

Franchise

in 32 jurisdictions worldwide

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Overview

1 What forms of business entities are relevant to the typical franchisor?

Business entities that are most commonly adopted by franchisors are those that allow them to limit their liability and thus to control the risk they are ready to assume when launching a franchise.

Three main forms of limited liability companies may be used:

- The *société anonyme* (SA), which requires a minimum capital of €37,000 and a minimum of seven shareholders. This company may be governed by a dualistic structure (a directory board manages the SA under the constant supervision and control of a supervisory board) or a simple structure (the SA is managed by a board of directors that entrusts a general manager with the day-to-day management of the company). The appointment of a statutory auditor is mandatory. The SA is also the only entity under French law that can be listed on a public stock exchange.
- The *société à responsabilité limitée* (SARL/EURL), which can be incorporated by a sole shareholder without minimum capital, and does not need an auditor to be appointed unless some thresholds (turnover and number of employees) are reached.
- The *société par actions simplifiée* (SAS/SASU), which can also be incorporated by a sole shareholder without minimum capital. The appointment of a statutory auditor is mandatory only if certain thresholds (turnover, total assets, and number of employees) are reached (and provided that the company is not affiliated to a group). This entity offers a greater flexibility and freedom of organisation as compared with the SARL and SA. The SAS is easily customisable, whereas the two other entities must comply with a rigid legal framework.

The choice of one of these corporate entities will depend on the size of the concerned business and its short-term plans (for example, IPO), the resources available to the franchisor or tax considerations. However, as a general remark, it should be noted that a change of corporate form is always possible between these three entities.

2 What laws and agencies govern the formation of business entities?

All the laws and regulations governing the formation and incorporation of limited liability companies have been collected within the French Commercial Code.

Business entities must be registered with the Trade and Companies Registry of the commercial court with jurisdiction over the company's seat.

3 Provide an overview of the requirements for forming and maintaining a business entity.

The formation of a business entity requires the signature of the articles of association of the company by the shareholders. The articles of association must contain all the means of identification of the

company (amount of the capital, registered seat, first managers, corporate purpose, etc) and the capital has to be paid up to 50 per cent for a SA and a SAS and up to 20 per cent for a SARL (please also refer to question 1). The articles of association must then be registered with the Trade and Companies Registry. Upon registration, the company acquires legal capacity.

In order to maintain a business entity, a shareholders' meeting must be held every year to approve the annual accounts, which must be registered with the Trade and Companies Registry.

4 What restrictions apply to foreign business entities and foreign investment?

Generally, no restrictions apply to foreign entities wishing to develop their business in France, or to foreign investments. Except in restricted areas, for which prior authorisation from the French administration is required (for example, the defence sector), foreign investors are free to invest in France, subject only to a prior statistical declaration (this declaration must also be submitted when incorporating a company in France). However, if a foreigner who is not a citizen of a country of the European Economic Area or of Switzerland is appointed as legal representative of a French company, some formalities – declarations to the prefectural authorities or obtaining a resident permit, depending on whether the person resides in France – must be fulfilled prior to the registration of the company.

5 Briefly describe the aspects of the tax system relevant to franchisors. How are foreign businesses and individuals taxed?

No specific taxation applies to franchisors. They are thus subject to the following main categories of taxes:

- Income taxes: taxes on the profits generated by the activity of the franchisor. If the franchisor is a company, it will be taxed at a 33.33 per cent flat rate (with some minor exceptions). If the franchisor is an individual, he or she will be subject to a progressive tax up to a maximum amount of 40 per cent of his or her income.
- Value added tax: a flat rate of 19.6 (and, in certain cases, of 5.5) per cent applies on all sales of goods or services in France. The fees paid to the franchisor are subject to VAT.

Pursuant to the treaties for the avoidance of double taxation entered into with most countries, foreign business entities are generally not subject to taxation in France. However, in light of the specificity of each given situation, this is a matter that calls for personalised advice.

6 Are there any relevant labour and employment considerations for typical franchisors? What is the risk that a franchisee or employees of a franchisee could be deemed employees of the franchisor? What can be done to reduce this risk?

In principle, a typical franchise agreement would be entered into between the franchisor and the franchisee as independent parties. Hence, franchisees (or their employees) should not be deemed employees of the franchisor.

However, whatever the terms of the franchise agreement, if, as a matter of fact, a franchisee is placed under the close control of, and takes instructions from, the franchisor (a 'subordination link'), it is likely that this could be construed as an employment relationship under the law.

This could be the case, in particular, where the franchisee's duty merely consists of selling goods that are exclusively (or almost exclusively) supplied by the franchisor, at conditions and prices fixed by the franchisor, in premises owned or rented by the franchisor, or where the elements entering into the franchisee's remuneration mainly depend on the conditions imposed by the franchisor, or both.

It must be noted that under certain circumstances, certain provisions of the French Labour Code may apply to franchisees who are economically dependent on the franchisor, without it being necessary to establish a subordination link (articles L7321-1 and seq of the French Labour Code).

In order to limit that risk, a franchisor must be careful not to impose a direct subordination link on franchisees or conditions that would make them economically dependent.

The franchisee is the employer of its own employees. However, if there is a direct subordination link between the franchisor and the franchisee's employees, there is a risk that the franchisor would be deemed to be their employer, or at least their co-employer, which could entail criminal sanctions under certain circumstances. In order to avoid that risk, it is important to ensure that the franchisee is the sole decision-maker in hiring, providing work instructions, supervising, sanctioning and terminating employment contracts of the franchisee's employees.

7 How are trademarks and know-how protected?

Trademarks are protected in France by way of registration with the French Industrial Property Institute. European trademarks (registered with the Office for Harmonisation in the Internal Market) also enjoy legal protection in France, as do international trademarks (registered with the World Intellectual Property Organization) provided that they designate France.

Trademarks are regulated by the Intellectual Property Code, enacted by Law No. 92-597 of 1 July 1992.

A duly registered trademark confers exclusive rights on its holder for a period of 10 years, which is renewable indefinitely. These rights notably enable their holder to act against any unauthorised use of the trademark.

Signs can be protected by way of registration with the Registry of Commerce and Companies. However, such protection is granted under the condition that the signs are effectively and continuously exploited on the national territory.

Know-how and trade secrets are not subject to any form of registration but can be enforced as long as they are original; secret; economically valuable; and protected from any form of involuntary disclosure. In order to enforce their protection, one should act on the grounds of unfair competition. Particular care must be taken with respect to confidentiality obligations when disclosing the know-how, particularly at the pre-contractual stage.

8 What are the relevant aspects of the real estate market and real estate law?

In France, the purchase of real estate is governed by the Civil Code. Sales contracts must be signed before a notary public and registered with the land registry. Urban planning has been subject to extensive legislation in order to preserve architecture and environment and to create a framework for the development of urban and rural areas. Domestic and foreign purchasers of real estate are not treated differently.

Franchisors usually rent the premises in which they conduct business under a commercial lease. Commercial leases are regulated by mandatory rules set out in the French Commercial Code. The lessee must be registered with the Registry of Commerce and Companies. A foreign lessee has similar rights to a domestic lessee. These include, under specific conditions, the right to renew the lease and to obtain compensation should the lessor decide to terminate the lease.

Laws and agencies that regulate the offer and sale of franchises

9 What is the legal definition of a franchise?

Although this is a widely used model for developing business, in particular in the distribution sector, there is no legal definition of a franchise in French law. Nevertheless, franchising is viewed, generally speaking, as the 'reiteration of a commercial success'.

According to case law and to various legal commentators, a franchise may be defined as an agreement by which two independent companies or persons proceed to cooperate, such that one of them (the franchisor) provides the other (the franchisee) with its distinctive signs (trademark, commercial sign), original and permanently improved know-how and ongoing commercial and technical assistance. As consideration, in addition to paying fees (and sometimes a lump sum when joining the franchise network), the franchisee is notably committed to use the know-how and distinctive signs in a uniform commercial manner.

Franchising was previously described, in a 29 November 1973 administrative order, as 'an agreement by which one entity, in exchange for fees, grants to other independent entities the right to use its commercial sign and its trademark in order to sell products and services. This agreement generally includes technical assistance'. This definition was considered partial and is no longer in force.

After having elaborated its own definition of franchise in 1987, the French Franchise Federation now refers to the European Code of Ethics for Franchising, which defines franchising as:

A system of marketing goods and/or services and/or technology, which is based upon a close and ongoing collaboration between legally and financially separate and independent undertakings, the franchisor and its individual franchisees, whereby the franchisor grants its individual franchisees the right, and imposes the obligation, to conduct a business in accordance with the franchisor's concept. The right entitles and compels the individual franchisee, in exchange for a direct or indirect financial consideration, to use the franchisor's trade name, and/or trademark and/or service mark, know-how, business and technical methods, procedural system, and other industrial and/or intellectual property rights, supported by continuing provision of commercial and technical assistance, within the framework and for the term of a written franchise agreement, concluded between parties for this purpose.

Such a definition may be taken into consideration by French courts.

10 Which laws and government agencies regulate the offer and sale of franchises?

As there is no codified mention of franchise agreements in French law, there are no specific legal provisions applicable to franchises.

General contractual aspects are governed by the Civil Code and commercial aspects are governed by the Commercial Code. In particular, it is worth mentioning articles L330-1 and L330-3 of the Commercial Code, which apply to exclusivity or quasi-exclusivity undertakings, and often impact on franchises (see question 11).

There are no government agencies specifically dedicated to the regulation of the offer and sale of franchises. However, competition law aspects of distribution (including franchises) fall under the respective authority of the General Directorate for Competition Policy, Consumer Affairs and Fraud Control, an administrative body within the Ministry of Economy, and of the Competition Authority, an independent authority.

11 Describe the relevant requirements of these laws and agencies.

Article L330-3 of the Commercial Code provides for pre-contractual disclosure obligations. It is applicable to all agreements by which one person grants to another a trade name, a trademark or sign, and requires an exclusivity or quasi-exclusivity undertaking for the exercise of such other person's activity.

The pre-contractual information must be disclosed in a document (the content of which is described in question 16), which must be remitted at least 20 days prior to the signature of the franchise agreement. Such document must contain truthful information allowing the franchisee to commit to the contract with full knowledge of the facts.

Pursuant to article L330-1 of the Commercial Code, the duration of exclusive supply obligations may not exceed 10 years. It is nevertheless possible for the parties to enter into another agreement at the end of this 10-year period.

12 What are the exemptions and exclusions from any franchise laws and regulations?

As French law does not provide for any specific franchise law or regulations, no exemptions or exclusions are applicable.

13 Does any law or regulation create a requirement that must be met before a franchisor may offer franchises?

There is no such legal or regulatory requirement under French law. However, since a franchise is described by case law as the 'reiteration of a commercial success', the franchisor must be in a position to prove, prior to offering a franchise, that it has operated at least one similar commercial business, in a manner and for the time necessary to consider such business as a success.

14 In the case of a sub-franchising structure, who must make pre-sale disclosures to sub-franchisees? If the sub-franchisor must provide disclosure, what must be disclosed concerning the franchisor and the contractual or other relationship between the franchisor and the sub-franchisor?

There are no specific provisions regarding sub-franchising structures in French law. Nevertheless, article L330-3 of the Commercial Code is applicable to 'any person who provides to another person a corporate name, trademark or trade name'. Hence, it is up to the sub-franchisor, as the contracting party, to disclose the pre-contractual information. This would apply even more so where the sub-franchisor has altered the franchise concept in order to customise it to the geographical area granted to it by the franchisor.

The pre-contractual document mentioned in article R330-1 of the Commercial Code does not specifically require that a sub-franchisor disclose information concerning the franchisor and the contractual or other relationship between the franchisor and the sub-franchisor. However, since article L330-3 of the Commercial

Code requires the disclosure of truthful information allowing the franchisee to commit to the contract with full knowledge of the facts, the sub-franchisor is under the obligation to disclose all relevant information, which may also relate to the franchisor. Such information may consist notably in the franchisor's name, its location, registration number, professional references, the identity of the managers, or the date of the company's creation.

In the event that there are direct contractual obligations between the franchisor and the sub-franchisee, the pre-sale disclosure might also be made by the franchisor.

15 What is the compliance procedure for making pre-contractual disclosure in your country? How often must the disclosures be updated?

The pre-contractual disclosure must be made in writing at least 20 days prior to the occurrence of the first of the two following events:

- signature of the franchise agreement; or
- payment by the future franchisee of a sum prior to the signature of the agreement, notably in order to obtain the booking of a geographic area.

According to case law, the disclosure has to be made at each renewal of the agreement, even tacit ones. The general principle of 'good faith' in contractual relationships may also require that the franchisor deliver any necessary piece of information during the course of the contractual relationships.

16 What information must the disclosure document contain?

Articles L330-3 and R330-1 of the Commercial Code provide for a very precise list of information that must be disclosed to the franchisee.

The disclosure document must contain, notably, the following information:

- on the franchisor: company name, location, description of its activity, capital, registration number, bank accounts (this may be limited to the five main bank accounts), identity of the entrepreneur or of the managers, all indications regarding their professional references, date of the company's creation, principal stages of its evolution over the past five years, annual financial statements of the two last financial years or the annual reports for the past two years, if the company's securities are publicly traded;
- on the licensed trademark: registration, registration number, date of acquisition of the trademark or date and duration of the licence of the trademark, if applicable;
- on the state and prospects of the market (general and local);
- on the network: list of the member companies with indication of the operating mode, list of the companies (maximum 50) located in France with which the franchisor concluded the same agreement and the date of conclusion or renewal, or both, of such agreements, indication of the number of companies which have left the network during the previous year and of the reason why they left the network (termination, expiration, etc), indication of the presence within the business area of the franchisee of any commercial premises where the products or services concerned are sold; and
- on the contract: the term and conditions of renewal, cancellation and assignment of the contract and the scope of the exclusive rights.

The document must also mention the nature and amount of the expenses and investments related to the commercial name, sign or trademark that the franchisee must pay out before exploiting those IP or commercial rights (see also question 21).

17 Is there any obligation for continuing disclosure?

As explained above (see questions 10 and 14), there are no specific legal provisions applicable to franchises. However, franchise agreements are characterised by the transfer of the franchisor's know-how to the franchisee. The European Code of Ethics for Franchising states that the franchisor shall inform and provide training to the franchisee in order to pass down its know-how; this transfer of know-how and training implies ongoing disclosure of the necessary information related thereto.

Moreover, franchise agreements must comply with general principles of contracts and the franchisor is under a general obligation to contract in good faith (see question 21). As a consequence of this good faith obligation, the franchisor must provide to the franchisee, after the execution of the agreement, all information that may have an effect on the franchise and/or the franchisee. In particular, according to case law, the franchisor should inform the franchisee of any significant change in its situation (eg the franchisor must immediately inform the franchisee if it goes into receivership).

18 How do the relevant government agencies enforce the disclosure requirements?

There is no specific government agency involved in the enforcement of disclosure requirements. Any violation would be assessed by the courts that have material (typically, the tribunal de commerce) and territorial jurisdiction.

19 What actions can franchisees take to obtain relief for violations of disclosure requirements? What are the legal remedies for such violations? How are damages calculated? If the franchisee can cancel or rescind the franchise contract, is the franchisee also entitled to reimbursement or damages?

The franchisee may bring an action before the commercial courts, in order to be granted damages and to obtain proportionate reimbursement of the fees paid to the franchisor and the investments made by the franchisee.

It may also ask for the rescission of the contract in case of an error (article 1110 of the Civil Code) or a fraudulent misrepresentation (article 1116 of the Civil Code), provided that it proves it would not have entered into the contract had the franchisor met the disclosure requirements. Where the contract is rescinded, the franchisee may be entitled to reimbursement of the franchise fees, as well as to compensation for losses suffered during the exploitation of the franchise.

Damages generally amount to the gross margin that the franchisee would have realised if the information had been correctly disclosed. It must be noted that in assessing damages, courts generally take into account the professional experience of the franchisee itself.

20 In the case of sub-franchising, how is liability for disclosure violations shared between franchisor and sub-franchisor? Are individual officers, directors and employees of the franchisor or the sub-franchisor exposed to liability? If so, what liability?

There are no provisions under French law regulating any sharing of liability between the franchisor and sub-franchisor. Nevertheless, even though the sub-franchisor is directly exposed to liability, the franchisor may also be held liable if it has disclosed any erroneous information to the sub-franchisor or directly to the franchisee. As far as civil liability is concerned, individuals are in principle not exposed to personal liability unless they have not acted on behalf of a company.

21 In addition to any laws or government agencies that specifically regulate offering and selling franchises, what are the general principles of law that affect the offer and sale of franchises? What other regulations or government agencies or industry codes of conduct may affect the offer and sale of franchises?

It may not be sufficient to comply with the disclosure requirements of article L330-3 of the Commercial Code. According to the principle of good faith set forth in article 1134 of the Civil Code, the franchisor may have to disclose other significant information (for example, the fact that a previous franchisee in the same area declared bankruptcy two years ago. Article R330-1 of the Commercial Code requires that such information be given only for the previous year).

The French Franchise Federation issued a Code of Ethics which has been substituted by the one put out by the European Franchise Federation. It must be noted that membership of the French Franchise Federation is not mandatory. Therefore, the Code of Ethics may not be enforceable against any franchisor or franchisee, even though it may be viewed by French courts as a guide to what is commonly promoted.

22 Are there any general obligations for pre-sale disclosure that would cover franchise transactions?

See questions 10, 11, 14, 15, 16 and 21.

23 What other actions may franchisees take if a franchisor engages in fraudulent or deceptive practices in connection with the offer and sale of franchises? How does this protection differ from the protection provided under the franchise sales disclosure laws?

A franchisor may be prosecuted in specific cases of fraud (for example, use of a false identity or occupation) or misleading advertising.

Legal restrictions on the terms of franchise contracts and the relationship between parties involved in a franchise relationship**24** Are there specific laws regulating the ongoing relationship between franchisor and franchisee after the franchise contract comes into effect?

There are no specific French laws that govern the entire franchisor-franchisee relationship in ongoing franchise contracts. However, it should be noted that general contract rules apply, as well as certain specific rules relating to distinct contractual obligations within the framework of the franchise relationship (for example, licences of intellectual property rights).

25 Do other laws affect the franchise relationship?

Where a franchisor exercises an excessive amount of control over the franchisee, the latter could be qualified as an employee, which will lead to the applicability of labour law (see question 6).

The provisions of French and EC competition laws are also applicable to certain obligations provided for in franchise contracts.

26 Do other government or trade association policies affect the franchise relationship?

As a member of the European Franchise Federation, the French Franchise Federation ensures that its members comply with the European Code of Ethics for Franchising.

In addition, the French Association for Standardisation has issued a standard known as AFNOR Standard (NF Z 20-000), which contains non-binding rules related to the content and termination of franchise agreements.

27 In what circumstances may a franchisor terminate a franchise relationship? What are the specific legal restrictions on a franchisor's ability to terminate a franchise relationship?

Where a franchise agreement is concluded for an indefinite term, it may be terminated by the franchisor at any moment by giving a written notice of termination, provided that a reasonable notice period is respected.

It should be noted that pursuant to article L442-6 of the Commercial Code, a party to a commercial agreement may be held liable in case of an abrupt termination of an established commercial relationship.

Where a franchise agreement is concluded for a fixed term, it may be cancelled in the case of serious and repeated breaches by the franchisee of its main contractual obligations (for example, failure to comply with network standards, breach of an exclusive supply clause, breach of loyalty).

As a general rule, cancellation for breach of contract has to be decided by a court. However, there are precedents for the unilateral termination of franchise contracts (without recourse to courts) in the case of gross misconduct by one of the parties.

A franchisor may also unilaterally terminate a franchise agreement for breach if the agreement contains an automatic cancellation clause.

On the other hand, a provision in a commercial agreement whereby it may be terminated upon the bankruptcy of one party is unenforceable as a matter of law.

28 In what circumstances may a franchisee terminate a franchise relationship?

A franchisee may terminate a franchise agreement under the same conditions as those described in question 27.

As far as cancellation for breach of contract is concerned, according to case law, it may be justified in the case of breach of the franchisor's obligation to provide the franchisee with an original and specific trademark, distinctive sign or know-how, or with the assistance necessary to carry out the contemplated activity.

29 May a franchisor refuse to renew the franchise agreement with a franchisee? If yes, in what circumstances may a franchisor refuse to renew?

A franchisor is not required to renew a franchise agreement upon the expiration of its term. The franchisor is neither required to indemnify the franchisee, nor to justify its decision not to renew the agreement.

However, the franchisor's right not to renew an agreement must not be abused (for example, by leading the franchisee to believe that the agreement would be renewed under certain conditions, but refusing to do so).

30 May a franchisor restrict a franchisee's ability to transfer its franchise or restrict transfers of ownership interests in a franchisee entity?

Franchise agreements are considered to be concluded on the basis of the contractors' identities (*intuitus personae*). Consequently, the franchise agreement's terms may require the franchisor's consent prior to any transfer of the franchise or change of control of the franchisee entity, or may alternatively prohibit such transfers.

31 Are there laws or regulations affecting the nature, amount or payment of fees?

Article L330-3 of the Commercial Code may apply to initial franchise fees if, under the terms of a franchise agreement, a licence to use a trade name, a trademark or a logo is granted subject to a

commitment of exclusivity. Pursuant to article L330-3, if payment of any monies is requested prior to the execution of such an agreement, the disclosure document mentioned in question 15 must contain information concerning 'the undertakings made in consideration of such payment' and the 'reciprocal obligations of the parties in case of forfeiture'. This information must be provided to the franchisee 20 days prior to the payment of the monies.

The amount and nature of fees are not affected by any statutory provisions applicable specifically to franchise fees and royalties. They are of course subject to applicable taxes.

32 Are there restrictions on the amount of interest that can be charged on overdue payments?

As a general principle, the amount of interest that can be charged on overdue payments is determined by the parties. However, article L441-6 of the Commercial Code stipulates a minimum rate of three times the legal interest rate. If no rate is provided by the agreement, the rate applied amounts to 10 per cent over the official interest applied by the European Central Bank to its most recent financing operation.

There is no specific provision for a maximum interest rate. However, the imposition of unreasonably high rates, in particular with regard to commercial practices, may be considered as manifestly abusive and thus prohibited by article L442-6 of the Commercial Code.

The creditor may also claim damages for any harm he or she may have suffered as a result of late payments.

33 Are there laws or regulations restricting a franchisee's ability to make payments to a foreign franchisor in the franchisor's domestic currency?

Case law consistently holds that clauses relating to payment in a foreign currency are valid in international contracts.

34 Are confidentiality covenants in franchise agreements enforceable?

Confidentiality covenants are upheld insofar as they tend to protect the franchisor's know-how or the common identity and reputation of the franchise network, or both.

35 Is there a general legal obligation on parties to deal with each other in good faith? If so, how does it affect franchise relationships?

Pursuant to article 1134 of the Civil Code, agreements must be performed in good faith. This general contract rule fully applies to franchise agreements. It implies in particular an obligation of loyalty and cooperation at all stages of the dealings.

35 Is there a general legal obligation on parties to deal with each other in good faith? If so, how does it affect franchise relationships?

The notion of a consumer is somewhat disputed under case law. However, it may be noted that for the purpose of the main consumer-related legal provisions, and according to recent case law, only natural persons may be treated as consumers. In the few remaining instances where a legal person may be considered as a consumer, it is usually required that it act as a non-professional. As franchisees generally act as professionals, they are unlikely to be treated as consumers, even if they happen to be natural persons.

36 Does any law treat franchisees as consumers for the purposes of consumer protection or other legislation?

The notion of a consumer is somewhat disputed under case law. However, it may be noted that, for the purpose of the main consumer-related legal provisions and according to recent case law, only

natural persons may be treated as consumers. In the few remaining instances where a legal person may be considered as a consumer, it is usually required that it act as a non-professional. As franchisees generally act as professionals, they are unlikely to be treated as consumers, even if they happen to be natural persons.

37 Must disclosure documents and franchise agreements be in the language of your country?

There are no statutory rules imposing the mandatory use of the French language in disclosure documents and franchise agreements. However, the disclosing party must make sure that the disclosure document is understandable to the future franchisee.

For the sake of completeness, it should be noted that the non-binding AFNOR standard mentioned in question 26 requires that the franchise agreement be written in the language of the franchise's place of exploitation.

38 What restrictions are there on provisions in franchise contracts?

Concerns related to the anti-competitive effects of these provisions are mentioned in question 39.

If the franchise agreement contains an exclusivity clause, the duration of the exclusivity is limited to a maximum of 10 years pursuant to article L330-1 of the Commercial Code.

Restrictions on sources from which the franchisee may purchase goods or lease services are valid provided that their duration is limited to 10 years and that they do not restrict competition (see question 39).

According to case law, a non-competition clause applicable after the termination of the agreement is valid only if it is necessary in order to protect, in a proportionate manner, the legitimate interests of the beneficiary, and the time and place of its performance is limited.

Parties acting as traders enjoy great liberty in choosing jurisdiction or governing law, or both. In particular, they may elect to submit a dispute to a court which would not normally have territorial jurisdiction over it, or to arbitration. Parties to an international contract may also freely choose the governing law of the contract. However, a French court may refuse to apply any provision of the governing law which it considers to be manifestly incompatible with French public policy.

39 Describe the aspects of competition law in your country that are relevant to the typical franchisor. How are they enforced?

Competition issues are governed by French and EC competition rules. In particular, European Commission (EC) Regulation 330/2010 of 20 April 2010 (replacing Regulation 2790/1999 of 22 December 1999) on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices is applicable to franchise agreements (insofar as they may affect trade between EU member states) and may be enforced by French competition authorities and courts.

The fixing of minimum prices by the franchisor for the resale of goods is prohibited pursuant to articles L420-1 and L442-5 of the Commercial Code. However, price guidelines or maximum prices are allowed provided that they do not have the effect of creating pressure on franchisees that effectively leads to the fixing of prices or to a uniform price applied by the whole network.

Exclusive agreements leading to absolute territorial protection are prohibited.

As regards restrictions on customers that the franchisee may serve, one must distinguish between restrictions of active sales and restrictions of passive sales to customers reserved to the franchisor or allocated by it to other franchisees. In general, active sales may

Update and trends

According to a French organisation called 'the Observatory of Franchise', the number of franchisees increased in 2009 (49,094 in 2008 and 51,619 in 2009). The sectors in which franchise networks are most widely used are the personal equipment sector and the hotel business. Food retailing is also a sector that represents an important number of franchisees (7,846 in 2009).

The French Competition Authority is currently conducting investigations of the supermarket distribution sector. It is looking in particular at the duration of franchise agreements, as well as at other obligations of the franchisee such as commitments towards the franchisor's central purchasing entity, which in practice may prevent franchisees from changing one franchisee for another (typically, this is the case where the term of a franchise agreement differs from the term of the supply agreement with the franchisor's central purchasing entity).

The French Competition Authority has already condemned such practices. In a decision dated 3 March 2010, the French Competition Authority stated that maintenance of the identity of the franchise network and protection of the franchisor's know-how can justify the franchisor's exercise of some degree of control over the franchisees' commercial policy. However, the practice by certain franchisors of imposing a set of contractual clauses on their franchisees that limit the franchisees' ability to quit the network or that restrict competition in a manner that is not proportionate with the objectives of a franchise agreement can constitute an abuse of economic dependence, which is prohibited by article L420-2 of French Commercial Code.

be restricted (provided that this restriction does not limit sales by the customers of the franchisee), but there can be no restriction on passive sales.

As far as restrictions on the source from which a franchisee may purchase goods or lease services are concerned, according to the European Commission's Guidelines on Vertical Restraints, they are not deemed to restrict competition if they are necessary to maintain the common identity and reputation of the franchised network. Under French law, non-compete obligations must be reasonable as regards their duration, their geographical applicability, and the scope of activities covered. French law does not provide for a strict limitation in time. However, French competition authorities refer to EC Regulation 330/2010 of 20 April 2010, which provides for a one-year limitation on post-contractual obligations and a five-year limitation on non-compete obligations applicable during the contract term.

40 Describe the court system. What types of dispute resolution procedures are available relevant to franchising?

In the French court system, disputes are brought before specialised courts, depending on the matter at stake.

A typical franchise dispute would be brought before relevant commercial courts – usually those of the jurisdiction where the defendant is located. Appeals may be brought before the relevant court of appeal, whose decision may be appealed to the Supreme Court, which will review questions of law only.

Labour law matters must be brought before specific labour jurisdictions. Matters concerning trademarks must be brought before the ordinary civil courts. These cases may subsequently be taken up by a court of appeal and the Supreme Court.

Arbitration is possible between professionals under the French Civil Procedure Code. The case may be brought before various relevant internal or international organisations (French Arbitration Association, French Arbitration Committee, ICC, etc).

41 Describe the principal advantages and disadvantages of arbitration for foreign franchisors considering doing business in your jurisdiction.

The main advantages of arbitration for a franchisor are the discretion, confidentiality and flexibility of the procedure. The fact that the parties can choose arbitrators who are specialists in the matter at hand and who are not attached to the national legal system of one of the parties can also be an advantage. Furthermore, as an arbitration award may be final and binding upon the parties, the arbitration procedure can be faster and more efficient than a standard procedure before the courts.

However, the fact that the enforcement of an arbitration award requires a judgement of a civil court (Tribunal de Grande Instance) may be a disadvantage in case of emergency. Besides, arbitration can be expensive and the costs of the procedure can dissuade the parties from choosing arbitration or, where arbitration is already provided in the franchise contract, from bringing an action before the arbitration panel.

42 In what respects, if at all, are foreign franchisors treated differently from domestic franchisors?

Foreign franchisors are not, in practice or legally, treated differently from domestic franchisors.

Investments made in France by foreign companies are only submitted to statistical declarations. This may concern foreign franchisors if they intend to invest directly in France (see question 4).

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