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AGENCY AND DISTRIBUTION AGREEMENTS (AUSTRIA)

General

The general legal framework on the law of contracts is set forth in the Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) and in the Austrian Commercial Code (*Unternehmensgesetzbuch*), the latter being applicable to all persons or legal entities operating an enterprise (*Unternehmer*).

There are no formal requirements for a contract to be valid under Austrian law, unless explicitly required by statute. Oral agreements and, under certain restrictive circumstances, agreements implied through action (tacit agreements) are also legally binding and enforceable. It is prudent, though, to conclude a written contract to record the terms agreed between the parties which can then be used for evidential purposes in case of a dispute. However, where such written contract deviates from the actual intent of the parties, the latter will prevail over the written text ("falsa demonstratio non nocet").

Freedom of Contract

Freedom of contract is the fundamental principle of Austrian contract law. The contracting parties are thus free to choose any terms suitable for a transaction, unless contractual provisions are contrary to mandatory provisions of statutory law or to public policy (*sittenwidrig*). For example, certain provisions in contractual agreements with consumers might be overruled by mandatory provisions of the Austrian Consumer Protection Law (*Konsumentenschutzgesetz*). The Austrian Act on Trade Representatives (*Handelsvertretergesetz*), the Austrian Act on Commercial Agents (*Maklergesetz*) and competition law rules also impose restrictions on the freedom of contract.

Distributors, Trade Representatives and Commercial Agents

Austrian law differentiates between distribution agreements, agreements with trade representatives and agreements with commercial agents. While distributors (*Vertragshändler*) distribute products in their own name and for their own account, trade representatives (*Handelsvertreter*) are continuously entrusted by another person (the "principal") to negotiate or conclude business on behalf and on the account of the principal. Basically, trade representatives

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perform this activity on a self-employed and commercial basis; if this is not the case, certain provisions of Austrian labour law might be applicable. Commercial agents (*Handelsmakler*), on the other hand, are entrusted by another person, on a case-by-case basis, with the arrangement of business on behalf of and in the name of the principal.

Distribution agreements are not subject to any special statutory provisions. By contrast, the legal status of self-employed trade representatives is regulated in the Act on Trade Representatives (*Handelsvertretergesetz*), and the activities of commercial agents are covered by the Act on Commercial Agents (*Maklergesetz*). However, according to case law of the Austrian Supreme Court, certain provisions of the Act on Trade Representatives also apply (by analogy) to distribution agreements if the contractual relationship with the distributor corresponds to a usual relationship between a principal and a trade representative.

The majority of the provisions in the Act on Trade Representatives are mandatory, meaning that they cannot be overridden by contractual agreements or by choice of the law of another jurisdiction. If an Austrian trade representative is permanently engaged by a principal (even a foreign one) for the arrangement or conclusion of business transactions on a commission basis, the Austrian trade representative (as physical person or legal entity) is automatically subject to the Act on Trade Representatives.

In general, an explicit formal agreement between the principal and the trade representative is not required, unless requested by one of the parties. In case the parties have not agreed on the amount of commission, the respective provisions of the Austrian Act on Trade Representatives apply. In case of doubt, the trade representative is entitled to charge a commission (i) even if he has not been directly involved in the business relations of the principal and his client and (ii) if he has been engaged as the sole representative for a certain area or a certain clientele, even for business transactions between the principal and such clients in which he was not at all involved. Therefore, it is recommendable to stipulate unambiguous provisions in writing.

As regards termination of the agreement, the Act on Trade Representatives provides for minimum periods of notice which cannot be altered to the disadvantage of the trade representative. In general, the termination of the agreement entitles the trade representative to claim reasonable compensation, unless he himself has given notice of termination or terminated the contract prematurely without reasonable grounds.

Competition Law / Antitrust

Generally, agreements between businesses which restrict competition are prohibited under national and EU competition law. Antitrust regulations at EU level come into play where an agreement is likely to affect trade between EU Member States. However, vertical restraints, i.e., agreements between two or more undertakings each of which (for the purpose of the agreement) operates at a different level of the production or distribution chain, are generally subject to a more lenient antitrust regime than horizontal agreements (i.e., agreements between competitors).

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Distribution agreements as well as agreements with trade representatives often contain restraints on competition, such as resale price maintenance, territorial or customer restraints, non-compete or exclusive supply obligations or tie-in clauses. If contained in distributorship agreements, such restraints by all means fall within the ambit of competition law. Agreements with trade representatives may, according to the jurisprudence of the Austrian Supreme Court (and also EU practice), also be subject to competition law if the trade representative's position is similar to that of an independent dealer. Critical factors in this respect include both the risk that the agent assumes with regard to his performance under the agreement and the level of independence he enjoys from the supplier's organization.

The Austrian Cartel Act (*Kartellgesetz*) contains a general prohibition of agreements restricting competition, but at the same time provides for an exemption in line with the terms of Article 81 para 3 EC-Treaty. This exemption applies to restrictive agreements which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives and (ii) afford such undertakings the opportunity of eliminating competition in respect of a substantial part of the products in question. Besides, the Austrian Cartel Act contains a "de minimis" threshold and exemptions regarding the retail of books, certain art prints, music supplies, journals and newspapers and the distribution of agricultural products. Note, though, that such exemptions are not available if EU law applies (i.e., if the agreement is likely to affect trade between EU Member States).

In line with the application of EU competition law, the parties to an agreement need to assess themselves whether their contractual provisions comply with the Cartel Act. As competition law issues are complex, it is strongly recommended that principals as well as distributors and trade representatives obtain expert advice on the particular arrangements relating to the contractual relationship in question.

International Conventions

Austria ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention 1958) on 2 May 1961 and enacted the same on 31 July 1961. Furthermore, Austria is a party to the United Nations Convention on Contracts for the International Sale of Goods (enacted on 1 January 1989).

Internet Links

1. The Federal Association of Commercial Agents (*Bundesgremium der Handelsagenten*), a department of the Austrian Federal Economic Chamber (*Wirtschaftskammer Österreich*), represents the interests of the Commercial Agents in Austria. The department's website contains information about issues like the Austrian Act on Trade Representatives:

www.handelsagenten.at

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2. The European Consumer Centre of VKI (*Verein für Konsumenteninformation*) is one of several European Consumer Centres set up by the European Union. Its website provides information on certain topics with regard to consumer protection law:

www.europakonsument.at

3. The Legal Information System of the Republic of Austria (*RIS*) is a computer-assisted information system on Austrian law. It contains a selection of Austrian laws in English translation:

www.ris.bka.gv.at

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