



EUROPEAN FRANCHISE FEDERATION

"The Single Voice for the Franchise Industry & its Ethics in Europe"

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EC-DG COMP BER 330 EVALUATION QUESTIONNAIRE

Extended answer to the TABLE questions about the LEVEL of LEGAL CERTAINTY provided by the VBER & VGL:

EXPLANATIONS:

i) Eval. Quest. Point 1-1: Agreements of Minor importance: definitions in the revised VBER must align with those in the new 2014 De Minimis communication.

ii) Eval. Quest. Point 2-3 : about vertical agreements containing provisions on intellectual property rights (IPRs): in the VGL # 31 d) a franchise agreement is stated as being an example of an agreement containing provisions about IPRs ("The IPR provisions must be directly related to the use, sale or resale of goods or services by the buyer or its customers. **In the case of franchising** where marketing forms the object of the exploitation of the IPRs, the goods or services are distributed by the master franchisee or the franchisees");

AND

In VGL# 43: about Know-How: (*"Franchise agreements, with the exception of industrial franchise agreements, are the most obvious example of where know-how for marketing purposes is communicated to the buyer. Franchise agreements contain licences of intellectual property rights relating to trademarks or signs and know-how for the use and distribution of goods or the provision of services. In addition to the licence of IPR, the franchisor usually provides the franchisee during the life of the agreement with commercial or technical assistance, such as procurement services, training, advice on real estate, financial planning etc. The licence and the assistance are integral components of the business method being franchised.*)

It is important that Franchising not be cited only as an example in the VGL but that it be recognised as a specific distribution model in its own right within the VGL.

The above comment explains our answer "2" in the Evaluation Questionnaire (5)-7 ("Franchising") and underscores our wish to have a definition of franchising in the VBER itself; this seems indispensable to us.

Thus, for this specific mode of distribution, whose fundamental specificity is the transfer of know-how, it is justified that it be protected by a certain number of vertical restraints, as is the case for Selective Distribution, so that the franchisor may protect the homogeneity/unity of the network so as to safeguard its know-how.

iii) Eval. Quest. Point 3-1 RPM (Art. 4(a) & VGL 48-49 / VGL # 223-229 : relating to Resale price restrictions

A lot of economic analysis has been done about RPM. Their results should inspire a softening of the actual policy in that in most cases for franchising, RPM can be assumed with sufficient certainty they generate efficiencies in line with art. 101(3) TFUE. They contribute to greater inter-brand competition since RPM contributes to promoting the common identity & reputation of the franchise network as well as the uniformity in the business concept at the basis of the latter.

iv) Eval. Quest. Points 3-2 and 3-3: relating to

Territorial/customer restrictions (Article 4(b) VBER and recital 50 VGL) and exceptions to these restrictions (Article 4(b) (i)-(iv) VBER and recitals 51,55 VGL) AND

Online sales restrictions (recitals 52-54 VGL):

Franchisors should have the possibility to control their distribution channels, including the right to prohibit the re-sale of their products by their franchisees via third-party platforms.

In addition, the EFF requests that the definitions of active and passive sales be revised in order, for example, to take into account, as active sales, the faculty for novel digital tools (bots, SM pages, cookies, etc.) to automatically trigger the seller's active sale without the seller having voluntarily initiated the contact.

v) Eval. Quest. Point 4-1 and 4-2: relating to

Non-compete obligations with indefinite duration or exceeding 5 years (Article 5(1)(a) VBER and recitals 66-67 VGL) **AND**

Post term non-compete obligations (Article 5(1)(b) VBER and recital 68 VGL)

It would be opportune for the next Regulation to clarify the following:

- that in-term non-compete clauses may have the same duration as the term of the contract if they can be justified by the protection of the franchisor's know-how (see GL # 190),**
- that post-term clauses relating to the post-term protection of know-how may be longer than one year if this can be justified.**