

# *Future policy options in franchising in the EU*

EP Workshop on “Relations between franchisors and franchisees: regulatory framework and current challenges”  
Panel II: Policy Options

Prepared for IMCO Committee  
in cooperation with Policy Department A

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# The structure of franchise private relations: the stronger and the weaker party

- ▶ Franchisor, stronger: guardian formula
- ▶ Franchisee, weaker: dependent on formula
- ▶ Restrictions on franchisee justified to protect formula , uniformity, reputation



# Main legal problems in franchise private relations in the EU\*:

- 1) No definition of franchise
- 2) Unfair Trade Practices (UTPs)
- 3) Ineffective enforcement mechanisms

\*information from research of the Study group on a ECC, based on national case-law and literature, IMCO project and experience as legal practitioner

# Main legal problems:

## 1) No definition

- ▶ Scope obligations?
- ▶ Difference between types of franchise relations?
- ▶ Difference between distribution relations?



# Main legal problems:

## 2) UTPs in franchise

- ▶ See EC findings on UTPs in B2B supply chains
- ▶ Specificities UTPs franchise

Franchisee always the weaker (=victim)

Measure unfairness = Protection formula justifies restrictions

Uniform treatment franchisees in cross border franchise

Unjustified exemptions of Vertical Restraints (IMCO)

Vertical Restraints which on application lead to UTPs



# Main legal problems:

## 3) Ineffective enforcement

- ▶ No success in overcoming contingencies
- ▶ Inaction franchisees due to “fear factor”
  - Dependence on continuation to recuperate investments
  - No switch possibilities
- ▶ Remedies mean no continuation
- ▶ Compensation requires court intervention



# Current policy approach in the EU

- ▶ EU-level
- ▶ Allowing pro-competitive Vertical Restraints (BER 330/2010)
- ▶ Soft-law to promote ethic and standard relations (EFF's code of conduct)
- ▶ National level
- ▶ Specific franchising laws
- ▶ General contract law and case-law

# Current policy approach fails to solve problems: BER 330/2010

- ▶ No definition (Franchise = selective distribution)
- ▶ Definitions in previous BER, applicable?
- ▶ Unjustified exemption Vertical Restraints
- ▶ Vertical Restraints when applied lead to UTPs
- ▶ No enforcement mechanisms



# Current policy approach fails to solve problems: EFF Self-regulation

- ▶ Specific definition, but unknown impact
- ▶ “*Pre-qualification mode of self-regulation*” (EFF):
  - Fair standards code only as control on admission
  - No redress mechanism



# Current policy approach fails to solve problems: National laws

- ▶ Focus on precontractual information
- ▶ Different definitions
- ▶ Different unfairness tests, if any
- ▶ Disregard cross-border element – uniformity
- ▶ General contract law remedies: no emphasis on continuation

# The way forward: EU-level solutions to main problems?

- ▶ EU uniform definition of franchise
- ▶ Fair standards against UTPs in franchising
- ▶ Effective enforcement mechanisms



# The way forward: justification for EU-level (re)action

- ▶ Direct negative impact on franchisees
- ▶ Impact on functioning Internal Market?
- ▶ Consumer's welfare?
- ▶ Under-representation franchisees
- ▶ Disregard cross-border element
  - Assure uniformity throughout the network
  - Avoid that fragmentation hinders trade

# The way forward.

## Step 1: Create a level playing field

- ▶ Organise participation franchisees
  - Strengthen franchisee associations
  - European digital franchise platform
- ▶ Cope with confidentiality claims
  - Eg: Online anonymity (Your Europe, SOLVIT)
- ▶ Controlling franchisor's lobby power
- ▶ Overcoming franchisor's fears

# The way forward:

## Step 2: Public consultation

- ▶ Collect information on main legal problems
- ▶ Collect reactions to policy options
  - 1) No intervention
  - 2) Adjust existing regulatory framework
  - 3) EU-level principles for franchising



# Policy Options:

## 1) No intervention

### ▶ Pros:

- Follow view franchisors
- Respect “safe-harbor” Vertical Restraints (EFF)
- Problematic situations are the exemption
- Franchisees should take more precautions

### ▶ Cons:

- No protection franchisees
- Under-representation franchisees remains
- Favor collective complaints in court
- Attacks to reputation in Internet
- It does not neutralise the “bad franchisee” (EFF)
- Disregard cross-border element – uniformity

# Policy options:

## 2) Adjust regulatory framework

- ▶ Adjust BER 330/2010
  - Franchise = selective distribution?
  - Proportionality of Vertical Restraints
  - Enforcement mechanisms
- ▶ Adjust Self-regulation
  - Get approval franchisees
  - Enforcement mechanisms
- ▶ Search for fair representation of franchisees in regulating bodies
- ▶ Broaden the scope of existing directives?

# Policy options:

## 2) Adjust regulatory framework

- ▶ Pros:

  - Initiative remains with stakeholders

  - Regard cross-border element

  - Benefit from work already done

- ▶ Cons:

  - Guarantee of enough support franchisees?

  - Agreement on enforcement mechanisms?

# Policy options:

## 3) EU-level principles

- ▶ Adjust BER 330/2010
  - Franchise = selective distribution?
  - Proportionality of Vertical Restraints
  - Enforcement mechanisms
- ▶ Draft private law principles
  - Definition of franchise
  - Fair standards: proportionality of restrictions
  - Enforcement mechanisms



# Policy options:

## 3) EU-level principles

- ▶ Inspiring models for private law principles

EFF´ s Code of Conduct

Netherlands Franchise Code of Conduct

*Principles of European Law on Commercial Agency,  
Franchise and Distribution Contracts (PEL CAFDC)*

# Policy options:

## 3) EU-level principles

- ▶ Definition of franchise
- ▶ General principles
  - Cooperation
  - Proportionality
  - Mutual profitability (win-win)
- ▶ Specific principles
  - Pre-contractual obligation to inform
  - Contractual rights and obligations of the parties
  - Specific remedies and alternative dispute resolution

# Policy options:

## 3) EU-level principles

- ▶ Other issues that should be dealt with:

General or/and specific principles?

Legislation or self-regulation?

Mandatory or default?



# Policy options:

## 3) EU-level principles

### ▶ Pros

- Inspired by franchisor's Code of Conduct
- Strengthened with protection franchisee
- Balance in representation from the very beginning
- Regard cross-border element – uniformity
- Neutral measurement unfairness
- Closer to outcome of consultation

### ▶ Cons

- Initiative not given to stakeholders
- Overcome fears franchisors to intervention
- Convince franchisor to accept protection franchisee

# The way forward: Outcome consultation

- ▶ Inventory “core” problems
- ▶ Adjust chosen policy option
  - Not expecting main surprises on definition
  - Verify “proportionality” test of restrictions
    - Pro-competitive restraints vs. interests franchisee
    - Protection formula vs. interests franchisee



# Conclusions

- ▶ Perceived problems in franchise relations ask for action at EU-level
  - Correct the unfair representation imbalance
  - Correct the unfair contractual imbalance
  - Respect uniformity in cross-border franchise
- ▶ The study for IMCO
  - Presents the right overview on main problems
  - Proposes a well thought way forward

Thank you very much  
for your attention

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