

Franchise

in 29 jurisdictions worldwide

2015

Contributing editor: Philip F Zeidman



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Getting the Deal Through is delighted to publish the ninth edition of *Franchise*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 29 jurisdictions featured. New jurisdictions this year include Brazil, China, Guatemala and Spain.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.gettingthedealthrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. *Getting the Deal Through* would also like to extend special thanks to contributing editor Philip F Zeidman of DLA Piper LLP (US) for his invaluable assistance with this volume.

Getting the Deal Through

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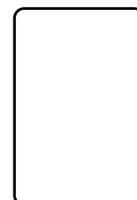


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Ukraine

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Nobles

Overview

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

As with most businesses in Ukraine, the typical franchisor would incorporate as a limited liability company (LLC). There are other forms of business entities available, such as a private enterprise or joint-stock company. However, those other corporate forms are either under-regulated or over-regulated, while the LLC strikes a proper balance. A single-person franchisor may also register as an individual entrepreneur.

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

The formation of business entities is primarily governed by the Civil Code, the Commercial Code, the Law on Companies, the Law on Joint-stock Companies and the Law on State Registration of Legal Entities and Individual Entrepreneurs. These laws set out substantive and procedural requirements as well as filing formalities necessary to incorporate a business entity in Ukraine.

The State Registration Service of Ukraine is a special agency to govern matters of registration of business entities and individual entrepreneurs, along with other state registration procedures. The State Registration Service is subordinate to the Ministry of Justice. The actual registration of business entities is performed by local state registrars who verify the documents and make entries to the Unified State Registry of Legal Entities and Individual Entrepreneurs.

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

There are a number of requirements for forming and maintaining a business entity that may vary depending on the type of such an entity. The main ones are as follows.

Substantive requirements

A company (LLC or joint-stock company) is formed by one or more persons that can be an individual or another business entity. There are certain rules that apply to ownership structure of the companies. In particular, one individual or business entity may not be the sole member of more than one company. A company may not have as a member another company with only one member. For certain forms of companies, the law also sets a limit for maximum number of members. For instance, the LLC may have up to 100 members.

A company must have at least one responsible director who must be a natural person. In addition, a company must have a distinctive name that also contains the indication of its corporate form.

Each business entity must have an office located in Ukraine.

Filing requirements and formalities

To register a company, the founders must file a special registration form, founding resolution, statutory documents, statement of beneficial ownership and confirmation of registration fee payment.

The common statutory document of the company is its charter. There are certain mandatory requirements with regard to the content of the charter. Following recent changes, model charters are also available, but these are still rarely used in practice.

Capital maintenance

Ukrainian law envisages some capital formation and maintenance rules for companies. In particular, joint-stock companies must have a minimum capital of not less than 1,522,500 hryvnas at its formation. There are also restrictive rules regarding consideration paid for issue of shares of the joint-stock companies. At the end of each year following its formation, the joint stock company must ensure that its net assets are not less than the amount of its charter capital.

There is no minimum capital requirement for registration of an LLC and capital formation rules are generally less restrictive for LLCs.

Reporting requirements

Business entities must all be registered with tax authorities and social funds. They are required to keep accounting records and file returns on a monthly, quarterly and annual basis.

Licensing requirements

Some areas of business may require that a company obtains a licence before it begins trading. Each licensed activity is subject to sets of special requirements regarding the capital, personnel and assets of the company.

- 4** What restrictions apply to foreign business entities and foreign investment?

Foreign business and foreign investment are generally subject to the national regime in Ukraine, which basically implies the same rights and possibilities as local residents. Moreover, foreign investors have certain statutory guarantees that protect their investment, for instance, guarantee of profit repatriation and compensation of losses, guarantee against nationalisation, guarantee changes in the law. However, certain limitations and restrictions do naturally apply to foreign business and foreign investment. These are mostly related to national security and strategic interests in certain important industries (eg, financial services, railway, mining, agriculture, publishing, media). Also, in practice, due to strict currency control regulations, some difficulties may arise with the repatriation of investment and profits.

A foreign business would usually incorporate in Ukraine to operate a substantial business in the country. However, a foreign franchisor may choose not to do so if it only licenses its franchise to franchisees in Ukraine. Since franchising is usually not related to the above-mentioned strategic industries, it typically does not raise any purely foreign investment restriction issues.

- 5 Briefly describe the aspects of the tax system relevant to franchisors. How are foreign businesses and individuals taxed?

For tax purposes, franchise fees shall fall within the definition of royalty under Ukrainian tax law. As a general rule, Ukraine charges a 15 per cent withholding tax (WHT) on outbound royalty payments. WHT is usually withheld and then paid to the tax authorities by a local franchisee. Where there is a double tax treaty between the country of the franchisor domicile for tax purposes and Ukraine, the applicable WHT may be lower, for example 10 per cent, 5 per cent or even zero per cent. Such treaties have a priority over Ukrainian domestic legislation. The franchisor must, however, confirm its residence with the certificate.

Another important tax issue relates to deduction of outbound royalty payments. The tax deduction of franchise fees paid offshore from Ukraine is subject to limitation. A Ukrainian business entity paying such fees (franchisee) can deduct only a certain amount for tax purposes, which in any given year cannot exceed 4 per cent of revenues obtained in the previous fiscal year.

Generally, royalties are not subject to VAT. Normally, however, goods and services are subject to VAT at the 20 per cent rate in Ukraine.

Ukrainian business entities are subject to a corporate profit tax. The general corporate profit rate is currently 18 per cent. There are some simple taxation systems available for small and medium-sized businesses that do not have a substantial turnover.

Foreign franchisors must be careful not to create a permanent establishment on the territory of Ukraine, as a permanent establishment would be subject to general corporate taxes in Ukraine.

- 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?

Employment law is rather formalistic in Ukraine. Therefore, given a proper franchise agreement is in place, the risk that a franchisee or employees of a franchisee could be deemed employees of the franchisor is extremely low. For avoidance of any doubt, it would be advisable to include protective provisions in this regard in the franchise agreement.

- 7 How are trademarks and know-how protected?

Ukraine has a number of laws that regulate protection of intellectual property. The state is a member of the World Intellectual Property Organization (WIPO) and a party to almost all major international treaties for protection of intellectual property, such as the Paris Convention, the Berne Convention, the Nice Convention and the TRIPS Agreement.

Trademarks are subject to the territorial principle of protection. Trademarks must be registered in Ukraine to enjoy protection. In order to safeguard a trademark in Ukraine, the foreign franchisor should either register the trademark in Ukraine directly with the Ukrainian patent office or apply for international registration to the WIPO through the Madrid System. The trademark registration is normally valid for 10 years and may then be further extended.

Some trademarks may be qualified as well-known brands, which implies a stronger protection for the trademark holder. For this, a trademark must meet certain stringent criteria of identity and public awareness. To formalise such protection, the trademark holder must file an application to the State Intellectual Property Service of Ukraine, supporting it with substantive evidence; or obtain a respective court judgment in a trademark dispute.

Know-how is a novel and rather problematic notion for the Ukrainian legal system. Ukrainian law defines know-how as information obtained through experience and tests and which is:

- not public or easily accessible;
- substantive (ie, important and useful for producing goods and rendering services); and

- defined (ie, it is properly described in writing with sufficient details and it is possible to verify if it meets the criteria of being non-public and substantive).

In court practice, know-how is further defined as technical knowledge, experience, production secrets and information necessary for solving tasks of a technical or other nature. Know-how is understood to be the result of technical creation, technical or other information, necessary for the production of certain produce, or a technical decision, performed as an invention, which is not duly patented. Know-how is often associated and is therefore protected similarly to commercial and trade secrets. There are no formal filings required in order to receive legal protection. However, some franchisors also employ patent filings to protect some aspects of franchise other than trademarks.

Infringement of intellectual property rights can be enforced through civil, administrative and criminal liability.

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

The Ukrainian real estate market is rather structured and developed. Commercial real estate is rapidly expanding, especially in metropolitan areas. However, its level still remains much lower than the usual level or trading area per capita in Europe or the North America.

Real estate is normally leased or, less often, bought for franchising purposes. From a procedural point of view, real property sale and purchase transactions must be certified with a notary and registered with the respective state register. Long-term lease agreements of three years and longer are also subject to notarisation. This implies additional costs, but it also provides for better certainty and protection. To avoid notarisation costs, the lease agreements are often concluded for two years and 11 months with a pre-emptive right to renew the lease.

Lease agreements must contain certain mandatory provisions (eg, lease object description, its value with indexation, rent with indexation, lease term and renovations) but, in general, the parties are largely free to determine specific terms and conditions. Under the respective lease agreements, real property is often insured against fire and accidental destruction.

Laws and agencies that regulate the offer and sale of franchises

- 9 What is the legal definition of a franchise?

Ukrainian law does not use the term 'franchise'; instead it provides a definition for 'commercial concession agreement', which is the equivalent of franchise agreement in Ukraine. It may be logically inferred that franchise is a legal relationship based on an agreement under which one party (titleholder) undertakes an obligation to grant for remuneration to the other party (user) the right to use a set of rights of the titleholder with the purpose of production or sale of certain goods and services. Pursuant to further provisions of Ukrainian law, the franchise agreement implies the use of a titleholder's rights, business reputation and commercial experience in the agreed scope, with or without reference to the territory and to particular areas of commercial activities.

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

The Civil Code and Commercial Code are major laws that regulate the sale of franchises, but still to a very limited extent. Ukrainian law does not specifically regulate the offer and acceptance of franchises and, therefore, the general rules and regulations envisaged by in contractual obligations apply here. In terms of state oversight, there is no special governmental agency that regulates the offer and sale of franchises in Ukraine. For this reason, some self-regulated non-governmental associations try to fill this void.

11 Describe the relevant requirements of these laws and agencies.

The most controversial issue of franchise laws in Ukraine is the requirement for state registration of franchise agreements. Ukrainian private law actually requires the franchisor to register the franchise agreement with local state registrars whose primary function is to administer the Unified State Registry of Legal Entities and Private Entrepreneurs.

The problem is that Ukrainian public law does not envisage any procedure for state registrars to perform such registration. It does not specify the powers of state registrars in this regard, terms of such registration, grounds for refusal or any other procedural details. Nor does the law specify whether a state registrar should conduct a substantive review of the deal terms before it confirms the agreement. There is not even a register in place. For this reason, the state registrars in Ukraine refuse to perform registration of franchise agreements altogether.

There is currently no completely safe option to comply with the registration requirement under Ukrainian law. There is a practice where the parties to a franchise agreement show their efforts to comply with the requirement in order to mitigate any risks.

The legal consequences of failure to register the franchise agreement are also disputable in the Ukrainian courts. The common position nowadays is that the franchise agreement is valid for its parties, but may not be legitimately referred to in relations with third parties. Further, there have been instances of Ukrainian courts rendering agreements void due to lack of registration.

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

There are no specific exemptions or exclusions from the relevant franchise laws and regulations.

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

A potential franchisor is not obliged to comply with any special requirements before offering a franchise for sale. Theoretically, any business is entitled to offer its franchise if this business has certain defined intellectual property rights, such as title to a trademark and know-how.

14 Are there any laws, regulations or government policies that restrict the manner in which a franchisor recruits franchisees or selects its or its franchisees' suppliers?

There are no such restrictions under Ukrainian law.

15 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?

Ukrainian law does not regulate pre-sale disclosures in cases of sub-franchising. The relevant provisions may be regulated in the master franchise agreement.

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

Ukrainian law does not require formal pre-sale disclosure in a franchise transaction. The parties decide on the information to present to each other and are not obliged to follow any particular procedure. A franchisor does have to provide a copy of the technical and commercial documentation and other information necessary for performance of the franchisee's rights under the commercial concession agreement (franchise agreement). However, this obligation only arises after the contract has been concluded.

There are no special rules for update of information either. The respective update procedures may be regulated in the franchise agreement.

17 What information must the disclosure document contain?

Ukrainian law does not regulate this issue.

18 Is there any obligation for continuing disclosure?

Ukrainian law obliges the franchisor to inform the franchisee on issues related to the rights transferred under the franchise agreement. The law does not define the scope of information to be presented; however, in practice, this would mean the information that allows the franchisee to comprehensively use the transferred rights in their business activities.

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

There is no such government agency in Ukraine.

20 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?

For breach of the limited disclosure obligations under Ukrainian law, franchisees would be able to file a lawsuit with the court demanding that they either rescind the franchise contract; or demand its fulfilment in kind. In any case, the franchisee would be entitled to claim damages in court. Damages can include real damages as well as loss of profit. However, from a practical point of view, it is highly difficult to prove a loss of profit in the Ukrainian court.

21 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?

As a general rule, the franchisor and sub-franchisor would be jointly liable for any losses caused to the franchisee. Individual officers, directors and employees of the franchisor or the sub-franchisor are normally not liable for any business decisions before the franchisee, provided there is no fraud or other criminal wrongdoing. Rather, the employees are subject to disciplinary liability under labour law. Again, disclosure violation cases rarely appear before the Ukrainian courts due to the lack of mandatory comprehensive disclosure requirements, as indicated above.

22 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 general principles of civil and commercial law apply to franchise agreements, unless there is a specific rule. In terms of the offer, the key civil law requirement for the offer for franchise is that it must contain all the essential binding terms of the franchise agreement. The offer may be revoked only before or on receipt. Commercial laws envisage some additional procedures for concluding a written agreement between the business entities. In practice, those are not strictly followed but must be taken into account.

In the absence of government agencies that regulate the franchising industry, Ukraine has established several non-governmental organisations that try to fill the void on a self-regulatory and voluntary basis. Many franchises in Ukraine are sold via such non-governmental organisations. They require their members (franchisors and franchisees) to comply with certain requirements in

the offer and sale of franchises, thus ensuring the reliability of their members.

The Federation for Development of Franchising, Hospitality and Infrastructure (FDFHI) and the Ukrainian Franchising Association are the most active and influential of such organisations. The FDFHI has developed the Code of Ethics of Franchising, which establishes detailed requirements for disclosure of information, franchise advertising and sale of franchise. However, the Code of Ethics is not a law and is therefore not mandatory for franchisors. The Ukrainian Franchising Association recommends the Unidroit Model Franchise Disclosure Law as guidance with regard to information to be disclosed. Although Ukraine has not adopted this model law, it can be still referred to in the court as a business custom.

23 Other than franchise-specific rules on what disclosures a franchisor should make to a potential franchisee or a franchisee should make to a sub franchisee regarding predecessors, litigation, trademarks, fees etc, are there any general rules on pre-sale disclosure that might apply to such transactions?

If the sale of a franchise is advertised publicly, the respective pre-sale disclosures are then subject to the unfair competition laws. For this reason, the franchisor should avoid any deceptive or misleading statements about its franchise. Otherwise, this practice may be also scrutinised by the competition regulator in Ukraine – the Antimonopoly Committee of Ukraine (AMC). The AMC may initiate investigations on its own initiative or upon a complaint from a third party and may potentially impose a significant fine.

24 What 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?

If a franchisor engages in fraudulent practices while offering a franchise for sale, the franchisee can use both civil and criminal remedies. The franchisee may demand that the franchise agreement is invalid due to the deception. For this, it must be proved that the franchisor was misleading on essential circumstances.

The franchisee may also complain to the police department. However, it should be noted that in general the standard of proof for criminal prosecution is rather high for fraudulent practices in commercial matters in Ukraine.

In both cases, the franchisee is entitled to claim damages before the court.

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

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

The Civil and Commercial Codes of Ukraine provide specific regulation of the ongoing relationship between franchisor and franchisee. In particular, these laws set forth some default ongoing franchisor obligations which may be varied in the franchise contract. Namely, the franchisor is obliged to control the quality of goods produced by the franchisee and to regularly provide technical and consultancy support and training for the franchisee's personnel.

The franchisee also has certain statutory obligations towards the franchisor, namely to follow the instructions of the franchisor on compliance with the quality, methods and conditions of the franchise use; and not to disclose any confidential information and trade secrets of the franchisor.

Ukrainian law allows for the parties to restrict their rights in the franchise agreement, namely in relation to territorial exclusivity, non-compete obligations of franchisee, exclusive dealing, preliminary approval of premises and interior design. These restrictions, however, must comply with Ukrainian competition law requirements.

26 Do other laws affect the franchise relationship?

Competition law has to be taken into consideration and may substantially affect the franchise relationship. Specifically, Ukrainian competition law prohibits concerted actions that impose prices or other hard-core restrictions such as limitation of production or technical development, territorial markets and supplier allocation, and tying. The franchise agreement requires careful consideration in this regard, and further relations between the franchisor and franchisee must be constantly controlled for compliance.

When providing payments to a foreign franchisor in foreign currency, currency control laws must be under constant consideration.

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

Franchise relationships are affected by rules developed by franchising associations, as indicated above. Competition rules and respective prescriptions of the Antimonopoly Committee should be carefully taken into account in franchise relationships.

28 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?

If a franchise contract is conducted for an indefinite period, both parties are entitled to its unilateral termination upon a six-month notice unless the contract envisages a longer notice period.

If a franchise contract is conducted for a defined period of time, termination is only possible upon mutual consent of the parties or on the basis of a court decision. Court ability to terminate the franchise relationship is limited with general restrictions of the laws on contracts termination. In particular, the court may terminate the franchise contract if the franchisor proves a substantial breach on the part of the franchisee. In some limited circumstances, the franchisor may also claim a substantial change of unforeseen and incurable circumstances.

The franchise contract also terminates under operation of law in the following cases: when a franchisor loses its title to the trademark, without substitution; or in the case of the bankruptcy (insolvency) of the franchisor.

The termination of franchise relationships is subject to state registration. However, given the absence of registration procedures (see question 11), this requirement is usually forgone in practice.

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

The basic conditions for termination of a franchise agreement by a franchisee are similar to the conditions applicable for a franchisor *mutatis mutandis* (see question 28).

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

Under direct provisions of Ukrainian law, a franchisee that duly performed its obligations has the right to renew the franchise agreement for the same period of time under the same terms and conditions. Further grounds may be established under which a franchisor may refuse to renew a franchise contract. No such grounds can be found anywhere in Ukrainian legislation.

However, while a franchisee has the right to renew the agreement, the law does not place a direct obligation on the franchisor to do so. The court, therefore, may not force the franchisor into the renewed agreement. In this regard, the right of the franchisee should be interpreted as a right of first refusal, rather than an absolute right to renew the contact.

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

Under Ukrainian law, a franchisor may restrict a franchisee's ability to transfer its franchise in the provisions of the franchise contract. At the same time, transfer of ownership interest in a franchisee entity may hardly be restricted pursuant to Ukrainian company and civil law.

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

As mentioned above, it should be noted that Ukraine has rather strict currency control regulations that may affect the payment of fees. Currency control regulations are aimed at limiting withdrawal of foreign currency by Ukrainian entities. For the currency market protection purposes, additional requirements for payment clearance may be necessary where royalty payments exceed certain limits. In particular, payments under IP-related agreements that exceed €100,000 or its equivalent are subject to 'fair market price' review by a competent state agency. As the franchise agreement payments usually exceed the threshold, the franchisee will usually be required to obtain a price appraisal report from the State Information and Analytical Center for Monitoring External Commodities Markets before any actual payments are made. Such a report should confirm that the payments do not exceed the 'fair market price'.

Tax-related issues in Ukraine also make franchising rather expensive. Those issues primarily relate to withholding tax and limits on deductions (see question 5).

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

Ukrainian law establishes the maximum limit of interest (penalty interest) that can be charged on overdue payments. The limit is double the interest rate set by the National Bank of Ukraine (NBU). This rate is subject to occasional change and within the past few years has varied between 7.5 and 9.5 per cent. The current NBU interest rate is 7.5 per cent and maximum penalty interest is, therefore, 15 per cent. Under Ukrainian law, it is possible to combine such a limited interest rate with a one-off fine. For instance, the agreement may stipulate a fine of 5 per cent of the overdue amount if the delay in payment is longer than seven days.

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

Payments in foreign currency between residents and non-residents of Ukraine (foreign businesses) are permitted, but subject to some currency control restrictions. Having obtained the necessary regulatory clearances, the franchisee is free to pay in a hard currency such as US dollars. Ukrainian banks usually use SWIFT for international payments.

If a resident of Ukraine is receiving a payment in foreign currency, this payment must enter the resident's account within 90 days from the date of customs clearance of the goods. Otherwise, the resident becomes subject to statutory penalties. So, if the franchisor is a foreign entity, it is important to follow this time restriction. An important consideration to be observed is that the income or loss obtained as a result of currency exchange is charged either to income or to expenses accordingly.

35 Are confidentiality covenants in franchise agreements enforceable?

Confidentiality covenants are generally enforceable. In practice, cases on breach of confidentiality are rarely tried before the Ukrainian courts. The major issues with enforceability of confidentiality clauses (agreement) is that these documents must be drafted

clearly and supported with hard evidence (eg, letters or e-mails), which is extremely difficult in Ukraine.

Moreover, there are few court cases on confidentiality because there are no definite rules for calculation of damages related to unlawful disclosure. Therefore, for confidentiality agreements under Ukrainian law, it is advisable to stipulate specific contractual penalties for breach of non-disclosure obligations.

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

Acting in good faith is one of the basic principles of Ukrainian civil law. This notion is sometimes used as a supporting argument in the court cases. However, it should not be relied on as a core argument in a lawsuit. On some occasions, the AMC has used a similar notion of 'fair dealing' in its investigations against some allegedly unfair competitors. The AMC used this argument to prescribe recommendations, without imposing a fine, when practice of competitor, though inappropriate, did not evidently qualify as a violation of any statutory restrictions of Ukrainian competition law. Such recommendations, nevertheless, are usually followed by the market participants.

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

The franchisees are not likely to be treated as consumers for the purposes of consumer protection.

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

This is not mandatory under Ukrainian law. However, any filings to courts or any state authority in Ukraine normally require that all supporting documents must be translated into Ukrainian. Ukrainian banks also require official translations of agreements to facilitate any payments. For this purpose, we usually recommend drawing up a bilingual agreement.

39 What restrictions are there on provisions in franchise contracts?

In general, provisions in franchise contracts should not contradict the statutory provisions of Ukrainian civil and commercial law. Even though some deviation from statutory provisions is generally allowed according to the principle of freedom of contract, this should not be a substantial deviation. Otherwise, there is a risk that the court would render a deviating contractual clause unenforceable and choose to apply a statutory provision instead.

Provisions in franchise contracts are also subject to restrictions of competition law. Implications for violation of competition law are discussed in the question below.

40 Describe the aspects of competition law in your country that are relevant to the typical franchisor. How are they enforced?

The franchisor should bear in mind aspects of competition law that prohibit the imposition of certain vertical restraints on the franchisee in the franchise agreement. In particular, the franchisor should be careful with restrictions imposed on the franchisor that may affect competition. The common practice is the competition begins to be substantially restricted with undertakings involved approaching a dominant position separately or collectively. Before that, the said restriction may also fall under certain market-based exemptions and block exemption for intellectual property rights transfer. If neither exemption applies, the provisions may still be cleared by an approval from the AMC.

The Law on Protection Against Unfair Competition is also relevant to the typical franchisor. As mentioned above, it may hold a franchisor accountable for any deceptive or misleading statements about its franchise to potential franchisees. Besides that, on the

other hand, the law provides for certain protection to the franchisor against dishonest franchisees or third-party competitors in relation to passing off, infringement of trademarks and other intellectual property, trade libel, unlawful collection, misappropriation and unauthorised disclosure of trade secrets.

To enforce the respective provisions of unfair competition laws, the franchisor may file a lawsuit directly to the court and argue under the general competitive principle on the basis of the evidence it has collected. Alternatively, the franchisor may file a complaint with the AMC or its local division that would take up some burden of collecting the evidence against a breaching party. As a result of its investigation, the AMC may order a stop to any violation and impose a substantial fine. Moreover, once the violation is confirmed, the franchisor may then turn to the court for damages suffered, relying on such established fact. There are, however, some drawbacks of the investigation process at the AMC for the franchisor. First, due to bureaucracy reasons, it takes an overly long time for the AMC to conclude the process. Second, the franchisor itself has no access to the information the AMC has collected during its investigation proceedings and, therefore, the franchisor has little influence on the course of such investigation.

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

The court system in Ukraine may be nominally divided into the courts of civil, commercial, administrative and criminal jurisdiction. At the same time, the courts at some levels are not explicitly divided into respective separate branches. In particular, courts are the local courts of general jurisdiction that hear cases on civil, criminal and certain administrative matters. Disputes between business entities are heard in specialised local commercial courts. Appeals on decisions of the courts of first instance are reviewed by the appellate courts on general matters for the administrative regions (24 courts), the Autonomous Republic of Crimea and the cities of Kiev and Sevastopol, as well as eight commercial courts of appeal. The cessation complaints on civil and criminal matters are heard by the Highest Specialised Court of Ukraine on Civil and Criminal Cases, which has separate chambers. The Highest Commercial Court and the Highest Administrative Court review under cessation procedure the decisions of lower courts on commercial and administrative cases. The Supreme Court of Ukraine reviews the decisions of the highest courts on all matters but only in some exceptional cases.

Most disputes on franchising matters are heard by the courts of either civil or commercial jurisdiction (depending on the parties), including contractual and non-contractual matters. Whenever a public act or failure to act is challenged, such a case is resolved by

the courts of administrative jurisdiction. For instance, the franchisor or franchisee would have to file a suit with an administrative court to challenge a refusal of the state register to register a franchising contract. Criminal proceedings of public prosecution are overseen by the courts of criminal justice. In relation to franchise relations, a criminal prosecution may be initiated for intellectual property infringement.

Besides the system of state courts, parties can choose to submit their dispute to an arbitration tribunal. Although binding on the parties, decisions of arbitration tribunals can be appealed to the courts.

Foreign courts may be used as an alternative as well. To enforce such a decision in Ukraine, however, the courts of both jurisdictions should have established mutual recognition of judgments. A significant disadvantage is the burdensome and long-lasting notification process under the Hague Service Convention.

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

Dispute resolution in international arbitration tribunals is allowed and enforceable in Ukraine. Ukraine is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Ukrainian courts respect and frequently enforce arbitral awards. There is an established international tribunal at the Ukrainian Chamber of Commerce.

The major advantage of international tribunals is that the case is heard by either a sole professional international practitioner or a bench of such arbiters selected in the manner agreed by the parties. This provides more certainty for a fair and just award on the case. The Ukrainian courts may, however, refuse to enforce the arbitration awards on the grounds set forth by the New York Convention. The most common ground for such refusal is that of public policy. The other disadvantage is that injunctions in support of arbitration procedures are not currently practicable in the Ukrainian courts.

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

As a rule, foreign businesses enjoy equal treatment with domestic entities and individuals. In some ways, foreign franchisors are treated favourably in light of the Ukrainian declared policy towards attracting foreign investment and know-how. In certain circumstances, franchisors are protected against political risk by way of bilateral investment protection treaties. Ukraine has concluded over 70 investment protection treaties. There are even some cases brought by private investors against Ukraine for violations of these treaties and other international rules.

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