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The concept of franchising in Romania, as in many other countries is a business concept which is spreading to business in Romania, as a result of the current economic climate, and the simple laws and regulations in this field in Romania. The purchase of a franchise does not guarantee success, but can represent to the prospective business person a lower risk rather than a business started from scratch. In certain circumstances there are also the possibilities of greater earnings in a shorter period of time.

Currently, the most important sectors in which the concept of franchising is being developed in Romania are hotels, gas stations, retail clothing and other service goods, fast food and coffee shops and restaurants as well as industrial products such as sanitary installations, electronic equipment , and services such as rent-a-car services, laundries and advertising.

The Law of Franchising in Romania

A franchise in Romania is regulated by a contract, which governs the legal relationship between the parties usually of sale purchase, license, leasing, enterprise, representation contract. Prior to 1989 there were no franchises in Romania because of ideological reasons. After 1989 the use of franchises was slow to take hold and was governed by the Romanian Civil Code, the Romanian Commercial and the Romanian Procedural Code.

The Government passed in 1997 Governmental Ordinance no 52/1997 which was to govern franchising and franchises (“Franchise Law”). Further on 1st October 2011 the new Civil Code entered into force which amended further the relationships between the parties and the implementation of

the franchise law. The amendments introduced by the new Civil Code will only affect franchise agreements which entered into force after 1st October 2011.

In all cases the Civil Code and the Commercial Code will be applied where matters are not covered in the Franchise Law. The procedural aspects of the entering into a franchise agreement are regulated by the Franchise Law and the Romanian Civil Procedure Code.

The Franchise Law has been amended only once since it entered into force. The Franchise Law does not impose many terms and conditions on the parties and comprises only 15 articles. It does, however, implement principles and regulations contained in the texts applicable in the European Union regarding competition policy, namely, Regulation no. 4087/1988 regarding to franchise agreements.

All terms of the franchise between the parties can be freely negotiated and agreed provided that they observe the provisions of the Franchise Law and the Codes as mentioned previously.

The Franchise Law requires that the franchise agreement defines without ambiguity, the object of the agreement, the rights and obligations of the parties both prior to, during, and after the termination of the franchise agreement. It should state the financial conditions and arrangements between the parties, the period of the agreement, including the terms related to the amendment, continuation, cancellation and termination of the franchise and the franchise agreement.

Prior to 1997 the franchise was defined in the doctrine as a concession contract, the concession consisting of the products or service mark to which assembly methods were added in order to provide operation, management and the best rent ability conditions.

A franchise has subsequently been defined in article number 1 of the Romanian Fiscal Code (as amended). This states that a franchise is a trading system based on a continuous collaboration between natural or legal persons, who are financially independent, based on which a specific person, referred to as the franchisor, grants to another person, referred to as the beneficiary, the right to exploit or to develop a business, a product, a technology or a service.

Contractual obligations

In order for the franchise agreement to be effective, the parties have to comply with certain requirements imposed by law and these requirements must be unambiguously defined in the contract.

According to article 4 of the Franchise Law, the franchisor for a certain period of time prior to launch of the franchise network must own and carry out the commercial business that will be franchised. The period is not defined by the law or been tested in the courts., We believe that it must be sufficiently long to allow the franchisor to gain experience and know-how on how to develop a business that can be franchised. Further the franchisor must be the holder of the intellectual and/or industrial property rights of the products, technology or trademarks used in the franchising process. A breach of these provisions can lead to the annulment of the agreement.

The same article states that the franchisor has the duty to provide the franchisee with initial training and activity organization when starting the new business. No period of time is specified. The initial training is considered to be indispensable for all types of franchises. The assistance in organizing the activity may consist in choosing the place of the activity and its layout, purchase of the equipment and the initial stock, and choosing staff. After this period, the franchisee must benefit from full-time commercial and/or technical assistance from the franchisor.

The assistance is decided by the parties during the negotiation of the contract, and may consist of periodical meetings, depending on the commercial or technical experience of the franchisee. These meetings may consider the evolution of the company, inspection of premises, identification of the franchisee's needs, as well as discussions with the staff and clients.

The same doctrinaire states that there is also an obligation on the franchisor to promote both nationally and internationally, the activities that are the subject of the franchise agreement. Before doing this, the franchisor must inform the franchisee and provide him the advertising materials of the promotion campaign.

The franchisee is required by the Franchise Law to develop the franchise for the benefit of itself and the franchisor and preserve its identity, as well as its reputation. The franchisee must provide the franchisor with information to facilitate knowledge of the development of the franchise and to enable the franchisor to analysis the performances and the actual financial situation, in order to

provide an efficient management of the franchise. Although the Franchise Law mentions the term “management of the franchise” it does not define it relying on the more general principles of management.

The franchisee is required to keep secret the know-how of the Franchisor and any secret process. According to article 4 paragraph 3 of the franchise law, the franchisee must not disclose to third parties the know-how provided by the franchisor, both during the term of the franchise agreement and after termination, for any reason, of the agreement. No period is set by the law, but in practice, this period is unlimited. By analogy, this obligation is binding on the franchisee’s staff as well.

Other clauses normally included relating to the parties obligations such as any prescription periods are regulated by the Romanian Civil Code. This enables the parties to establish limitation period than those set out in the Code as well as defining the dates from which the prescription runs as well as other terms.

Disclosure of Information prior to signing the franchise agreement.

The Franchise Law sets out in the article 2 paragraph 3 the rules covering the pre-contractual relationship between the parties. The franchisor must provide to the prospective franchisee information concerning the franchise to be acquired as well as the details of financial terms of the agreement. These details should include information concerning the initial royalty, any periodical royalty payments and advertising royalties. The initial information should allow the prospective franchisee to establish and calculate the future income of the business and also be sufficient for him to draft a financial plan. In addition there must be clearly stated the objective of the franchise and its scope.

Prior to signing the Franchise Agreement the franchisee must be advised as to the period of the agreement (which is not set by the law, but may vary depending of the nature of the business or the parties), as well as the terms for the continuation, cancellation and assignment of the franchise agreement.

The franchise law does not state the time when the disclosure should be given only that it must be provided prior to the signing of the Franchise Agreement (article 2 paragraph 3). The law does not provide which courts or arbitration forums shall apply to any agreement leaving it to the choice of the parties. Further, the Franchise law does not provide for any specific penalty to be applied to the

franchisor for breach of the obligation to supply pre-contractual information. Therefore, the Civil Code's art. 1184 regarding responsibility in negotiations will be applied. The Civil Code stipulates that when confidential information is communicated by one party to another during negotiations, the other party must not disclose it or use it for themselves, whether or not they enter into a contractual relationship. Breach of this obligation causes damages which is proportional to the damages suffered by the franchisor.

The franchise agreement must also reflect the interests of the members of the franchise network, and protect the industrial or intellectual property rights of the franchisor by preserving the common identity and the reputation of the franchise network. The franchisor is required by the law to establish a franchise based on the contractual relations with its franchisees. The network is to be exploited in such a way as to protect and preserve the identity and reputation of the network. The law further states in art. 12 that this is carried out by means of organisation and development; the franchise network must facilitate the manufacture, distribution of goods and services.

The Franchise Law includes in article 14 the rules about publicity and the selection of the franchisee. Any publicity for the selection of franchisees must not be ambiguous and must not include any erroneous information. As an example, the publicity can contain, details of the brand, the franchisor, existing franchisees in the network as well as possible results. The publicity documents presenting the financial information must be objective and able to be checked. The information can be included in the pre contractual information to be supplied as mentioned above.

The franchisor, according to the art. 15 of the Franchise Law, is required to select a franchisee that shows the required competences for a franchise, namely managerial skills, and financial strength to exploit the business. Also, the franchisor, acting as the initiator and warrantor of the franchise network, must strive to preserve the identity and reputation of the franchise network.

The period of the Franchise Agreement must be sufficiently long enough to allow the franchisee to recover its investments. Normally, this period in Romania is between 5-10 years.

The post-contractual relationship between the franchisor and franchisee it to be based on the rules of "loyal competition" as set out in the article 8 of the Franchise Law. However, the competition relations as provided in the article 8 are not that strict. Therefore a franchisor should require a non-competition and a confidentiality clause, in order to prevent the alienation of the know-how transmitted during the term of the agreement. The period for f the non-competition and the

confidentiality clause are not provided for in the Franchise Law, parties having the power to set it will through negotiations.

The agreement can contain an exclusivity clause which will be regulated by the Franchise Law. In certain cases, the franchisor will be willing to offer territorial exclusivity, in which case the franchisor will not allow the opening in that perimeter / area of the network of other franchised units or units owned by the franchisor, in exchange for an exclusivity fee. This fee as stated in article 9 of the Franchise Law may be aimed to cover part of the expenses necessary for the implementation of the franchise, for limiting the area and/or for the transmission of the know-how. In cases where the franchisor proposes the execution of such an agreement, the amount related to exclusivity provided for in the agreement must be proportional to the entry fee and is added to the initial fee. In case there is no entry fee, the methods for the repayment of the exclusivity fee must be stipulated expressly in the franchise agreement.

The same article mentions that the exclusivity agreement must contain a cancellation clause that must be equitable to both parties. The term of this agreement is determined according to the specific characteristics of every franchise. During the term of the exclusivity agreement and afterwards, the franchisor may, for his protection, to require a non-competition and confidentiality clause.

Termination

The Franchise Law does not stipulate methods of termination there the termination will be according to the general law, such as expiry and unilateral termination as well as termination from breach of the terms of the franchise agreement. In the case of expiry the franchise agreement should state whether or not the franchisee can request the extension of the contract, and if so what new conditions will be imposed by the franchisor.

In all cases, the termination has the same effect: the franchisee is prohibited to continue the activity as a franchisee and to use the franchisor's trademark, to pay immediately the owed sums and to return the know-how materials to the franchisor. Depending on the confidentiality clause there will also be protection for know-how etc. The Franchise Law does not state any special conditions in relation to termination leaving it as a commercial decision for the parties. Yet, the franchise law states in article 8, as a principle, that upon termination of contractual relations, the relations between parties will be based on post-contractual fair competition rules. Further in the same article, is

mentioned the possibility of the franchisor to impose obligations on the former franchisee thereby protecting the confidentiality of the business and, in particular, the use of the know-how by a competing network.

Procedural aspects

Defending the rights of the partners is exercised by the Romanian courts, as well as arbitration. The parties to an agreement are free to choose both the law and forum for any dispute provided it does not breach the Franchise Law. If no specific clauses are inserted the general law will lean towards the Romanian Franchise Law and the Romanian courts as being applicable. In Romania mediation is gaining popularity as the most efficient and cheapest way to stop a conflict. If the mediation process does not succeed, the parties can either submit a request to the arbitration court or to a civil court.

Taxation

The Romanian Fiscal Legislation charges differentiated the individual persons and companies in the relation to the royalty. According with the article 52 of Romanian Fiscal Code, the tax charged by the Romanian state for the franchise contraction represents 10% from the gross income of the independent person franchisor. The tax is retained at source, meaning that the franchisor will receive only the difference of the royalty after is taxed by the state. The 10% will be paid by the franchisee to the state, in the name of the franchisor. The royalty after taxation is deductible from the gross income of the independent person franchisor.

On the other hand the royalty paid to a company (as franchisor) is taxed by 16% and is calculated in rapport of the gross profit, as is stated by article number 17 of the Fiscal Code.

The Romanian Franchise Association

The Association is a non-profit association, founded in 2006. The terms of reference are to promote and defend the ethics of the franchisor and the franchisee's ethics and to explain the meaning and the implications of these terms to interested parties. The association has some advantages for its members such as the existence of a mediation committee, consisting of international specialists. They endeavour to resolve amicably any dispute arising between franchisors and franchisees and punish violations of ethics code. Another advantage is the supply of background information

provided by the Association. More details about the association can be found on its website: www.francizor.ro

Conclusion

Even if the franchise concept appeared in the Romanian economic and social environment later than in other countries, it has managed to develop a comprehensive system in this domain formed by the Franchise Law, the Franchise Association, and a free market suitable to take advantage of this concept. The legal system respects the community tendencies regarding competition, exclusivity and information disclosure, and provisions that exist in the other European Union member states. Therefore, the franchise remains in Romania a good opportunity to succeed in Romania, with a recognized brand, as "it is easier to buy a wheel than inventing one".