BOOK REVIEW – THE LAW AND REGULATION OF FRANCHISING IN THE EU

John Baer, *Greensfelder, Hemker & Gale, P.C., Chicago, USA*

Dr. Mark Abell[1] has published a thought provoking and controversial book entitled "*The Law and Regulation of Franchising in the EU.*"[2]

What the book does better than any source I have read is to examine the contractual and regulatory environment for franchising in the European Union ("EU"). Of the EU member states that have franchise laws, Mark points out that they have taken "markedly different" approaches to regulating franchising. Despite that difference, he found that there is a uniform contractual environment for franchising in the EU. He also sampled 25 agreements from five countries (Germany, France, UK, US and Australia) and found that while there is a distinct difference between the agreements used in civil jurisdictions from those used in common law jurisdictions, they exhibit a common architecture and address common issues.

"He argues that self-regulation of franchising does not work and does not effectively support or re-enforce the drivers that attract either franchisors or franchisees to franchising."

But Mark concludes that the regulatory environment in the EU is partly responsible for franchising's underachievement in the single EU market. He argues that self-regulation of franchising does not work and does not effectively support or re-enforce the drivers that attract either franchisors or franchisees to franchising. He argues that franchising needs to be regulated uniformly in the EU and he suggests that it be accomplished by means of an EU Directive providing for pre-contractual disclosure for business format franchises rather than a European Civil Code. His rationale for using a Directive is that a Directive would provide a middle ground by achieving harmonization while allowing EU member states the freedom to choose how to implement the Directive into their national laws. Mark even provides the reader with a proposed Draft Franchise Directive.

Mark recognizes that there will be difficulties in implementing an EU Directive because the European Franchise Federation and some of its member national associations (including the British Franchise Association) will be vigorously opposed to regulating franchising. Interestingly, he points out that of the EU franchisors he surveyed, the majority in France, Spain and Germany and about one-third of those in the UK would be in favor of a EU-wide statutory regulation of franchising. Mark's draft Directive calls for less disclosure than many other countries with franchise laws on the theory that the less information that is provided the more likely the franchisee will analyze it. But his draft Directive also would require franchise agreements to incorporate certain mandatory clauses that impose

[1] Bird & Bird, London, England UK.

[2] Elgar Intellectual Property Law and Practice (Cheltenham, UK 2013).

obligations on, and grant certain rights to, both franchisors and franchisees. The draft Directive calls for disclosure, but not registration.

In summary, Mark reaches three conclusions:

1. "although franchising is a specific, distinct and uniform type of commercial activity with a positive influence in the EU which stimulates economic activity by improving distribution, giving business increased access to other activity by offering economic advantages to all those involved and improving distribution and giving businesses increased access to other EU member state markets, it is not fulfilling its potential to contribute to the realisation of the single market;"

2. "the regulatory environment in the EU is, at least in part, responsible for this underachievement of franchising in the single market;" and

3. "the regulatory environment in the EU should be re-engineered to enable franchising to better fulfill its potential in the EU."

As Mark anticipates in his book, there will be many critics of his re-engineering proposal who think there should be no EU regulation. Perhaps the debate should be not whether regulation is necessary or desirable, but whether the regulation should be a European Civil Code or a Directive, and what should be the content of the Code or Directive. Regulation will bring a certain level of uniformity to the regulation of franchising in the EU, which may be desirable. However, it may be that a European Code may provide for more uniformity than a Directive, and the EU franchise community should decide which approach is better suited to the EU single market.

"Perhaps the debate should be not whether regulation is necessary or desirable, but whether the regulation should be a European Civil Code or a Directive, and what should be the content of the Code or Directive."

"Despite the lack of any real uniformity throughout the whole disclosure process, the franchise community in the U.S. has accepted the disclosure obligation and the state registration and review process with virtually no complaint ..."

The U.S. example may be instructive. Initially the 1978 FTC Franchise Rule co-existed with the 15 state franchise registration and disclosure laws, but most franchisors used a disclosure document called the Uniform Franchise Offering Circular ("UFOC") rather than the FTC disclosure format. After it became apparent that franchisors preferred the UFOC disclosure format, the FTC finally amended its rule in 2007 to adopt a modified version of the UFOC as the FTC's Franchise Disclosure Document ("FDD"). All franchisors now must use the FDD, but the states are still free to require other non-pre-empted disclosures. In other words, the FTC refused to assert complete pre-emption (despite requests to do so) to prevent the states from adding additional disclosure burdens on franchisors. And the states have continued to do that, for no good or apparent reason. Thus, while the FDD follows a required format, the states can impose additional requirements on franchisors. The FDD requires disclosure of too much information, thus reinforcing Mark's view that too much information makes it essentially useless for many franchisees.

What has happened in the U.S. now is that a few of the states that require registration and review FDD filings with them act as the policemen of the disclosure process and decide how the disclosures should be made. Some of the registration states that review the FDD impose conditions on the FDD that make the initial registration and annual renewal process extremely time consuming and costly without any real benefit to franchisees. Despite the

"The concept of uniform regulation in a single market really should not be controversial."

lack of any real uniformity throughout the whole disclosure process, the franchise community in the U.S. has accepted the disclosure obligation and the state registration and review process with virtually no complaint (other than perhaps to complain that they do not like the comments of some of the state examiners). No serious effort has been made to repeal any of that registration or disclosure legislation, although many states have amended their laws to conform to the FTC disclosure requirements and a few have simplified the registration process to eliminate examiner review of the disclosure documents. If a regulated franchise environment is acceptable to the U.S. franchise community, which is the birthplace of franchising, can anyone rationally argue that self-regulation is better for member states of the EU or that having diverse franchise laws in the EU is acceptable even though it may be costly and time consuming to comply with those diverse laws when the franchisor operates in more than one member state?

The simple fact of the matter is that Mark's call for more uniformity in EU franchise regulation would benefit franchising and is something that makes absolute sense, even if it means that EU member states without franchise laws now would have to comply with a Code or adopt a law required by a Directive. The concept of uniform regulation in a single market really should not be controversial. Uniformity provides efficiency and cost savings. And keep in mind that Mark did not call for a uniform regulation out of the blue – he called for uniformity because the current legal environment is so markedly different and contributes to franchising's under-achievement in the single EU market. What may be controversial is (1) whether there should be an EU Civil Code or a Directive, and whether a Directive would create the same lack of uniformity that the U.S. franchise regulations exhibit, and (2) the content of Mark's draft Directive, which contains mandatory agreement clauses and other matters that require careful review and consideration.

Mark has done a service by calling for a re-engineering of the regulatory environment in the EU. Let the debate begin.

John R.F. Baer

John Baer is Managing Officer of the Chicago office of Greensfelder, Hemker & Gale P.C. and an Officer in the franchising & distribution and corporate practice groups. John has a broad transactions practice with extensive experience representing companies engaged in franchising and distribution. He is the immediate past Chair of the International Franchising Committee of the International Bar Association's International Sales, International Franchising and Product Law Section.
(jrb@greensfelder.com)