

FEATURES OF CONCLUDING FRANCHISE AGREEMENT IN FRANCE

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ABSTRACT

Description: The purpose of the article is to study the legal nature of the franchise agreement in France. The subject of the study is a franchise agreement in France. Research methodology. The research is based on the use of general scientific and special-scientific methods and methods of scientific knowledge, in particular: dialectical method, comparative and legal method, normative and dogmatic method, system and structural method, the methods of grouping and classifying, legal modeling method. Results of the Study: The peculiarities of concluding franchise agreement in France are studied. Practical implication. Positive experience on the issues related to the conclusion franchise agreement of such leading European country as France can be used to make appropriate changes to the legislation of Ukraine. Value /originality. This scientific work is the first research in Ukraine devoted not only to general issues of regulation of franchising activity in Europe, but specifically to the franchise agreement in a particular country (France).

Keywords: Franchising, Franchising Agreement, Pre-Contract Disclosure Obligation, Essential Conditions.

INTRODUCTION

Franchising is a proven means of achieving commercial success, which has become increasingly widespread and effective in recent years. Establishing your own franchising network is a great idea for those entrepreneurs who want to go beyond the corporate system and distribute their products not only within the country of residence, but also on the international market.

Franchising has a number of advantages, which makes it attractive for both experienced entrepreneurs and to budding franchisees. These advantages are:

1. A relatively small amount of initial investment;
2. The tried and tested concept of doing business;
3. Brand recognition;
4. Compliance of product quality and design of retail outlets;
5. No need to advertise products;
6. Support of the franchisor (educational and technical);

7. Support of the franchisees who are already the members of the network (since they can share their experience);
8. Financial support (banks willingly provide loans to budding franchisees).

Certainly, success is possible only provided that the provisions of the franchise agreement, which is concluded between a franchisor and a franchisee, completely provide for the mechanism of their interaction and the means of protecting of their rights and interests. So in order for a franchising agreement to become an effective instrument, it must include not only a number of essential conditions, but also adapt the agreement to each specific situation.

In connection with the course of Ukraine on Euro integration it is reasonable to study positive experience of leading European countries for its further application to the legislation of our state.

Therefore, in this article, we will consider how exactly the problem of concluding the franchise agreement is regulated in France, since this country has the most systematized legislation concerning this issue.

MATERIALS AND METHODS

The research is based on the use of general scientific and special-scientific methods and methods of scientific knowledge. The dialectical method allowed to explore the definition of the franchise contract in France and to distinguish its key terms. The comparative and legal method was used to compare doctrinal approaches to this issue. Interpretation of the content of legal acts of the French legislation governing the issues related to the conclusion of a franchise agreement in this country was carried out with the help of the normative and dogmatic method. The system and structural method was used to study the franchise agreement in the above-mentioned country as a single whole (system) with the coordinated functioning of all its elements. The methods of grouping and classifying formed the basis for separation the list of conditions which are necessary for concluding a franchise agreement in France, as well as provisions that should be included in the content of this agreement. The legal modeling method helped to formulate further conclusions.

RESULTS AND DISCUSSION

Franchising in France dates back to the 1960s and since then has developed constantly. Based on recent data by the French Franchising Federation, franchising accounts for a total turnover in France of €55 billion, covering 71,508 franchised outlets within 1,900 networks and employing directly and indirectly 618,845 people. France is the biggest market for franchising in Europe by the number of networks. International franchisors (for the greatest part of US origin) account for about 10 per cent of the total. Five business sectors represent 60 per cent of the franchising turnover in France: personal and household equipment, food retail, hotels and hairdressing. Most of the networks are mixed, which means they combine the franchisor's own outlets and the franchisees' (French Franchise Federation, 2019).

Franchising is one of the few sectors that create new jobs, despite the difficult economic conditions in the state. Thus, all economic indicators of franchising in 2017 have increased, namely: the number of points of sale has increased by 3.6%; the number of franchise networks increased by 4%; the overall sector turnover increased by 8.07%.

France is top in the European franchising sector, creating 620,000 direct and indirect jobs. In 2017, 76 new franchise networks and 2,594 new points of sale were created, generating EUR4.45 billion more turnover than in 2016.

These trends reflect the overall direction of consumer spending, as more households are looking for ways to facilitate their daily lives, and an increase in the franchising of personal services is the answer to this growing demand (Menguy, 2018).

The national franchise association in France is the French Federation for Franchising. The membership in this association is not mandatory, but it is recommended because it, *inter alia*, conducts training regarding franchising in France, arranges the participation of its members in the Franchise Expo Paris, which is well-known annual franchise exhibition in France. The French Federation for Franchising also verifies if the provisions of the disclosure document and franchise agreements correspond to the European Code of Ethics of Franchising.

Approximately 160 large franchisors are members of the French Franchising Federation, which represents approximately 45% of French franchisees. Its main role is to promote and maintain franchise networks in their development both within and outside the country. The services offered to its members include documentation, training, legal assistance, mediation, etc. The French Franchising Federation founded the European Franchise Federation in 1972 (Mellerio, 2018).

There is no legal definition of the franchise agreement in France, but it has been formulated in relevant court decisions and scientific works of French civilians. According to these definitions, the franchising agreement is the agreement that includes the following elements: the right to use a registered trademark and a transfer of know-how.

Even if the parties do not consider their relationship as franchising, any agreement containing the above mentioned elements can be regarded as a franchise agreement, which means that the franchisor provides the franchisee with an appropriate assistance, the main purpose of which is to obtain profit from the franchise activity.

In practice, the definition given in paragraph 1 of the Code of Ethics (European Franchise Federation, 2016) adopted by the European Federation of Franchising is used. According to this definition, franchising is 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 Franchisee 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 trade mark 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.

The law does not impose any restrictions on the franchisor's organizational form, but the most widespread organizational forms in France are various types of limited liability companies such as *société par actions simplifiée*, *société à responsabilité limitée* and *société anonyme*.

Franchisees usually establish their business directly or create a subsidiary company in which they own 100% of the shares. In addition, master franchise agreements are often used, especially if the franchisor does not have experience in France. In this case, the entrepreneurial structure is managed by specialists who are well aware of the features of the French market. A

joint venture is not very common, since one of the most important principles of the French franchise system is an independence of the franchisee (Peskin & Deschamps, 2015).

There is no special law on franchising in France, but it is the first country where a special normative act for the settlement of franchise agreements was adopted (though not for regulation of franchise contracts directly, but the category of contracts, which franchising is subject to). Thus, on December 31, 1989 the Law № 89-1008 (hereinafter – the Law 89-1008) on the development of trade and industry and the improvement of the economic, political and social situation of the relevant branches was adopted in France. It was the first law in the European Community, which consolidates the provision for compulsory pre-contractual disclosure. In particular, as it is stated in the clause 1 of the Law 89-1008, the disclosure document containing specific information must be transferred to the potential partner twenty days prior to the signing of the main contract. Namely, the partner should be provided with the information on the record of service, the company's experience, the prospects for the development of the relevant market, the duration of the agreement, the terms of renewal or termination of contractual relations (Law of the French Republic, 1989).

On April 4, 1991, the Government of France adopted the Decree № 91-337 on application of the clause 1 of the Law 89-1008 (Law of the French Republic, 1991) for clarification and extension of the content of the latter. The Decree has specified which information should be contained in the document on pre-contractual disclosure:

1. Franchisor's information (company name, registered office, form, capital, manager, registration number);
2. Trademark registration number and registration number of the trademark license agreement if relevant;
3. Franchisor's banking information (bank address, account number);
4. Franchisor's audited financial statements regarding the past two years;
5. History and presentation of the company and of the network;
6. General and local market «statements» (presentation) and development prospects of the general and local market;
7. List of the undertakings of the network, and nature of their relationship with the Franchisor (franchise agreement, subsidiaries, JVs, etc.);
8. Address of the franchised undertakings located in France, conclusion and renewal dates of the related franchise agreement;
9. Number of franchisees that have left the network the year before the issuance of this document, detailing whether this has resulted from expiry, cancellation or termination of the contract;
10. Presence of any undertaking member of the network in the same territory, and distribution of services or products that are the subject of the franchised business in the same territory;
11. The most important provisions of the contract: duration, renewal, termination, assignment, exclusive rights;
12. Investments linked to the franchise operation.

Later, the provisions of the Law № 89-1008 and the Decree № 91-337 were included in clauses L.330-3 and R.330-1 of the French Commercial Code (Law of the French Republic, 2015) respectively. These clauses are the main source of regulation of franchising relationship in France nowadays.

In accordance with the clause L.330-3 of this Code, the franchisor is required to provide the franchisee with a pre-contract information document (disclosure document) at least twenty days before the signing of the franchise agreement, or at least twenty days before payment of any amount or of any investment related to franchising. The disclosure document includes various categories of information to be revealed, for example: about the franchisor, its parent company and related companies; litigation, bankruptcy cases against the franchisor; initial and recurring

payments; the amount of the initial investment; territory; trademarks and other objects of intellectual property, full text of the franchise agreement; detailed information about the franchiser and the trade marks transferred under the contract; a list of franchisees included in the system, as well as outlets managed by the franchisor itself; annual statistics of the changes in the number of franchisees, description of the business that is the subject of the franchise, etc.

The sanctions for failing to comply with pre-contract disclosure obligations are both criminal and civil.

Each infringement is subject to a criminal fine of EUR1 500 for natural persons and EUR7 500 euros for legal entities (Article R.330-2, Commercial Code). These fines are doubled in the case of repeated offences.

Two main sanctions for the franchisor for breach of pre-contract disclosure obligation enacted by the French Civil Code are invalidity of the contract and compensation of the franchisee.

The procedure of invalidation is governed by clauses 1128 – 1144 of the Civil Code of France (Law of the French Republic, 2018). Invalidity is not automatic in case of non-fulfillment of pre-contractual disclosure obligation. The franchisee must prove that his consent is invalid because of the influence of error or deception, having known which the franchisee would refuse to conclude a franchise agreement.

On February 11, 2003, the highest French Court specified that the obligation to give a sincere presentation applies not just to the information that is required by articles L.330-3 and R.330-1 of the French Commercial Code but also to any other facultative information voluntarily given by the Franchisor to the Franchisee before it entered into the agreement (Peskin & Deschamps, 2015).

However, if the information that was hidden is not essential, the failure to provide it will not necessarily justify invalidating of the contract. However, if the disclosure document contains incomplete data or if it isn't true or misleads the franchisee, the contract is deemed null and void.

In addition to invalidation, the franchisor may also be imposed on an alternative sanction in the form of compensation of the franchisee in accordance with clause 1231-2 of the Civil Code of France, if the violation of its obligation to provide true information has directly harmed the franchisee.

Consequently, even if the lack of information or its inadequacy is not the reason for the invalidation of the franchise agreement, the franchisor may be brought to civil responsibility and must repair the damages to the franchisee. For that, the franchisee has to prove that the lack of information led to the conclusion of the agreement on different terms from those he had been counting on, and this affected his business.

Franchisor's pre-contractual disclosure obligation is often subject to judging in France, especially in cases when the franchisee's business is not successful and he claims that the franchisor has misled him concerning the financial prospects of entrepreneurial activity. So, according to clause 1 of the Doubin Law, which was adopted on December 31, 1989 (Business Opportunities, 2008) any person who makes available for another person a commercial name, a brand or a brand name, and which asks to this person an exclusive or quasi exclusive commitment concerning the activity must, prior to the signature of any contract, provide to the other signer a document which gives faithful information in order to commit with full knowledge of the facts.

In cases the franchisee complains about the lack of projections, French courts tend to apply this approach: the law does not require the franchisor to provide the franchisee with an assessment of the local market and projected income. However, if the franchisor provides the franchisee with the market assessment and projections, such information should be true and accurate.

If the court finds that the lack of information or its inauthenticity misleads the franchisee (which will often be the case where significantly below the forecast figures, for example by more than 30 per cent), it can find the franchise contract invalid and cancel it. In some cases, the court may bring the franchisor to liability for damage caused to the franchisee if the former provided false information. If it is not possible to prove that the franchisor provided untrue data or the franchisee made a mistake in conducting an entrepreneurial activity, the judge may still grant damages to the damages for losses incurred (covering the costs and investments incurred by the franchisee but not the profit he or she was expecting to make on the basis of the figures provided by the franchisor). This especially refers to cases where the franchisee has become bankrupt because of structurally unprofitable business (Mellerio, 2018).

However, even if the court finds that the franchisee had to carry out the market analysis and calculate the risks of future business on its own, the franchisor must check whether the franchisee's calculations are realistic. On October 26, 2006, Orleans Court of Appeal was particularly clear on this:

“Even if the Law doesn't oblige the Franchisor to provide local market research or to establish provisional operating accounts, this task being up to the Franchisee who shall, regarding his investment, proceed to this analysis and evaluate the related risks; it is constant that when providing this information and particularly business plans, the observance of article L.330-3 and of the general obligation to act in good faith in contract law require the Franchisor to give a sincere presentation of the local market and to establish reasonable budgets by reference to tangible sales figures (Peskin & Deschamps, 2015).”

At the same time, the Court of Appeal of Versailles, on June 7, 2007 stressed that a 50% gap between the franchisor's forecast and the franchisee's profits is not sufficient to bring the franchisor to liability, since the calculation was based on the average sales result for a certain period of time for equivalent points of sale operating in a similar geographic area. Therefore, the franchisor's obligation to provide true information was fulfilled.

The Court has also confirmed the franchisee's obligation to conduct research on the expected profitability of the project and to check the information provided by the franchisor, with the assistance of the relevant specialists, if necessary (Peskin & Deschamps, 2015).

Besides the statutory pre-contractual disclosure obligation, certain requirements are additionally set for concluding contracts in France (including franchise agreements). Thus, clause 1103 of the Civil Code of France fixes the principle of binding force of the treaty. According to this article, legally enforceable agreements are as binding as the law chosen by the parties. Clause 1104 of the same normative act states that, as well as issues of state policy, contracts should be discussed, formulated and executed in good faith. Clause 1194 stresses that agreements commit the parties not only to what is stated in them, but also to all consequences derived from equity, custom and the law.

The principle of bona fide is formulated in clause 1195 of the Civil Code of France. Violation of this principle is the basis for the legitimate requirement of the injured party to demand a review of the agreement in case of the unforeseen change of circumstances. In this

case, the judge is authorized not only to nullify the agreement, but also to reconsider its provisions. However, since this principle is not a public policy provision, the parties have the right not to adhere to it.

Clause 1171 of the Civil Code of France provides that in a preformulated standard agreement, any clause which creates a significant imbalance between the rights and obligations of the parties to an agreement is deemed null and void. The determination of the significant imbalance does not relate to the main object of the agreement or the adequacy of the price to the performance. The franchising agreement can also be referred to preformulated standard contracts because of the traditionally limited scope of negotiation on the contract terms.

On the basis of these principles, French courts formulated a set of rules for the execution of contracts (for example, the obligation to provide necessary information and warn the other party about the possibility of certain risks). That is why franchise agreements in France (as well as other distribution agreements under French law) are often shorter than contracts governed by English or American law, since the parties may rely on implied obligations, beyond what is stated precisely in the agreement (Mellerio, 2018).

Rights and obligations of the parties to the franchising agreement are not prescribed at the legislative level in France. In practice, it is approved to indicate the following rights and obligations of the franchisor and franchisee in the franchise agreement.

Consequently, the franchisor must:

1. Transfer know-how;
2. Verify the good use of the trademark by the franchisee;
3. Provide the franchisee with appropriate assistance.

The difficulty is to determine what kind of assistance the franchisor must provide the franchisee, since the former remains an independent entrepreneur and is responsible for managing his own business. Thus, the role of the franchisor should be limited to providing consulting and technical training in order to ensure the successful implementation of the franchising concept. The franchisor may also agree to assist him with marketing of products or services. However, the franchisor's obligation to provide assistance to the franchisees does not imply financial support for the latter.

The franchisee's assistance is provided from the moment of the conclusion of the franchise agreement and as long as the agreement remains valid. The franchisor must pay particular attention to the franchisees that face certain difficulties.

In addition, the French courts take into account the collective dimension of the franchising network. In this context, the franchisor has a particular responsibility to monitor his network in the interests of all its members. A franchisor that does not control and watch over its network may be liable. Thus, the franchisor is obliged to:

1. Make sure that the franchisees do not violate the territorial exclusivity of other franchisees;
2. Ensure that network members do not tarnish the reputation of a trademark as a whole (for example, they do not respect the concept of franchising or violate health and safety rules).

The franchisee, in turn, must ensure that it does not damage the reputation of the franchisor's trademark. For example, judges believe that the franchisee that uses misleading

advertisements damages the image of the network. Such actions by the franchisee may be the reason for termination of the contract.

Other obligations of the franchisee are mainly of financial character, such as the payment of the initial fee and royalties (Menguy, 2018).

The duration of a franchise agreement in France is not legally determined, however, agreements on exclusive supply right are only allowed for a limited period of time. Thus, in accordance with clause L.330-1 of the Commercial Code of France, any agreement with an exclusive supply provision is concluded for a period of no more than 10 years. In general, the franchise agreement in this country is concluded on average for 7 years.

As a rule, a franchise agreement is terminated due to the expiration of its validity, but there may be circumstances that lead to sudden contradictions between the franchisor and the franchisee, as a result of which one party may wish to terminate the franchise agreement. Without an appropriately prescribed provision on the termination of the contract, the latter may be terminated only by a court decision. Thus, the purpose of the provision on termination of the contract is to give the franchisor the right to terminate it unilaterally if the franchisee violated the terms of the agreement. It is not necessary to indicate the types of violations as a result of which the contract can be terminated (although the contract usually contains a list of examples of situations permitting the termination of the contract).

In case of the absence of the termination clause, the suffering party is entitled, at its own risk, to terminate the contract if the breaching party fails to remedy the breach within a reasonable time after receipt of a breach notice, provided that the breach is sufficiently serious (clause 1226 of the Civil Code of France). If a change in circumstances, unforeseeable at the time of execution of the agreement, makes performance unduly onerous for a party that had not agreed to bear the related risk, the latter can apply to the other party for renegotiation of the agreement (clause 1195 of the Civil Code of France).

In general, any termination of the established trade relationship is prohibited (Article L.442-6, I, 5 of the Commercial Code of France). Since franchise relations are established trade relations, the franchisor may be held liable if he does not comply with the termination clause, for example, in particular if the franchisee has not given sufficient notice (Menguy, 2018).

The renewal of the franchise agreement is up to the mutual consent of the parties. For this reason, the franchisor may refuse to renew the contract without justification of his decision. However, if the franchisor has clearly expressed his intention to renew the franchise agreement and this urged the franchisee to invest costs necessary for conducting business on the verge of expiration of the contract, and then the former refused to renew the contract, a good cause arises for the franchisee to claim for the loss.

CONCLUSION

Consequently, on the basis of the foregoing, the following conclusions can be made. There is no special franchise law in France, but it was the first country to adopt a special regulatory act (Law 89-1008) to resolve this issue. It was the act which secured the provision on pre-contract disclose obligation in the European Community in the form of a document preceding the conclusion of the main contract, which is often used in franchise relations. The violating of this obligation results in civil or criminal liability, that is, the French legislator regards this evasion as a serious offence and provides for harsh punishment in the form of

considerable fine. Two main sanctions for the franchisor for breach of this obligation, which are provided by the Civil Code, are the invalidation of the agreement and the compensation for the franchisee.

It should be noted that the pre-contract disclose obligation is secured in internal regulatory acts of France. This means that there is no need for the French courts to refer to the general principle of contract law culpa in contrahendo (the principle of pre-contract obligation) when considering cases connected with the breach of this obligation.

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