market for at least one year and with at least one pilot project.
- The franchisor must be the owner or rightful user of the company name, trade mark or other special identification of its franchise system.
- The franchisor must provide initial training to the individual franchisee and provide ongoing commercial and/or technical assistance throughout the term of the contract.

Observance of the stated principles of the Code of Ethics is obligatory in order to become and remain a member of the Austrian Franchise Association.

1.10 Is membership of any national franchise association mandatory or commercially advisable?

No, membership of the Austrian Franchise Association is not mandatory. The Austrian Franchise Association offers different membership models, depending especially on seniority. Generally, membership of the Austrian Franchise Association is seen as a quality feature for recognised franchise systems within Austria. Thus it is commercially recommendable to become a member at some point.

1.11 Does membership of a national franchise association impose any additional obligations on franchisors?

Members of the Austrian Franchise Association must comply with the standards set in the Code of Ethics (see <https://www.franchise.at/wp-content/uploads/2019/07/ETHIKKODEX-2018.pdf>). The Code of Ethics of the Austrian Franchise Association is in compliance with the European Code of Ethics for Franchising of the European Franchise Federation (EFF).

Additionally, to become a full member, franchisors must conduct a comprehensive quality review, including the checking over of the franchise agreement by an attorney.

1.12 Is there a requirement for franchise documents or disclosure documents to be translated into the local language?

No, there is no such requirement. Nevertheless, in case of court proceedings in Austria, a (certified) translation of the agreement and all other relevant documents will become necessary, given that the language in court needs to be German.

2 Business Organisations Through Which a Franchised Business Can be Carried On

2.1 Are there any foreign investment laws that impose restrictions on non-nationals in respect of the ownership or control of a business in your jurisdiction?

No, generally there are no Austrian investment laws or other national laws that impose restrictions on non-nationals in respect of the ownership or control of a business.

2.2 What forms of business entity are typically used by franchisors?

Franchisors may continue using their initial legal entity in their home country. If they want to set up a business in Austria, they may do so under a variety of legal forms, e.g.:

- Sole trader (*Einzelunternehmer*; suitable only for single entrepreneurs).
- Partnerships (*Offene Gesellschaft, Kommanditgesellschaft*; generally no limitation in liability).
- Public Limited Liability Company (*Aktiengesellschaft*).
- Limited Liability Company (*Gesellschaft mit beschränkter Haftung – GmbH*).

The most common legal form is the GmbH due to its limitation of personal liability for the shareholders and a noteworthy freedom regarding internal agreements. An Austrian GmbH requires a minimum amount of capital investment (generally at least €35,000; under certain circumstances at least €10,000 in case of a “foundation privilege”). A GmbH must publish its annual accounts in the commercial register.

Franchise joint ventures as a vehicle for establishing a network in Austria are possible but are not a common vehicle.

There is no reasonable data on whether master franchising or area development is more common in Austria. Nevertheless, both options are a reasonable and possible way of getting into the Austrian market. In case of an area development agreement, less comprehensive pre-sale disclosure obligations may apply.

2.3 Are there any registration requirements or other formalities applicable to a new business entity as a pre-condition to being able to trade in your jurisdiction?

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, restrictions exist, depending on the type of activity sought to be performed and the location of that specific business.

There are some (few) exclusions from this obligation. 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 latter require compliance with specific criteria (namely age, qualification and experience). All trades are registered in the trade register.

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. This representative, who can be a different person from the managing director but needs to be an employee of the company (with at least 20 hours per week of working time), is responsible for compliance with industrial trade law provisions. Generally, the business representative may not carry out his activity for more than two companies at the same time.

3 Competition Law

3.1 Provide an overview of the competition laws that apply to the offer and sale of franchises.

Austrian competition law is in line with European competition law. The latter is applicable as soon as trade between EU Member States is affected, which is usually the case.

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, 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 (e.g. EU Block Exemption Regulation No. 330/2010 – BER). Austrian law is in line with European antitrust law, but Austrian antitrust law regarding misuse of dominant position is wider in scope because it permits the existence of a dominant position when one party has a severe business disadvantage coupled with a reliance on the imposing (and therefore “dominant”) party.

In addition to antitrust regulations, the competitive relationship with competitors is regulated in particular by the Act against Unfair Competition (UWG).

3.2 Is there a maximum permitted term for a franchise agreement?

In principle, Austrian law allows freedom of contract; the parties can make an individual agreement. Exceptions to this rule usually follow – in connection with franchising – antitrust law, the rules on contract forms or general terms and conditions and consumer protection law. Under certain conditions, some provisions of the Commercial Agents Act can also be applied analogously to franchisees.

As a general rule, particularly long contractual relationships of the franchisee (10 years or more) require special justification. One argument can be particularly large investments on the part of the franchisor.

Conversely, particularly short contract periods or particularly short termination options in favour of the franchisor can often trigger claims for damages by the franchisee or are even considered invalid if a large part of the investments agreed with the franchisor are lost to the disadvantage of the franchisee as a result.

3.3 Is there a maximum permitted term for any related product supply agreement?

Generally, the franchisor must be able to take the 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. That is also the case with regard to the franchisee's obligation to sell the goods covered by the contract only in premises laid out and decorated according to the franchisor's instructions, which is intended to ensure uniform presentation in conformity with certain requirements (see European Court of Justice, judgment of 28 January 1986, case No. 161/84, ECR 1986, 353, *Pronuptia*). In practice, the benchmark for proving that a restriction on competition (e.g. purchase obligation) is essential for the franchise system can be quite high.

If a purchase obligation is not essential for the identity and reputation of the franchise system (or this circumstance cannot be proven), the BER can still apply: according to Art 5 BER, purchase obligations are exempted by the BER where the duration is neither indefinite nor exceeds five years. Contracts that are tacitly renewable beyond a period of five years are therefore not exempted by the BER. In the case that goods are sold or services are provided by the franchisee from the premises and land owned by the franchisor or leased by the franchisor from a third party not connected to the franchisee, the non-compete obligation may be of the same duration as the period of occupancy of the premises and land.

The BER only applies to franchise systems with a market share of less than 30 per cent. In case of higher market shares, an individual exemption under article 101(3) TFEU might still be possible.

3.4 Are there restrictions on the ability of the franchisor to impose minimum resale prices?

Generally, 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 its products or services. This includes the franchisee's actual and technical possibility to set his own price (e.g. in his IT software, etc.). 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. Regarding the guidelines on vertical restraints of the European Commission, fixed resale prices may be permissible to organise a coordinated short-term low price campaign in a franchise system (two to six weeks in most cases).

It is highly recommendable to consult a specialised lawyer before imposing any kind of pricing guidelines on the franchisee.

3.5 Encroachment – are there any minimum obligations that a franchisor must observe when offering franchises in adjoining territories?

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 is all forms of marketing where the franchisee is not actively approaching potential customers, but just responding to their requests. Passive distribution cannot be prohibited. Thus the franchisee cannot be restricted in delivering goods or providing services to customers outside of his exclusive area, if such customers were not approached actively by the franchisee. In general, the European Commission considers having a website as a form of passive selling that cannot be prohibited either.

Even when not having agreed on an exclusive area, there might be restrictions on the franchisor granting a second franchisee rights to operate a franchise in the initial franchisee's area. This restriction is based on the mutual duty of loyalty under the franchise agreement, under which both parties are obliged to support each other's businesses and to avoid harming it.

3.6 Are in-term and post-term non-compete and non-solicitation of customers covenants enforceable?

Non-compete obligations often prohibit the franchisee, for 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 their effect is the restriction of the franchisee's freedom of business activities and the prevention of other franchisors from distributing their products or services through the franchisee involved. Provisions in franchise agreements that are essential to protecting the franchisor do not constitute restrictions of competition for the purpose of 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 such case, non-compete clauses for the duration of the agreement must not exceed a period of five years or longer 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 a 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. Generally, the franchisee cannot claim compensation for a (valid) post-term non-compete obligation.

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.

Under Austrian procedural law, in-term and post-term non-compete clauses can be enforced by way of an action for injunction and by way of a court-ordered interim injunction.

A claim for injunction exists if two elements are given: (i) duty to cease and desist; and (ii) risk of infringement of this obligation to refrain. Therefore, it is not necessary to prove fault.

In addition, injunctive relief claims presuppose that a breach of fair trading law has taken place (so-called genuine injunction claims) or is imminent (so-called preventive injunction claims). If the infringer has already acted against it once, it is assumed that he will act against it again in the future (risk of recurrence); if he has acted lawfully so far, it must be proven that the infringement is imminent (risk of first infringement).

4 Protecting the Brand and Other Intellectual Property

4.1 How are trade marks protected?

The protection of a trade mark can arise almost by itself through use, popularity and fame or can also be applied for and registered. Even without application/registration, certain protection already exists by law, in particular under section 9 of the Federal Act Against Unfair Competition. Logos may also be protected by copyright. Please note that the protection of a non-registered trade mark is less and its enforcement is much more difficult than in comparison to a properly registered trade mark. Besides, the catalogue of possible claims is shorter.

There are different types of trade marks:

1. Word mark for pure names, regardless of the representation.
2. Word and figurative mark for the combination of lettering with graphic elements.
3. Figurative mark for logos without lettering.
4. Other types of trade mark such as 3D trade mark, position trade mark, multimedia trade mark, colour trade mark, etc.

A broader protection is offered by the word mark compared to the word and figurative mark. However, this broader protection also increases the risk of conflict. If a sign consists of a word and a picture, the dominant part is decisive for the overall impression.

Normally, trade mark protection is necessary and sensible where the franchisor's own market interest or the market interest of the franchisee lies.

The following possibilities are available:

1. National application directly in Austria at the Austrian Patent Office (www.patentamt.at).
2. International application: Direct national application in Austria at the Austrian Patent Office and extension of this basic trade mark to other countries within six months at an international level.

3. EU trade mark with an application at the European Union Intellectual Property Office (EUIPO; www.euiipo.europa.eu).

The EU trade mark offers the advantage of covering the entire EU internal market (caution: without Switzerland, Liechtenstein, Norway, Iceland!). Registration is possible with or without prior Austrian trade mark registration.

With the registration of a trade mark, it is protected for 10 years from the date of registration in the trade mark register. The protection can then be extended indefinitely for a further 10 years at a time.

4.2 Are know-how, trade secrets and other business-critical confidential information (e.g. the Operations Manual) protected by local law?

Austria has implemented the provisions of the EU Trade Secrets Directive (2016/943) in sections 26a–26j of the UWG. The provisions are intended to provide stronger protection for trade secrets and counteract the danger of industrial espionage and betrayal of secrets. Previously, the protection of trade and business secrets was mainly characterised by case law. Nevertheless, compared to other European countries, the protection level was at a decent level before the implementation of the Trade Secrets Directive.

As legal remedies, the law provides for provisional and precautionary measures by way of interim injunctions; furthermore, the seizure or delivery of suspected infringing goods shall be possible. In cases of intentional behaviour, the infringer shall pay damages to the trade secret holder.

Claims arising from the infringement of trade secrets are subject to a limitation period of three years from the date of knowledge of the infringement and the alleged infringer. In any case, such claims shall become time-barred six years after the act of infringement occurred.

Negligence in the protection of one's own know-how can lead to the loss of legal protection. In addition to appropriate technical precautions, the necessary protective measures also include confidentiality agreements.

The new sections in the Act against Unfair Competition are also intended to provide for new procedures to protect the confidentiality of trade secrets in the course of legal proceedings.

4.3 Is copyright (in the Operations Manual or in proprietary software developed by the franchisor and licensed to the franchisee under the franchise agreement) protected by local law?

Copyrights are protected under the Austrian Copyright Act. In case of a copyright infringement, Austrian law offers different instruments, such as civil, criminal and competition law. The copyright holder may, amongst other authorised users, claim removal, omission and damages. Under certain circumstances, copyright infringement may also be considered an unfair business practice under the UWG.

There is no database or register of works subject to copyright protection. In many cases, the franchise operations manual as a whole is subject to copyright protection. Whether individual parts of it also enjoy copyright protection can only be assessed on a case-by-case basis.

5 Liability

5.1 What are the remedies that can be enforced against a franchisor for failure to comply with mandatory disclosure obligations? Is a franchisee entitled to rescind the franchise agreement and/or claim damages?

Any lack of information or misleading information in regard to disclosure that is relevant for the potential franchisee's business may lead to liability on the basis of a breach of pre-contractual disclosure obligations (*culpa in contrahendo*). The franchisee might be entitled to claim damages. In some cases, it may also lead to the franchisee's right to challenge the whole contract due to error.

In very severe and exceptional cases, the franchisor may realise the criminal offence of fraud if he (intentionally) misleads the franchisee by deceiving him about relevant facts into signing the franchise agreement and causing the franchisee damages.

5.2 In the case of sub-franchising, how is liability for disclosure non-compliance or for pre-contractual misrepresentation allocated between franchisor and master franchisee? If the franchisor takes an indemnity from the master franchisee in the Master Franchise Agreement, are there any limitations on such an indemnity being enforceable against the master franchisee?

Both sub-franchisors and franchisees are generally self-employed, independent entrepreneurs who are (also usually by contract) not allowed to act on behalf and for the account of their (sub-)franchisor. There is no direct contractual relationship between the franchisor and the sub-franchisees.

Therefore, sub-franchisees can only claim damages against the franchisor by tort law or product liability. Thus, a sub-franchisor is solely responsible for fulfilling the disclosure obligations with regard to his sub-franchisees (see question 1.6).

Nevertheless, under certain circumstances, the sub-franchisor has the opportunity to regress to the franchisor, in cases where the sub-franchisor has used and legitimately relied on the franchisor's disclosure material containing misleading information regarding the sub-franchisees.

In this regard, Austrian law does not provide a possibility to exclude liability for injury to life, body or health and in case of gross fault in the franchise agreement.

5.3 Can a franchisor successfully avoid liability for pre-contractual misrepresentation by including disclaimer clauses in the franchise agreement?

General disclaimers in the franchise agreement (or in other documents) do not automatically lead to the loss of any possible liability. Nevertheless, certain disclaimers or explanations might be recommendable to avoid accusations of providing misleading information.

5.4 Does the law permit class actions to be brought by a number of aggrieved franchisees and, if so, are class action waiver clauses enforceable?

There is a "class action of Austrian coinage", also called a "test process" or "association sample action". It is known as an "Austrian-style" class action lawsuit because, for example, a class action in the

USA – contrarily to Austria – does not require an individual assignment of each claim, but rather the "opting out" of those affected who do not wish to be affected by the effects of the class action.

In regard to franchise agreements, this kind of "Austrian class action" seems rather unlikely and not very practical. In practice, class actions in regard to franchise agreements are not common. Nevertheless, action waiver clauses will, in most cases, not be valid due to the Austrian law on standard terms.

6 Governing Law

6.1 Is there a requirement for franchise documents to be governed by local law? If not, is there any generally accepted norm relating to choice of governing law, if it is not local law?

Generally, the principle of contractual freedom also allows the choice of the place of jurisdiction and the applicable law to be made by mutual agreement (see also article 3 of Regulation (EC) No. 593/2008, 'Rome I'). Nevertheless, according to the European provisions on conflict of laws, there are certain provisions that cannot be excluded even by a valid choice of law, for instance consumer protection law (see article 6 Rome I), competition law (see article 9 Rome I) and employment law (see article 8 Rome I).

Furthermore, Austrian law can apply where provisions of a foreign law interfere with fundamental principles of the Austrian jurisdiction (so-called '*ordre public*', article 21 Rome I).

In the event that its application is not explicitly excluded, the provisions of the UN Convention on Contracts for the International Sale of Goods (CISG) may apply.

The mutually agreed applicable law must have some connection to the parties or the actual place of business involved. Agreements on the application of a law where none of the contracting parties has its business nor the franchise agreement itself is fulfilled might be invalid.

If the franchisee is signing the contract as a sole trader and has not been working in this field of industry before, he might be considered an initial founder (*Existenzgründer*) within the meaning of section 1 of the Consumer Protection Act (KSchG). Thus, any choice of law or agreement on the place of jurisdiction including an arbitration clause may be invalid. In this case, the franchisee might start a lawsuit and might only be sued at the court of his domicile or business and Austrian law would be applicable in cases where foreign law does not provide the same amount of protection for the franchisee.

6.2 Do the local courts provide a remedy, or will they enforce orders granted by other countries' courts, for interlocutory relief (injunction) against a rogue franchisee to prevent damage to the brand or misuse of business-critical confidential information?

A judgment of a third state (outside the EEA) generally does not have any domestic enforcement effect in Austria unless there are international agreements or a declaration of enforceability by the European Union.

If the judgment is declared enforceable in Austria, it is subsequently treated like a domestic judgment.

Judgments issued by courts of European Union Member States, which are enforceable in the Member State in which they were issued, are enforceable in all other Member States including Austria without the need for a declaration of enforceability (see article 39 Regulation (EU) No. 1215/2012).

Under certain circumstances, especially when the place of jurisdiction shall be outside of the franchisee's territory, an arbitration clause might be recommendable.

6.3 Is arbitration recognised as a viable means of dispute resolution and is your country a signatory to the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Do businesses that accept arbitration as a form of dispute resolution procedure generally favour any particular set of arbitral rules?

Especially in an international context and in the context of a foreign franchisor or sub-franchisor, arbitration clauses are not exceptional and can be recommended in most cases.

Between Austrian contract parties, the Vienna Rules of the Vienna International Arbitral Centre (VIAC) are the most common ones. Among other rules, those of the International Chamber of Commerce (ICC) are very common.

Austria is a member of the New York Arbitration Convention. There is no mandatory obligation to engage in mediation before commencing formal arbitration or court proceedings unless mutually agreed otherwise.

Please be aware that if the franchisee is signing the contract as a sole trader and has not been working in this field of industry before, he might be considered an initial founder (*Existenzgründer*) within the meaning of section 1 KSchG. Thus, any choice of law or agreement on the place of jurisdiction including an arbitration clause may be invalid. In this case, the franchisee may start a lawsuit and may only be sued at the court of his domicile or business. Additionally, Austrian law would be applicable in cases where foreign law does not provide the same amount of protection for the franchisee.

7 Real Estate

7.1 Generally speaking, is there a typical length of term for a commercial property lease?

Under Austrian legislation, there are no special franchise-related regulations concerning lease agreements or the real estate market in general. The general rules of the Civil Code and other real estate related regulations and acts apply.

Generally, the parties are free to agree on the length of term for a commercial property lease. The periods and dates of notice to be observed shall, in principle, be governed by the contractual agreement. Nevertheless, especially depending on the question of whether the lease agreement is (partially) subject to the Tenancy Act or not, different regulations regarding minimum termination periods may apply.

Temporary lease and rental contracts can only be terminated if this is agreed in the contract. If this is not the case, a time limit shall cause the contract to be mutually non-cancellable for the entire duration of the time limit.

7.2 Is the concept of an option/conditional lease assignment over the lease (under which a franchisor has the right to step into the franchisee/tenant's shoes under the lease, or direct that a third party (often a replacement franchisee) may do so upon the failure of the original tenant or the termination of the franchise agreement) understood and enforceable?

For the franchisor, it is possible to ensure that he 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. In order to successfully enforce such an agreement between the franchisor and franchisee and not only claim damages, the landlord must have agreed to this provision in the lease agreement.

7.3 Are there any restrictions on non-national entities holding any interest in real estate, or being able to sub-lease property?

Generally, there are no restrictions on non-national entities being able to (sub-)lease.

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 estate 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 estate acquirer is resident in Austria or has a residence permit. The exact regulations on the acquisition of land by foreigners are provided in the Foreigners' Acquisition Act of the individual federal states. Some bilateral agreements provide nationals of some third countries to purchase land without an authorisation procedure.

Commercial leases are often subject to the Austrian Civil Code and the Tenancy Act. Under Austrian law, it is essential to determine under which regulatory tenancy scheme or regime a certain property falls: under the liberal regime of the Austrian Civil Code or – partly or fully – under 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. The conclusion of a written lease agreement triggers stamp duty.

According to the Austrian Civil Code, subletting is in principle permitted, but it can be contractually prohibited – whereas, in the full scope of application of the Tenancy Act, a subletting prohibition can only be enforced if there are important reasons (see below).

If subletting has not been contractually prohibited, it is nevertheless not permitted if it is to the detriment of the landlord (the existing tenant).

If the lease agreement is fully covered by the Tenancy Act, the landlord may only prohibit the main tenant from subletting to a very limited extent. First of all, there must be a contractual ban on subletting. In addition, there must be an important reason against subletting. The Tenancy Act lists such an important reason demonstratively as one of the following:

- the complete subletting of the existing property;
- subletting at a disproportionately high sublease rate;
- if, as a result of subletting, the number of occupants of a portfolio property exceeds the number of its residential premises; or
- the reasonable concern that the lodger would disturb the peace of the house.

If there is a contractual ban on subletting and there is an important reason against subletting, the landlord may request the main tenant to cease subletting.

Irrespective of the question of the permissibility of subletting, this may constitute a reason for termination pursuant to the Tenancy Act.

7.4 Give a general overview of the commercial real estate market. Specifically, can a tenant reasonably expect to secure an initial rent free period when entering into a new lease (and if so, for how long, generally), or are landlords demanding “key money” (a premium for a lease in a particular location)?

From a legal point of view, the Austrian real estate market generally provides a high level of protection for tenants, even in the commercial area.

All payments in this regard (initial rent free period, key money, etc.) are subject to the parties' negotiation and the freedom of contract.

Whether or not key money has to be paid is up to the negotiation between the contracting parties.

8 Online Trading

8.1 If an online order for products or request for services is received from a potential customer located outside the franchisee's exclusive territory, can the franchise agreement impose a binding requirement for the request to be re-directed to the franchisee for the territory from which the sales request originated?

See question 3.5.

8.2 Are there any limitations on a franchisor being able to require a former franchisee to assign local domain names to the franchisor on the termination or expiry of the franchise agreement?

There are no limitations on a franchisor being able to require a former franchisee to assign local domain names to the franchisor on the termination or expiry of the franchise agreement, if the parties have agreed on such a transfer. Besides, after termination or expiry of the contract, the franchisee might not be allowed to continue using the franchisor's trade marks online or offline due to general trade mark law.

9 Termination

9.1 Are there any mandatory local laws that might override the termination rights that one might typically expect to see in a franchise agreement?

There is no specific law imposing restrictions that might override the termination rights that are typical in franchise agreements. Generally, the principle of contractual freedom applies.

In the case that the franchisee is obliged by the franchisor to make big investments (e.g. infrastructure), the franchisee might claim damages if the termination period is too tight.

9.2 Are there local rules that impose a minimum notice period that must be given to bring a business relationship that might have existed for a number of years to an end, which will apply irrespective of the length of the notice period set out in the franchise agreement?

All continuing obligations, including franchise agreements, can be terminated for good cause, irrespective of time limits, notice periods or termination dates. The right to terminate for good cause cannot be waived in the contract. In principle, the contractual relationship will be terminated immediately in the event of (justified) extraordinary termination.

Prerequisites for extraordinary termination are the existence of an important reason and the unreasonableness of maintaining the contract for the terminating party.

When assessing whether a sufficiently important reason exists, Austrian case law applies a strict standard; the extraordinary termination is therefore only the “outermost emergency valve” to terminate a contract. Important reasons include a breach of major obligations regarding the contract, considerable loss of confidence in the person of the contractual partner, or a serious change of circumstances. To assess whether, e.g., a breach of obligations regarding the contract justifies the termination of the contract for good cause, an overall evaluation of the circumstances of the individual case is required, weighing up the interests of the franchisor and the franchisee. The termination notice has to be communicated within a reasonable time after the relevant event that led to the friction in the relationship. In some cases, it may be recommendable to send a warning letter before terminating the contract with good cause.

If the reasons justifying the dissolution were already foreseeable before the conclusion of the contract or if these were accepted, a dissolution of the contract for important reasons is not possible.

Within certain limits, it is possible to contractually agree on a catalogue of possible reasons for extraordinary termination.

10 Joint Employer Risk and Vicarious Liability

10.1 Is there a risk that a franchisor may be regarded as a joint employer with the franchisee in respect of the franchisee's employees? If so, can anything be done to mitigate this risk?

In the case of a comprehensive right of instruction of the franchisor, the Austrian courts sometimes consider franchisees to be employees or at least quasi-employees.

This problem only arises where the franchisee is a natural person (sole trader) but not where the franchisee concludes the contract as a legal entity (partnership, corporation).

The term “quasi-employee” refers to service providers who are not employees due to their lack of personal dependency, but who are also not entrepreneurs due to their economic dependency or lack of self-employment.

A decisive factor for classification as a quasi-employee is economic dependence. If personal dependence is also added (e.g. mandatory requirements to be personally present for a certain number of hours), there is the risk of the franchisee being classified as a full employee.

The classification of the franchisee as quasi-employee leads, among other things, to the jurisdiction of the labour and social courts in the event of disputes. In addition, individual provisions of labour law apply. In the case of classification as an employee, the franchisor might even be confronted with holiday entitlements and entitlement to sick leave. Irrespective of this, provisions of the Commercial Agents Act may nevertheless continue to be applicable. A possible claim for a good will indemnity is also not excluded (see question 12.1).

In order to avoid such problems, care must be taken to ensure that the franchise agreement is worded accordingly and that it is handled correctly in practice.

10.2 Is there a risk that a franchisor may be held to be vicariously liable for the acts or omissions of a franchisee's employees in the performance of the franchisee's franchised business? If so, can anything be done to mitigate this risk?

Generally, franchisees are self-employed, independent entrepreneurs who are (usually by contract) not allowed to act on behalf and for the account of their (sub-)franchisor. There is no direct contractual relationship between the franchisor and the franchisee's employees or clients.

Therefore, at least in the vast majority of cases, the franchisee's employees and clients could only claim damages against the franchisor by tort law or product liability.

11 Currency Controls and Taxation

11.1 Are there any restrictions (for example exchange control restrictions) on the payment of royalties to an overseas franchisor?

Currently there are no exchange controls on an overseas franchisor. Nevertheless, it is recommendable to include clauses regarding costs of currency exchanges in the franchise agreement.

11.2 Are there any mandatory withholding tax requirements applicable to the payment of royalties under a trade mark licence or in respect of the transfer of technology? Can any withholding tax be avoided by structuring payments due from the franchisee to the franchisor as a management services fee rather than a royalty for the use of a trade mark or technology?

Usually, there are no tax advantages to structuring payments due from the franchisee to the franchisor as a management services fee rather than royalty for the use of a trade mark or technology. Nevertheless, certain circumstances may give opportunities to reduce taxes. By way of a general overview, the most important and common taxes are as follows:

Corporate income tax/withholding tax

Corporations are considered as tax residents in Austria 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 €1,750 for a GmbH.

Personal income tax

Individuals who are permanently domiciled or resident (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 55 per cent of annual gross income.

VAT

Even if an entrepreneur conducts his business from abroad, certain transactions may be taxable in Austria (notably the supply of goods and services, the intra-EU acquisition of goods, and

imports). Where the place of supply of goods or services is in Austria, such supply is, in principle, taxable in Austria as well. The standard VAT rate is 20 per cent, the reduced rate is 10 per cent.

11.3 Are there any requirements for financial transactions, including the payment of franchise fees or royalties, to be conducted in local currency?

No, there are no such requirements. Nevertheless, it is recommendable to include clauses regarding costs of currency exchanges in the franchise agreement.

12 Commercial Agency

12.1 Is there a risk that a franchisee might be treated as the franchisor's commercial agent? If so, is there anything that can be done to help mitigate this risk?

Individual provisions of the Commercial Agents Act are applied analogously to franchisees under certain conditions according to established Austrian case law. In particular, the claim for compensation pursuant to section 24 of the Commercial Agents Act (HVertrG) is regularly at the centre of disputes. Having its origin in the commercial agency law, this claim is intended to compensate the principal for the advantage he has in building up a permanent customer base via the sales agent even after termination of the contract.

The good will indemnity has to be distinguished from an (additional) possible claim for investments which the franchisee was obliged to make for uniform distribution under the franchise agreement and which are neither amortised nor adequately usable at the time of termination of the agreement.

For the analogous application of section 24 HVertrG, it is necessary that the franchisee is integrated into the sales organisation of the franchisor in a similar way to a commercial agent. In addition, the franchisee must either be obliged to transfer his customer base to the franchisor upon termination of the contract or there must at least be a *de facto* transfer of the customer base. The case law developed a catalogue of criteria, which can be relevant in the way of an overall view for the evaluation of the question of the integration into the sales organisation. According to case law, it is not necessary for all criteria to be cumulative.

Criteria for such an integration can be, for example:

- Obligation to promote and accept goods.
- Minimum purchase requirements.
- Obligation to maintain an efficient sales and service organisation and a (minimum) warehouse.
- Obligation to participate in the introduction of new models.
- Obligation to participate in advertising.
- Allocation of a contract territory.
- Notification and notification obligations.
- Control and book inspection rights of the franchisor.
- Franchisor's right of access to business premises.
- Right of the franchisor to issue instructions.
- Non-competition clause.

At least if the contract is subject to Austrian law, the good will indemnity can neither be limited nor excluded before the legal termination of the franchise contract.

The good will indemnity does not exist, for example, if the franchisee terminates the contract without good cause. Conversely, the claim for good will indemnity may also exist in the event of the expiry of a fixed-term contract or in the event of an amicable termination.

The risk of such an analogous good will indemnity can only be reduced by giving the franchisee more leeway than an independent entrepreneur and by reducing the control rights of the franchisor.

13 Good Faith and Fair Dealings

13.1 Is there any overriding requirement for a franchisor to deal with a franchisee in good faith and to act fairly in its dealings with franchisees according to some objective test of fairness and reasonableness?

Both the franchisor and the franchisee have to follow the general principle of good faith. Besides, Austrian courts sometimes also consider a mutual duty of loyalty under the franchise agreements. This can lead to an increased duty of care if, for example, the franchisor wishes to allocate a further location which is in the immediate vicinity of an existing franchisee. The franchisor must not obviously damage the franchisee's business and must, under certain circumstances, at least offer the new location to the existing franchisee.

In the case that one party does not follow the principles of good faith and the mutual duty of loyalty, this party may be liable for damages and such a breach would constitute a reason for dismissal.

14 Ongoing Relationship Issues

14.1 Are there any specific laws regulating the relationship between franchisor and franchisee once the franchise agreement has been entered into?

There are no franchise-specific laws or regulations. The general provisions of the Civil Code, and the following Austrian laws, govern the franchise agreement from a legal perspective: the Consumer Protection Act; the Act Against Unfair Competition; the Antitrust Law; the Corporate Code; the Trademark Protection Act; and the Copyright Law. In addition, the provision of the Austrian Civil Code concerning general business terms may be of relevance.

15 Franchise Renewal

15.1 What disclosure obligations apply in relation to a renewal of an existing franchise at the end of the franchise agreement term?

In case of a renewal of an existing franchise, no specific disclosure obligations apply that would exceed the franchisor's obligations for continuous disclosure to existing franchisees regarding information relevant to the franchisees' business. See also question 1.7.

15.2 Is there any overriding right for a franchisee to be automatically entitled to a renewal or extension of the franchise agreement at the end of the initial term irrespective of the wishes of the franchisor not to renew or extend?

There is no right for a franchisee (or a franchisor) to be automatically entitled to a renewal or extension of the franchise agreement at the end of the initial term, unless the parties agreed

on it. The principle of freedom of contract applies. Thus, no party has to give reasons not to renew the franchise agreement.

15.3 Is a franchisee that is refused a renewal or extension of its franchise agreement entitled to any compensation or damages as a result of the non-renewal or refusal to extend?

In case of refusal of renewal or extension of the franchise agreement, the franchisee may be entitled to a good will indemnity (see question 12.1).

Additionally, the franchisee may have a claim for investments which the franchisee was obliged to make for uniform distribution under the franchise agreement and which are neither amortised nor adequately usable at the time of termination of the agreement.

Due to the principle of good faith, the franchisee may have a claim regarding investments (besides the one just mentioned) made by the franchisee at the franchisor's instigation shortly before the termination of the franchise agreement.

16 Franchise Migration

16.1 Is a franchisor entitled to impose restrictions on a franchisee's freedom to sell, transfer, assign or otherwise dispose of the franchised business?

It is possible and common to include such restriction in the franchise agreement. The franchisor may include a clause which allows him to terminate the franchise agreement in the event of the franchisee's death or inability to continue the business. It is also possible to make the franchisee's transfer of ownership in the franchise entity subject to prior approval of the franchisor.

16.2 If a franchisee is in breach and the franchise agreement is terminated by the franchisor, will a "step-in" right in the franchise agreement (whereby the franchisor may take over the ownership and management of the franchised business) be recognised by local law, and are there any registration requirements or other formalities that must be complied with to ensure that such a right will be enforceable?

The mentioned "step-in" right can only be implemented by way of a purchase option in favour of the franchisor. Generally, the parties can agree to such an option in the franchise agreement. Nevertheless, in order to be valid, such an option has to be drafted very carefully. Especially (but not only) in case of insolvency of the franchisee, the option might be void if the amounts agreed on in the franchise cannot withstand a third-party settlement.

16.3 If the franchise agreement contains a power of attorney in favour of the franchisor under which it may complete all necessary formalities required to complete a franchise migration under pre-emption or "step-in" rights, will such a power of attorney be recognised by the courts in the country and be treated as valid? Are there any registration or other formalities that must be complied with to ensure that such a power of attorney will be valid and effective?

A “step-in” right might already be void in many cases. Thus, a (general) power of attorney in favour of the franchisor in this regard is even more likely to be void and not recognised by courts.

17 Electronic Signatures and Document Retention

17.1 Are there any specific requirements for applying an electronic signature to a franchise agreement (rather than physically signing a “wet ink” version of the agreement), and are electronic signatures recognised as a valid way of creating a binding and enforceable agreement?

Contracts, including franchise contracts, can also be concluded orally. Of course, this is not recommended because of the evidence issues involved. There are no regulations that require a handwritten signature. An electronic signature can also be a valid way of signing a franchise contract.

Like the naming of the issuer in a paper document, the question of imputability is subject to the assessment of evidence.

The qualified electronic signature (as defined in article 3 (12) Regulation (EU) No. 910/2014) is generally equated with the personal signature. With a qualified electronic signature (e.g. citizen card, mobile phone signature), legal or contractual written-form requirements can basically be fulfilled.

In principle, agreed written-form requirements are also fulfilled by a qualified electronic signature. However, this can be expressly or implicitly excluded by agreement. Please note that such restrictions can be invalid when dealing with initial founders within the meaning of the Consumer Protection Act.

17.2 If a signed/executed franchise agreement is stored electronically (either having been signed using e-signatures or a “wet ink” version having been scanned and saved as an electronic file), can the paper version of the agreement be destroyed?

If the existence and the content of the franchise agreement are not in dispute, a scanned version is sufficient. Nevertheless, in regard to court proceedings, it is highly recommendable to keep an original version due to evidence-related issues.



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