

# Creating online policies for the distributor's/franchisor's website and for the use of social media

Panel: Ercüment Erdem, Melanie Käser, Dominic Hui, Iain Irvine

# 1. How to legally discourage franchisees from creating their own websites? How to address in the Agreement?

- **Switzerland**
- Better to motivate than to discourage, for example with:
  - **Operational Incentives**
    - Centralized Support (technical and content wise)
    - Consistent Branding and Customer Experience
    - E-Commerce Integration
    - Performance Metrics
  - **Legal Incentives**
    - Ensuring compliance with local internet/e-commerce law
  - **Cost Incentives**
    - Reduced franchise fees
    - Reduced costs for operation of website (e.g. scale effect for licenses)

## **1. How to legally discourage franchisees from creating their own websites? How to address in the Agreement? (continued)**

- **Switzerland**
- Competition Law Perspective?
  - Vertical Ordinance from the Competition Commission 12.12.2022 and its explanatory notes (“Vertikalbekanntmachung WEKO”) → aligned with EU Law

# 1. How to legally discourage franchisees from creating their own websites? How to address in the Agreement? (continued)

- **Switzerland (Requirements for own website of Franchisee)**

*Prior to Franchisee creating and operating a website on the Internet promoting the Business, Franchisee will comply with the following:*

- a) Franchisee must obtain Franchisor's prior written approval for the form and content of Franchisee's website before it is used on the Internet in order to maintain the common identity of the System.*
- b) Notwithstanding the right to operate an own website by Franchisee in compliance with the section above, Franchisee will not register any of the Proprietary Rights, including but not limited to the Franchisor Marks, or similar words as part of any domain name;*
- c) Prior to placing any hyperlinks to third party websites, Franchisee must obtain written approval of such hyperlinks from Franchisor;*
- d) Franchisee must ensure that the Franchisee's website complies with all relevant legislation and regulations;*
- e) Franchisee will undertake to use the same entry page and the same structure/concept as defined and determined by Franchisor. This includes, but is not limited to, that Franchisee undertakes to comply with Standards, including the then current form of the Franchisor web style guide.*
- f) In order to ensure compliance with Standards and the Franchisor web style guide, Franchisee agrees to not use internet platforms or internet marketplaces of third parties, insofar as these third party platforms are recognisable as third party platforms externally.*

# 1. How to legally discourage franchisees from creating their own websites? How to address in the Agreement? (continued)

- **Switzerland (Motivation for integration into franchisor's website)**

*The Franchisee can (but is not obliged to) participate in and benefit from the centralized website and online infrastructure provided and managed by the Franchisor. As part of this, the Franchisor shall:*

- a) Provide a Dedicated Subpage or Microsite on the Franchise Website for the Franchisee's specific location, including contact details, opening hours, promotional content, and location-specific offering;*
- b) Ensure Search Engine Optimization (SEO) efforts and online marketing campaigns are conducted to promote the Franchise Website as a whole, thereby increasing visibility and customer traffic for all participating Franchisees;*
- c) Share Leads and Online Inquiries relevant to the Franchisee's territory with the Franchisee in a timely and transparent manner;*
- d) Offer Preferential Access to online advertising campaigns, loyalty programs, and digital tools (such as booking systems or e-commerce functionalities) that are integrated into the Franchise Website;*
- e) Reduce the Marketing Contribution Fee by [e.g., 10%] for Franchisees who fully comply with the centralized website policy, as an incentive for consistency and brand alignment across all locations;*
- f) \*\*\**

## 2. Use of Influencers/KOLs by distributors/franchisees

- **China**
- Distinguishable from non-advertising contents (Art. 9 Internet Advertisement Management Measures 2023)
- Joint liability on the part of influencer/KOL (Art. 38 Advertising Law)
- Due diligence against Influencers/KOL?
  - History/track record
  - Stance on social and political issues?
- Remedial actions if things go wrong, reporting requirement
- Record maintenance



I show speed (Darren Jason Watkins Jr.)



Snow (Sharon Yung)

## **2. Use of Influencers/KOLs by distributors/franchisees (continued)**

- **China**
- Invitation for experience, sponsorship, collaboration, or services?
  - Also covers sharing of knowledge, sharing of experience, review of products or services, providing links (Art. 9 Internet Advertisement Management Measures 2023)
- Suggested contractual provisions with influencers/KOLs
  - Exclusivity – kind of business/products, time and/or channel?
  - Control of contents – no false information to harm a competitor (Art. 11 of Anti-Unfair Competition Law)
  - Termination
  - Post-termination non-disparagement and exclusivity

## 2. Use of Influencers/KOLs by distributors/franchisees (continued)

- **China** – some suggested languages in the policy
  - The Distributor shall conduct necessary due diligence before engaging an influencer for any promotional or collaboration activities, including but not limited to the following:
    - Characters of the influencer and his/her behaviour
    - The number and spectrum of followers
    - The track records of the influencer for 24 months, and if there were any unsuitable contents and negative incidents
    - An analysis as to whether the influencer is suitable for the promotional activity and the targeted customers
    - An analysis as to the stance of the influencer on certain social and political issues, and would such stance cause any potential impact to the brand
    - Previous representation of any competing brands
    - Crisis management plan if there are known risks
  - Due diligence report should be provided to the Brandowner
- **Q:** Appointment to be confirmed by Brandowner? All?



### 3. How can online policies be used to limit the risk of bad publicity resulting from errant licensee posts?

- **Australia**
- Example – *Help Wanted – Over 60s need not apply*
  - McDonald's unit in Auckland advertised online for workers aged 16 – 60
  - Adverse social media response
  - Brand impact exacerbated by franchisor vs franchisee response to media outlet
- Issues
  - Franchisee control of online accounts? Benefits –
    - Online marketing targeted locally
    - Reduced resources required of franchisor
    - Online marketing more responsive/dynamic

### **3. How can online policies be used to limit the risk of bad publicity resulting from errant licensee posts? (continued)**

- **Australia**
- *Licensee controlled accounts - Social media policy a useful tool – Provisions:*
  - Requirement to clearly identify author as a licensee
  - Requirement for content to comply with law and brand standards
  - Require use of any approved templates/materials
  - Licensee must monitor feedback
  - Complaint and media handling provisions including deferral to licensor (where appropriate)

### **3. How can online policies be used to limit the risk of bad publicity resulting from errant licensee posts? (continued)**

- **Australia**

- *Example complaint/media handling policy provision:*

- If a person posts or otherwise publishes a complaint or criticism relating to Your Franchise on a Profile maintained by you, you must comply with the following:
  - Do not cause immediate deletion of the complaint unless required by this Policy [eg in a section requiring deletion of threatening, harassing, discriminatory, offensive content].
  - Promptly respond to the complaint using a calm and non-confronting tone. Your response should thank the author for their feedback and invite the author to discuss resolution of the matter with the Franchisee directly offline.
  - If you are unsure how to respond refer the complaint to us.
  - Once the matter is resolved the initial complaint should be deleted (if appropriate) or notice of its resolution should be published alongside the complaint.
  - If the matter is not resolved promptly, refer the matter to us.
  - Refer any allegation of illegal conduct to us immediately.
  - Do not speak to media outlets regarding the complaint and refer them to us if they make contact.

## **4. What privacy issues can arise from allowing licensees to operate online?**

- **Australia**
- International network issues
  - Varying data privacy laws across jurisdictions
  - Licensor privacy policy may not comply with local law
  - Privacy clause in license:
    - Compliance with law
    - Transfer of data to licensor and use and further disclosure
  - Licensee might adapt franchisor data privacy policy (eg schedule or addendum)
  - Licensor may prefer to amend and require use.

## **4. What privacy issues can arise from allowing licensees to operate online? (continued)**

- **Australia**
- Data breach reporting – Brand Issue
  - Australia – Notifiable Data Breach Scheme (Part IIIC of the Privacy Act 1988)
  - Prompt reporting to impacted data subjects and regulator of potentially harmful breaches
  - Entities with possession or control of records including personal information
  - Licensor and/or Licensee may be obliged to notify – Brand risk if Licensee acts without Licensor direction or message is inconsistent
  - Licensor should seek to control process and notification wording

## 4. What privacy issues can arise from allowing licensees to operate online? (continued)

- **Australia**
- Agreement/Online Policy – Example provision:
  - In the event of a known or suspected data breach in relation to personal information held or accessible by Licensee it must immediately notify Licensor. Subject to Licensee's obligation to comply with applicable law, Licensee must (a) refrain from disclosing any information about the data breach without Licensor's prior written consent; and (b) follow all reasonable directions of Licensor in relation to the data breach and compliance with the requirements under Part IIIC of the Privacy Act 1988.

## **5. Would an unilateral right of amendment of franchisor in a franchise agreement be enforceable in Switzerland?**

### **• Switzerland**

*“Franchisee agrees that Internet is a rapidly developing field and that the provisions of this (Internet/Social Media-) clause may need to be modified in the future or that further guidelines on use of the Internet, including but not limited to the use of social media, may be introduced by Franchisor. In the event of such modification or the issue of such guidelines by Franchisor, Franchisee agrees that they will be binding on Franchisee.”*

- Reasons for such a vague clause?
- Principles to ensure compliance?
  - Good Faith
  - Sufficient Time
  - Implications cost wise?
  - Competition Law ?

## 6. Managing Risks and Crisis

- **China**
- Loyalty scheme (in multiple distributors/franchisors situations)
- Prepayment (Single Purpose Commercial Pre-paid Cards Management Measures, and Supreme People's Court's Interpretation 2025)
- Trade promotion competition (Art. 10 Anti-unfair Competition Law, Hong Kong licensing regime)
- Use of third party materials (potential IPR infringement)
- No pushing of advertisements without consent (Art. 43 Advertising Law)
- Just 1 button for closing any internet advertisement (Art. 44 Advertising Law)
- AdBlock – remaining time must be shown (Art. 10(1) Internet Advertisement Management Measure 2023)



## **6. Managing Risks and Crisis (continued)**

- **China**
- Immediate response to basically everything
- Crisis Management
  - Covers all kinds of issues
  - Reporting obligation
  - Crisis team and participation of brand owner
  - Enhanced intervention by brand owner? When? Who is in control?
  - Media relationship maintained by the distributors/franchisors – transparency (to the brand owner)
  - Record maintenance

## 6. Managing Risks and Crisis (continued)

- **China** – some suggested languages in the policy
- Categorization
  - Incident – any issue, incident, or event, whether internal or external, that have caused or may cause a limited adverse impact to the brand reputation or sale of the products/services (e.g. illustrative examples)
  - Crisis – any issue, incident, or event, whether internal or external, that have caused or may cause a major adverse impact to the brand reputation or sale of the products/services (e.g. illustrative examples)
  - For the avoidance of doubt, in incident can turn into Crisis
- The distributor shall designate a team of staff to monitor various media and social media in the territory from time to time
- For any Incident, the distributor is entitled to take steps to control the impact, report the situation and steps taken and/or to be taken, within [18] hours
- All statements to public must be based on verifiable facts
- No statements or actions which are disrespectful to other parties

## 6. Managing Risks and Crisis (continued)

- For any Crisis, the distributor shall report to the brandowner the situation as soon as possible, in any event not later than 12 hours, and a crisis team should be formed
  - [who will be members – name the positions and/or specific individuals]
- The first meeting shall take place within [4] hours after such report, if possible, with distributor providing the necessary details of the situation, and subsequent meetings be held in such interval as directed by the brandowner
- Except for immediate steps for controlling the impact of such crisis, which shall be taken in upmost good faith, all further steps should be approved by the brandowner or executed according to directions of the brandowner
- Distributor to provide details of the situation and development from time to time, and on a timely basis
- Brandowner is at discretion to take over the general control in the event the crisis further escalates, and thus Brandowner may appoint such service provider to manage the situation at distributor's costs, provided that such discretion shall not be exercised unreasonably