

USE OF THE FRANCHISE CONTRACT AS A LEGAL INSTRUMENT IN THE DEVELOPMENT OF A BUSINESS

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REVIEW, RESEARCH ARTICLE

Abstract

The franchise contract is characterized by the fact that it is a consensual contract being valid by the simple agreement of the parties, bilaterally synallagmatic, giving rise to mutual obligations between the contracting parties, of adhesion, with onerous title and successive execution. It is the main tool used in the situation where it is desired to open a business through the use of technology, services, equipment, more precisely the exploitation of a prestigious brand and to enter a competitive market using production, sales and marketing techniques already perfected with a high degree of profitability.

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INTRODUCTION

Franchise is the operation that takes the form of a contract by which a person called *franchisor* grants another person, called *beneficiary* or *franchisee*, the right to exploit a set of industrial or intellectual property rights, for the purpose of production or marketing of certain types of products and services.

Obtaining a franchise involves the payment of an entry fee into the system as well as annual royalties, usually in the form of a percentage of the turnover (<https://ro.wikipedia.org/wiki/Franchiz%C4%83>).

Franchising is a system of commercialization of products, services and technologies, based on a continuous collaboration between individuals or legal entities that are independent from a legal and financial point of view, through which a person, called the franchisor, grants another person, called the franchisee, the right and imposes the obligation to operate a business, in accordance with the franchisor's concept.

This right authorizes and obliges the franchisee, in exchange for a direct or indirect financial contribution, to use product and/or service brands, other protected intellectual or industrial property rights, know-how, copyrights, as well as signs of merchants, benefiting from a continuous supply of commercial and/or technical assistance from

the franchisor, within and during the franchise contract concluded between the parties for this purpose.

MATERIAL AND METHOD

The materials used in writing this paper are composed of legislation and websites. The methods used are legal, namely the formal method, the comparative method, the logical and the analytical method.

The use of these methods has the role of performing a systematic analysis of the information from the studied sources in order to elaborate the points of view and the conclusions.

RESULTS AND DISCUSSIONS

The legal framework in Romania regarding the development of commercial activities under the franchise regime is provided by Government Ordinance no. 52/1997 regarding the legal regime of the franchise and Law 179/2019 for the amendment and completion of Government Ordinance no. 52/1997 regarding the legal regime of the franchise. Considering that both the franchisor and the franchisee carry out a commercial activity, they have the quality of professionals.

Thus, the franchisor is a professional who:

- is the owner of the rights to a registered trademark or any other intellectual or industrial property right; the rights must be exercised for

a duration at least equal to the duration of the franchise contract; » confers the right to exploit or develop a business, a product, a technology or a service; » provides the franchisee with initial training for the exploitation of the registered trademark; » uses personnel and financial means to promote its brand, research and innovation, ensuring the development and viability of the product; » demonstrates the concrete application of the knowledge he possesses, within a pilot unit; the main objectives of the pilot unit are testing and finalizing the business formula. The franchisee is a professional, natural or legal person, selected by the franchisor, who adheres to the principle of the franchise network homogeneity, as it is defined and established by the franchisors.

The basis of opening a franchise business is the franchise contract. Thus, the franchise network includes a set of contractual legal relations between a franchisor and one or more franchisees, for the purpose of promoting: a technology, a product or service and for the development of production and distribution of a product or service.

The franchisee is supported by the franchisor throughout the duration of the contract, through the continuous contribution of commercial and technical assistance, as provided for in the franchise contract concluded between the parties (art. 1 alin.2, 3 and Law 179/2019 for the amendment and completion of Government Ordinance no. 52/1997 regarding the legal regime of the franchise).

Ordinance 52/1997 republished, establishes the rules regarding the relations between the parties, more precisely the *pre-contractual, contractual and post-contractual relations*. In the pre-contractual phase, the future franchisee should be informed both about the franchise (commercial terms, entry fee, royalty, contributions to the marketing budget) and about the franchisor (past, history, current network of own units and franchised units, turnover, turnover from own and franchised units; visit to the franchisor to get to know him and the team he works with; discussion with one of the existing franchisees to see if he is satisfied. Thus, the purpose of *pre-contractual relations* is to enable each party to confirm its decision to collaborate, the franchisor providing the future franchisee with information that allows him to participate, in full knowledge of the case, in the execution of the franchise contract. Also, the franchisor

provides the potential franchisee with an information disclosure document, which must contain specific data regarding: the history and experience of the franchisor; details of the identity of the franchise management; the litigation history of the franchisor and its management; the initial amount that the franchisee must invest; mutual obligations of the parties; copies of the franchisor's financial results from the last year; holding information about the pilot unit. Until the start of its franchise network, the franchisor will effectively operate a business concept, for a period of at least one year, in at least one pilot unit. In terms of *contractual relations* (Art. 3, 4, 5 and 6 Ordinance no. 52/1997 regarding the legal regime of the franchise), the franchise contract must:

- I. to include the following clauses: the object of the contract, the rights and obligations of the parties, the financial conditions, the duration of the contract, the conditions for modification, extension and termination
- II. to be concluded in compliance with the following principles: the term will be fixed in such a way as to allow the franchisee to amortize the investments specific to the franchise; the franchisor will notify the franchisee with sufficient notice of the intention not to renew the contract on the expiry date or not to sign a new contract; within the termination clauses, the circumstances that may determine a termination without notice shall be clearly established; the conditions under which the transfer of rights arising from the contract will be able to operate will be clearly specified, especially the conditions for appointing a successor; the right of preemption will be provided, if the interest of maintaining or developing the franchise network requires the recognition of this right; non-competition clauses will be included in the contract, to protect the know-how; the financial obligations of the franchisee will be clearly specified and will be determined in such a way as to favor the achievement of common objectives
- III. to reflect the interests of the members of the franchise network, protecting the industrial or intellectual property rights of the franchisor, by maintaining the

common identity and reputation of the franchise network and to define, without ambiguity, the obligations and responsibilities of each party, as well as any other clauses of the collaboration. In order to be able to sign such a contract, the franchisor must own and operate a commercial activity, for a certain period, prior to the launch of the franchise network, be the holder of intellectual or industrial property rights and provide its franchisees with initial training, such as and permanent commercial and/or technical assistance, throughout the existence of the contractual rights, and the franchisee must develop the franchise network, maintain its common identity and its reputation; to provide the franchisor with any information of a nature to facilitate the knowledge and analysis of the performances and the real financial situation, in order to ensure efficient management in relation to the franchise and not to disclose to third parties the know-how provided by the franchisor, both for the entire duration the franchise contract, as well as afterwards.

The franchisor, in case it finds a breach of the contractual obligations by the franchisee, has the obligation to notify the franchisee in writing and to give him a reasonable term in order to remedy the situation.

The franchisor may impose a non-competition and confidentiality clause to prevent the alienation of the know-how transmitted during the exclusivity contract.

If the franchisor proposes to sign an exclusivity contract, the following rules will be observed: if a fee is charged for entering the franchise network, upon signing the franchise contract, the amount regarding the exclusivity rights, stipulated in the contract, is proportional to the entry fee and is added to it; in the absence of the entry fee, the methods of reimbursement of the exclusivity fee are specified in case of termination of the franchise contract; the exclusivity fee can be intended to cover part of the expenses necessary to implement the franchise and to delimit the area and/or for the know-how transmitted; the

exclusivity contract must provide for a termination clause, convenient for both parties; the duration is determined according to the characteristics of each franchise (art. 9 Ordinance no. 52/1997 regarding the legal regime of the franchise).

Regarding *post-contractual relations*, they must be based on the rules of fair competition. For franchises opened in Romania, the legal framework regarding this aspect is provided by Law no. 11/1991, which aims to ensure fair competition, with respect for honest practices and the general principle of good faith in order to protect the legitimate public and private interest, through the application of contraventional, criminal or civil law rules.

It constitutes unfair competition and the following commercial practices of the enterprise are prohibited, which contravene honest practices and the general principle of good faith and which produce or are likely to produce damages to other enterprises, as follows (art. 2 Law 11/1991 on combating unfair competition

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- a) defamation of a competing enterprise or its products/services, likely to harm its legitimate interests, carried out by the communication or dissemination by another enterprise or a former or current employee of information that does not correspond to reality
- b) diverting the clientele of a competing company by a former or current employee, by using information that he knew at the time of the act to represent trade secrets or confidential information and whose disclosure could significantly harm the interests of that company
- c) discrediting the activity of a competing enterprise or its products and services, carried out by another enterprise or a former or current employee, by resorting to actions intended to attract the loss of its good reputation or credibility, by means other than those provided for in letter

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- d) any other commercial practices that contravene honest practices and the general principle of good faith and that cause or may cause damage to competitors

Depending on the specifics of the activity carried out under a franchise contract, we have service, retail and master franchises.

Examples of franchises opened in Romania are: Maison des Crêpes (à la carte restaurant that serves only sweet and salty pancakes); Joy Pizza, Bubble Waffles (unique dessert of salty snacks with a sweet concept); L' Amande (producer of cakes, pastries, bakery, all gluten-free); TED'S Coffee Co (specialty coffee, 100% Arabica officially certified by CSC (Certified Specialty Coffee) based 70% on "to go"); Uncle John (100% Romanian concept, mixes the flavors of meat, onion rounds, cheese and sauces that they prepare themselves, according to their own recipes); Tucano (international network of coffee shops); Velocità (100% Romanian franchise, domain – ice cream shop, cafe); Hello Donuts; Deziclean (professional cleaning services); Biotiful Atelier (the first non-toxic beauty salon in Romania); Code School Clubs (is a 100% Romanian technology club, born from the passion for education and the desire to provide children and adolescents (6-18 years) with courses adapted to the present); Graphein (provides fast and precise topographic assistance services on site, 3D scanning and technical assistance for cadastre and tabulation); Vodafone; 5asec (professional cleaning services for textiles and other accessories); Kiddo Play Academy (playground for children

that combines education, imagination and fun, so that children do not realize that they are learning while playing); Nomin Jyuku (the first soroban center in Romania, the Nomin Jyuku technique being a mental arithmetic technique that is entirely created by the Japanese experts of the Houmei Jyuku school, recognized for over 70 years of tradition in soroban); Feydom (furniture brand); Yole (sells products based on frozen yogurt and ice cream, made according to own recipes, without added sugar and with a low level of caloric intake); Chuty's (Asian food prepared in a wok in front of the customer); Coptrz (experts in commercial drones for surveying, public safety, civil engineering and construction, defense, inspections); Lingotot (multilingual center based on an unconventional teaching method through play, children learning foreign languages naturally); Simigeria PETRU (according to an authentic recipe, at PETRU they produce pretzels, appetizing pizza, tasty sandwiches, sweet and savory patisserie treats); Treevi Pizza (Italian inspired pizza with original tastes); King Rolls – Fusion Kebab Concept (fast food franchise); Pofte (the preparation of healthy fast food options, including the classic shaorma through the perfect combination of the 21 herbs and 7 spices that can be found in the Pofte recipes); McDonald's, Pizza Hut, Hilton (https://www.francize.ro/22-de-idei-de-francize-testate-pentru-2022/?gclid=Cj0KCQiAip-PBhDVARIsAPP2xc20LpQGF2fCjKRGIJm tWKVR11Kvh3TenqgXOe1yGB-X2zEBFVsioMsaAieZEALw_wcB).

CONCLUSIONS

The franchise allows the provision of products and services to the population on a contract basis.

That is, the franchisor and the franchisee sign an agreement, the provisions of which oblige each other to comply with them. The franchise itself is not a guarantee of success both for the franchisor and especially for the franchisee because it requires compliance with certain conditions.

However, if the franchisee does everything right, he has a certain certainty that he will not only open the business, but also promote it quickly, attracting customers and earning income.

Franchising has a great advantage because it allows you to open your own business under someone else's already well-known name in the shortest possible time and with full technical and marketing support.

Despite the fact that it costs more than starting a business from scratch, franchising is

the safest solution for starting a business because, firstly, franchises allow opening a business under an already known, important and successful brand and secondly, in case of crisis, franchisors have developed special anti-crisis plans from which franchisees also benefit.

Opening a franchise business has both advantages and disadvantages.

Regarding the advantages, the risk of business failure for the franchisee is considerably reduced because it benefits from a type of business that is already tested on the market and that works; for the entire duration of the contract, the franchisee maintains its managerial, legal and financial independence, being a separate entity from the franchisor, by running its own business; the franchisee also benefits from training services, training, equipment, consumables, promotion, managerial and technical assistance, the reputation that the brand already has and which ensures a certain category of customers.

Regarding the disadvantages, the franchisee must pay an entrance fee to the franchise network, the payment of a certain percentage of his earnings to the franchisor, a percentage established in the contract; the franchisee must work in accordance with a business form established by the franchisor; to comply with the rules of production, distribution and provision of services imposed in order to maintain the integrity of the brand; conditioning the supply only from certain suppliers, to sell the products only in a certain geographical area.

REFERENCES

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