Franchise

in 32 jurisdictions worldwide

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Overview

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

Almost all franchisors operate as a limited company – apart from the limited liability afforded, such companies are often perceived (wrongly) to be more substantial businesses than unincorporated businesses.

It is also possible to set up a limited liability partnership (LLP), which has separate legal liability and is more akin to a limited company than to a traditional partnership, but these are rare.

The responses provided here are by reference to the legal system in England and Wales. Scotland’s legal system differs in some relatively minor respects.

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

A sole trader is not subject to any specific legislation. An LLP is incorporated under the Limited Liability Partnership Act 2000, while a partnership is subject to common law rules and the Partnership Act 1989 and 2006. All companies are required to be registered at Companies House and are subject to further regulatory requirements, including providing annual returns and accounts (unless they are exempt).

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

Sole traders, which tend to be relatively small concerns, are not subject to any specific legislation in terms of formation or maintaining the business. However, they are required to pay income tax on profits generated by the business.

The PA does not provide a complete code of partnership law. The rules of equity and common law apply except where they are inconsistent with the PA. To satisfy the definition of a partnership, two or more persons must be carrying on a business. The factors for determining the existence of a partnership include common ownership of property, sharing of gross returns and the receipt of a share in profits. The existence of a partnership is always a question of fact. Partners are liable for the debts and obligations of the partnership without limit.

A company is formed under the Companies Act by a process called registration, which involves submitting at least form INO1 and a fee with the Registrar of Companies, the official responsible for the registering and maintaining the records of companies. A company comes into existence on the issue of a certificate of incorporation. Details of the registered office, annual returns and accounts must be filed with the registrar unless the company is exempt from filing accounts.

An LLP will also have to be registered with the Registrar of Companies and a certificate of incorporation will be issued. To achieve incorporation, two or more persons must subscribe their names to the incorporation documents and pay a fee. The LLP’s name must end with LLP and a statement about the intended location or the registered office must be provided. LLPs will be required to file accounts and annual returns, and to make the relevant notifications regarding any changes to membership and to its registered office.

Companies and LLPs are required to display their company registration details and registered office address on their letters and order forms. The names of all partners have to appear on business letters and order forms. Sole traders are also required to disclose their names on such documents. Further, any business that employs staff is obliged to have in place, and to maintain, employers’ liability insurance.

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

The UK Trade and Investment (website www.ukti.gov.uk) is a government agency that helps foreign businesses to invest and locate in the UK and grow internationally. The UK is the fifth largest economy in the world and is one of the easiest places in Europe in which to set up and run a business.

There are generally no restrictions on foreign ownership or investment in the UK and there is little or no regulation on foreign ownership of companies. Foreign franchisors have no difficulty setting up in the UK.

Foreign nationals from outside the European Union will need a visa and a Certificate of Sponsorship from a UK-registered business. The UK now has a points-based system (PBS) and it is for the company to ensure that those it wishes to employ meet the criteria of the PBS. The sponsor is also responsible for its migrant employees and must report any unexplained absences, etc., to the UK Border Agency.

Among other legislation and regulations, the foreign franchisor will have to comply with the Data Protection Act 1998 and money laundering requirements (for opening a bank account), and accounting and tax considerations must be taken into account.

5. Briefly describe the aspects of the tax system relevant to franchisors.

How are foreign businesses and individuals taxed?

There are no special tax rules that are applicable to franchisors. Unincorporated businesses are assessable to tax on a current-year basis, which means the profits for the accounting period ending within the current tax year are assessed for tax that tax year. There are special rules for the first and last periods of trading. With partnerships, each partner’s share of profit, after expenses and capital allowances, is assessed on him individually, using the profit-sharing ratio that applies in the accounting period ending in the tax year in question.

A company is chargeable to corporation tax on its profits by reference to its accounting periods and not tax years, as is the case with
sole traders and partnerships. Where a company distributes retained profits to its shareholders as a dividend, the shareholder will be liable to pay tax on the net dividend received. Companies are obliged to self-assess their corporation tax liability and are required to submit a corporation tax return with their set of accounts on an annual basis. Failure to do so, or failure to pay the corporation tax in time, may result in penalties.

The tax treatment of the initial fee needs to be given careful consideration. The UK tax system draws a distinction between capital and revenue expenditure and receipts. Part of the initial fee payment is usually consideration for the grant of rights to operate the franchise, and the balance is usually attributable to goods or services provided to equip the franchisee and to help launch the business. The great majority of the initial fee will be a revenue receipt in the hands of the franchisor.

A foreign business will not be subject to UK tax unless it is permanently established in the UK, for example, if it had a subsidiary or branch. If this is the case, the foreign entity may be subject to UK tax.

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

Any entity that takes on employees will be required to comply with UK anti-discrimination laws, which prevent discrimination on grounds of sex, race, sexual orientation, disability, religion and age. A franchise agreement will often require that a franchisee comply with all relevant laws and regulations, which include employment legislation.

In 2009 the Court of Appeal decided that a contract could still be a contract of employment despite the individual being called a franchisee and the contract being referred to as a franchise agreement. This decision is being appealed to the Supreme Court. In practice, very few franchisees are likely to be treated as employees.

7 How are trademarks and know-how protected?

The franchisor’s trade name and trademarks, confidential information and know-how are essential elements of what the franchisor provides to the franchisee. It is a requirement of the Code of Ethics issued by the British Franchise Association (the BFA Code) that the franchisor either is ‘the owner of [has] the legal rights to the use of its network’s trade name, trade mark or other distinguishing feature’ (section 2.2).

Trademarks in respect of goods and services are registrable in the UK under the Trade Marks Act 1994 in specific classes and, upon registration, provide protection against unauthorised use. It is also possible to obtain a Community Trademark that enables the trademark owner to rely on a single registration with effect throughout the European Union (via the OHIM in Alicante, Spain) and an international registration that is filed under the Madrid Protocol administered by WIPO.

It is possible to bring a claim for the tort of passing off, whether or not a trademark has been registered, if a person seeks to take advantage of the reputation of another’s goods or services by adopting a similar name or get-up or otherwise implying a link between his product or service and another’s. One has to establish that the infringer has made a misrepresentation that is calculated to, and does, cause injury to the business or to goodwill.

The franchise agreement or operations manual will contain various provisions with regard to the protection of intellectual property that includes confidential information (know-how).

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

In England and Wales, land is held either by way of ‘freehold’ or ‘leasehold’.

If the business model requires the use of prime retail outlets, then the franchisor may have to take a lease and grant their franchisees a sub-lease of the premises, although this is becoming less common. Granting a sub-lease to a franchisee provides much greater control over the outlet for a franchisor. It is not uncommon for a landlord to require a third party to guarantee the performance of the tenant, particularly where the franchisee is of limited financial means.

If the lease and sub-lease procedure is adopted, it is important for the franchisor to exclude the lease from the provisions of the Landlord and Tenant Act 1954, which, if applied, would give a franchisee security of tenure so that the franchisee could not be evicted from the premises following termination of the franchise agreement.

If a franchisor does not take a lease and grants a sub-lease, a deed of option can be used so as to oblige the franchisee to transfer the premises to the franchisor on termination of the franchise agreement, subject to the consent of the landlord.

If the franchise agreement contains an option to renew, the lease should reflect this.

Laws and agencies that regulate the offer and sale of franchises

9 What is the legal definition of a franchise?

There is no legal definition of franchising and no franchise specific legislation. Most reputable franchisors join the British Franchise Association (BFA) (www.thebfa.org), a self-regulatory body. Membership of the BFA is voluntary. The BFA has adopted the European Franchise Federation’s definition of franchising, which provides (inter alia):

Franchising is a system of marketing goods and/or services and/or technology, which is based upon a close and ongoing collaboration between legally and financially separate and independent undertakings, the franchisor and its Individual Franchisees, whereby the Franchisor grants its Individual Franchisees the right, and imposes the obligation, to conduct a business in accordance with the Franchisor’s concept [...].

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

There are no specific agencies that regulate the offer and sale of a franchise that is governed by the general law, where the overriding principle is ‘caveat emptor’ (buyer be aware). A prudent buyer should undertake all necessary due diligence and obtain advice from BFA-affiliated professionals prior to entering into the franchise agreement.

11 Describe the relevant requirements of these laws and agencies.

While not specifically aimed at franchising, certain laws have had an impact on drafting franchise agreements, for example, the Fair Trading Act 1973 and Fair Trading Schemes Act 1996, which regulates pyramid selling, and for competition law see question 39.

Under the Trading Schemes Act 1996 (the 1996 Act) franchise systems are likely to be treated as a trading scheme and will have to comply with the 1996 Act, unless they fall under one of two exceptions (see question 12). The purpose of the 1996 Act is to regulate pyramid selling that arises when distributors are encouraged to or discover that it is it more remunerative to find other sub-franchisees (who in turn are encouraged to find sub-franchisees, etc) than to sell the goods or services that are allegedly the subject of the franchise. While the 1996 Act does not prohibit pyramid selling, it seeks to control it by regulating three aspects, namely, the control of
advertising, the imposition of a ‘cooling-off’ period and the control of contractual provisions.

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

Franchisors who operate a single-tier trade scheme are exempt from the Trading Schemes Act 1996 if all franchisees operate at a single level (except for the franchisor) or where all franchisees are registered for VAT.

See question 39 for further information on Competition Law issues.

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

There are no such legal requirements, but the BFA Code requires a franchisor to:

- have successfully operated a business concept for a reasonable time in at least one pilot unit before starting its franchise network. Company-owned units can provide the basis for a pilot operation, but to gain the right experience the pilot should be run by a ‘manager’ on an arm’s-length basis to test the system and infrastructure;
- be the owner or have the legal rights to the use of the network’s trade name, trademarks or other distinguishing identification; and
- provide the individual franchisee with initial training and continuing commercial and technical assistance during term of the agreement.

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

Save for what is set out in question 15, there is no specific requirement for pre-sale disclosure to sub-franchisees in the UK. The BFA Code requires disclosure to be made to any prospective franchisee. This includes providing a copy of the Code of Ethics and full and accurate written disclosure of all information material to the franchise relationship prior to the execution of the binding documents.

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

There is no specific legislation that provides for pre-contract disclosure. However, the BFA Code stipulates that advertising for franchise recruitment must be free of ambiguity and misleading statements. Further, where there are direct or indirect references to future possible results, figures or earnings to be expected by individual franchisees, these should be objective and factually based and must not be misleading. The BFA also requires its members to refund deposits paid by prospective franchisees if they do not proceed, although it is acceptable to deduct related and verifiable expenses.

16 What information must the disclosure document contain?

This is not applicable, but see questions 14 and 15.

17 Is there any obligation for continuing disclosure?

No.

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

When applying for membership of the BFA, applicants must commit themselves to comply with the Code of Ethics. See questions 14 and 15.

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

Not applicable: see above.

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

Not applicable: see above.

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

The offer and sale of a franchise is not subject to any specific law, but is subject to the overriding application of contract law and, in particular, laws relating to misrepresentation.

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

There are no such obligations. However, the franchisor must be careful not to make any misrepresentations. See question 23.

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

Where a franchisee has relied on a statement (of fact or law) made by the franchisor, whether this was made orally (at exhibitions, seminars, awareness days) or contained in sales literature (franchise prospectus, the franchisor’s website, or financial projections or the business plan for the franchisee), in entering into a contract that turns out to be untrue, the franchisor may be liable for a claim of misrepresentation. This remedy is not specific to franchising. An action for fraudulent misrepresentation occurs where a false statement is made knowingly, or without belief in its truth, or recklessly as to its truth. Misrepresentation can also be innocent or negligent.

Clauses that seek to limit liability for misrepresentation are often included in franchise agreements. However, such disclaimers are of no effect where the franchisor has committed a fraudulent misrepresentation. With fraudulent or negligent misrepresentation the franchisee may claim rescission and damages, whereas for innocent misrepresentation the court has the discretion to award damages. Rescission means that the contract is set aside and the parties are put back into the position in which they were before the contract was made; as such, damages can be substantial.
Legal restrictions on the terms of franchise contracts and the relationship between parties involved in a franchise relationship

24 Are there specific laws regulating the ongoing relationship between franchisor and franchisee after the franchise contract comes into effect?

Apart from general contract law principles, there are no specific laws regulating the ongoing franchise relationship. See question 25 for other laws of general application that may affect franchise relationships.

25 Do other laws affect the franchise relationship?

There are no specific laws. Franchise agreements are not treated any differently to other commercial contracts. However, two areas of general law are particularly relevant to franchising.

The Data Protection Act 1998 (DPA) governs the processing of personal information held on living and identifiable individuals. It applies to the ‘processing’ of ‘personal data’, both of which are widely defined, and means that practically any business operating in the UK that holds information about individuals, whether employees, customers or anyone else, is affected by the DPA. A breach of data protection laws can lead to criminal as well as civil liability. All the obligations under the DPA fall upon the ‘data controller’, who is defined as the person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which personal data is, or is to be, processed. In the franchising context, franchisors and franchisees are both usually data controllers, although franchisees are sometimes data processors rather than data controllers.

Under the DPA, anyone who processes personal information (names, addresses, etc) to include a franchisee must comply with the eight data act principles, which include ensuring that the information is fairly and lawfully processed, is kept accurate and is processed for a limited purpose. It must be kept secure and must not be kept for any longer than necessary.

In many franchises the franchisor will require the franchisee to provide customer information to the franchisor, and franchisees will not be able to comply with data protection legislation. This highlights the need for the franchise agreement to set out what the franchisee must do to comply with data protection legislation and for the franchisor to facilitate compliance.

It is not uncommon for franchise agreements to contain exemption clauses that seek to limit or exclude the franchisor’s liability for representations made at the pre-contract stage; for example, when supplying projected profit or turnover figures. In assessing the enforceability of exemption clauses, reference must be had to the Unfair Contract Terms Act 1997 (UCTA), which applies where a party seeks to limit its liability or where the contractual party seeks to avoid the consequences of misrepresentation by reliance on exclusion clauses. Franchise agreements are likely to be treated as standard form documents, and therefore any exclusion clauses will only be valid insofar as they are fair and reasonable.

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

Most reputable franchisors and franchise professionals are members of, or affiliated to, the BFA. The BFA Code sets out a best practice guide for franchisors, consultants and franchisees. Members are required to accept and adhere to the BFA Code, which sets out standards in franchise advertising, recruiting and selection and dispute resolution.

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

Most well-drafted franchise agreements will contain an express provision for terminating franchise agreements immediately in the event of a serious breach by a franchisee (eg, abandonment, serious criminal conviction, insololvency, repetitive breach or incurable breach of a material provision of the franchise agreement). Other provisions can include providing the franchisee with an opportunity to rectify the breach within a specified period. The BFA Code (paragraph 2.4) provides that a franchisee should be given notice of any contractual breach and, where appropriate, should be granted a reasonable amount of time to remedy a default.

The franchisor (and franchisee) also have an overriding common-law right to terminate the agreement by accepting the franchisee’s repudatory breach (where it is clear that the party in breach no longer wishes to be bound by the terms of the agreement), which will bring about an immediate end to the franchise agreement.

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

A franchise agreement is most unlikely to contain an express right allowing a franchisee to terminate the franchise agreement. However, a franchisee may terminate the agreement under common law where a franchisor has committed a repudiatory breach of contract.

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

The BFA Code provides that the contract should state ‘the basis for any renewal of the agreement’ (paragraph 5.4). This wording does not make it obligatory that there should be renewal, but if renewal is available, its basis should be contained in the contract.

Most franchise agreements lasting five years (the usual period in the UK) will contain two ‘guaranteed’ renewals and will set out the conditions that a franchisee will have to satisfy in order to apply to renew the franchise agreement. Such conditions are likely to include the franchisee not being in substantial breach during the term of the franchise.

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

A franchisor will wish to control who becomes a member of its franchise network, and this is achieved through regulating the way in which a franchisee can sell, dispose of or transfer the franchise business. The agreement will contain provisions to ensure that a franchisor’s consent is obtained prior to the transfer and that the new incoming franchisee meets with the franchisor’s approval and has the necessary skills required to ensure that the franchise is a success. The agreement will also contain an option for the franchisor to purchase if or when the franchisee decides to sell his or her business.

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

There are no laws affecting the nature, amount or payment of fees.

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

Most agreements will contain provision for the franchisor to charge interest on any late payments at the rate agreed by the parties. Sometimes these interest rates can be high – around 24 per cent per annum.
A franchise agreement may contain some provision applicable to the payment of continuing fees that deal with the time at which the payment is to be converted, and at what rate. The UK does not enforce any exchange restrictions.

34 Are confidentiality covenants in franchise agreements enforceable?
Yes.

35 Is there a general legal obligation on parties to deal with each other in good faith? If so, how does it affect franchise relationships?
There is no general legal obligation requiring contracting parties to act in good faith with each other. However, the BFA's Code does require the parties (both franchisor and franchisee) to exercise fairness in their dealings with each other.

36 Does any law treat franchisees as consumers for the purposes of consumer protection or other legislation?
It is very unlikely that franchisees will be treated as consumers for the purposes of consumer protection laws.

37 Must disclosure documents and franchise agreements be in the language of your country?
While there is no specific legislation on disclosure, the BFA Code requires that the franchise agreement be translated (by a sworn translator) or drafted into the official language of the country of the franchise.

38 What restrictions are there on provisions in franchise contracts?
There are no restrictions. The BFA Code provides some guidance as to the duration of the agreement in the statement that 'it should be long enough to allow the individual franchisee to amortise their initial investment specific to the franchise' (section 5.4).

39 Describe the aspects of competition law in your country that are relevant to the typical franchisor. How are they enforced?
Article 101 of the Treaty for the Functioning of the European Union (previously article 81(1) of the EC Treaty) (article 101) regulates agreements, decisions or concerted practices which may affect trade between member states and that have the object or effect of distorting competition. The UK has passed its own legislation modelled on article 101, but obviously without the need for any effect on trade between member states (chapter 1 of the UK Competition Act 1998). If an agreement is prohibited by article 101, the offending provisions (and in some case the whole agreement) are void and the parties can be subject to fines. Vertical agreements are agreements between undertakings that operate at different levels in the production or supply chain.

Franchise agreements are vertical agreements and have the potential to affect competition, especially if they contain territorial restrictions, pricing obligations or non-compete requirements. It is not possible to remove these restrictions from formal agreements and to 'hide' them in commercial practices, because Article 101 applies not only to agreements but also to concerted practices.

Many franchise agreements may not be caught by the legislation, because they are treated as being of 'minor importance' or have been entered into by 'small and medium-sized enterprises'.

Vertical agreements (including franchise agreements) have been exempted from competition laws by the new vertical agreements block exemption and the accompanying revised vertical restraints guidelines that were adopted by the EC on 20 April 2010.

The new block exemption, which is available from the Commission's website (http://ec.europa.eu/competition/antitrust/legislation/vertical.html), was published with guidelines that are available on the same website. The guidelines are extremely important when it comes to understanding the block exemption. The block exemption applies to all new agreements entered into after 1 June 2010, and existing agreements have to comply with it as from 1 June 2011. Almost all properly drafted franchise agreements contain a provision whereby the franchisor, on receiving advice that its franchise agreement does not comply with EU legislation, can change the agreement so that it does comply. This clause will enable changes to be made to existing agreements before the 1 June 2011 deadline. The block exemption expires on 31 May 2012.

Three areas covered by the block exemption are particularly relevant in a franchising context. They are: price, territory (passive/active sales), and non-compete obligations (in-term and post-term).

Price restrictions
Resale price maintenance is a 'hard-core' restriction (contained in article 4 of the block exemption). If this is contained in a franchise agreement, none of the other provisions of the agreement will be exempted. Not all price restrictions are prohibited: franchisors can set maximum prices and can recommend prices, provided that these are recommendations and are not mandatory. Franchisors cannot set minimum prices either by means of express contractual provisions in the franchise agreement or by indirect methods such as threatening franchisees who step out of line, offering rebates or free products such as marketing collateral for those who comply with minimum prices, or imposing price monitoring (see paragraph 48 of the Guidelines for more information on this).

Territory restrictions
These restrictions are also viewed as 'hard-core'. Exclusive territories are not quite as exclusive as they once were, as the Commission draws a distinction between active and passive selling. Active sales are sales made by franchisees who have taken active steps to obtain that customer; passive sales are sales made as a result of unsolicited enquiries from customers. A franchisor can prevent active sales outside a franchisee's territory but cannot prevent franchisees from undertaking passive sales in respect of customers outside their territory.

Internet sales
The Commission takes the view that internet sales are 'in principle' passive sales and, therefore, cannot be prohibited (for an analysis of the Commission's view on internet sales, reference should be made to paragraph 52 of the Guidelines). The Commission does recognise that not all internet sales will be passive sales because, for instance, if a franchisee makes use of a search engine to optimise its website's rating in territories outside its own allocated territory, this could be an active sale. Franchisors cannot prevent franchisees from having their own website, but can set quality standards for franchisees' websites in precisely the same way that they may set quality standards for retail premises or the vehicles that they use.

Non-compete obligations (in term)
In-term non-compete obligations are also prohibited (contained in article 5) and are therefore grey list and not hardcore restrictions,
which means that only the clause containing the restriction is void and unenforceable and not the whole agreement. A non-compete obligation is, for the purposes of the block exemption, an obligation on a franchisee not to be involved in a similar business or an obligation on a franchisee to purchase at least 80 per cent in value (occasionally volumes can be used) of its required purchases from the franchisor or its nominated supplier.

The Commission, however, recognises that a non-compete obligation lasting for only five years should be permitted. It is for this reason that most franchise agreements in the United Kingdom last for five years. The five year exemption still applies even where the franchise agreement is renewed after each five years. The five-year period can be increased if the franchisor owns the premises from which franchisees operate to the length of the lease granted by the franchisor to the franchisee.

Non-compete (post-term)
This is another grey list restriction. Post-termination non-compete covenant are prohibited unless they are indispensible for the protection of the franchisor’s know-how. Changes have been made to the definition of know-how, the know-how must be secret (as it had to be in the previous block exemption) but save that now following redrafting of what is ‘secret’ it appears less likely that franchisors would be able to argue that although none of the elements of its know-how are secret the compilation of these non-secret elements do make it secret. In practice, a franchisor’s know-how – usually contained in operating manuals – would be unlikely to be secret.

If the know-how is capable of protection, it is permissible to impose post-termination non-compete covenants for a period of one year preventing an ex-franchisee from being involved in competing goods or services from the ‘premises and land’ that it had previously used. In other words a franchisor cannot prevent a franchisee from opening next door and the limited permission for non-compete covenants does not, on the face of it, apply to non-premises based franchises such as van distribution franchises. It is not clear whether this is intended and helpfully the Guidelines refer to ‘point of sale’ rather than premises and land.

The provisions referred to above relating to post termination non-compete covenants could have a very serious effect on franchising but the Court of Justice, which is the ultimate authority on European matters, took a less ‘tough’ stance on post-termination non-compete covenants in its Pronuptia decision and, as a result, it may be that franchisors would be able to rely on the Court of Justice’s decision rather than the Block Exemption and Guidelines to impose a non-compete covenant.

For the first time in 2010 an English court had to deal with an argument from a former franchisee (against whom enforcement of the post-term non-compete in the franchise agreement was being sought) that the covenant did not comply with section 2 of the Competition Act 1998 (which is modelled on article 101 TFEU). At the interim application, the High Court relied on the Pronuptia decision and indicated that whether the post-termination non-compete covenants falls outside the scope of section 2 depends on whether it is essential to prevent the risk that know-how and assistance provided by the franchisor to the franchisee will, after termination, be used by the franchisee’s competitors.

Please note that similar responses will be given in all EU countries and so may need to be amalgamated.

The EC or UK competition law authorities may carry our investigations into anti-competitive activities. In the UK, the OFT is the principal law enforcement agency (www.oft.gov.uk). The competition authorities have significant investigative powers that include entering and searching business premises and imposing fines. The EC’s involvement is limited to where there has been a suspected infringement that affects trade between member states.
the parties to consider forms of ADR prior to commencing court proceedings in all cases, other than where urgent injunctive relief is required. Choice of jurisdiction and law is a matter agreed on by the parties in the agreement.

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

In addition to the arbitration service offered by the BFA, the London Court of International Arbitration also offers an arbitration scheme. The LCIA offers a combination of the civil and common law systems. It provides flexibility for parties and the tribunal to agree on procedural matters; speed and efficiency of arbitrator’s appointments, means of reducing delay and countering delaying tactics. They also have a range of interim remedies, for example, security for claims and costs. However, an arbitrator will conduct a formal enquiry process where the parties are required to produce documents and witness statements and this could be as costly as conventional court-based litigation. An arbitrator’s findings are final on the matter and may only be appealed to a High Court judge.

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

Foreign franchisors are not treated any differently from domestic franchisors.
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