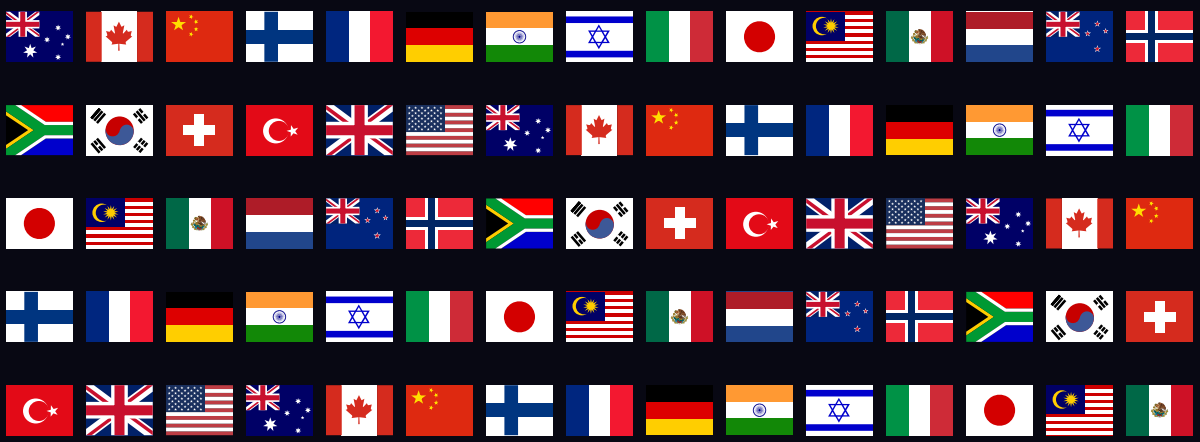
FRANCHISE

France



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Getting The Deal Through

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Quick reference guide enabling side-by-side comparison of local insights, including franchise market overview; key considerations when forming and operating a franchise; offer and sale of franchises; franchise contracts and the franchisor/franchisee relationship; and recent trends.

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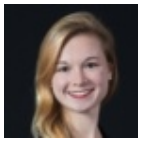

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MARKET OVERVIEW

Franchising in the market

How widespread is franchising in your jurisdiction? In which sectors is franchising common? Are there any economic or regulatory issues in the market that are more or less hospitable to franchising or make it economically viable in your jurisdiction?

Franchising is widespread in France. The number of franchise network has doubled over the past 10 years. According to a study lead in 2021 by the French Franchise Association (FFF), there are 1965 franchise networks operating across 79,134 sales areas. The same study specifies that this sector employs 795,441 people and its global turnover amounts to €68.8 billion.

In France, franchising covers a broad spectrum of occupations. Sectors that have historically been dominated by the franchise – which have remained sustainable – include personal and household goods, hotel businesses, food, and hairstyle and aesthetics. New sectors also started franchising in 2016, including fast food and home services. Nowadays, the five most attractive sectors experiencing a strong growth in terms of franchised companies are food, household goods, varied trade, fast food, and personal equipment.

Law stated - 16 May 2022

Associations

Are there any national or local franchise associations? What is their role in franchising, including any impact on laws or regulations? Are there any rules of conduct or membership requirements?

The FFF, founded in 1973, is a national association that brings together franchisors and their franchisees. The FFF aims to represent and serve its members, but also to promote, develop and defend franchising. It is a member of the European Franchise Federation and of the World Franchise Council.

The FFF applies the European Code of Ethics for Franchising, with which members of the FFF must agree to comply. This code is now recognised by most economic operators and by the courts. It establishes a definition of franchising as well as guiding principles and the commitments of every involved party, specifically regarding recruitment, membership and operation of the network, and the contractual relationship.

To join the FFF, the prospective member must submit its membership application and present it to an admission committee. The FFF's board of directors then decide whether or not to grant membership.

Law stated - 16 May 2022

BUSINESS OVERVIEW

Types of vehicle

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

A typical franchisor will have a variety of legal forms to choose from in France, depending on the size of the business, the resources available to the franchisor, and tax and corporate considerations or targets. Usually, the most relevant business vehicle will be a limited liability company (similar to a private limited company in common law countries) since shareholders' liability will be limited to the amount of their investment in the vehicle. There are three main types of business entities.

For small and medium-sized businesses:

- société par actions simplifiée (SAS) (that is, a simplified joint-stock company); and
- société à responsabilité limitée (SARL) (that is, a limited liability company).

For large businesses: a société anonyme (SA) (that is, a classic joint-stock company).

The use of a Societas Europaea (Société Européenne) (SE) is very rare in France.

Law stated - 16 May 2022

Regulation of business formation

What laws and agencies govern the formation of business entities?

The French Commercial Code and the French Civil Code govern the formation of business entities. Business entities must be registered with the Trade and Companies Registry where the company has its head office.

Law stated - 16 May 2022

Requirements for forming a business

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

The requirement for forming and maintaining a business entity depends on the corporate form chosen.

For a SAS, a SARL and an SA, initial registration and annual filings are required. There are additional, ongoing filing requirements such as the obligation to file articles of incorporation (whenever they are amended) and yearly financial statements.

Law stated - 16 May 2022

Restrictions on foreign investors

What restrictions apply to foreign business entities and foreign investment?

For the most part, no restrictions apply to foreign business entities or foreign investments in France. Decree No. 2017-932 of 10 May 2017 abolished the previous administrative and statistical reporting requirement for certain foreign investments. However, some transactions – such as the sale of at least 10 per cent of the capital or voting rights of a resident company, or real estate investments exceeding €15 million – are subject to a statistical report to the Banque de France (section R152-3 and R152-11 of the French Monetary and Financial Code (MFC)). This report must be made within 20 days of completion of the relevant transaction. Failure to comply with this reporting requirement is treated as a customs violation and is punishable by five years' imprisonment and a fine of up to two times the amount of the transaction.

Courts may also impose a prohibition on exercising a commercial activity or a public function (section 459 Customs Code; sections L165-1 and R165-1 MFC). In addition, foreign investments in 'sensitive sectors' affecting public policy, public security, national defence interests, or activities relating to the production or marketing of weapons, are subject to prior authorisation by the Economy Minister (section L151-3 MFC). The economic sectors considered as sensitive are listed in section R151-3 MFC . They include gaming, private security, pathogenic or toxic agents, and information technology security products and systems. Investments in these sectors must also be reported to the Treasury Department at the time they are actually carried out. If made without authorisation or in violation of the conditions imposed by the Ministry of the Economy and Finance, an injunction may be issued to cancel, rescind or modify the

transaction. If such injunction is not complied with, the investor may be fined up to twice the amount of the transaction in addition to the obligation to restore the previous situation.

Law stated - 16 May 2022

Taxation

What aspects of the tax system are relevant to franchisors? How are foreign businesses and individuals taxed?

There is no specific tax system applicable to franchisors.

They are thus subject to income taxes and taxes on the profits generated by the activity of the franchisor. If the franchisor is a company, it will be taxed, depending on its revenues, at a rate of 15 or 26.5 per cent (with some minor exceptions). The corporate income tax rate is due to decrease to 25 per cent by 2022.

If the franchisor is an individual, he or she will be subject to a progressive tax up to a maximum amount of 45 per cent of his or her income and value added tax (VAT): a flat rate of 20 per cent (and, in certain cases, 10 per cent or 5.5 per cent) applies on all sales of goods or services in France. The fees paid to the franchisor are subject to VAT.

Article 182 B of the French tax code provides that royalties paid by a French company to a foreign entity are subject to a withholding tax in France at a rate of 25 per cent from 1 January 2022). However, pursuant to the treaties for the avoidance of double taxation that have been entered into with most countries, foreign business entities are generally not subject to taxation in France, or subject to taxation at a reduced rate. In light of the specifics of each given situation, this is a matter that calls for personalised advice.

Law stated - 16 May 2022

Labour and employment

Are there any relevant labour and employment considerations for typical franchisors?

A franchising relationship is one between two independent contractors. However, any interference by the franchisor in the management of the franchisee may result in the independent contractor status of the latter being called into question, and the relationship being held to be an employment relationship. If the courts requalify a franchisee as an employee, the franchisor may be liable for the debts of the franchisee (Supreme Court, labour division, 27 September 1989; Supreme Court, labour division, 3 May 1995, Paris Court of Appeals, 3 July 2002); the franchisee may be awarded damages in case of dismissal (Supreme Court, labour division, 14 December 2006, No. 05-40.844 - Nîmes Court of Appeals, 10 January 2007) and be entitled to paid leave (Supreme Court, labour division, 18 June 2008, No. 06-46.494).

However, the courts rarely requalify a franchise agreement as an employment agreement because the existence of a ‘relationship of subordination’, required under section L 8221-6 of the Labour and Employment Code, must be unambiguously established. The franchisee is required to prove that his or her activities are carried out under the authority, direction and control (including disciplinary) of the franchisor or employer (Supreme Court, 18 January 2012, Supreme Court, 22 March 2007). Nonetheless, even if the courts determine that the franchisee is not an employee, the franchisee can also benefit, in the context of franchises, from the protective provisions applicable to managers of subsidiaries or branches pursuant to sections L 7321-1 and L 7321-2 of the Labour and Employment Code if the strict conditions laid down by section L 7321-2 are met. In practice, the conditions laid down by that section are rarely met by franchisors. While liberally construed by the Supreme Court in favour of the franchisee, to date the court has required three criteria to be met for a franchisee to qualify as a manager of a subsidiary:

- the activity of the franchisee merely consists of selling goods that are exclusively (or almost exclusively) supplied

by the franchisor;
- in premises made available or approved by the franchisor; and
- at prices and under working conditions fixed by the franchisor.

More generally, this requalification will be made when the situation of economic subordination (ie, dependence) entails legal subordination (Supreme Court, labour division, 18 January 2012). As both of these provisions are public policy rules, no waiver of this status by the franchisee in the franchise agreement is valid. However, application of this status does not entail the requalification of the franchise agreement but is limited to the application of the provisions of the Labour and Employment Code to the franchisee: a franchisee who has been requalified as a manager will thus be eligible for the protection afforded in that code (specifically as regards termination of the agreement, working time, paid leave, etc) and benefit from any collective agreements applicable within franchisor's organisation, and may obtain, for example, a refund of the up-front entry fee paid to become a franchisee (Supreme Court, labour section, 14 December 2006).

Lastly, employment law can also apply the franchise network if deemed a 'group' within the meaning of section L 1233-4 or L 2331-1 of the Labour and Employment Code (Supreme Court, labour division, 13 January 2016; Supreme Court, labour division, 16 November 2016). However, since Order No. 2017-1387 of 22 September 2017, a franchise network is not deemed a group provided there are no capital ties between franchisor and franchisee. This will not be the case where the franchisor has a 10 per cent interest or more in the share capital of the franchisee and can exert decisive influence on the franchisee's activity.

To mitigate the above two risks of requalification (as an employee or manager of a subsidiary), the franchisor should be careful not to impose, at any time during the franchise agreement, a subordination link on the franchisee and refrain from imposing prices on the franchisee

Law stated - 16 May 2022

Intellectual property

How are trademarks and other intellectual property and know-how protected?

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

French trademarks are governed by specific provisions of the Intellectual Property Code and, to a lesser extent, by the provisions of the French Civil Code (mainly as regards provisions related to contracts for lease) and of the French Criminal Code (for criminal offences related to counterfeiting).

Traditionally, no specific legislation protected know-how, which was accommodated by the protection of trade secrets and governed by the ordinary rules of law on civil tort liability (unfair competition) or addressed by specific criminal provisions. Considering such protection to be ineffective and insufficient, specific legislation on know-how and trade secrets was enacted on 26 July 2018, transposing the 9 June 2018 Directive (EU) 2016/493 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets). This law has been codified in the Commercial Code (in sections L151-1 through L154-1). Know-how is now protected by measures modelled on those existing in intellectual property law (for patents, trademarks, copyright, etc) as well as by competition law (specifically as regards investigatory measures available to the courts). Franchisor may protect its know-how after the end of the business relationship without abuse. For instance, a non-reaffiliation clause limited in time and space as long as it aims to protect the network (Supreme Court, commercial division, 4 September

2018, No 17-17.891).

Law stated - 16 May 2022

Real estate

What are the relevant aspects of the real estate market and real estate law? What is the practice of real estate ownership versus leasing?

The French real estate law aspects that impact franchisees the most are those relating to title (ownership and leases), town planning, authorisations to operate, and health and safety regulations.

Ownership

The main ways to own the operating premises are:

- direct real estate asset purchase: this implies a notary will be involved when drafting and registering the deed of sale with the mortgage registry, and the payment of transfer taxes (around 5 per cent of the purchase price); and
- indirect purchase through the purchase of the company owning the asset: the use of notaries is not mandatory and the basis of the transfer taxes will be deducted from most of the company's debts.

Apart from some mandatory specific warranties, the extent of the representation and warranties in the asset or share purchase agreement is freely negotiable between the parties. Preliminary due diligence is, therefore, usually carried out.

Leases

The leasing of commercial premises in France by commercial companies is strictly regulated by the French Commercial Code.

The commercial lease regime offers strong protection to the tenant, including:

- a minimum nine-year term and exit right for the tenant every three years (except if waived in the lease);
- a cap on yearly increases in rent and (in some cases) on renewed-lease rent;
- a limitation on charges that can be invoiced to the tenant; and
- the right to the renewal of the lease or to the payment of an eviction indemnity covering the loss of ongoing business concern.

Town planning

On top of regulating the aspects and dimension of real estate projects, town planning regulates the authorised types of use, thus restricting the ability to freely operate commercial premises in some designated zones.

Authorisations to operate

Some specific premises require authorisation to be operated.

This is notably the case for retail outlets. Under articles L 751-1 et seq of the Commercial Code, the creation or

extension of an outlet comprising sales areas of over 1,000 square metres require prior administrative authorisation from the Departmental Commercial Development Commission (CDAC). The change of commercial use is also subject to prior administrative authorisation from the CDAC. The CDAC notably takes into account the fair repartition of the competition for one type of sale activity in the project's area.

In addition to retail outlets, specific activities requiring authorisations are, among others, cinemas, pharmacies, fuel stations and alcohol sales.

Health and safety regulations

Buildings that are open to the public must comply with fire prevention and accessibility regulations. The local Security and Accessibility Commissions are responsible for checking the implementation of these rules and controlling the compliance of premises with changes of law. Office premises are subject to less restrictive health, safety and accessibility regulations.

Law stated - 16 May 2022

Competition law

What aspects of competition law are relevant to the typical franchisor in your jurisdiction? How is competition law enforced in the franchising sector?

The lawfulness of a franchise agreement is determined in reference to French competition rules – in particular, sections L 420-1 , 420-3 and L 442-5 et seq of the Commercial Code – and to European competition rules stemming from the Treaty on the Functioning of the European Union (TFEU), notably article 101 regarding the different restrictions on competition that may be provided in a franchise agreement. These rules are enforceable by French competition authorities and by the courts.

Franchise agreements are covered until 2022 by the Block Exemption Regulation (EU) No. 330/2010, dated 20 April 2010. This regulation is accompanied by the Guidelines on Vertical Constraints, which serve as a guide for analysing the provisions of the regulation and express the European Commission's position concerning how the guidelines should be interpreted and applied.

Since it can be shown that the clauses provided in the franchise agreement are directly related to the accessibility of know-how, the use of the trademark and, more generally, the maintenance of the identity and the reputation of the network, based on this landmark decision:

- such clauses should, in principle, escape the application of article 101(1) TFEU and section L 420-1 of the Commercial Code that punish anticompetitive agreements and practices; and
- the franchisor does not need to show positive welfare effects, on balance, within the meaning of article 101(3) TFEU and section L 420-4 of the Commercial Code.

As of 1 June 2022, a new Vertical Block Exemption Regulation (EU) and accompanying Vertical Guidelines will be effective.

The changes aim to readjust the safe harbour to eliminate false positives and reduce false negatives under this regulation and to provide stakeholders with simpler, clearer and up-to-date rules and guidance that can help businesses to self-assess the compliance of their vertical agreements with article 101 of the Treaty in a business environment

reshaped by the growth of online sales and by new market players such as online platforms, and ensure a more harmonised application of the vertical rules across the European Union.

As regards the draft regulation, a transitional period is foreseen. For a period of one year after its adoption, agreements which are already in force and do not fulfil the conditions for exemption under the new Regulation but do fulfil the conditions for exemption under Regulation (EU) No 330/2010 are not affected by the prohibition in article 101(1) TFEU.

The following outlines some typical provisions in a franchise agreement that can be found invalid or unenforceable (or both) on their own or taken together when they have restricted competition.

Exclusive sourcing clause

The Supreme Court considered that:

the exclusive sourcing clause imposed on franchisees was necessary to ensure uniform quality and taste of the products at each of them, manufactured according to the specifications and specific methods [of the supplier], and is therefore a decisive element for the image and the identity of the franchise network[.]

The lawfulness of this could not therefore be contested (Supreme Court, commercial division, 20 December 2017, No. 16-20.500).

Right of first refusal clause

Franchise agreements often provide a right of first refusal (or pre-emption agreement) to the benefit of the franchisor, in case of the sale or transfer of the premises or the business by the franchisee during the term of the agreement and for a specified term thereafter.

The franchisee must inform the franchisor of any sale or transfer and must ensure that it provides full information to its franchisor, as the period for the franchisor to pre-empt does not begin until the franchisor has received full disclosure (Rennes Court of Appeals, 7 May 2019, No 18/06698 confirmed by Supreme Court, commercial division, 31 May 2021, No.19-17.545). Franchise agreements cannot limit the pre-emption notice to the sole intention to sell or transfer the franchisee; the clause must include all necessary information and document.

Provided that this right of first refusal is justified and does not artificially restrict competition, the courts may decide that the transfer of the business by the franchisee is not enforceable against the franchisor and order the substitution of the transferee by the franchisor (Paris Court of Appeals, 7 October 2016; Supreme Court, 26 May 2006).

In addition, reference should also be made to the provisions stemming from Order No. 2016-131 of 10 February 2016 that reformed contract law, the general regime of obligations and proof of obligations, and section 1123 of the Civil Code. This section introduces the concept of a 'right of first refusal' in the Civil Code and provides penalties in case of its breach, namely:

- a strict obligation to redress the harm or loss sustained; and
- the invalidity or substitution of the third-party transfer if the third party 'knew of the existence of this right and of the beneficiary's intention to exercise it'.

Post-contractual non-compete clause and covenant not to join another franchise network

Most agreements also place the franchisee, after the end of the agreement, under a non-compete obligation or under an obligation to not become a member of a competitor network. This is justified by the fact that the franchisor legitimately seeks to prevent the know-how shared with the franchisee from being used to benefit a competitor.

Pursuant to the Guidelines on Vertical Restraints, Block Exemption Regulation (EU) No. 330/2010 covers both 'an obligation on the franchisee not to engage, directly or indirectly, in any similar business' (point 45, a) and 'an obligation on the franchisee not to acquire financial interests in the capital of a competing undertaking such as would give the franchisee the power to influence the economic conduct of such undertaking' (point 45, b). The Guidelines on Vertical Restraints related to the new regulation have not yet been adopted.

Since 6 August 2016 (Supreme Court, commercial division, 16 February 2022, No 20-20.429) – the date of entry into force of the Macron Law of 6 August 2015 – the validity of the above clause is subject to the following cumulative conditions (section L 341-2 of the Commercial Code):

- it must 'relate to goods and services competing with those covered by the franchise agreement';
- it must be 'limited to the premises and land from which the entity has operated its activity during the duration of the agreement';
- it must be 'essential to protect the know-how, which is secret, substantial and identified, transferred in the context of the agreement'; and
- its duration 'must not exceed one year' after the expiration or termination of the franchise agreement.

The inclusion of a right of first refusal clause in a franchise agreement – applicable for the duration of the agreement and for one year thereafter – combined with a post-contractual non-compete clause could be deemed an anticompetitive agreement, provided that the plaintiff in the proceedings can demonstrate that, based on an analysis of the market and of the economic data, in practice the right of first refusal clause has artificially restricted competition (Supreme Court, commercial division, 3 May 2018, No. 16-27.926). The plaintiff bears the burden of proof.

Law stated - 16 May 2022

OFFER AND SALE OF FRANCHISES

Legal definition

What is the legal definition of a franchise?

There is no statutory definition of a franchise.

However, over the course of time, case law and legal scholars have crafted a definition. For a franchise to be recognised, three main criteria must be met:

- the franchise agreement must entail a transfer of know-how;
- the franchise agreement must include the transmission of the right to use distinctive signs (trade name, trademark or service mark, or both); and
- ongoing commercial and technical assistance by the franchisor during the performance of the franchise agreement.

The transfer of know-how is decisive as it distinguishes the franchise contract from other types of contract. A franchise implies the existence of know-how and its transfer to the franchisee during the course of the agreement. The courts typically assess the existence of this know-how by carrying out a factual analysis of the relationship. If the know-how is

not found to exist, the courts can either order the rescission of the contract or award damages for breach of contract by the 'pseudo' franchisor.

Pursuant to the European Franchising Federation's European Code of Ethics for Franchising, of which the French Franchise Association (which is not an official regulatory body) is a member and to which it refers, a franchise is

A system of marketing goods, services and 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, trademark or service mark, know-how, business and technical methods, procedural system, and other industrial 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.

Law stated - 16 May 2022

Laws and agencies

What laws and government agencies regulate the offer and sale of franchises?

There is no specific law or agency regulating the offer and sale of franchises under French law. There is, however, 'soft' law, which only applies where the parties have expressly agreed to be bound by such law. The French Franchise Association (FFF), and the French Standardisation Organisation have issued non-binding rules regarding the contents of franchising agreements. The European Code of Ethics for Franchising has replaced the FFF's former code, and the courts may refer to it even in a case involving a non-FFF member.

More generally, ordinary civil and commercial rules apply, and in particular:

- sections L 420-2 et seq of the French Commercial Code, which prohibit anticompetitive practices where they are intended to fix prices, restrict market access, restrict or control production, opportunities, investment or technical progress, or divide up markets or sources of supplies;
- sections L 442-1 et seq of the Commercial Code, which prohibit restrictive trade practices such as to obtain from the other party an advantage that does not correspond to any consideration or that is disproportionate to the value of the consideration granted, as well as to create intentionally a significant imbalance between rights and obligations of the parties;
- European regulations regarding anticompetitive practices, mainly, Commission Regulation No. 330-2010 of 20 April 2010, along with the Guidelines on Vertical Restraints 2010/130/01, and the new Regulation adopted;
- sections L 330-1 and L 330-2 of the Commercial Code regarding the maximum duration of exclusivity agreements (10 years);
- section L 330-3 of the Commercial Code regarding the pre-contractual disclosure requirement for exclusivity and quasi-exclusivity agreements, specifying that this requirement has been reinforced by a general pre-disclosure requirement under section 1112-1 of the Civil Code (stemming from the reform of general contract law that entered into force on 1 October 2016); and
- sections L 341-1 and L 341-2 of the Commercial Code (stemming from the law of 6 August 2015) on the requirement of a common expiration date for distribution network agreements and on post-contractual non-compete clauses contained in these agreements.

These rules are mandatory rules and cannot be waived by parties.

Competition law aspects of distribution (including franchises) fall within the respective remit of the General Directorate for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF), an administrative body operating under the aegis of the Ministry of the Economy, and of the Competition Authority, which is an independent administrative authority. Both have investigative and prosecutorial powers, including the power to impose sanctions and fines on franchisors and franchisees, owing to their pricing practices or failure to comply with consumer information requirements for instance. In general, the investigative powers of DGCCRF agents and of the Competition Authority depend on the type of investigation involved.

Law stated - 16 May 2022

Principal requirements

What are the principal requirements governing the offer and sale of franchises under the relevant laws?

Pursuant to section L.330-3 of the French Commercial Code, codifying the provisions of Act No. 29-1008 of 31 December 1989 on the development of commercial and craft enterprises and the improvement of their economic, legal and social environment (the Doubin Act), franchisors are required to disclose pre-contractual information to their franchisees. This requirement is not specific to franchising, but applies to all agreements whereby a party provides another party with intellectual property rights and requires an exclusivity or quasi-exclusivity arrangement, as is typically the case in franchising agreements.

This pre-contractual information must be disclosed in a written document provided at least 20 days before signing the agreement, along with the draft franchise agreement. If applicable, this disclosure must be provided 20 days before any payment made by the franchisee in consideration of the reservation of a territory or specific services to be provided by the franchisor.

Where payment is required prior to signature, especially for the reservation of a territory, the services provided in consideration of that payment must be specified in writing, as well as the reciprocal obligations of each party in case of cancellation.

This document must contain truthful information allowing the future franchisee to freely enter into it on a fully informed basis.

The question that has arisen since the reform of contract law in 2016 is whether the scope of the pre-contractual disclosure obligation has been broadened. Pursuant to section 1112-1 of the Civil Code:

[a] party who knows information that is of decisive importance for the consent of the other, must inform him of it where the latter is legitimately unaware of this information or relies on the contracting party.

In other words, the franchisee must be provided with any information of decisive importance, which is defined as information that has ‘a direct and necessary relationship with the content of the contract or the status of the parties’. This choice of wording will doubtless give rise to litigation before the courts. Faced with this type of legal uncertainty, franchisors are advised to be as transparent as possible in the information provided to franchisees. However, in the absence of settled case law on this topic yet, the need to disclose information above and beyond these requirements can be contested, the franchisee being a professional and therefore under a stronger duty to seek out information (Supreme Court, commercial division, 7 October 2014, No 13-23.119), regardless of whether the network is extensive (Paris Court of Appeals, 16 February 2005) or not (Nîmes Court of Appeals, 23 June 2005). However, if the second criterion of ‘reliance’, which points to the application of a broader disclosure requirement, the framing of section 1112-1

could be construed as meaning that the information must be given without having to verify whether the party to whom the obligation is owed (the franchisee) already knows it and thus that any information known to the franchisor that could influence the franchisee's decision to join the network must be provided to the franchisee.

Failure to comply with this pre-contractual obligation may result in the nullity of the franchise agreement on the ground of fraud (Supreme Court, commercial section, 1 December 2021, n°18-26.572) provided that the franchisee provides that, in the absence of this failure, it would never have consented to the agreement (Versailles, Court of Appeal, 19 November 2020, n°19/01483).

Pursuant to section L.330-1 of the Commercial Code, the duration of all exclusive supply agreements is limited to 10 years. It is, however, possible for the parties to enter into a new agreement upon expiration of this 10-year term, on the main condition that the above-mentioned pre-contractual information is given before the new agreement is signed.

Law stated - 16 May 2022

Franchisor eligibility

Must franchisors satisfy any eligibility requirements in order to offer franchises? Are there any related practical issues or guidelines that franchisors should consider before offering franchises?

There is no such legal or regulatory requirement under French law. However, as part of the franchisor's pre-contractual information duties, the franchisor is required to prove its experience and the size of its network. Some legal scholarship and case law consider on this basis that the franchisor must be in the position to demonstrate that it has significant experience and success in similar businesses. The European Code of Ethics for Franchising provides that the franchisor is required to 'have operated a business concept with success, for a reasonable time and in at least one pilot unit before starting its franchise network'. Case law has also recognised a duty to experiment and test the concerned business before franchising it and to request that the franchisor demonstrate that the concept has been profitably operated by it for at least some years before developing the franchise (Paris Commercial Court, 3 July 2009; Paris Commercial Court, 24 September 2009). Similarly, the information contained in the disclosure documentation regarding the franchisor's recent experience and the recent developments in the franchise network must be truthful.

Law stated - 16 May 2022

Franchisee and supplier selection

Are there any legal restrictions or requirements relating to the manner in which a franchisor recruits franchisees or selects its or its franchisees' suppliers? What practical considerations are relevant when selecting franchisees and suppliers?

No specific regulation exists restricting the manner in which a franchisor recruits franchisees or selects its franchisee's suppliers. However, rules regarding non-discrimination could apply and the courts may check that the criteria applied by the franchisor are objective (Supreme Court, commercial division, 25 Jan 2000). Even if a franchise relationship clearly has an intuitu personae aspect, the franchisor is free to choose its franchisees, provided it applies clear selection criteria, based mainly on the professional skills and financial resources of the franchisee as well as geographical criteria (to comply with exclusivity arrangements with other franchisees and legal requirements concerning the distance between outlets). In the event that talks are broken off, both the liability of the franchisor or the franchisee may be incurred. Any breach of the duty of fair dealing during the pre-contractual stage can be sanctioned (Supreme Court, commercial division, 26 March 2008; Paris Court of Appeals, 14 March 2018). It is common practice for franchisors to require exclusive dealings from the franchisee (ie, to only buy from approved suppliers specified by the franchisor) or else strict compliance with specifications where the franchisee is free to choose its supplier.

Law stated - 16 May 2022

Pre-contractual disclosure – procedures and formalities

What procedures and formalities for pre-contractual disclosure are required or advised in your jurisdiction? How often must the disclosures be updated?

Pre-contractual disclosure must be made in writing at least 20 calendar days prior to the occurrence of the earlier of the two following events: signature of the franchise agreement; or any payment made by the future franchisee before the agreement is signed, in particular in order to obtain the reservation of a geographic area or specific services from licensor.

Case law usually considers that the disclosure must be updated upon each renewal of the agreement, including in case of tacit renewal or upon the assignment of the franchise agreement by the franchisor. A new general principle of 'good faith' in contractual relationships may also require that the franchisor to disclose any necessary piece of information during the course of the contractual relationships that could affect the relationship. The date to be taken into account is the date the franchise agreement was signed and not its effective date (Paris Court of Appeals, 13 June 2007). The burden of proof of compliance with this pre-contractual disclosure obligation lies with the franchisor (Paris Court of Appeals, 13 June 2007). Similarly, poor performance of this obligation must be proven by the franchisee. Franchisors can also contractually restrict the disclosure or use of their know-how.

Law stated - 16 May 2022

Pre-contractual disclosure – content

What information is the disclosure document required or advised to contain?

Sections L 330-3 and R 330-1 of the Commercial Code provide a very precise list of information to be disclosed to the candidate franchisee.

The disclosure document is required to specify the age and experience of the company, the size of the network of operators, the term of the contract, the scope of exclusive rights, and the conditions for its renewal, termination and assignment. Any payment that is required prior to signing the contract, especially for the reservation of a territory or for services provided in return for the specified payment, must be specified in writing, as must the reciprocal obligations of each party in the event of cancellation.

In particular, the disclosure document must provide the following information:

- relating to the franchisor:
- relating to the licensed trademark:
- any information relating to the state and prospects of development of the relevant market (general and local);
- relating to the network:
- information regarding the terms and conditions of renewal, cancellation, and assignment of the contract, and the scope of the exclusive rights.

The disclosure document must also refer to the nature and amount of any expenses and investments related to the trade name, sign or trademark that the franchisee must invest before exploiting those intellectual property or commercial rights.

Law stated - 16 May 2022

Pre-sale disclosure to sub-franchisees

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 under French law. However, section L 330-3 of the French Commercial Code applies to 'any person who provides to another person a corporate name, trademark or trade name'. Accordingly, it is up to the sub-franchisor as the contracting party to disclose the pre-contractual information to the sub-franchisee. This obligation would be all the stronger where the sub-franchisor has modified the franchise concept in order to adapt it to the geographical area granted to it by the franchisor. If the franchisor has a direct contractual relationship with the sub-franchisee, it would be advisable for the franchisor to comply with the pre-contractual disclosure requirement.

No specific legislation requires a sub-franchisor to disclose information concerning the master franchisor or its own contractual relationship with the master franchisor. However, based on the requirement under section L 330-3 of the Commercial Code regarding the disclosure of truthful information allowing the franchisee to enter into the agreement on a fully informed basis, the sub-franchisor is under the obligation to disclose all relevant information, which may also relate to the franchisor. This information could consist of the franchisor's name, its location, registration number, professional references, the identity of the managers, the date of the company's creation or the age of the franchise concept. Moreover, the general pre-contractual duty of information reinforces the importance of pre-contractual disclosure between the franchisor and the sub-franchisor.

Law stated - 16 May 2022

Due diligence

What due diligence should both the franchisor and the franchisee undertake before entering a franchise relationship?

It is indeed recommended for both parties to undertake due diligence before entering into a long-term business relationship.

The authors therefore recommend for the candidate in particular to do the following:

- Contact the network of franchisees. The disclosure document lists the contact details of existing franchisees. As a bare minimum, it is recommended to have the feedback of at least three existing franchisees, some that have been in operation for a while and one that has recently left the network.
- Analyse the growth of the franchise network. The disclosure document provides some understanding of the number of franchisees year on year and the franchisor should be able to supply more historical data. A franchise network showing steady growth is a good sign. A high rate of termination could also indicate that the business may not be sustainable.
- Check the financial statements and request financial data from the franchisor. In particular, it is important to ascertain that the franchise has sufficient financial backing to operate on an ongoing basis. It is important for the franchisee to prepare a business plan and cash-flow analysis for the local market. The disclosure document lists the franchise fees and expenses, both up front and ongoing. It is highly recommended for the franchisor to review the business plan and check the prior experience of the candidate.

Law stated - 16 May 2022

Failure to disclose – enforcement and remedies

What actions may franchisees or any relevant government agencies take in response to a franchisor's failure to make required disclosures? What legal remedies are available? What penalties may apply?

There is no specific government agency involved in the enforcement of disclosure requirements. Any breach would be an issue for the courts that have subject matter and territorial jurisdiction, which enforce disclosure requirements on a case-by-case basis.

Failure to comply with section L 330-3 of the Commercial Code carries criminal penalties (ie, a fine of up to €1,500). Typically, a franchisee chooses to bring an action before the commercial courts rather than filing a criminal complaint. While it is available as a remedy, the commercial courts do not typically impose fines. Accordingly, the remedies available to franchisees are either the rescission of the contract or termination due to breach by the franchisor, if the franchisee can prove that its consent was not valid or that the franchisor committed a material breach (Supreme Court, commercial division, 21 January 2004; Bordeaux Court of Appeals, 12 July 2018). If the court orders the rescission of the contract, the franchisee can obtain a reimbursement of all amounts paid (eg, the upfront entry fee, royalties and any investments made) plus an indemnity for loss of an opportunity and for moral damage (Paris Court of Appeals, 17 Jan 2018). As a general rule, the courts consider that the damage arising from the violation of a pre-contractual disclosure obligation corresponds to the loss of an opportunity to not have contracted or to have contracted on better terms. The loss of an opportunity to earn the income indicated by the franchisor in the pre-contractual documentation is not considered by the courts if considered unrealistic.

There are no punitive damages in France. The courts calculate damages on the basis of the actual loss incurred, taking into account the investment made by the franchisee.

Law stated - 16 May 2022

Failure to disclose – apportionment of liability

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 legal provisions regulating any sharing of liability between the franchisor and sub-franchisor. This matter should be addressed contractually in the master franchise agreement. However, although the sub-franchisor is directly exposed to liability by having a direct contractual relationship with the franchisee, the franchisor's liability may also be incurred if it has disclosed any erroneous information to the sub-franchisor or directly to the franchisee (based on a direct contractual relationship or tort).

As far as civil liability is concerned, the general principle is that it rests with the business. Accordingly, the individual officers, directors and employees of the franchisor or sub-franchisor are not exposed to liability unless they were not acting on behalf of the business. They are exposed to criminal liability if they have acted in a fraudulent manner (misuse of company assets, fraud, etc).

Law stated - 16 May 2022

General legal principles and codes of conduct

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

The ordinary rules of contract law, consumer law and competition law apply to franchising. The general principle of good faith in contractual relations enshrined in section 1104 of the Civil Code and the general duty to disclose all information of decisive importance for the consent of the other party, in addition to the information requirements under section L 330-3 and section R 330 of the Commercial Code, may apply to the franchise.

Within the Economy Ministry, the DGCCRF, in the course of its monitoring of the proper functioning of markets to the benefit of consumers and businesses, has the power to monitor and impose sanctions, following investigations and administrative proceedings, or else to refer to the competent courts any violations in the field of franchising. The DGCCRF focuses on price monitoring, fair market practices for consumers, labelling rules, and consumer safety.

In France, the applicable industry code of conduct since 1973 is that of the FFF, which is not an official regulatory authority but is a member of the European Franchise Federation. The FFF now applies the European Code of Ethics for Franchising for all stakeholders in the franchise industry in Europe, which was last updated in January 2017. This code, with which members of the FFF agree to comply, is now recognised by most economic operators and by the courts. It establishes a definition of franchising as well as guiding principles and the respective commitments of the parties, specifically regarding recruitment, membership, operation of the network and the contractual relationship.

Law stated - 16 May 2022

Fraudulent sale

What actions may franchisees take if a franchisor engages in fraudulent or deceptive practices in connection with the offer and sale of franchises?

Fraudulent or deceptive practices and violation of the disclosure obligations by the franchisor allow the franchisee to bring an action for rescission of the franchise agreement or for its termination due to material breach, and to claim reimbursement of all payments made by the franchisee. The franchisee may also claim damages if it can demonstrate that its consent to enter into the franchise was not valid by reason of fraud. Fraud can also constitute a material breach of contract by the franchisor when it occurs during the performance of the franchise agreement, provided that the franchisee can demonstrate a direct loss.

Legal restrictions on the terms of franchise contracts and the relationship between parties apply in a franchise relationship.

Law stated - 16 May 2022

FRANCHISE CONTRACTS AND THE FRANCHISOR/FRANCHISEE RELATIONSHIP

Franchise relationship laws

What laws regulate the ongoing relationship between franchisor and franchisee after the franchise contract comes into effect?

No, there are no specific laws regulating the ongoing relationship between franchisor and franchisee during the course of the term of the franchise agreement. The nature of the relationship involved determines what laws apply: contract

law, consumer law, competition law, product liability, intellectual property law, employment law, personal data protection laws, etc.

Law stated - 16 May 2022

Operational compliance

What mechanisms are commonly incorporated in agreements to ensure operational consistency and adherence to brand standards?

Franchise systems must be able to monitor their franchisees for system compliance to ensure brand protection, including operation of the franchisee business within the concept and satisfying their other obligations to the franchisor. This monitoring also enables the franchisee to prove that the franchisor complies with its obligation of technical and commercial assistance. Consequently, most franchise agreements give the franchisor the right to audit franchisee compliance, reporting requirements, an obligation of communication of accountant documents by the franchisee and occurrence of 'mystery shopper' visits held by the franchisor. Nevertheless, the franchisor must be vigilant when using mystery shoppers. Indeed, in order to be admissible, evidence must have been obtained in a fair manner. However, when the fault has been provoked by a mystery shopper, the resulting evidence is unfair and the franchisor cannot use it (Supreme Court, commercial section, 21 November 2021, No. 20-14.670). However, this monitoring does not necessitate interference of the franchisor in the management of the franchisee.

Such a clause must be carefully drafted and operated in practice. Indeed, for example, the French courts generally authorise a franchisor to issue instructions with a direct impact on the working conditions of franchisees' employees, provided that this is necessary to maintain the reputation and the uniformity of the franchise network. If the franchisor issues direct and nominative instructions to franchisees' employees or gets involved in hiring or firing, and more generally interferes in the management of the franchisee beyond its technical and commercial assistance obligations arising from the franchise agreement, the franchisor might be held to be the de facto manager of the franchisee and be liable for serious wrongdoing should it cause, for example, the franchisee's insolvency. Therefore, the franchisor may be ordered to cover the liabilities of the bankrupt franchisee or the dismissal of the franchisee's employees.

Law stated - 16 May 2022

Amendment of operational terms

May the franchisor unilaterally change operational terms and standards during the franchise relationship?

Usually, the franchise agreement (or any contract) cannot be modified unilaterally by the franchisor or the franchisee. Therefore, the parties must conclude an addendum. Furthermore, prior information must be organised between the franchisor and the franchisee regarding the different modifications to be made.

However, it is true that the franchisor also has an obligation to evolve the system. For franchisees, franchisors should be duty-bound to develop and innovate the system, and keep it competitive against other similar systems. Such changes could happen during the operation of the franchise agreement. Therefore, in order to avoid seeking the franchisee's consent on this evolution, the authors would recommend inserting an evolution clause that strictly defines the scope where the agreement of the franchisee would not be required and the right to modify, for example, the operational manual from time to time. This clause must be clearly drafted especially if, in practice, it could lead to financial or important operational constraints for the franchisee.

Law stated - 16 May 2022

Policy affecting franchise relations

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

There is no government policy that significantly affects the franchise relationship. Regarding trade association policies, the European Code of Ethics for Franchising and the French Standardisation Organisation standard (NF Z-20 000), which are non-binding rules, provide guidelines to their members on good practices to be implemented in their franchise relationships. The European Code, for example, contains guiding principles and sets forth the respective rights and obligations of the franchisor and of the franchisee, specifically in terms of:

- recruitment;
- membership;
- the operation of the network; and
- the contractual relationship before, during and after the termination of the franchise agreement.

Law stated - 16 May 2022

Termination by franchisor

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?

A franchise agreement is typically entered into for a fixed term and can be successively renewed per the terms of the agreement. If the agreement is not renewed, the contractual notice period must be complied with. Such notice is required to be 'reasonable' so as not to run afoul of the provisions of section L 442-1 (II) of the Commercial Code on sudden termination of an established business relationship.

Unless the agreement contains a specific clause permitting termination by the franchisor in certain circumstances pertaining, for example, to the revenue made with the franchisee, and unless the franchisee has committed contractual breaches, early termination by the franchisor is not possible. In practice, termination of the franchise relationship at the initiative of the licensor occurs if the franchisee fails to pay the franchise royalties or for the goods delivered by the franchisor, or commits material breaches of the franchise agreement, such as failure to respect the concept, disclosure of know-how, infringement of the franchisor's intellectual property or failure to comply with exclusive sourcing requirements. Under no circumstances is the opening of insolvency or similar proceedings against a franchisee grounds for termination of the franchise agreement under the applicable mandatory public policy rules. The termination clause contained in the franchise agreement authorises the franchisor to directly terminate the agreement without having to go through the courts.

The formalities indicated in the agreement should be complied with. Typically, a termination clause requires a notice of breach, a time frame (or not) in which to cure the notified breach and the effective date of termination. If the franchise agreement does not contain a termination clause but is terminated by the franchisor, the matter would ultimately be decided by the courts in the event that the franchisee challenges the termination. The provisions introduced by the contract law reform in 2016 on the rescission of contracts could have an impact on the franchise relationship (sections 1224 through 1230 of the Civil Code), given that they have incorporated major changes. In summary, in the Civil Code:

- The term résolution (rendered here as rescission, and previously used as a generic term for ending an agreement) has replaced the term résiliation (rendered here as termination for the future), the use of which is now reserved to cases where a court cancels an agreement without ordering restitution of any services that have already been

performed (section 1229(3)).

- The franchisor may, at its own risk, after having given notice of breach to the franchisee, rescind the agreement by notice sent to the latter in case of continuing breach (section 1226).
- In any event, rescission can also be requested from the courts (section 1227).
- Where the acts of performance exchanged were useful only on the full performance of the agreement that has been rescinded, the parties shall restore the whole of what they have obtained from each other (section 1229(3)).
- Dispute resolution clauses (arbitration clause in particular), as well as confidentiality and non-disclosure clauses, survive the end of the agreement (section 1230).

Case law has also extended the survival of the limitation of liability clause (Supreme Court, commercial division, 7 February 2018). A rescission possibility is now also open to both parties in the case of unforeseen economic circumstances not contemplated by the agreement that arise during the term of the franchise agreement and that place an excessive burden on a party (ie, hardship). Section 1195 of the Civil Code permits the rescission of the franchise agreement by mutual agreement between the parties if the franchisee refuses to renegotiate the terms of the agreement.

Law stated - 16 May 2022

Termination by franchisee

In what circumstances may a franchisee terminate a franchise relationship?

The rules applicable to termination are the same for franchisors and franchisees. In a 28 February 2018 ruling, the Paris Court of Appeals ordered a franchisee to pay damages to the franchisor due to wrongful termination, on the grounds that 'the voluntary cessation' of the franchisee's activity was not grounds for early termination under the terms of the agreement.

Law stated - 16 May 2022

Renewal

How are renewals of franchise agreements usually effected? Do formal or substantive requirements apply?

Franchise agreements are subject to the common rules of contract law and are not necessarily concluded for a fixed-term duration. Generally, parties conclude a franchise agreement for a period of five to 10 years, and provide a specific clause specifying the terms and conditions of the renewal of the franchise agreement. Thus, whether the requirements are formal or substantive depends on what is indicated in the specific provisions.

A franchisee has usually no automatic right to renew its franchise agreement. Thus, courts often rule that the franchisor would not be liable if it decides not to renew the franchise agreement (Court of Appeals, Paris, 12 January 2005, No. 03/02283; Court of Appeals Versailles, 24 January 2017, No. 15/00955). The franchisor does not have to justify its decision not to renew the franchise agreement and the franchisee usually cannot claim any compensation (Court of Appeals Versailles, 14 March 2017, No. 15/00146). In the case of the renewal of a franchise agreement with a fixed term, in any event, the renewal involves a new franchise agreement and therefore, the franchisor must provide the franchisee with a new pre-contractual information document.

Law stated - 16 May 2022

Refusal to renew

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

Unless otherwise contractually agreed, the franchisee has no right to obtain the renewal of the franchise agreement when the latter has been entered into for a fixed term and been performed through to its term, and any notice that is owed contractually or legally has been respected. This principle is now enshrined in section 1212(2) of the French Civil Code ('No-one may require the renewal of the contract'). Accordingly, unless the refusal to renew is unfair or sudden, the franchisor is not liable for any indemnity payment on the mere basis of non-renewal, even in the absence of cause for non-renewal. The franchisor is under no obligation to give reasons for the decision not to renew. The franchisor's liability can only be incurred if the decision not to renew the agreement constitutes an abuse of right, which must be demonstrated by the franchisee. Proof of the abuse of the right cannot be brought simply on the basis of the expression of a refusal, the unjustified nature of such refusal, proposing the signature of a different agreement, the mere fact that there is an economic imbalance between the parties or the franchisor's decision to prioritise the opening of branches in developing the franchise. Lastly, abuse of the right not to renew the franchise agreement may constitute an 'intentional wrongdoing' by the licensor (Supreme Court, commercial division, 4 September 2018). Case law in liability cases claiming abusive non-renewal by the franchisor primarily involve the reorganisation of distribution networks.

Law stated - 16 May 2022

Transfer restrictions

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

A franchise agreement is typically deemed to be concluded intuitu personae , at least where the franchisee is concerned. This being the case, in the absence of a clause permitting transfers of the franchise agreement, the franchisee cannot transfer the agreement without the consent of the franchisor. It is, of course, possible to contractually restrict the franchisee's ability to transfer its franchise by requiring, for example, the franchisor's approval in case of the sale of the franchisee's business. Contrary to the transfer of the franchise agreement, transfers of ownership in a franchisee entity (change of control), inasmuch as that legal entity remains the same, do not infringe the intuitu personae nature of the franchise agreement. Unless otherwise provided in the franchise agreement, such a change of control in no way requires the prior approval of the franchisee (Lyon Commercial Court, 12 June 2015). If an intuitu personae clause allows for early termination of the franchise agreement, it must be for the benefit of both the franchisor and the franchisee. If it is only for the benefit of one of them, it is considered a clause causing a significant imbalance and will be cancelled (Court of Appeal, Paris, 5 January 2022, No. 20/00737).

Law stated - 16 May 2022

Fees

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

There is no law or regulation affecting the nature, amount or payment of fees.

However, the pre-contractual information document is required to contain the financial details of the agreement proposed by the franchisor, and therefore to specify any upfront entry fee, the amount of the royalties and how they are

calculated, as well as the terms of payment. The document should also contain an estimate of the overall investment required to open the franchise.

Case law also posits that the franchisor is required to allocate advertising and promotional fees to advertising and promotion, and to provide evidence thereof to the network (Versailles Court of Appeals, 29 September 2015).

Law stated - 16 May 2022

Usury

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

The amount of interest that can be charged on overdue payments is determined by the parties. However, section L 441-10 of the French Commercial Code provides a minimum rate of three times the statutory interest rate. If no rate is provided by the agreement, the rate applied would be 10 per cent over the official interest applied by the European Central Bank to its most recent financing operation. While no specific legal provision deals with maximum interest rates, the imposition of unreasonably high rates, in particular regarding commercial practices, could be considered as manifestly abusive and thus prohibited under section L 441-16 and L 442-1 of the Commercial Code. Creditors may also claim damages for any harm and costs they may have suffered as a result of late payments.

Law stated - 16 May 2022

Foreign exchange controls

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

No. The parties may agree to make payments in the currency of their choice.

Law stated - 16 May 2022

Confidentiality covenant enforceability

Are confidentiality covenants in franchise agreements enforceable?

Confidentiality covenants in franchise agreements are enforceable. As one of the essential characteristics of the franchise agreement is the transmission of know-how, this supposes the possible conclusion, during the negotiation phase, of a confidentiality or non-disclosure agreement. The main objective of a franchise agreement consists of the reiteration of know-how, therefore the negotiations themselves involve the sharing of confidential information, even if that information does not necessarily correspond to the know-how itself. For example, this information may enable the franchisee candidate to assess the quality of the method to be transferred, as well as information about the network that the candidate is contemplating joining. Similarly, most franchise agreements contain, so as to protect the franchisor's know-how, a confidentiality clause whereby the franchisee undertakes not to disclose such know-how to third parties. In the case of litigation concerning the breach of this type of clause (and thus the termination of the franchise agreement by the franchisor based on such breach), the courts may restrict its scope of application, for example by excluding information that is in fact already publicly available or a scope insufficiently limited in space (Court of Appeal, Toulouse, 18 November 2020, No.19/00757; Court of Appeal, Angers, 10 November 2020 No.16/01971). Since the 2016 reform of contract law, section 1230 of the Civil Code also expressly provides that confidentiality clauses expressly survive the agreement.

Law stated - 16 May 2022

Good-faith obligation

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

Pursuant to section 1104 of the French Civil Code, agreements must be negotiated, concluded and 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 performance of the franchise agreement.

Law stated - 16 May 2022

Franchisees as consumers

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

Only consumers and non-professionals benefit from consumer law protection. The rationae personae scope of consumer law is, therefore, sometimes difficult to establish. The legislator defined the notion of consumer for the first time in Act No. 2014-344 of 17 March 2014 (popularly known as the Hamon Law). Previously, it was left to the courts to define what consumer meant. The legal definition established is broad, as is codified in the preliminary section of the French Consumer Code as referring to 'any natural person acting for purposes other than his commercial, industrial, craft, profession or agricultural activity'. The definition of a consumer given in article 2-1 of Directive No. 2011/83/EU on consumer rights is 'any natural person who, in contracts covered by this Directive, is acting for purposes that are outside his trade, business, craft or profession'. Legal persons, therefore, fall outside the scope of the definition of 'consumer'.

Order No. 2016-301 of 14 March 2016, which entirely recast the legislative part of the Consumer Code, added to the preliminary section of the Consumer Code the category of 'non-professional'. The definition of a non-professional was simplified by Act No. 2017-203 of 21 February 2017, which ratified the order and defined a non-professional as 'any legal person who is not acting for professional purposes'. Accordingly, unlike a consumer, a legal person can benefit from status as a non-professional. However, a non-professional can only benefit from the provisions of the Consumer Code that specifically cover non-professionals. The same preliminary section of the Consumer Code defines a professional as 'any natural or legal person, public or private, acting for purposes related to his commercial, industrial, craft, profession or agricultural activity, including when he acts in the name or on behalf of another professional'.

It is not always easy, in the practice of consumer law, to determine who qualifies as a consumer, a non-professional or a professional. The Supreme Court has adopted a stance in this respect in two rulings dated 29 March 2017, in which it held that a 'legal person acting for purposes which are outside its commercial, industrial, craft, profession or agricultural activity' can qualify as a non-professional and thus benefit from consumer law protection. Accordingly, if a franchisee is a legal person and acts in the scope of its franchising activity, it will not be protected under consumer law.

Law stated - 16 May 2022

Language of the agreement

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

There is no specific legal requirement that the disclosure document or the franchise agreement be written in French. However, to avoid any future argument that the licensee did not consent to contract on a fully informed basis, it would be safer for the documents and agreements to be drafted in French or else translated into French.

Law stated - 16 May 2022

Restrictions on franchisees

What types of restrictions are commonly placed on the franchisees in franchise contracts?

There are generally no restrictions on provisions in franchise contracts. A notable exception concerns competition law.

Law stated - 16 May 2022

Courts and dispute resolution

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

The French court system has two separate orders: administrative courts and judicial courts. The court before which a dispute is brought depends on the subject matter and the amount at stake.

The judicial or 'ordinary' court system is comprised of civil, commercial and criminal courts. A dispute involving a typical franchise agreement falls within the jurisdiction of the ordinary courts, of which there are three levels: the commercial court (court of first instance), the court of appeals and the Supreme Court. A franchise dispute may also be subject to arbitration if the franchise agreement contains an arbitration clause or if the parties so decide when the dispute arises.

Mediation as an alternative dispute resolution method is also available.

Law stated - 16 May 2022

Governing law

Are there any restrictions on designating a foreign governing law in franchise contracts in your jurisdiction? How does the governing law affect the contract's enforceability?

The franchisor and the franchisee can freely choose the governing law of their contract.

However, the application of French mandatory rules cannot be waived by parties and they will be applied by the French courts if any are applicable.

For instance, regarding section L 330-3 of the Commercial Code concerning the pre-contractual disclosure requirement, there is a debate whether it is a mandatory rule or not. Under the 30 November 2001 decision of the Paris Court of Appeals, section L 330-3 of the Commercial Code is not a mandatory rule applicable within the international legal order. However, in a later decision (Paris Court of Appeals, 25 October 2011 No. 10/24023), the same court applied section L 330-3 of the Commercial Code to a contract, notwithstanding the designation by the parties of a foreign law as the law of the contract.

Also, a French court may refuse to apply any provision of the governing law that it considers to be manifestly incompatible with French public policy.

Law stated - 16 May 2022

Arbitration – advantages for franchisors

What are the principal advantages and disadvantages of arbitration for foreign franchisors considering doing business in your jurisdiction? Are any other alternative dispute resolution (ADR) procedures particularly favoured or disfavoured in your jurisdiction?

The principal advantages are as follows.

- The parties may choose one or more arbitrators specialising in the law or in a given field, depending on the specifics of the dispute. For example, an arbitral panel may be composed of one lawyer and two technical specialists or by a lawyer, a businessperson and a technical specialist.
- Arbitration is confidential. Hearings are not open to the public. Parties not wishing their case or certain related aspects to become public knowledge have every interest in resorting to arbitration.
- Arbitration avoids jurisdictional conflicts between courts, in particular in international disputes and more generally in conflict-of-law issues. It therefore offers greater security than judicial resolution.
- Enforcement is possible everywhere.
- Arbitral awards have the force of judicial decisions and can be easily enforced abroad through international arbitral conventions to which many countries are signatories.
- Arbitration is expeditious.
- The time period in which the award must be entered is set by the parties or, otherwise, by the Rules of Arbitration.
- Challenges of an arbitral award are limited in scope.

The main disadvantage can be the cost of arbitration.

Law stated - 16 May 2022

National treatment

In what respects, if at all, are foreign franchisors treated differently (legally, or as a practical matter) from domestic franchisors?

Foreign franchisors are not treated differently from domestic franchisors.

Pursuant to the provisions of section L151-1 of the Monetary and Financial Code, financial dealings between France and abroad are unrestricted. However, in certain limited sectors (such as those involving national defence or affecting public order, or activities that are essential to secure the interests of the country), section L151-3 of the Monetary and Financial Code submits foreign investors to a prior authorisation process.

Law stated - 16 May 2022

UPDATE AND TRENDS

Legal and other current developments

Are there any proposals for new legislation or regulation, or to revise existing legislation and regulation? Are there other current developments or trends to note?

As of 1 June 2022, the Block Exemption Regulation (EU) No. 330/2010, dated 20 April 2010, will be renewed by a new Block Exemption Regulation (EU) and its accompanying guidelines.

The authors wish to acknowledge the invaluable contribution made by Louise Chanez to this chapter.

Law stated - 16 May 2022

Jurisdictions

Australia	Norton Rose Fulbright
Canada	Lapointe Rosenstein Marchand Melançon LLP
China	Jones & Co
Finland	ADVOCARE Law Office
France	Bersay
Germany	Taylor Wessing
India	G&W Legal
Israel	Gilat Bareket & Co, Reinhold Cohn Group
Italy	Rödl & Partner
Japan	Anderson Mōri & Tomotsune
Malaysia	Wong Jin Nee & Teo
Mexico	Gonzalez Calvillo SC
Netherlands	Parker Advocaten
New Zealand	Stewart Germann Law Office
Norway	CLP
South Africa	Spoor & Fisher
South Korea	Lee & Ko
Switzerland	Kellerhals Carrard
Turkey	Özdağıstanli Ekici Attorney Partnership
United Kingdom	Ashtons Legal
USA	Lathrop GPM