
THE FRANCHISE LAW REVIEW

THIRD EDITION

EDITOR
MARK ABELL

LAW BUSINESS RESEARCH

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The Franchise Law Review
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THE FRANCHISE LAW REVIEW

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EDITOR'S PREFACE

Since the publication of the second edition of *The Franchise Law Review*, there have been major economic and geopolitical developments that have had a significant impact on world trade. The price of oil has plunged relentlessly downwards; China's manufacturing sector is suffering significant setbacks while its capital markets have taken a tumble; Europe faces a range of challenges, from Schengen and 'Brexit' to VW's disgrace over emissions; Iran and Saudi Arabia are exacerbating the problems in the Middle East and the Russian economy continues to float in the doldrums. Through all this, however, the apparently inexorable march towards the globalisation of commerce has continued unabated.

Despite the slow emergence of a few economic bright spots, the economy of what was once called the 'developed' world continues for the most part to struggle, while even Brazil – one of the much-vaunted BRICS nations – has fallen into recession. As a consequence, businesses are often presented with little choice but to look to more vibrant markets in Asia, the Middle East and Africa for their future growth.

At the same time, South–South trade is on the increase, perhaps at the expense of its North–South counterpart. All of this, coupled with the unstable wider geopolitical landscape, presents business with only one near certainty: there will be continued deleveraging of businesses in the coming years and, thus, growing barriers to international growth for many of them. All but the most substantial and well-structured of such businesses may find themselves facing not only significant difficulties because of their reduced access to funding to invest in their foreign ventures, but also challenges arising from their lack of managerial experience and bandwidth.

Franchising, in its various forms, continues to present businesses with one way of achieving profitable and successful international growth without the need for either substantial capital investment or a broad managerial infrastructure. In sectors as diverse as food and beverages, retail, hospitality, education, health care and financial services, it continues to be a popular catalyst for international commerce and makes a strong and effective contribution to world trade. We are even seeing governments turning to it as an effective strategy for the future of the welfare state as social franchising gains still more traction as a way of achieving key social objectives.

Given the positive role that franchising can make in the world economy it is important that legal practitioners have an appropriate understanding of how it is regulated around the globe. This book provides an introduction to the basic elements of international franchising and an overview of the way that it is regulated in 36 jurisdictions.

As will be apparent from the chapters of this book, there continues to be no homogenous approach to the regulation of franchising around the world. Some countries specifically regulate particular aspects of the franchising relationship. Of these, a number try to ensure an appropriate level of pre-contractual hygiene, while others focus instead on imposing mandatory terms upon the franchise relationship. Some do both. In certain countries there is a requirement to register certain documents in a public register. Others restrict the manner in which third parties can be involved in helping franchisors to meet potential franchisees. No two countries regulate franchising in the same way. Even those countries that have a well-developed regulatory environment seem unable to resist the temptation to continually develop and change their approaches to regulation – as is well illustrated by the recent changes to the Australian regulations. The inexorable march towards franchise regulation continues as countries such as Argentina, which has previously not specifically regulated franchising, have adopted franchise specific laws over the last 12 months.

Many countries do not have franchise-specific regulation, but nevertheless strictly regulate certain aspects of the franchise relationship through the complex interplay of more general legal concepts such as antitrust law, intellectual property rights and the doctrine of good faith. This heterogeneous approach to the regulation of franchising presents yet another barrier to the use of franchising as a catalyst for international growth.

This book certainly does not present readers with a full answer to all the questions they may have about franchising in all the countries covered – that would require far more pages than it is possible to include in this one volume. It does, however, try to provide the reader with a high-level understanding of the challenges involved in international franchising in the first section and then, in the second section, explain how these basic themes are reflected in the regulatory environment within each of the countries covered.

I should extend my thanks to all of those who have helped with the preparation of this book, in particular Caroline Flambard and Nick Green, who have invested a great deal of time and effort in making it a work of which all those involved can be proud.

It is hoped that this publication will prove to be a useful and often-consulted guide to all those involved in international franchising, but needless to say it is not a substitute for taking expert advice from practitioners qualified in the relevant jurisdiction.

Mark Abell

Bird & Bird LLP

London

January 2016

Chapter 44

SPAIN

*Mónica Esteve Sanz, Remedios García Gómez de Zamora
and Bárbara Sainz de Vicuña Lapetra¹*

I INTRODUCTION

According to the 2015 report issued by the Spanish Franchisors Association (AEF) on 31 December 2014,² the presence of international franchisors has increased considerably in recent years. The report shows that there are currently 211 franchise brands of foreign origin operating in Spain, with France being the country with most brands (45), followed by Italy (39) and then the United States (34). The report points out that the market sector with the most franchise establishments in Spain is the food sector, followed by the beauty sector and then technology.

Any Spanish or foreign franchisor that has presence in the Spanish market can become a member of the AEF. Among other services, the AEF provides legal advice to its members and carries out their registration in the Franchisor Registry. There is also a Spanish Franchisee Association (AEDEF), the main purpose of which is to protect franchisees and to contribute to the growth of franchising as a form of independent business development.

II MARKET ENTRY

i Restrictions

There are no specific restrictions on foreign franchisors entering the local market or on granting master franchises to local entities.

1 Mónica Esteve Sanz and Remedios García Gómez de Zamora are senior associates and Bárbara Sainz de Vicuña Lapetra is an associate at Gómez-Acebo & Pombo Abogados SLP.
2 All reports issued by the AEF are available at www.franquiciadores.com/estudios.php.

The sole differences between foreign and domestic franchisors are the following:

- a* in the framework of the pre-contractual disclosure obligation, foreign franchisors must communicate to franchisees (along with the data required of all franchisors) the franchisor's inscription data from the register wherein they are obliged to be registered according to the laws of their country of origin; and
- b* franchisors established in Member States of the EU that operate under the right of freedom to provide services without a permanent establishment in Spain are required only to notify the Franchisor Registry of the initiation of their activities in Spain.

ii Foreign exchange and tax

A franchise agreement is a kind of complex contract that is not specifically regulated in Spain for tax purposes. In the event of there being international aspects to a franchise agreement, the different tax regimes applicable in the jurisdictions involved must be analysed in detail. As the different tax treaties for the avoidance of double taxation signed by Spain include different regulations regarding the categories of income that could be present in a franchise agreement – such as royalty payments, interest, dividends or capital gains – careful analysis of the relevant jurisdictions is recommended.

III INTELLECTUAL PROPERTY

i Brand search³

Protected Spanish trademarks or international trademarks that have effect in Spain can be searched for in the online database of the Spanish Patent and Trademark Office (SPTO).⁴

Protected Community Trade Marks (CTMs) can be searched for in the online database of the OHIM.⁵

These databases provide information on the trademark status and on the right assignments over those trademarks provided that those assignments have been registered; nevertheless, it is advisable to include a clause in franchise agreements requiring the franchisor to guarantee that the use of its trademarks does not infringe third parties' rights.

3 The Community Trade Mark system is undergoing a deep reform that, once in force, will imply a recast of Directive 2008/95/EC approximating the laws of the Member States relating to trademarks (and thus of the national implementing rules), and a revision of Regulation 207/2009/EC on the Community Trade Mark (to be referred to as the European Union Trade Mark after the reform). The Office for Harmonization in the Internal Market (OHIM) will in future be named the European Union Intellectual Property Office.

4 www.oepm.es.

5 www.oami.eu.int.

ii Brand protection

National trademark rights are acquired through registration at the SPTO (or at the OHIM for CTMs). Spanish law also grants protection to unregistered trademarks provided the 'well-known' condition is fulfilled.

An application for a Spanish trademark registration is filed before the SPTO. The SPTO will then examine the application to see if it meets the formal requirements established by law. The applicant will be notified of any irregularities in the petition so that it may rectify them within a period established in the corresponding regulations. If irregularities are not rectified, the SPTO will issue a decision by which the application will be considered not to have been submitted.

Applications that meet the formal requirements will be published in the Official Industrial Property Gazette.

Any person who opposes the registration of a trademark may raise an objection in writing with the SPTO within two months of the publication of the application.

Once the period for presenting objections has concluded, an examiner will study the application to check whether it falls within any of the prohibitions established in the applicable regulations. Unless an opposition has been filed, the examiner shall not analyse *ex officio* whether the trademark application falls within relative grounds for refusal.

If a total or partial denial of the trademark application results from the objections or the SPTO examinations, the applicant may modify the trademark by limiting the products or services that were originally applied for, or by removing from the trademark the element that motivated the provisional denial as long as such removal does not substantially alter the trademark from the initial application.

The decision denying or granting registration of the trademark will be published in the Official Industrial Property Gazette. The SPTO's decisions may be appealed before the appeal division of the SPTO. The appeal division's decision is the final decision of the administrative process; an appeal of this decision initiates the judicial contentious-administrative process.

The registration of a trademark is granted for 10 years from the application date and may be indefinitely renewed for subsequent 10-year periods.

iii Enforcement

Trademark protection

Trademarks are protected in Spain under Act 17/2001 of 7 December 2001 on Trademarks (the Trademarks Act). Additionally, Community Trade Marks are protected under Council Regulation (EC) No. 207/2009 of 26 February 2009 on the Community Trade Mark. Spain is also a member of the Paris Convention for the Protection of Industrial Property.

Criminal or civil actions may be exercised to enforce trademark rights. Civil actions comprise actions seeking cessation, removal of effects (recall from the market and destruction of the infringing goods or their assignment for humanitarian purposes), compensation for damage and the publication of the judgment at the defendant's cost.

Article 134 of Act 11/1986 on Patents (the Patents Act),⁶ to which the Trademarks Act refers, provides for a special injunctive relief action in the event of trademark infringement. Article 274 of the Criminal Code includes provisions applicable to trademark and commercial name usurpation.

Copyright

Copyrights are regulated in Spain by the Copyright Act.⁷ Civil actions may be exercised to enforce copyrights, requesting the suspension of the infringing exploitation, the withdrawal from the market and destruction of unlawful copies, etc. Additionally, Articles 270 and 271 of the Criminal Code include provisions applicable to copyright infringements. Copyright registration is not mandatory and is not required to obtain protection.

Trade secrets

Trade or industrial secrets are protected by Act 3/1991 of 10 January 1991 on Unfair Competition (the Unfair Competition Act). This Act includes the possibility of court actions for the cessation of acts of unfair competition regarding unauthorised disclosure or use of know-how and trade secrets, interim injunctions and claims of compensation for damage. Even though unauthorised use and disclosure of know-how and trade secrets is prohibited, the enforcement of these rights is rather difficult, since proving infringement is hard. Article 279 of the Criminal Code punishes unauthorised disclosure or use of industrial or commercial information.

iv Data protection, cybercrime, social media and e-commerce

Data protection

If a Spanish entity, acting as data controller, collects and processes clients' personal information, it must comply with Organic Act 15/1999 of 13 December on the Protection of Personal Data) while collecting and processing such information. In particular, data subjects from whom personal data is requested must be informed of certain aspects of the data processing prior to processing. Furthermore, processing of personal data shall require the unambiguous consent of the data subject.

According to Spanish data protection regulations, to transfer personal data to countries that do not offer the same level of protection as Spain,⁸ the data controller located in Spain must obtain the pertinent authorisation from the director of the Spanish Data Protection Agency (SDPA). However, if personal data is going to be transferred to companies that are located in countries that do offer an adequate level of protection, no authorisation will be required. Nevertheless, the SDPA has to be notified of such transfers.

6 On 24 July 2015 a new Patents Act (Act 24/2015) was approved. However, it will not enter into force until 1 April 2017.

7 As recently amended by Act 21/2014 of 4 November.

8 The SDPA has stated that the following countries offer the same level of protection on data processing as Spain: EEC Members, Switzerland, Canada, Argentina, Guernsey, Jersey, Isle of Man, Faroe Islands, Andorra, Israel, Uruguay and New Zealand.

The SDPA authorisation to transfer personal data to countries that do not offer an adequate level of protection will also not be required in some specific cases set forth by the Spanish Data Protection Regulation, such as when all data subjects whose personal data is to be transferred have given specific, prior consent to the data transfer. Nevertheless, the SDPA has to be notified of such transfers.

Note that before 6 October 2015, under a decision issued by the European Commission on 26 July 2000, no authorisation from the SDPA was required to transfer data to companies located in the United States that had 'Safe Harbor' certificates since, according to the above-mentioned decision, companies that voluntarily adhered to the US Safe Harbor Privacy Principles ensure an adequate level of protection.

However, on 6 October 2015, the CJEU delivered a judgment stating that the Safe Harbor decision is invalid.⁹ Given the loophole that has been created, and while awaiting indications from the European Commission and relevant data protection authorities on how to proceed, the SDPA has advised entities that are currently transferring personal data from Spain to companies in the United States under the Safe Harbor Framework to take proactively the following steps: (1) identify the notifications made to date under the Safe Harbor scheme to determine whether additional precautionary measures have to be implemented; and (2) if there is a need to transfer data to the United States, obtain prior authorisation for international data transfers.

E-commerce

While setting up in Spain a website through which information, publicity and offer of services and products are provided, companies must comply with the following Spanish regulations (in addition to specific regulations that may apply to the provision of certain services or products):

- a* Act 34/2002 of 11 July 2002 on Information Society Services and Electronic Commerce (LSSI), which regulates e-commerce and distance contracting. According to the LSSI, service providers are required to provide certain mandatory information on the website, before, during and after the contracting process;

9 In 2013, following Edward Snowden's leaks concerning the US National Security Agency, an Austrian citizen named Maximilian Schrems lodged a complaint with the Irish supervisory authority on account of personal data related to his Facebook profile being transferred from Facebook's subsidiary in Ireland to servers based in the United States, a country that could not, in his opinion, offer an adequate level of protection. The Irish supervisory authority rejected the complaint on the grounds of the existence of the Safe Harbor Framework. The High Court of Ireland, before which the case is pending on appeal, decided to refer the matter to the Court of Justice of the European Union (CJEU) for a preliminary ruling on whether the Safe Harbor decision prevents national supervisory authorities from examining a complaint alleging that a third country does not afford an adequate level of personal data protection. On 6 October 2015, the CJEU delivered a judgment that follows the opinion given by Advocate General Yves Bot. In its judgment, the CJEU, having assessed the validity of the Safe Harbor decision, concluded that US legislation does not comply with the EU Charter of Fundamental Rights.

- b* Act 34/1988 of 11 November 1988 on General Advertising and Act 3/1991 of 10 January 1991 on Unfair Competition; all slogans and advertisements included on the website must comply with these regulations; and
- c* the Spanish Consumers and Users Protection Act (Royal Decree 1/2007 of 16 November 2007) as amended by Act 3/2014 of 27 March 2014. The latter Act has also modified, among others, some provisions of the LSSI and of Act 3/1991 on Unfair Competition.

IV FRANCHISE LAW

i Legislation

There is no specific Franchise Act that regulates franchise agreements in Spain.

Article 62 of Spanish Act 7/1996 of 15 January 1996 on the Regulation of Retail Trading (the Retail Trade Act) regulates franchising in Spain. Additionally, Royal Decree 201/2010 of 26 February 2010 on commercial activities of franchising and communication of data to the Franchisor Registry (Royal Decree 201/2010) provides the rules and regulations that govern franchise activity in Spain. The Ministry of Economy and Competitiveness is the Spanish regulatory authority responsible for administering portions of, and enforcing, Spanish franchise law. These two provisions only regulate the Franchisor Registry and the pre-contractual information disclosed to franchisees before entering into a franchise agreement.

ii Pre-contractual disclosure

Article 62.3 of the Retail Trade Act and Article 3 of Royal Decree 201/2010 require a franchisor to provide a prospective franchisee with a pre-sale disclosure document containing all necessary information to enable the prospective franchisee to be able to decide freely and knowingly about incorporation into the franchise network.

In general terms, the franchisee will have to supply the following information:

- a* details of the franchisor and its network;
- b* certificates of the trademarks under which the franchise is being ruled, and information about any claim against them;
- c* a general overview of the business sector to which the franchise belongs and an estimated investment and expenditure plan to be carried out by the franchisee for the setting up of a standard establishment;
- d* an explanation about the franchisor's experience;
- e* a general description of the franchise;
- f* the structure and size of the franchise network in Spain;
- g* a list of franchisees that have terminated their franchise contracts in the two previous years, and the cause of termination; and
- h* a statement of the franchise contract.

The disclosure document must be provided to the prospective franchisee at least 20 days prior to the payment of any sum by the franchisee or the execution of the franchise agreement or other agreement related to the franchise.

Private individuals and the Ministry of Economy and Competitiveness may bring legal actions for violation of the disclosure requirements before administrative courts.

Additionally, franchisees may bring civil legal actions against the franchisor for violations of the disclosure requirements. Civil actions may result in the nullity or termination of the agreement, although courts generally consider that violations of disclosure requirements are only administrative defaults and they may not grant damages to the franchisee.

iii Registration

According to the provisions set forth by Royal Decree 201/2010, franchisors are required to file certain information about their franchising activities with: (1) the registry of the autonomous community where the franchisor intends to carry out its activity; or (2) the Ministry of Economy and Competitiveness's Franchisor Registry if the autonomous community does not stipulate the filing of this information as a requirement, or when the franchisor intends to develop its activity in more than one autonomous community.

If the franchisor has no permanent premises in Spain but is established in other Member States of the European Union, the only obligation for the franchisor will be to inform the Franchisor Registry about the commencement of the activities.

The information to be filed before the Franchisor Registry includes:

- a* the particulars of the franchisor;
- b* a list and details of the industrial or intellectual property rights to which the franchise agreement refers, and evidence of the franchisor's ownership of or licence over such rights;
- c* a description of the franchised business, including the number of franchised and company-owned outlets located in Spain; and
- d* if the franchisor is a master franchisee, the particulars of the ultimate franchisor and details of the master franchise agreement.

The law requires that the franchisor be registered within three months from the date when it starts carrying out the franchising activity.

Every January, the franchisor must inform the Registry of any closing or opening of any company owned or of franchised outlets that occurred during the preceding year. This obligation begins the year that an outlet is first opened.

Franchisors must also inform the Registry of any modification of the information provided to the Registry within three months from the date when such a modification takes place, and of the cessation of the franchising activities once such a cessation takes place.

iv Mandatory clauses

The Retail Trade Act and Royal Decree 201/2010 do not include any provisions concerning the content of the franchise agreement (which can be subject to foreign regulations) and only refer to regulatory issues.

Franchise contracts are ruled by the principle of free will of the parties or contractual freedom. Parties can establish the pacts, clauses and conditions they wish as long as they are not contrary to law, morality or public order. The cogent laws that

override choice of law are those regarding public order issues (data protection laws, consumer protection laws, competition laws, employment laws, tax laws, etc.) and those regarding real estate and intellectual property rights registered in Spain.

Nevertheless, for an agreement to qualify as a franchise agreement it must include the following essential elements:

- a* the use of a common trade name or logo or any other intellectual or industrial property rights and a uniform presentation of the locations that are the object of the contract;
- b* the communication by the franchisor to the franchisee of some technical knowledge or know-how; and
- c* the provision of continuous assistance, either commercial or technical, by the franchisor to the franchisee during the term of the agreement.

v Guarantees and protection

Spanish regulation does not include any specific guarantee for franchisees other than the franchisors' obligation to provide a disclosure document containing all necessary information to enable prospective franchisees to be able to decide freely and knowingly about incorporation into the franchise network

V TAX

i Franchisor and franchisee tax liabilities

Spanish tax legislation does not contain any specific regulation of franchising activities. Therefore, the Spanish general tax system will be applicable, to both the franchisor and the franchisee, taking into account those specific provisions or regulations that, considering the particulars of the franchising activities, or the relation existing between the parties, could be relevant.

Spanish taxation is structured on the basis of direct and indirect taxes, as applicable to individuals and corporations (or other types of entities) and to certain activities.

On the basis of such a tax structure, franchisors and franchisees operating in Spain will generally be exposed to the following taxes:

Corporate income tax (CIT)

This tax is currently regulated by Act 27/2014 of 27 November on the CIT and its Regulations, as approved by Royal Decree 634/2015 of 12 July. The tax is applicable to corporations (or other types of entities) having their tax residence (as defined in the Spanish tax legislation) in Spain.

The tax is levied on profits and capital gains, as determined under Spanish accounting legislation and principles, and adjusted in accordance with the CIT legislation. The current general tax rate is 28 per cent for 2015, although there are some reduced rates that may apply to small entities under certain conditions. However, for 2016 and onwards, the general tax rate will be reduced to 25 per cent, and this is also applicable to small entities.

The CIT legislation includes certain tax allowances and credits related to R&D activities and to income derived from the transfer of certain immaterial assets and rights, which can be of interest in the context of franchising activities (see Section V.ii, *infra*).

Also, Spanish CIT legislation includes transfer-pricing provisions applicable in the case of transactions made between related parties (as defined in the CIT Act). These transactions have to be valued at arm's length and the parties must comply with several documentary obligations.

Personal income tax (PIT)

Personal income tax is applicable to individuals resident in Spain for tax purposes. The tax is governed by Act 35/2006 of 28 November, and its Regulations, as approved by Royal Decree 439/2007 of 30 March. The tax is applicable, on a worldwide basis, to income and gains, including business income when derived from business activities carried out by the individual. The tax rates are established in a progressive scale, up to 49 per cent. Certain categories of income (mainly savings income) are subject to special tax rates.

Non-resident income tax (NRIT)

This tax applies to non-Spanish residents obtaining income or gains from Spanish sources. The tax is regulated by the consolidated text of the NRIT Act, as approved by Royal Decree Law 5/2004 of 5 March, and its Regulations, approved by Royal Decree 1776/2004 of 30 July. The tax distinguishes between non-Spanish residents operating in Spain through a permanent establishment, who are taxed on terms similar to those of the Spanish CIT (and at the same rates), and those non-Spanish residents who obtain income or gains in Spain without a permanent establishment. The latter are taxed in respect of each income or gains obtained, separately. The general tax rate, in the case of non-Spanish residents acting without a permanent establishment, is currently 24 per cent and a reduced 19 per cent tax rate (19.5 per cent in 2015) applies to those non-Spanish residents who reside in another EU Member State with which there is an effective exchange of tax information. Interest, dividends, royalties and capital gains were subject to a reduced 19.5 per cent rate in 2015, although this reduced tax rate will be 19 per cent in 2016 and onwards. In this regard, the aforementioned NRIT Act reform is expected to introduce a tax rate of 20 per cent for 2015 and 19 per cent for 2016. The Spanish NRIT Act includes, however, several tax exemptions applicable to certain types of income, such as dividends distributed from Spanish subsidiaries to their EU parent company, under certain conditions.

In addition, where a tax treaty for the avoidance of double taxation applies (considering the residence of the parties and the sources of income), its provisions will generally prevail over those of the NRIT Act. Tax treaties generally establish reduced rates for certain types of income (such as dividends, royalties and interest) and distribute the competence of the contracting states to tax capital gains, among others.

Franchise agreements usually include a variety of transactions between the parties, such as IP rights assignments (use of the brand, patents, know-how), technical assistance, advertising, sales of goods, etc., which will need to be identified to categorise, if applicable, income corresponding to each of them (as royalties, business income, interest, etc.), and the corresponding applicable taxation.

Value added tax (VAT)

Value added tax is regulated by Act 37/1992 of 28 December, and its Regulations, approved by Royal Decree 1624/1992 of 29 November, which follow the EU directives on this tax. It is levied on deliveries of goods and provisions of services as carried out by VAT taxpayers (individuals carrying out business activities and corporations). Spanish VAT applies to those transactions that, according to the location rules included in the VAT legislation, are considered to take place within the Spanish VAT territory. The general current tax rate is 21 per cent. VAT borne in the acquisition of goods or services needed for taxable transactions are generally tax deductible.

As indicated above, franchise agreements usually include several transactions that may need to be differentiated for VAT purposes also. In particular, the classification of such transactions as services provisions or deliveries of goods is of relevance, as it will determine the location rules applicable and potential tax exemptions or reduced rates. In this respect, technical assistance and IP rights assignments are generally treated as services provisions, for VAT purposes.

Spanish entities or entrepreneurs, and non-Spanish entities or entrepreneurs acting in Spain without a permanent establishment for VAT purposes, are subject to several formal obligations related to VAT compliance and payment.

Transfer tax and stamp duty

Spanish transfer tax generally applies to transfers of goods or assets that are not subject to VAT. Stamp duty is levied, in general, on notarial deeds documenting acts that have an economic value and are recordable in a Spanish public registry (such as the Land Registry, IP Registry or Mercantile Registry). The tax rates depend on the competent autonomous community but range between 6 per cent and 11 per cent, in the case of the transfer tax; and 0.75 per cent to 2.5 per cent for stamp duty.

Local taxes

There are several local taxes in force in Spain that may affect both the franchisor and the franchisee as regards their activities or patrimony. The most relevant local taxes are: (1) Tax on Business Activities, which is levied on the mere exercise of a business activity; (2) Tax on Real Estate, imposed on the ownership of real estate; and (3) Tax on the Increase of Value of Urban Land, which burdens the increase of value of the urban land upon its transfer, with the seller being the taxpayer.

ii Tax-efficient structures

As indicated above, a franchise agreement is a type of complex contract that is not specifically regulated in Spain for tax purposes. Therefore, to determine a tax-efficient structure for a franchise relation, it is necessary to review the particulars of the case, such as the object of the franchise, type of services or goods to be provided, tax residence of the parties, payments to be made, etc.

See Section II.ii, *supra*, regarding foreign tax implications for franchises in Spain.

As regards Spanish internal tax legislation, certain measures were approved by Act 14/2013 of 27 September 2013 to support and encourage entrepreneurs and their

internationalisation. Furthermore, new regulations were included in the tax reform affecting the Spanish CIT, PIT, NRIT and even VAT legislation, which entered into force on 1 January 2015.

Some of the incentives regulated in those taxes and potentially of relevance to franchise agreements are: (1) a tax credit for research, development and technological innovation activities (I+D+i); and (2) a tax reduction of income obtained upon assignment of certain intangible assets (patent box), which could imply significant tax savings in the context of franchise agreements, where certain IP rights, qualifying for the reduction, are assigned or transferred.

VI IMPACT OF GENERAL LAW

i Good faith and guarantees

Article 1258 of the Civil Code establishes the parties' duty of good faith while executing agreements.

In franchise agreements, the good faith principle mainly has the following consequences:

- a* during negotiations prior to the signature of the agreement, especially when complying with disclosure requirements, parties must be truthful and must collaborate with each other. Additionally, all the information exchanged during these negotiations must not be disclosed; and
- b* as explained below (see Section VI.vii, *infra*), a party wishing to terminate the franchisee agreement before the established termination date must notify its decision to the other party within a reasonable term prior to the effective date of the termination.

ii Agency distributor model

Under Spanish regulations, a franchise agreement is considered to be a type of distribution agreement.

There is no specific regulation related to distribution agreements in Spain. The legal regime of exclusive distribution contracts, selective distribution contracts and franchise is substantially the same: all these contracts are ruled by the principle of free will of the parties. The sole principal difference applying to franchise is that the Retail Trade Act establishes: (1) the obligation for the franchisor to register with the Franchisor Registry; and (2) a pre-contractual obligation of disclosure on the part of the franchisor (an obligation that could be considered as similar to that implied in distribution contracts by virtue of contractual good faith). No aspects of competition apply differently to franchisors and distributors either, except for the pact of contractual or post-contractual non-competition, which is given more favourable treatment in franchise contracts.

There has been strong controversy over the years on whether Act 12/1992 on the Agency Contract of 27 May (the Agency Contract Act) also applies to distribution agreements (including franchise agreements), especially with regard to the company's obligation to pay compensation to the agent on termination of the agreement. The current majority trend is to apply, by analogy, the Agency Contract Act provisions in relation to damage and customer compensation and to the termination notice term to

the termination of franchise agreements by the franchisor. To avoid the payment of such compensation, distribution agreements usually expressly exclude any compensation on termination of the agreement.

iii Employment law

The risk that a franchisee or employees of a franchisee could be deemed employees of the franchisor is limited according to existing case law, which has clearly stated that franchisor–franchisee relationships are not employment relationships: these are regarded as two independent employers who are linked by the simple transfer of a licence or the exploitation rights of certain products or services.

The relationship between franchisor and franchisee is based on the franchisee assuming the risk of the business and only submitting to certain controls by the franchisor on those aspects related to the exploitation rights assumed and those regarding technical and commercial assistance. However, if the franchisor does not limit its relationship to the aforementioned circumstances and also tries to organise and make decisions regarding the franchisee's staff (i.e., intervenes and decides on disciplinary matters, on working schedules and timetables, salaries, dismissals or recruitment, etc.), employment law would apply to the relationship between the franchisee's staff and the franchisor.

iv Consumer protection

The Spanish Consumers and Users Protection Act states that, for the purpose of that Act, consumers or users are individuals or legal entities operating in an area outside a business or professional activity.

As a businessman or businesswoman, or company, operating within his, her or its own business, a franchisee does not match the legal definition of a consumer and therefore franchisees are not protected as consumers.

v Competition law

The main legal provisions on antitrust law in Spain are set out in Act 15/2007 on the Defence of Competition. Royal Decree 261/2008 approving the Regulation on the Defence of Competition, which has been modified by Royal Decree 657/2013 of 30 August, approving the Organic Statute of the National Commission on Financial Markets and Competition, is the main procedural regulation applicable to competition matters, and it develops and completes Act 15/2007 in matters such as *de minimis* agreements, leniency applications and other procedural aspects.

The Act does not contain specific provisions on vertical agreements but a generic prohibition of agreements and concerted practices.

Under Article 1 of the Act, vertical agreements may benefit from a national block exemption if they comply with the EU block exemption regulations or with any other block exemption that may be adopted by the Spanish government. Accordingly, agreements complying with the block exemption under European Commission Regulation (EU) No. 330/2010 concerning vertical agreements (the Block Exemption Regulation) and the related Guidelines benefit from a national block exemption.

In relation to franchise agreements, the following rules included in the aforementioned European Commission Block Exemption Regulation must be taken into account (although some of these rules are established for selective distribution systems, they would by analogy be applicable to franchising):

- a* it is prohibited to restrict cross-supplies between authorised distributors within a network, including between dealers operating at different levels of trade;
- b* it is prohibited to restrict active or passive sales¹⁰ to end-users by members of a selective distribution network, without prejudice to the possibility of prohibiting a member of the network from operating out of an unauthorised place of establishment;
- c* as a general rule, dealers should be free to sell through the internet. The following limitations could, however, be imposed on dealers: (1) to have one brick-and-mortar shop as a condition for becoming a member of a network; (2) specific quality standards for the use of the internet site to resell its goods; and (3) without limiting the dealers' online sales, to sell at least a certain absolute amount (in value or volume) of the products offline;
- d* restrictions on the geographic area in which the franchisee can market its products or services are prohibited; and
- e* minimum resale price restrictions, except in the case of promotional items, are prohibited.

vi Restrictive covenants

A covenant not to compete is generally enforceable in Spain. In the framework of franchising, the extension of the duration of a non-compete obligation equal to the duration of the contract itself is only admitted under the EC Guidelines on Vertical Restraints when the obligation is necessary to maintain the common identity and reputation of the franchised network.

Non-competition covenants regarding passive sales outside the exclusive territory are not allowed.

Confidentiality covenants throughout the term of the franchise agreement and following its termination without limitation are also enforceable.

vii Termination

The parties are free to agree the circumstances under which termination or renewal shall take place as long as the termination conditions are not contrary to law, morality or public order. However, as previously stated above, the Agency Contract Act provisions on termination notices and customers and compensation damages might be applied. As

10 As stated by the EC Guidelines, 'active sales' means actively approaching individual customers, for instance by direct mail, including the sending of unsolicited emails, or visits; or actively approaching a specific customer group or customers in a specific territory through advertisements in the media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory. In turn, 'accept orders' would be equivalent to 'passive sales'.

for other Spanish provisions applicable regardless of the choice of a different applicable law, Article 16.3 of the Spanish Unfair Competition Act provides for: (1) an obligation of a minimum notice of six months to terminate any commercial relationship (in which, according to the majority of case law, there is a situation of economic dependence), except in cases of serious breach by the other party or in cases of *force majeure* and; (2) an obligation not to abuse a situation of economic dependence (which could be applied, for example, to those situations where the franchisor only accepts to renew if certain abusive conditions are accepted by the franchisee).

Covenants not to compete are generally enforceable in Spain. However, such covenants must be limited to one year post-term. Additionally, non-competition obligations must be related to the goods or services subject matter of the agreement, and limited to the premises and land from which the buyer has operated during the contract period; they are indispensable to protect know-how transferred by the supplier to the buyer.

As previously stated, post-term confidentiality obligations are generally enforceable.

The agreement can include provisions allowing the franchisor to take over the franchisee's business as long as those provisions are not contrary to law, morality or public order.

viii Anti-corruption and anti-terrorism regulation

In Spain there is no specific legislation on prevention of fraud, anti-corruption or money laundering in franchising. The Spanish Prevention of Money Laundering and Terrorist Financing Act (Act 10/2010) would only be applicable to franchising in the event that the commercial activity developed by the franchisors and franchisees was one of the activities listed in Section No. 2 of the aforementioned Act. If that were the case, strict measures on prevention of money laundering and terrorism financing should be implemented by franchisors and franchisees when developing their activities.

Concerning the legislation on prevention of fraud and anti-corruption, we can refer in general terms to the Spanish Criminal Code, under which crimes of fraud, corruption and money laundering are severely punished. Also, subject to definite approval by the relevant Spanish authorities, an amendment to the Spanish Criminal Code has been proposed that could oblige Spanish companies to implement internal measures for preventing the commission of felonies such as fraud and private or public corruption. Consequently, Spanish companies are implementing corporate compliance programmes on the prevention of the commission of felonies such as fraud and private or public corruption so as to benefit in the case of criminal liability arising of the exemption or the mitigation of the possible criminal liability, according to the amendment of the Criminal Code in force since 1 July 2015.

ix Dispute resolution

Usually franchise agreements are subject to the franchisor's law and jurisdiction. Arbitration is a recognised and usual form of alternative resolution and will be mandatory if it has been established as the dispute resolution form by the parties in the agreement.

Spanish courts recognise and uphold foreign choice of law or jurisdiction clauses. Article 25 of Council Regulation (EU) 1215/2012 on jurisdiction and the recognition

and enforcement of judgments in civil and commercial matters states that courts freely agreed upon by the parties will have exclusive jurisdiction for any disputes that have arisen or that may arise in connection with a particular legal relationship, provided that the agreement is: (1) in writing, or (2) in a manner consistent with practices that the parties have established between themselves, or (3) in international trade, when it is in compliance with the uses that the parties know or ought to know. Article 25 also provides that courts freely agreed upon by the parties will have exclusive jurisdiction for any disputes that have arisen or that may arise in connection with a particular legal relationship, unless the agreement (by which the courts have been freely agreed upon) is void according to the law of the Member State to which the chosen court belongs.

There is a specific arbitration procedure for franchising disputes. The Spanish Franchise Court deals with disputes arising from franchise agreements that were specifically submitted to the Court and with disputes dealing with franchise matters that were submitted to arbitration. Arbitral awards are issued within six months from the start of the proceeding. The main advantages of the arbitration procedure are, *inter alia*, that disputes are solved faster than in judicial proceedings and the arbitration panel is formed by experts on franchise matters.

Violation of franchisee agreements can be asserted through civil proceedings with the possibility of interim injunctions and compensation as well.

Spain is a signatory to the New York Convention and foreign arbitration awards are normally enforceable as long as they are enforceable in the foreign country in which they were issued. The Supreme Court will review the arbitration agreement to ensure that it is valid under the law applicable to the arbitration proceeding, and the award to confirm that it is in compliance with the New York Convention.

There have been no noteworthy franchising disputes in Spanish jurisdictions over the past year.

VII CURRENT DEVELOPMENTS

The franchising sectors and the AEDEF are requesting the drafting of a franchise act similar to those in other countries, to regulate in depth franchising activity in Spain; however, there is no legislation pending nor discussions on this matter.

Appendix 1

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