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*Franchising Online and Digital Consumer Protection
in the European Union Law*

ABSTRACT: The initial approach to franchising under European Union law was to consider it as a distinct business model to be regulated from a competition point of view. The Court of Justice case law, the following decisions of the European Commission and the relevant consumers protection rules afterwards reflected the European Union position with respect to online transactions carried out by consumers in the frame of a franchising system. Online sales between a franchisor or franchisee and a consumer are still basically regulated, under European Union law, by the competition provisions and the consumer protection rules concerning many areas of interests, such as unfair online practices, transparency, right of withdrawal, use of personal and non-personal data, digital market, legal obligations and enforcement of consumers rights. Consumers are considered to benefit from the online franchising sales system. By means of online sales consumers have access to a wide range of goods and services, in a large number of sales countries. The homogeneity of the network and the co-operation between the franchisor and the franchisees should improve the quality of the products and services and the fairness of the costs. Online sales should increase consumer welfare since, also in a franchising system, they offer access to new markets and commercial opportunities and allow consumers in the European Union to exploit those benefits, in particular by increasing their choice of goods and services, as well as by contributing to offering competitive pricing online. On the other hand, all the online sales must strictly comply with the relevant rules, since they raise challenges that need to be addressed in order to ensure effective consumers protection.

KEYWORDS: European Union – franchising – consumer protection – online transaction – digital service – competition – electronic commerce – vertical agreement – intermediation services.

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1. *Franchising: the European Union Legal Framework*

1.1 *Definition of Franchising*

European Union law does not provide for an official definition of franchising. However, the Court of Justice of European Union recognised the functioning of the distribution franchising with the judgement of 28 January 1986, in the case 161/84 Pronuptia de Paris GmbH and Pronupia de Paris Irmgard Schillgalis (Pronupia Case), which outlined the initial approach to franchising in European Union law. In this judgement the Court described franchising as a self-standing method of contracting, identifying various forms of franchising and pointing out which contractual provisions, although of a restrictive character, are necessary to grant the proper functioning of a franchising contract. According to the Pronupia Case, a franchisor is an undertaking which has established itself as a distributor on a certain market and has developed a specific business granting independent traders, for a fee, the right to establish themselves in the market using its business name and business method which have made it successful. The Court pointed out that, rather than a method of distribution, franchising is a method to derive financial benefit from the expertise of an undertaking (the franchisor), without investing its own capital. The Court also clarified that distribution franchising gives undertakings who do not have specific experience access to methods that they could not have learned without considerable effort, allowing them to benefit from the reputation of the franchisor's business name. According to the Court, such a system allows the franchisor to profit from his success and does not interfere with competition principles. In the Pronupia Case the Court also distinguished among various forms of franchising, such as the service franchising, under which the franchisee offers a service under the business name, symbol or trademark of the franchisor, in accordance with the franchisor's instructions, the production franchising, where the franchisee manufactures products, according to the instructions of the franchisor, selling them under the franchisor's trade mark, or the distribution franchising, under which the franchisee sells specific products in a shop using the franchisor's business name or symbol.

It seems therefore that European Union initial approach was to consider franchising as a distinct business model with the focus on specific features.

The Pronupia Case was followed by various decisions of the European

Commission, based on the principles set by the Court of Justice and expressing the approach of the Court itself, such as the decision 87/14/EEC of 17 December 1986 (Yves Rocher Decision), the decision 87/17/EEC of 17 December 1986 (Pronupia Decision), the decision 87/407 of 13 July 1987 (Computerland Decision), the decision 88/604 of 20 August 1988 (Service Master Decision) and the decision 89/94/EEC of 2 December 1988 (Charles Jourdan Decision).

Although European Union Law seemed to be most interested in distribution franchising, in ServiceMaster Decision the Commission took the position that, despite the existence of specific matters, service franchises show strong similarities to distribution franchises and can therefore be treated in the same way as distribution franchises (already exempted by the Commission).

A definition of franchising is also provided by the European Code of Ethics for Franchising, a practical group of provisions aimed at governing the relations between a franchisor and each of its franchisees, operating together in the framework of the franchise network, drawn up by the European Franchising Federation. The Code is mandatory for its members.

Article 1 of the Code defines franchising as a system of marketing goods and/or services and/or technology, based upon a close and ongoing collaboration between legally and financially separate and independent undertakings (the franchisor and its individual franchisees) whereby the franchisor grants its individual franchisee the right, and imposes the obligation, to conduct the business in accordance with the franchisor's concept. The right entitles and compels the individual franchisee, in exchange for a direct or indirect financial consideration, to use the franchisor's trade name, trade mark, service mark, know-how, business and technical methods, procedural system, and other industrial and /or intellectual property rights, supported by provision of commercial and technical assistance, within the framework and for the term of a written franchise agreement between parties.

Specific national definitions of franchising are provided by different regulation of franchising contracts existing in several national legal systems.

In Italy franchising is governed by Law 129/2004 of 6 May 2004 (*Norme per la disciplina dell'affiliazione commerciale*). According to the Italian franchising law, a franchise contract is any agreement between two legally and financially independent parties, whereby one party grants the other party, in exchange for consideration, the right to use a set of

industrial or intellectual property rights, related to trademarks, trade names, shop signs, utility models, industrial designs, copyright, know how, patents, technical and commercial support and assistance, including the franchisee in a system formed by a group of franchisees distributed on the territory, for the purpose of distributing certain goods and services.

1.2 European Union Initial Approach on Franchising and its Evolution

European Union Law initial approach was to regulate franchising from a competition point of view.

To this aim, the principles enshrined in the Pronupia Case and the relevant following European Commission's decisions were included in the block exemption regulation concerning franchising contracts, which was the Commission Regulation (EEC) no 4087/88 of 30 November 1988 (no longer in force) on the application of Article 85(3) of the Treaty establishing the European Economic Community to categories of franchise agreements.

Franchising afterwards concerned different types of distribution contracts in two subsequent block exemption regulations: the Commission Regulation 2790/1999 of 22 December 1999 (no longer in force) on the application of Article 81(3) of the Treaty to categories of vertical restraints and concerted practices and the Commission Regulation 330/2010 of 20 April 2010 (no longer in force), also called Vertical Block Exemption Regulation (VBER), on the application of Article 101(3) of the Treaty on the Functioning of the European Union (TFUE) to categories of vertical agreements and concerted practices, adopted in 2010 by the European Union Commission along with the Guidelines on Vertical Restraints (2010/C 130/01) (Vertical Guidelines).

The competition policy towards vertical restraints, based on Article 101 TFEU (formerly Article 81), applied to vertical agreements that might affect trade between Member States and which had as their object or effect the prevention, restriction or distortion of competition within the internal market.

The Vertical Guidelines underlined that, for most vertical restraints, competition issues could arise only in case of insufficient competition at one or more levels of trade, considering also that vertical restraints are generally less harmful than horizontal restraints and may provide substantial scope for efficiencies.

European Union current regulation on franchising basically still

concerns competition law.

On 1 June 2022 entered into force the Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the TFUE to categories of vertical agreements and concerted practices (new VBER), which replaced the former VBER. The new VBER will expire on 31 May 2034, such as the related new vertical guidelines of 30 June 2022 on vertical restraints (2022/C 248/01), which set out the principles for the assessment of vertical agreements under Article 101 of the TFUE (new Vertical Guidelines).

The new Vertical Guidelines accompanying new VBER specify that franchise agreements contain licences of intellectual property rights (IPRs) relating to trademarks or signs, and know-how for the use and distribution of goods or services. In addition to the licence of IPRs, the franchisor usually provides the franchisee with commercial or technical assistance during the lifetime of the agreement. The franchisor is in general paid a franchise fee by the franchisee for the use of the particular business method and the licence and the assistance are integral components of the business method being franchised. Franchising may enable the franchisor to establish, with limited investments, a uniform network for the distribution of its products. In addition to the provision of the business method, franchise agreements usually contain a combination of various vertical restraints concerning the products being distributed, for instance selective distribution and/or non-compete obligations.

The new Vertical Guidelines point out that franchising (with the exception of industrial franchise agreements) has some specific characteristics, such as the use of a uniform business name, uniform business methods (including the licensing of IPRs) and the payment of royalties in return for the benefits granted. In view of these characteristics, provisions that are strictly necessary for the functioning of franchising systems can be considered as falling outside the scope of Article 101(1) of the Treaty. This concerns, for instance, restrictions that prevent the franchisee from using the know-how and assistance provided by the franchisor for the benefit of the franchisor's competitors and non-compete obligations relating to the goods or services purchased by the franchisee that are necessary to maintain the common identity and reputation of the franchise network.

2. *Franchising Online in the European Union Law*

According to the new VBER and to the new Vertical Guidelines, online sale cannot be prohibited. In general, every distributor must be allowed to use internet to sell products. However, it is permissible to impose certain requirements relating to the manner in which the contract goods or services are to be sold.

The European Union rules on online sales generally also apply to transactions carried out by undertakings acting in the frame of a franchising system (franchisees or franchisors themselves) which proceed to the sales through digital methods and by means of online intermediation services.

According to Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), in order to remove barriers to the development of cross-border services within the European Union it is necessary that compliance be guaranteed at European Union level with the aim of protecting consumers. In order to ensure legal certainty and consumer confidence, the Directive provides a clear and general framework to cover certain legal aspects of electronic commerce in the internal market, such as the treatment of the contracts (included sales contracts) concluded by electronic means.

A definition of online intermediation services *is* contained in the Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services. According to such Regulation, online intermediation services mean services which meet all of the following requirements: (i) they constitute information society services within the meaning of point (b) of Article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council, stating that information society service is any service normally provided for remuneration, at a distance (i.e.: without the parties being simultaneously present), by electronic means (i.e.: when the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression and storage of data), entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means) and at the individual request of a recipient of services (i.e.: the service is provided through the transmission of data on individual request); (ii) they allow business users to offer goods

or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded; and (iii) they are provided to business users on the basis of contractual relationships between the provider of those services and business users which offer goods or services to consumers.

Regulation 2019/1150 provides that examples of online intermediation services covered by the same Regulation should consequently include online e-commerce market places, including collaborative ones on which business users are active, online software applications services, such as application stores, and online social media services, irrespective of the technology used to provide such services. In this regard, online intermediation services could also be provided by means of voice assistant technology.

In line with the relevant case-law of the Court of Justice of the European Union and in the light of the fact that the dependent position of business users has been observed principally in respect of online intermediation services that serve as a gateway to consumers in the form of natural persons, the notion of consumer used to delineate the scope of Regulation 2019/1150 should be understood as referring solely to natural persons, where they are acting for purposes which are outside their trade, business, craft or profession.

Regulation 2019/1150 underlines that online intermediation services are key enablers of entrepreneurship and new business models, trade and innovation, which can also improve consumer welfare and which are increasingly used by both the private and public sectors. They offer access to new markets and commercial opportunities and allow consumers in the Union to exploit those benefits, in particular by increasing their choice of goods and services, as well as by contributing to offering competitive pricing online, but they also raise challenges that need to be addressed in order to ensure legal certainty.

The new VBER points out that the online platform economy plays an increasingly important role in the distribution of goods and services. Undertakings active in the online platform economy make it possible to do business in new ways, some of which are not easy to categorise using concepts associated with vertical agreements in the traditional economy. In particular, online intermediation services allow undertakings to offer goods or services to final consumers, with a view to facilitating the initiation of direct transactions between undertakings or between undertakings and final consumers.

It is clear that a competitive, fair and transparent online ecosystem, where companies behave responsibly, is essential for consumers welfare.

Ensuring the transparency of, and trust in, the online platform economy in business-to-business relations could also indirectly help to improve consumer trust in the online platform economy. Direct impacts of the development of the online platform economy on consumers are, however, addressed also by the consumer *acquis*, the collection of common rights and obligations that constitute the body of European Union law and is incorporated into the legal systems of European Union Member States.

3. A European Union Consumer Protection, Online Transactions and Franchising Business System

Consumers online sales carried out through a franchising business method are basically regulated, under European Union law, by the competition provisions and the consumer protection rules concerning many areas of interests, including but not limited to unfair online practices, transparency, right of withdrawal, use of personal and non-personal data, digital market, legal obligations and enforcement of consumers rights.

According to the new Vertical Guidelines, any undertaking, such as franchisees and franchisors, must be free to use the internet to sell products as they do in their non online shops.

The new VBER states that its provisions should not exempt vertical agreements containing restrictions which are likely to restrict competition and harm consumers or which are not essential to the attainment of the efficiency-enhancing effects. For instance, online sales restrictions should not benefit from the block exemption established by new VBER where their objective is to significantly diminish the aggregate volume of online sales of the contract goods or services in the relevant market or the possibility for consumers to buy the contract goods or services online.

Some restrictions of the use of the online selling by franchisees in connection to consumers are considered hard-core restrictions of competition. For instance, it is not allowed to impose any obligation requiring the franchisee to prevent customers located in another territory from viewing its website or online store or to reroute customers to the online store of the franchisor or of another seller. To the same aim, it is considered a hard-core restriction to automatically terminate consumers' transactions over the internet if their credit card data reveal an address that

is not within the franchisee's territory.

With reference to protection of consumers buying online, the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, covers a broad range of contracts concluded between traders and consumers, such as sales contracts concluded at a distance (i.e.: online). The Directive provides that consumers can withdraw from distance and off-premises contracts within 14 days of the delivery of the goods or the conclusion of the service contract, subject to certain exceptions, without any explanation or cost. The Directive also establishes rules on information to be provided for distance contracts, off-premises contracts and contracts other than distance and off-premises contracts and harmonises certain provisions dealing with the performance and some other aspects of business-to-consumer contract, without prejudice to Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

In order to strengthening the enforcement of European Union consumer protection rules and updating rules in line with the development of digitalisation, on 27 November 2019 was adopted the Directive (EU) 2019/2161 of the European Parliament and of the Council as regards the better enforcement and modernisation of European Union consumer protection rules. It amended four existing consumer law directives – the Unfair Contract Terms Directive 93/13/EEC, the Price Indication Directive 98/6/EC, the Unfair Commercial Practices Directive 2005/29/EC and the above-mentioned Consumer rights Directive 2011/83/EU. By means of those amendments, the Directive 2019/2161 also applies in the case that the trader supplies or undertakes to supply digital content which is not supplied on a tangible medium or a digital service to the consumer and the consumer provides or undertakes to provide personal data to the trader, with certain exceptions.

The Directive 2019/2161 emphasizes rules on penalties for infringements of the four directives, providing for new European Union right to individual remedies for consumers who are harmed by unfair commercial practices prohibited by the Unfair Commercial Practices Directive, included prohibition of specific unfair online practices regarding consumer reviews, advertising and paid placements in search results.

Furthermore, the Directive 2019/2161 includes new transparency

requirements about the main parameters determining the ranking of online search results, about whether the contract is concluded with a trader or an individual on an online marketplace and about the measures taken to ensure that published consumer reviews originate from consumers who actually used or purchased the product.

In accordance with Article 26(2) TFEU, the internal market is to comprise an area without internal frontiers in which the free movement of goods and services and freedom of establishment are ensured. The harmonisation of certain aspects of consumer distance and off-premises contracts is necessary for the promotion of a real consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring respect for the principle of subsidiarity. Article 169(1) and point (a) of Article 169(2) TFEU provide that Union is to contribute to the attainment of a high level of consumer protection through the measures adopted pursuant to Article 114 thereof.

Furthermore, to protect consumers buying online, as in other business, franchisors and franchisees must comply with the European Union data protection provisions of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR), which repealed Directive 95/46/EC. The GDPR protects individuals when their data is being processed by the private sector and most of the public sector. GDPR allows individuals to better control their personal data, by means of a system of unified rules monitored by a completely independent supervisory authorities in charge also of its enforcing.

Both franchisor and franchisee are obliged to meet the GDPR provisions in particular when collecting and handling data related to customers. For instance, it could happen that the data of the customers are transferred within the franchise network, for example for advertising purposes or within the context of loyalty scheme programs, and, also in this frame, data protection rules are to be fulfilled.

On January 11, 2024, the Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act) entered into force. The Data Act introduced a new regulatory framework that applies to the use of personal and non-personal data generated by connected devices and will apply beginning September 12, 2025. The Data Act follows

the Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act), which became applicable in September 2023 and established common European data spaces in an effort to make more data available for use.

The new rules apply to data generated using connected products and related services, as well as to data-processing services (including cloud services). The Data Act set forth rules concerning making data available to a variety of parties. It also makes it easier to change data-processing services, introduces safeguards against unlawful third-party access to non-personal data, and offers interoperability standards for data to be accessed, transferred, and used.

In the frame of the European Union's Digital Single Market Strategy (European Commission, Communication C (2022) 4388 final of 30 June 2022 on European Commission digital strategy: Next generation digital Commission) the European Commission proposed a new set of rules concerning the digital market.

Digital is a European Union priority, focused to build towards a better and more harmonized digital environment.

On 14 September 2022 the Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Market Act or DMA) was adopted.

On 19 October 2022 also the Regulation (EU) 2022/2065 of the European Parliament and of the Council on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act or DSA) was adopted.

While the DSA comprises general rules on the liability of providers of online intermediary services and safeguards their diligence by imposing more extensive obligations on online platforms and large online platforms, the DMA aims at ensuring a contestable and fair digital market, granting a higher degree of competition in European digital markets by preventing large digital platform (gatekeepers) operating in Europe from abusing their market power to the prejudice of other smaller companies and consumers.

According to the DMA, by approximating diverging national laws, it is possible to eliminate obstacles to the freedom to provide and receive services, including retail services, within the internal market. The targeted set of harmonised legal obligations established at European Union level by the DMA aimed therefore to ensure contestable and fair digital markets featuring the presence of gatekeepers within the internal market to the

benefit of the European Union's economy as a whole and ultimately of the European Union's consumers.

The DMA allows consumers to have more and better services to choose from, more opportunities to switch their provider if they wish so, direct access to services, and fairer prices.

The legal basis for the DMA is found in art. 114 TFEU, which enables the adoption of consumer protection measures via the ordinary legislative procedure for the approximation of the provisions laid down by law, regulation or administrative action in Member States.

The DMA is coherent with other European Union instruments: to ensure the effectiveness of the obligations laid down by the DMA, while also making certain that those obligations are limited to what is necessary to ensure contestability and tackling the harmful effects of the unfair practices by gatekeepers, it is important to fully comply also with applicable law, and in particular Regulation (EU) 2016/679 and Directive 2002/58/EC and legislation on consumer protection, cyber security, product safety and accessibility requirements, including Directive (EU) 2019/882, Directive (EU) 2016/2102 and the European Union consumer law *acquis* too.

Consumers should be entitled to enforce their rights in relation to the obligations imposed on gatekeepers under the DMA through representative actions in accordance with the above-mentioned Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers, which repealed Directive 2009/22. The Directive 2020/1828 applies to infringements listed in Annex I to the Directive, but member States may introduce broader regimes than those specified under the Directive, since it aims at minimum harmonisation in order to supplement, not replace, any existing national collective action mechanisms. The main impact of the Directive is to allow individual consumers from a Member State to join proceedings in other Member States on an opt in basis (being however noted that if an injunction order is sought, an opt-in or opt-out mechanism is not required). Member States may decide to provide for an opt-in or opt-out system or a combination of the two for redress claims. Member States must enable qualified entities, designated as such by the Member State in advance or ad hoc, to bring class actions in their national Courts. On the other hand, Courts must be enabled to issue injunction orders (for provisional or definitive relief) as well as redress orders (for example in the form of monetary compensation, contract termination or reimbursements).

DMA provides that Directive 2020/1828 is applicable to the representative actions brought against infringements by gatekeepers of provisions of the DMA that harm or can harm the collective interests of consumers.

4. Conclusive Remarks: the Effects of Online Franchising for Consumers

Franchising stimulates economic activity by improving the distribution of goods and the provision of services, as it gives franchisors the chance to establish a uniform network with limited investments and using franchisor know how. It facilitates cross-frontier development and may increase the entry of new competitors in the markets, particularly in the case of small and medium enterprises, making products and services available to a wide range of consumers, notwithstanding national frontiers within the European Union, contributing therefore to the establishment of a unified European market.

Consumers may benefit from the franchising system, considering that franchising generally allows consumers a fair share of the resulting benefits as they combine the advantage of a uniform network with the existence of the traders personal interest in the efficient operation of their business. The homogeneity of the network and the co-operation between the franchisor and the franchisees should improve the quality of the products and services.

Since consumers may obtain services elsewhere in the network, franchisees are forced to pass on to consumers a reasonable part of the benefits of this intra-brand competition, since the franchisees can be expected to offer better services and prices.

The homogeneity of the network, the standardisation of trading methods and the direct link between franchisor and franchisee ensure that the consumer benefits in full from the know-how passed on by the franchisor, with a focus on the quality of the products.

Consumers are therefore considered to benefit from the online franchising system.

The results of franchising on inter-brand competition and the fact that consumers may decide to deal with any franchisee in the online marketplace should grant that consumers may take advantages from online franchise.

Franchising constitutes a coherent distribution network offering

uniform product quality and a comprehensive range of articles available in the online market.

By means of the franchising method, consumers may benefit of a larger number of products to buy, a certain quality and characteristics of products to compare and the possibility to reduce costs.

However, to make those benefits effective for consumers, franchisors and franchisees must strictly comply with all the relevant provisions applying to their business, granting full compliance with all the consumers protections rules, given that undertakings' lawful conducts, such as consumers' responsible decisions, are essential to grant an efficient European Union legal system. Provided that, consumers acting in the frame of an online franchising system could be considered to represent the ultimate beneficiaries of a well-functioning European Union market.

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