



Support Vietnamese enterprises to understand distribution processes and market demand in the EU and to adjust to such processes and demand

Activity: ICB-14

## **REGULATORY REVIEW OF VIETNAMESE LEGISLATION ON FRANCHISING**

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## List of acronyms

ACCC	Australian Competition and Consumer Commission
AUD	Australian Dollar
IFA	International Franchise Association
CCA	Competition and Consumer Act 2010 (Australia)
DTI	Department of Trade and Industry (Philippines)
EU	European Union
F&B	Food and Beverage
FDD	Franchise Disclosure Document
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
ICC	Indonesian Civil Code
INPI	Brazilian Institute of Industrial Property
KFC	Kentucky Fried Chicken
MOF	Ministry of Finance
MOIT	Ministry of Industry and Trade
MOST	Ministry of Science and Technology
MOT	Ministry of Trade (Indonesia)
NOIP	National Office of Intellectual Property
STPW	Franchise Registration Certificate ( <i>Surat Tanda Pendaftaran Waralaba</i> ) (Indonesia)
TFEU	Treaty on the Functioning of the European Union
TLA	Trademark licensing agreement
TTA	Technology transfer agreement
UFDD	Uniform Franchise Disclosure Document (US)
UFOC	Uniform Franchise Offering Circular
UK	United Kingdom
UNIDROIT	International Institute for the Unification of Private Law
US	United States
WTO	World Trade Organization

## 1. Introduction

Although the World Trade Organization classifies franchising as part of the distribution services sector, franchising in fact is not an industry or economic sector, but a marketing system to deliver a product or a service to a customer. Franchising as a business model spans across the whole economy: the International Franchise Association (IFA) has identified over 75 different industries that use the methodology of franchising and this number is susceptible to grow. The flexibility of franchising is reflected in the fact that there is no unique definition of the concept, and the various jurisdictions having adopted dedicated regulations have used different descriptions. The European Franchise Federation's definition<sup>1</sup> contains the main common elements that can be found with variations in most national or State (US) regulations:

*“Business Format Franchising, or simply commercial franchising, is a system of marketing goods and/or services and/or technology based upon a written contract between two legally, financially and fiscally separate and independent undertakings, the Franchisor and each of its individual Franchisees, whereby the Franchisor grants each of its individual Franchisee the right, and imposes the obligation, to conduct a business in accordance with the Franchisor's concept.”*

While the roots of franchising date back in the Middle Ages, modern franchising started in the United States in the 1850s and this business format has begun to expand to international markets, first to Europe and Latin America, only in the 1950s. However, the global explosion of franchising is barely 20-30 years old.

Franchising appeared in Vietnam only in the mid-1990s due to the late development of an economic and legal system necessary to support it. Before 2006, there was no clear legal basis for franchising in Vietnam. Most franchises had been established and operated through a combination of trademark licensing and technology transfer agreements. In order to ensure an enabling legal environment for franchises and also in view of the the country's prospective WTO accession, Viet Nam has introduced a series legislative and administrative acts, namely the Commercial Law (2005), which provides the basic rules for franchising; Decree No. 35/2006/ND-CP (as amended by Decree No. 120/2011/ND-CP) and Circular No. 09/2006/TT-BTM which enacted specific implementing provisions focused on franchising. Other rules applicable to franchising are contained in the Law on Intellectual Property (2005) and the Law on Technology Transfer (2006).

Since the introduction of the dedicated franchise regulations, which for the first time recognized franchising as a discrete business method, franchising has experienced steady development as the number of franchise systems, both domestic and foreign, has increased fivefold during the seven years that followed the introduction of the franchise-specific regulations.<sup>2</sup> While in the first 10 years following the introduction of franchising, there were only 23 franchise systems that, with few exceptions, owned and

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<sup>1</sup> EFF (2011)

<sup>2</sup> Binh and Terry (2014)

operated their outlets rather than franchised them<sup>3</sup>, Vietnam currently has 140 foreign traders having registered franchising activities with over 150 franchising trademarks or brands.<sup>4</sup> Although to a more modest extent, the number of domestic franchisors has also increased, from 10 franchise systems in 2005 to 20 in 2012.<sup>5</sup>

Although franchising is still in its infancy, and the size of the franchising sector remains limited, Vietnam is considered as one of the most attractive target market in Asia for international franchisors, especially since it has become member of World Trade Organization in 2007 and has concluded or will accede to preferential trade and investment agreements linking it to more than 50 partner countries.

Whilst the adoption of the franchise regulations have undoubtedly positively influenced the development of Viet Nam's franchise market, the almost one-decade-long experience of both businesses and public authorities in charge of their implementation suggest a need for their review.

Two main issues have been identified prior to the review that affect the legal framework for franchising:

- 1) A number of difficulties faced by foreign businesses in complying with the franchising regulations partly resulting from the complexity of the legislation and of the administrative procedures.
- 2) The substantial changes in the surrounding international and the national legal and economic frameworks that occurred since 2006 when the main franchise regulations entered into force in. In particular, Viet Nam became a WTO Member in 2007, and subsequently concluded a number of other international trade agreements. Moreover, the country has recovered from the economic downturn that followed the global financial crisis, and regained a steady economic growth, which partially modified the pattern of consumption resulting among others in increased demand for franchises.

The main stakeholders therefore consider Decree no. 35 and Circular no. 9 out-dated, and have asked their revision in order to better cope with the new legal and economic conditions.

This regulatory review aims to provide an understanding of the critical issues in the present franchise regulations, where these legal acts can be improved to better cope with the new economic conditions, and where transparency of their implementation could be improved.

Finally the regulatory review concludes with recommendations on the amendments to the two legal acts.

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<sup>3</sup> Idem

<sup>4</sup> MOIT

<sup>5</sup> Binh and Terry (2014)

## 2. The origin and evolution of Franchise Regulation in Viet Nam

### 2.1. The first stage of franchising in Viet Nam

Franchise is a popular business model across the world. Franchising, which originated in the United States and spread to Western Europe and other parts of the World mainly in the 1960's and 70's has become a driver in many economies where small and medium sized businesses are a strong pillar of growth. Indeed, franchising brings a lot of economic benefits and is a good method for small and medium size entrepreneurs who want to start a new business in a short period of time. In comparison to new business, franchises have a more limited risk, a modest amount of invested capital, and a proven track record of success. Franchises also help SMEs to build business skills and acquire knowledge of modern management techniques.

In Vietnam, franchise is a new business concept. Although the mode of franchise business was present in Vietnam before 1975, it was limited to franchises of some US gas station brands such as Mobil, Esso and the UK/Dutch Shell. After the end of the war, franchise business appeared at the end of 1990s beginning with an investment in supplying water filter equipment. However, Vietnamese market at that time was not familiar with franchise activity. Furthermore, the enterprises, which applied the franchise model, were not able to establish their position in the market because of the following reasons:

- Firstly, in this time, the regulation on intellectual property was still inadequate; executing intellectual property law met a lot of difficulty, especially in protecting the subject of intellectual property right.
- Secondly, social awareness about intellectual property still has limitation, so the businessman often trend to infringement the intellectual property right of other, if the franchisor want to apply franchise mode, he may meet difficulty, the franchisee will not have the feeling of safeness when the subject of intellectual property right which franchised may be violated easily.
- Thirdly, up to year of 1986, Vietnam admitted enterprise which is owned by private person, so these enterprises met a lot of difficulty in making a strong trade-name that can franchise successfully, therefore this initial franchising system rapidly fallen into failure.

The first foreign franchisors, such as Jollibee, KFC and Lotteria entered the Vietnamese market in the late 1990s, but franchising did not begin booming in Vietnam until 2009, when the country eased restrictions in the retail market to fulfill its WTO commitments. As with any country in the early stages of franchising, the focus is on food and beverage, children's concepts, health and beauty, business services. KFC and Pizza Hut are doing well and beginning to add many new outlets. Dale Carnegie and Gloria Jean's are there, as is Jollibees from the Philippines and Lotteria from Japan. Crestcom has started management training operations.

Though Vietnam is just now beginning to realize the potential of the franchise business model, it already has emerged as a key potential market for international franchises and global brands. Rapid economic growth, a rise in disposable income, large population and rising domestic consumption, among other things, have all contributed to making Vietnam an increasingly attractive place for franchising to thrive. Although most existing franchise operations in Vietnam are in the fast food and beverage business, franchising

has potential to develop in other sectors too. A strong surge of interest in franchised businesses is anticipated among local entrepreneurs, and interest from franchisors is also expected to grow.

## 2.2 Current situation of commercial franchising

Up until 2006, Vietnamese law did not provide a clear legal basis for franchising arrangements. Up to then, franchisors and franchisees had to operate in Vietnam through a combination of trademark licensing and technology transfer agreements.<sup>6</sup>

Since Vietnam's entry into the WTO in 2007, franchising activity has been on the rise and franchise businesses showed remarkable resilience even to the recent economic downturn, during which major franchises have been attracted by the consumer buying potential of Vietnam, which has a nearly 90 million strong population, half of who are under 25 years of age. In recent years, several major franchises have registered to conduct franchising activities in Vietnam, including franchises in the restaurant, apparel, education, car rental, real estate, fitness, eyewear, and other fields.<sup>7</sup>

It is estimated that presently more than 137 foreign franchisors with 148 brands or trademarks with franchise registrations are operating in Vietnam.<sup>8</sup> The major franchising fields include:

- Restaurants (representing 43.7% of the franchise market):
  - Fast food, some types of cakes, coffee and other beverages, BBQ, restaurants, etc.
- Fashion (19.3%):
  - Women's fashion, children's fashion, shoes, handbags, accessories, sunglasses, etc.
- Education and training (14.1%):
  - Foreign language education, physical education, computer professional training, scientific education & entertainment, sales & sales management, etc.
- Convenience stores (CVS) (2.2%)
- Other retail stores (10.4%):
  - Furniture, products for printing, electrical equipment, other goods
- Manufacturing, wholesale and other services (10.3%):
  - Pharmaceutical products, chemicals, car rental service, real estate brokerage, packaging, storage, transportation, budget airlines, Internet services, short-term accommodation services

Some examples of franchised brands/trademarks include:

### *Restaurants:*

- From the US: McDonald's; Auntie Anne's, Baskin Robbins, Häagen-Dazs, Round Table, Chicken & Biscuits POPEYES ...

<sup>6</sup> Thomas J. Treutler: *Franchising Law in Vietnam*, Tilleke & Gibbins Consultants Ltd., March 2010

<sup>7</sup> Idem.

<sup>8</sup> MOIT statistics of commercial franchising into Vietnam from 15/01/2007 to 15/7/2015.



- From Singapore: Kentucky Fried Chicken; Pizza Hut and Bigfoot; Pepper Lunch, Burger King, BreadTalk ...
- From Korea: Lotteria; Caffe Bene, Tour Les Jour, BBQ Chicken ...
- From Malaysia: Swensen's ...

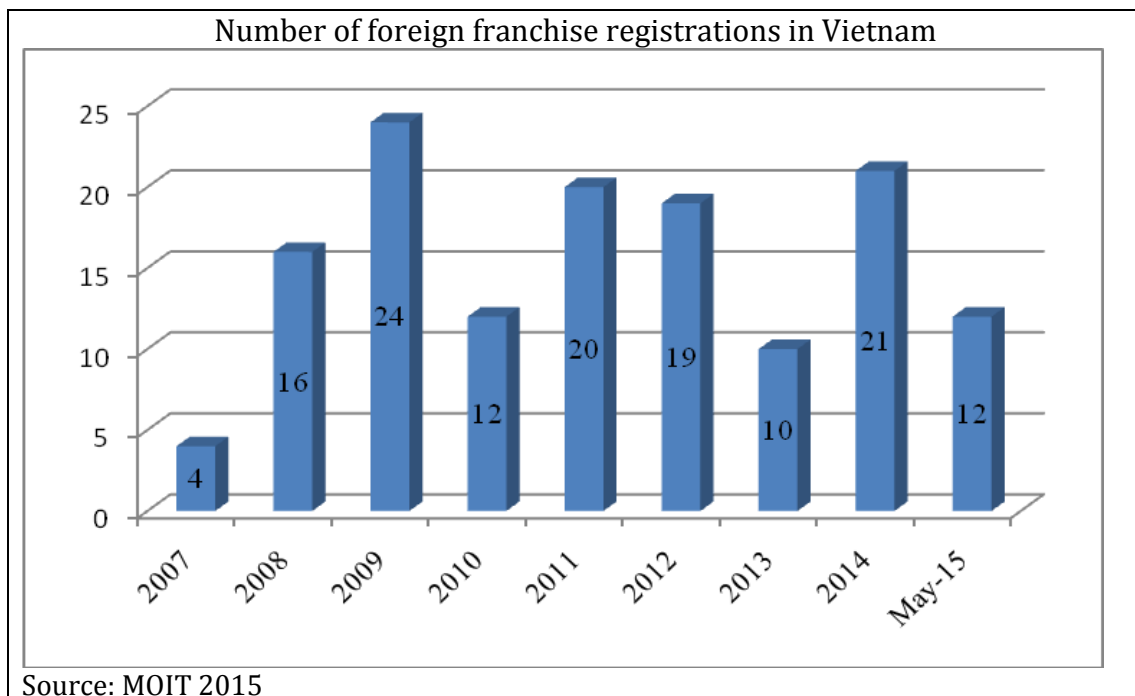
*Fashion:*

- From the UK: Oasis; Karren Millen, Warehouse, Topshop, Topman, Coast London, Marks & Spencer...
- From Canada: Le Château, La vie en Rose, Roselle, La Senza...
- From Italy: Bvlgari, Moschino, Rossi...
- From Australia: Playboy

Prominent franchises that have registered in Vietnam include Kentucky Fried Chicken, Avis and Budget car rental, and others...

Well-known local Vietnamese franchises, such as noodle soup shops, coffee shops, convenience store and supermarket chains, have also registered and are conducting franchising activities both within the country and abroad. Several Vietnamese businesses have joined the trend toward franchising, such as Trung Nguyen Coffee, Pho 24, Kinh Do Bakery, AQ Silk, Shop and Go, and Coffee 24 Seven.

The success of franchising activities in Vietnam has also been marked by the success of the Trung Nguyen Cafe Company. Running this mode of business, Trung Nguyen Cafe has established a franchise system with more 500 outlets throughout Vietnam and some outlets in other countries, such as Thailand, Cambodia, Singapore, Japan, and the United States. Notably, Pho 24 now has approximately 70 stores, including franchises in Indonesia, Australia, Korea, Philippines, and Cambodia.



## 2.3 Development prospects

Vietnam's market is still relatively small. However, growth prospects are bright as local investors become more familiar with franchising and are increasingly exposed to successful franchise concepts. This is especially true in the urban centers of Hanoi and Ho Chi Minh City, where incomes are quite high. As a result, competition is increasing as more brands enter the market.

The Vietnamese franchise market is open for foreign franchisors in all sectors, which are not conditional. Main franchised sectors include retail, fast food restaurants, fashion, convenience stores, and education. At present there are about 150 international franchising systems operating in Vietnam and consumer awareness of food and beverage franchise brands is quite strong. Food and beverage brands are by far the most prevalent, with the following key franchises already in the market: KFC, Subway, Starbucks Coffee, Jollibee, Lotteria, Bread Talk, Burger King, Carl's Jr, Pizza Hut, Hard Rock Café, Domino's Pizza, Roundtable Pizza, Z Pizza, Coffee Bean and Tea Leaf, Popeye's Chicken, Illy Café, Baskin Robbins and Gloria Jean's Coffee.

The franchise sector in Vietnam is poised for continued growth, not only in traditional sectors of fast food but also in other such sectors as retail, education, entertainment, health care, and lifestyle-oriented businesses. Best prospects for foreign franchisors include: fast food, quick service restaurants, business services, health and nutrition, education services, health care, children's services, cleaning and sanitation, hospitality, beauty and skincare, entertainment, and convenience stores.

Several factors have attracted foreign franchisors to Vietnam and foreign franchise are forecasted to further contribute to the growth of franchising market in Vietnam:

- Per capita GDP and per capita incomes are on the rise, and urban areas such as Ho Chi Minh City, Hanoi, Da Nang and Can Tho are experiencing significant income growth.
- An emerging middle-class with disposable income is driving demand for high-quality food and beverages, education, entertainment and lifestyle oriented products and services.
- High-end, well-known "premium" brands are in demand. Vietnamese consumers often associate foreign brands with quality, life-style, and reliability.
- Consumer patterns vary throughout the country: between urban and rural areas, and especially between the northern region with cities such as Hanoi, Danang in the Central Coast region, and Ho Chi Minh City and the Mekong Delta region in the south.

## 3. Description and regulatory analysis of the current Franchise Regulation

### 3.1 Past regulations (before 2006)

Up until 2006, Vietnamese law did not provide a clear legal basis for franchising arrangements. Up to that point, some prominent franchises managed to operate in

Vietnam through a combination of trademark licensing and technology transfer agreements.<sup>9</sup>

Franchising was legalized for the first time under the concept of “licensing of exclusive business rights” in *Circular No. 1254/1999/TT-BKHCNMT dated July 12, 1999 of the Ministry of Science, Technology and Environment guides the implementation of the Government’s Decree No.45/1998/ND-CP of July 1<sup>st</sup>, 1998 stipulating in detail the technology transfer.*

According to Point 4.1.1 of the Circular, “Contracts with the content on granting licenses to use trademarks accompanied with production and business know-hows transferred from abroad into Vietnam and with a total payment value worth more than 30,000 US\$ each (contracts for granting business franchise)”. The competence to approve contracts stipulated in Article 32 of Decree No. 45/1998, was assigned to the Ministry of Science, Technology and Environment which had power to approve or disapprove contracts for granting business franchise.

Franchising continued to be regulated by Decree No. 11/2005/NĐ-CP and Circular No. 30/2005/TT-BKHCN on technology transfer. Under those legal documents, franchising activities were regarded as a form of technology transfer only.

Decree No. 11/2005/ND-CP of 2 February 2005 providing in detail for technology transfer stipulated that:

*“Article 4: Contents of the technology transfer*

*Technology transfer includes transfer of one, some or all of the following contents:  
6. Granting business franchise licenses under which the transferees shall use the goods trademarks, labels and knows-how of the transferors for business activities in the domain of commercial services. The term of a business franchise license shall be agreed upon by the involved parties in accordance with the provisions of law.”*

Decree No. 11/2005/ND-CP applied to domestic and foreign organizations and individuals carrying out the following activities:

- Transfer of technology from abroad into Vietnam;
- Domestically transferring technology;
- Transferring technology from Vietnam to abroad.

Classifying franchising as a form of technology transfer, Decree 11 literally defined it as a “grant of a special commercial right” whereby the transferee of the right uses the trade name, trademark and knowhow of the transferor in order to conduct a commercial service business. A franchise was viewed from a legal standpoint, as creating a commercial relationship.

As it related to technology transfer rather than franchising *per se*, Decree 11 lacked to require disclosure similar e.g. to the United States’ “Uniform Franchise Offering Circular” (UFOC). The absence of disclosure requirement greatly contributed to the failure of some franchising systems in Vietnam.

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<sup>9</sup> Terry and Binh (2009)

Under Decree 11 a franchise agreement had to be implemented under two fundamental contractual documents:

- A technology transfer agreement ("TTA") which had to be registered with the Ministry of Science and Technology ("MOST"); and
- A trademark licensing agreement ("TLA"), which had to be registered with the National Office of Intellectual Property ("NOIP").

Many franchisors claimed that this dual registration requirement was time consuming, duplicative, and ultimately unnecessary. Further, since a franchising agreement was considered to be a TTA, it was subject to the maximum duration of seven years (ten years in certain cases).

## 3.2 Current franchise regulation

### 3.2.1 Overview of Vietnam's franchise law in the international context

In the legal literature on franchising, franchise laws are generally classified into three types of laws/regulations, each with a distinct purpose and characteristics.<sup>10</sup> These are:

- (i) Competition laws;
- (ii) Foreign trade and investment regulations; and
- (iii) "Pure" or "core" franchise regulations.

While competition laws are in principle applicable to franchising, some jurisdictions have competition regulations which specifically deal franchising; they are generally concerned with vertical restraints on the purchase, sale and resale of goods and services within a franchising contract, such as selective distribution, non-compete, tying, full line forcing, retail price maintenance or exclusive distribution, etc. The European Union's regulation of franchising is of this type: it is based on Article 101 of the Treaty on the Functioning of the European Union (TFEU) and the Block Exemption Regulation that legalizes franchise contracts subject to certain conditions. Two other countries use competition regulations on franchising: Japan and Venezuela. The Japan Fair Trade Commission Guidelines (2002) provide for disclosure and offer guidance on vertical restraints, whilst the Venezuelan Pro-Competition Agency's Guidelines for the Evaluation of Franchise Agreements (2000) follow the previous EU Franchise Block Exemption Regulations from 1988.<sup>11</sup>

Foreign trade/investment regulations seek to regulate the entry of foreign business systems that escape the restraints placed upon FDI. These are to be found in certain developing and transitional economy countries, e.g. Belarus, Barbados, China, Indonesia, Kazakhstan, Korea, Malaysia, Moldova, Russia, and Ukraine.<sup>12</sup>

The so-called "pure" franchise regulations are concerned about issues of potential abuse in franchising, and typically deal with pre-contractual disclosure and the in-term relationship between the franchisor and its franchisees. These are generally

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<sup>10</sup> Abell (2011)

<sup>11</sup> Abell, Hero and Toop (2012)

<sup>12</sup> Idem.

symptomatic of more developed markets and are found in some US States, Australia, Canada, Brazil, Taiwan, Georgia, Mexico, France, Spain, Italy, Belgium, and Sweden.<sup>13</sup> Most of Vietnam's franchise rules also fall in this category.

In some jurisdictions, a hybrid regulatory framework exists inasmuch as they are best placed in one category but also show characteristics of another. Examples include China and Malaysia, which have foreign trade/investment franchise laws with a strong element of pure franchise regulation in them.<sup>14</sup> One may argue that Vietnam's franchise law is also a hybrid system with mainly falling in the category of pure franchise regulation, but also including elements of foreign trade/foreign investment regulations: the franchise registration requirement is applicable only to foreign franchises for the "purpose of foreign investment management" by the State.<sup>15</sup>

The Vietnamese franchise law, which "provides a framework for the orderly development of the franchise sector"<sup>16</sup>, was introduced as part of Vietnam's extensive law modernization process prior to its WTO accession in January 2007. The laws and regulations, which make up the regulatory framework for conducting franchise operations, include the following:

- Civil Code (2005);
- Competition Law (2005);
- The Commercial Law's provisions on franchising (2005) and related sub-regulations;
- Intellectual Property Law (as amended 2009);
- Investment Law (2014);
- Enterprise Law (2014);
- Technology Transfer Law (2006);
- Decree No. 23/2007/ND-CP on Foreign Invested Companies' Purchase and Sale of Goods (2007).

While all these laws and regulations have relevance to franchising, the present study deals only with what is considered "pure franchise law" or "franchising regulations" of Vietnam, i.e. those franchise-specific legal provisions that are based on the Commercial Law's provisions on franchising.

Vietnam's franchise law (under "franchise law" we mean the body of all primary and secondary acts that are specifically dedicated to franchising) is composed of:

- Chapter 6, Section 8 of the Commercial Law of 2005<sup>17</sup>;
- Decree No. 35/2006/ND-CP of 31 March 2006 of the Government, Detailing the Provisions of the Commercial Law on Commercial Franchising, as amended by Decree No. 120/2011/ND-CP of the Government (16 December 2011);
- Circular No. 09/2006/TT-BTM of the Ministry of Trade, guiding the registration of commercial franchising.

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<sup>13</sup> Idem.

<sup>14</sup> Idem.

<sup>15</sup> As communicated by MOIT's Domestic Market Department on 15 July 2015.

<sup>16</sup> Terry and Binh (2009)

<sup>17</sup> Adopted by the National Assembly on 14 June 2005, took effect on 1 January 2006.

Additionally, the following apply to the financial aspects of franchising:

- Decision No. 106/2008/QĐ-BTC dated 17/11/2008 by MOF on collection, management and use of fees for registration of franchising activities.
- Decree No. 185/2013/ND-CP dated 11/15/2013 providing the penalties on administrative violations in commercial activities, production of, trading in counterfeit or banned goods and protection of consumer rights (article 95);

### 3.2.2 Structure of Vietnam's franchise law

This section provides a bird's overview of the structure of the franchise law of Vietnam.

#### *(a) The Commercial Law:*

Section 8 of the Commercial Law addresses franchising in eight, short, descriptive, general articles, which provide the framework for the implementing decree. Its structure is the following:

- Defines the concept of franchising (Article 284);
- Sets the forms of franchise contracts (Article 285);
- Provides for the rights and obligations of franchisors (Articles 286 and 287);
- Provides for the rights and obligations of franchisees (Articles 288 and 289);
- Deals with sub-franchises to third parties (Article 290);
- Directs the registration of franchises (Article 291).

#### *(b) Decree 35 (the implementing Decree):*

The implementing decree "Making Detailed Provisions for Implementation of the Commercial Law with Respect to Franchising Activities" was issued on 31 March 2006 and came in effect on 22 July 2006. It is interesting to note that the development of the franchise regulations under Decree 35 was developed in the framework of an AusAID program<sup>18</sup> and was influenced by such international precedents as the 1998 Australian Franchising Code of Conduct (the disclosure provisions of which were closely modeled on the US Uniform Franchise Offering Circular), the UNIDROIT 2002 Model Law on Franchising Disclosure, and China's Measures for the Administration of Commercial Franchises.<sup>19</sup> The Decree has three Chapters with the following structure and content:

Chapter I contains the General Provisions:

- Scope of regulation (Article 1)
- Subjects of application (Article 2)
- Interpretation of terms (Article 3)
- State management of commercial franchising (Article 4)

Chapter II deals with the regulations of franchising per se:

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<sup>18</sup> "Assistance for Improving the Commercial Law in the Integration Process" project.

<sup>19</sup> Terry and Binh (2009)

- Section 1 (Articles 5 to 7) sets the conditions for conducting commercial franchising;
- Section 2 (Articles 8 through 16) deals with supply of information between franchisors and franchisees and the terms of contracts in commercial franchising;
- Section 3 (Articles 17 through 23) provides for the registration system of commercial franchising;
- Section 4 deals with violation cases and handling of violations

Chapter III contains two closing articles (transitional provisions and effect of the decree).

*(c) Circular no. 9:*

Pursuant to Decree 35, the Minister of Trade issued on 25 May 2006 Circular no. 9 “Providing Guidelines or Procedures for Registration of Franchising Activities”. Circular 09 contains five sections, which provide for the procedural aspects of the registration of franchises.

- I. Registration agencies;
- II. Procedures for registration;
- III. Notification of changes in registered information;
- IV. Revocation of registration;
- V. Organization of implementation.

Although the Circular was meant to provide guidelines for the registration of franchises, it also includes, in Appendix III, the Franchise Description Document that prescribes the prior disclosure, a central feature of the franchise law.<sup>20</sup>

### *3.2.3 The core provisions of Vietnam’s franchise law*

#### **3.2.3.1 The definition of franchising**

In economic terms, franchising is a business relationship in which the franchisor (the owner of the business model and related industrial property rights and who is providing the product or service) assigns to independent businesses (the franchisees) the right to market and distribute the franchisor's goods or services, and to use the business name for a fixed period of time. It is a win-win relationship where the franchisor is able to expand its market presence without eroding its own capital, and the franchisee gains through access to established business systems, at lower risk, for their own commercial advantage.

There exist a number of different definitions of franchise that are used across the world for legal purposes and there are also cases where dedicated franchise laws don’t even define or don’t use the term “franchise” to denote the regulated subject matter.<sup>21</sup> The International Franchise Association (which actually is a US association) defines franchising as a “continuing relationship in which the franchisor provides a licensed

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<sup>20</sup> Terry and Binh (2009)

<sup>21</sup> For example, France and Belgium have franchise laws, but they don’t define franchising. See Abell (2013)

privilege to do business, plus assistance in organizing training, merchandising and management in return for a consideration from the franchisee". In the European Code of Ethics for franchising adopted by the European Franchise Federation (EFF), as last amended on 5 December 2003, franchise is defined in Part II, Section IV.1 as:

*"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 Franchisee the right, and imposes the obligation, to conduct a business in accordance with the Franchisor's concept.*

*The right entitles and compels the individual Franchisee, in exchange for a direct or indirect financial consideration, to use the Franchisor's trade name, and/or trade mark and /or service mark, know-how, business and technical methods, procedural system, and other industrial and /or intellectual property rights, supported by continuing provision of commercial and technical assistance, within the framework and for the term of a written franchise contract, concluded between parties for this purpose".*

In the Vietnamese franchise system, Article 284 of the Commercial Law 2005 defines franchising:

*"Franchising means a commercial activity whereby a franchisor authorizes and requires a franchisee to conduct on its own behalf the purchase and sale of goods or provision of services in accordance with the following conditions:*

1. *The purchase and sale of goods or the provision of services must be conducted according to the method of business organization specified by the franchisor and be associated with the trademark, trade name, business know-how, business mission statements, business logo and advertising of the franchisor.*
2. *The franchisor has the right to control and offer assistance to the franchisee in the conduct of the business."*

In the Vietnamese Commercial Law's definition, franchising is one kind of commercial activity, carried out by businessman; object of activity is "pack of rights", concluded trade-mark, trade-name, know-how, business logo and advertising of the franchisor; purpose of franchise activity is making profit. The definition of franchising in Vietnam is built on descriptive terms and is basically consistent with international practice, which incorporates elements of brand, system or control, and payment.

However, the payment element is not mentioned in the law, although Vietnamese practitioners (lawyers, franchisors and franchisees as well as public authorities) appear to agree that payment is an intrinsic element of franchising. Unlike the franchise law of most other countries, Vietnam's Franchise Law does not include the obligation of the franchisee to pay fees to the franchisor. According to some Vietnamese interpretations, this element was deliberately omitted because payment from the franchisee to the franchisor, either directly or indirectly, is inevitable in franchising. However, Vietnamese law firms representing foreign franchisors believe that this omission is a



major lacuna of the franchise law because its effect is to extend the scope of the law to non-franchise distribution relationships.

Decree No. 35/2006/ND-CP further expands the definition of franchising to include master franchising and sub-franchising and area development arrangements. The definition of "franchise" includes: (1) rights received by a party (i.e., the Franchisee) from a party (i.e., the Franchisor) to carry out the business of selling goods and supplying services under a system determined by the Franchisor and to affix trademarks, trade names, business logos, slogans, and advertisements of the Franchisor at the Franchisee's business premises; (2) rights received by a primary Franchisee from a Franchisor under a master franchise agreement; (3) rights received by a Sub-Franchisee from a Sub-Franchisor (i.e., the primary Franchisee) under a master franchise agreement; and/or (4) rights received by a Franchisee from a Franchisor under a franchise contract, which allows a Franchisee to set up more than one establishment to conduct the franchise business within a specific geographical area. The Decree prohibits secondary franchisees from engaging in further sub-franchising.<sup>22</sup>

### 3.2.3.2 Prerequisites

Applicants must meet certain requirements in order to qualify as of Franchisor or Franchisee.

- The conditions to meet by the franchisor

Under Article 5 of Decree 35, a franchisor must satisfy the following conditions:

- (1) A trader shall be permitted to grant commercial rights when the business system intended for franchise has been in operation for at least one year. Where a Vietnamese trader is the primary franchisee of a foreign franchisor, such Vietnamese trader must conduct business by mode of franchising for at least one year in Vietnam before sub-franchising;
- (2) Legal status of the trader: Such trader has registered commercial franchising with the competent agency and has *been approved*. This registration requirement only applies to foreign traders (franchisors).
- (3) The in-business goods and services are covered by commercial rights: Goods and services permitted for commercial franchising business are those not on the list of goods and services banned from business. Enterprises shall be permitted to deal in goods and/or services on the list of goods and services restricted from business or those on the list of goods and services subject to conditional business only after fully satisfying business conditions and/or being granted business licenses or papers of equivalent value by the competent agency.

- Conditions for the franchisee

Pursuant to Article 6 of the implementing decree, franchisees must have a business registration in accordance with the subjects of commercial rights.

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<sup>22</sup>Terry and Binh (2009)

### 3.2.3.3 Pre-contractual requirements

Every country with franchise specific legislation requires the franchisor to divulgate to the intended franchisees certain information about itself and its business (pre-contractual disclosure). Pre-contractual requirements also include some related obligations, such as when the disclosure should occur, etc. In general terms, the information that needs to be disclosed relate to the details of the franchisor, the commercial terms and details of its agreements. The information to be disclosed is in general terms very similar, not surprisingly because the influence of the American Uniform Franchise Disclosure Document (UFDD) is present in all franchise disclosure legislations. However, the details tend to vary across jurisdictions in a number of aspects particularly as regards the terms of the franchise agreement, the identity and experience of the franchisor and the franchise network.<sup>23</sup>

The main disclosure regulations in Vietnam's franchise law are the following:

- Franchise Disclosure Document (FDD)

Prior disclosure by the franchisor is the central feature of the Vietnamese franchise law. Because of the dominant position of the franchisor in a franchise relationship, unfairness in information between the contractual parties and the disadvantaged position of the franchisee at the negotiation table, Vietnam law has stipulated in a rather detailed manner the content and type of information which the franchisor have to disclose before signing and performance the contract.

Article 8 (1), first sentence, of Decree 35 provides that *"The franchisor shall have to supply copies of the commercial franchise contract form and the written introduction of its commercial franchise to the intended franchisee at least 15 working days before signing the commercial franchise contract, unless otherwise agreed by the parties. Compulsory contents of the written introduction of commercial franchise shall be specified and promulgated by the Trade Ministry."*

The "written introduction of commercial franchise", i.e. the FDD, is specified in Appendix III Circular 09 (reproduced in the Annex). These provisions were influenced by international precedents and are broadly consistent with the laws of those jurisdictions, which have a comprehensive disclosure regime including the American UFDD.<sup>24</sup>

There appears some incoherence between Decree 35 and the Commercial Law with respect to the compulsory nature of the FDD. Indeed, while Decree 35, which is a lower-level legislative act and therefore should not contradict the superior Commercial Law, states that the content of the FDD is compulsory, Article 287 (Obligations of franchisors), first paragraph reads as follows:

*"Unless otherwise agreed, franchisors shall have the following obligations:*

1. *To supply documents guiding the commercial franchise system to franchisees;"*

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<sup>23</sup>Abell, Hero and Toop (2012)

<sup>24</sup>Terryand Binh (2009)

Documents guiding the commercial franchise system obviously also include the FDD and therefore there seems to be an incompatibility with the mandated content pursuant to the implementing decree and the “chapeau” in Article 287 of the Law, which clearly gives freedom to the franchisor and its franchisees to “agree otherwise”.

The FDD must include a “warning” to the prospective franchisee to exercise due diligence, (and advises the franchisee to seek independent advice, talk to franchisees, in the system and attend educational courses).<sup>25</sup> The FDD must contain information on:

- I. Information about the franchisor
- II. The initial fee the franchisee must pay
- III. Other financial obligations of the franchisee
- IV. Franchisee’s initial investment
- V. Franchisee’s obligations to buy or rent equipment to fit the business system as provided by the franchisor
- VI. Franchisor’s obligations
- VII. Description of goods/services market operated in the mode of franchise
- VIII. Sample franchise contract
- IX. Information about franchise system
- X. Franchisor’s financial statements
- XI. Reward, recognition to gain or organization to participate in

As stipulated in Annex III of Circular No. 09/2006/TT-BTM, The FDD requires the franchisor to disclose information as follows:

- a. General information about the franchisor, include: Trade name; address of head office; Telephone; Fax (if available); The date of formation; Information about the franchisor i.e. the initial franchisor or the secondary franchisor; type of business; field of franchising; information about registration for franchise activity at the authority.
- b. Information about the trademark of goods/services and other intellectual property rights: The franchisor’s rights of using trade mark of goods/services and any other intellectual property rights; Detail about trade mark of goods/service and other intellectual property rights which have been registered under the law.
- c. Information about the franchisor: The franchisor’s structure; Name; duty and experience in working of each member in the director board; information about the franchisor’s department in charge of franchising of the franchisee; The franchisor’s experience in franchise; information about lawsuits relating to franchising of the franchisor in the last one year.
- d. The initial fees that the franchisee has to pay: type and amount of initial fees that the franchisee has to pay; the time to pay; the cases that the fees will be returned.
- e. Other financial duties of the franchisee: recurrent fees, marketing fees, training fees, service fees, payment for lease; other fees. For each type of fees, the franchisor must state fees level, the time to pay and the cases that the fees will be returned.

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<sup>25</sup> Binh (2012)

- f. Initial investment of the franchisee, including the main information below: location of business; equipment; pay for decoration; initial goods that the franchisee must purchase; pay for security; other fees that the franchisee must prepay.
- g. The franchisee's duty in buy or rent equipment to be suitable to business system: What equipment or services does the franchisee have to buy or rent or use to be suitable with the franchisor's business system; Whether or not the terms in franchising system can be amended; If it is possible, what procedure will apply to amend?
- h. The franchisor's duty: Duties before signing the contract; in the process carrying on franchise; in the case of choosing business location; training (initial training; supplementary training course)
- i. Description of the franchised goods/services market: The description of the market of goods/services which is subject of franchise contract in both general market and local market where the franchisee is permitted doing business;
- j. Franchising contract: Titles of articles of the franchising contract, term of the contract; conditions for extension of contract; conditions for termination of contract by the franchisee; conditions for termination of contract by the franchisor; obligations of the franchisor/franchisee arising from the termination of the contract; amendment of the contract at the request of the franchisor/franchisee; conditions for assignment of contract by the franchisee to another business entity; declaration of non-eligibility of the franchisor/franchisee in case of death;
- k. Information about franchise system: The number of the franchisor's business which are operating, the number of the franchisor's business has stopped operation; the number of franchise contract which the franchisor has concluded with the franchisees; the number of franchise contract has been transferred to the third party by the franchisee; the number of franchise contract was terminated by the franchisor/the franchisee; the number of franchise contract was renewed/not renewed.
- l. Financial Report of the franchisor: The financial report had been audited within the previous year.
- m. Rewards, acknowledgements to be received and organizations to participate.

In the case of sub-franchising, Article 8(3) provides that the "secondary franchisor" (the sub-franchisor) must provide to the "secondary franchisee" in addition to the Franchise Description Document the following:

- a) Information on the franchisor that has granted commercial rights to it;
- b) Contents of the common commercial franchise contract;
- c) Method of handling secondary commercial franchise contracts in case of termination of the common commercial franchise contract.

The franchisor is required to update information on any important changes to the franchise system, which affect the franchise business of a franchisee. If there are any changes occurring to information stated in part A of the FDD, the franchisor must notify the MOIT within 30 days of the change.

In general, the regulation on the franchisor's obligation in disclosing information is basically quite general, with the type of information, its content, and the time-limit to provide information. Regulation on the franchisor's duty in providing important

information of the franchise system in process of execution the contract, which may affect the franchisee's business is reasonable. However, some important information which need to be supplied by the franchisor are not required by law, such as business development plan of the franchise system; the goods, services that the franchisor distributes as well as distribution agreement of the franchisor on the franchisee's territory; and operation history of the franchisor. In addition, Vietnamese law in these issues remains holes on the franchisor's liability in the case of failure disclosure information.

In conclusion, the purpose of regulations on the franchisor's obligation in providing information is to ensure and assist the franchisee in decision joining or not joining the franchise system. With regulations about the franchisor's obligation as mention above, Vietnamese law, as beginning steps, has set foundation to protect the franchisee's right, reduced information privilege of the franchisor, narrowed the unfairness distance of information between the franchisor and the franchisee in franchise relationship.

- Timing of disclosure

Article 8 (1) of the Decree requires that the commercial franchise contract form and the FDD must be supplied to the intended franchisee "at least 15 working days before signing the commercial franchise contract, unless otherwise agreed by the parties".

Intentionally or not, Appendix III reduced the time between the supply of the FDD and the conclusion of the contract inasmuch as it changed "15 working days" to "15 days".

A further remark is that the proviso "unless otherwise agreed by the parties" questions the binding nature of this provision and leave open the possibility to the stronger party, i.e. the franchisor, to impose a shorter period than 15 (working) days.

- Cooling-off period

In addition to the period of advance disclosure, some franchise laws prescribe a cooling-off period after the execution of the franchise contract during which the franchisee can withdraw from the relationship without penalty.

Vietnam's franchise law does not include a cooling-off period.

Countries, which have a cooling-off period include Malaysia, Mexico and Taiwan. These range from a 30-day cooling-off period in Mexico to seven days in Malaysia, and five days in Taiwan.<sup>26</sup>

- Franchisee disclosure

Article 9 of Decree 35 also requires franchisee disclosure. It provides that the intended franchisee shall have to provide the franchisor with information reasonably requested by the latter before deciding on the grant of commercial rights to the former.

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<sup>26</sup> Abell, Mark: The Regulation of International Franchising, November 2010 found at <http://whoswholegal.com/news/features/article/28705/regulation-international-franchising>

### 3.2.3.4 The Franchise Contract

Some franchise laws provide for mandatory contractual terms; that of Vietnam does not appear to contain binding provisions.

- Form of franchise contracts

Article 285 of the Commercial Law (2005) provides that “A franchise contract must be made in writing or in another form with equivalent legal validity.”

The phrase “another form with equivalent legal validity” appears at first sight meaningless in light of the implementing decree requiring certain content elements to be included in the content that cannot be done otherwise than in writing. It is true though that even the Decree use the language “may contain” which ultimately questions the usefulness of any provision on the contract.

- Content of franchise contracts

Decree 35 follows the principle of the Civil Code (which took effect from 1 January 2006) on the rights of parties to freely agree on contractual provisions in order to establish rights and obligations provided that such commitments and agreements are not prohibited by law or are contrary to social order.<sup>27</sup> Article 11 of the Decree provides that the franchise contract “may have” the following principal contents:

- (1) Content of franchised commercial right.
- (2) Rights and obligations of the franchisor.
- (3) Rights and obligations of the franchisee.
- (4) Price, periodical franchise fee and mode of payment.
- (5) Valid term of the contract.
- (6) Renewal and termination of the contract, and
- (7) Settlement of disputes.

- Standard clauses

The FDD (Appendix III to Circular 09), lists the following elements of the “sample” franchise contract:

- (1) Names of contract’s articles.
- (2) Duration of contract.
- (3) Conditions for contract extension.
- (4) Conditions for the franchisee to cancel the contract.
- (5) Conditions for the franchisor to cancel the contract.
- (6) Obligations of the franchisor/franchisee arising from the cancellation of the contract.
- (7) Amend the contract at the request of the franchisor/franchisee.
- (8) Provisions on conditions for the transfer of the franchise contract by the franchisee to other traders.
- (9) In case of death, declare ineligible for the franchisor/franchisee.

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<sup>27</sup>Binh (2012)

- Term of the contract

The Vietnamese franchise law does not mandate minimum or maximum term of the franchise contract. Article 13 (1) simply states “The valid term of a commercial franchise contract shall be agreed upon by the involved parties.”

- Transfer of the franchise contract

A franchisee may transfer its rights to another franchisee subject to:

- the assignee being also in the possession of a valid business licence; and
- the franchisor giving its prior consent.

In order to obtain consent, the franchisee has to inform the franchisor in writing of its intention to assign its rights to a third party. Within 15 days after receiving the request, the franchisor then has to reply in writing. He may object to the transfer of rights on one of the conditions set out in Article 3 of the Decree:

- the assignee failed to fulfill its financial obligations under the franchise agreement;
- the assignee has not yet fulfilled the criteria for being chosen as a franchisee by the franchisor;
- the transfer might have an adverse effect on the existing franchise system;
- the assignee disagrees in writing to fulfill its obligations under the franchise agreement;
- the franchisee has not yet fulfilled its obligations towards the franchisor.

- Early termination

Early termination is possible in accordance with the conditions set out in Article 16 of Decree No 35/2006/ND-CP. Article 16 provides that a franchisee has the right to unilaterally terminate the franchise agreement if the franchisor breaches its obligations specified under Article 287 of the Commercial Law. The franchisor on the other hand is entitled to unilaterally terminate the franchise agreement in the following circumstances:

- the franchisee no longer holds the necessary business licence or equivalent papers required by law
- the franchisee is involved in winding-up or bankruptcy proceedings pursuant to Vietnamese law
- the franchisee commits a serious legal violation which has the potential to harm the reputation of the franchise network
- the franchisee fails to remedy immaterial breaches of its obligations under the franchise agreement within a reasonable time.

- Intellectual property

Article 10 of Decree 35 allows that industrial property subject matters be established in a separate section of the franchise contract but it does not permit a separate IP licensing contract between the franchisor and the franchisee.

### **3.2.3.5 In-term relationship/conduct issues**

In-term relationship rules aim at ensuring a balance between the parties' respective rights and obligation towards each other during the duration of the franchise contract.

Five articles of the Commercial Law prescribe the rights and obligations of franchisors and franchisees:

	<b>Franchisors</b> (Articles 286 and 287)	<b>Franchisees</b> (Articles 288, 289 and 290)
Rights	<p>Unless otherwise agreed, franchisors shall have the following rights:</p> <ol style="list-style-type: none"> <li>1. To receive franchise sums.</li> <li>2. To organize advertising for the commercial franchise system and the commercial franchise network.</li> <li>3. To conduct periodical or extraordinary inspections of activities of franchisees in order to ensure the uniformity of the commercial franchise system and the stability of quality of goods and services.</li> </ol>	<p>Unless otherwise agreed, franchisees shall have the following rights:</p> <ol style="list-style-type: none"> <li>1. To request franchisors to provide fully technical assistance related to the commercial franchise system;</li> <li>2. To request franchisors to equally treat all franchisees in the commercial franchise system.</li> </ol> <p>Besides, a franchisee shall be entitled to sub-franchise to a third party (referred to as sub-franchisee) if it is so consented by the franchisor (Article 290 "Sub-franchise to a third party")</p>
Obligations	<p>Unless otherwise agreed, franchisors shall have the following obligations:</p> <ol style="list-style-type: none"> <li>1. To supply documents guiding the commercial franchise system to franchisees;</li> <li>2. To provide initial training and regular technical assistance to franchisees for managing the latter's activities in accordance with the commercial franchise system;</li> <li>3. To design and arrange places of sale of goods or provision of services at the expenses of franchisees;</li> <li>4. To guarantee the intellectual property rights over objects stated in franchise contracts;</li> <li>5. To equally treat all franchisees in the commercial franchise system.</li> </ol>	<p>Unless otherwise agreed, franchisees shall have the following obligations:</p> <ol style="list-style-type: none"> <li>1. To pay franchise sums and other amounts under commercial franchise contracts;</li> <li>2. To invest adequate material facilities, financial sources and human resources to take over business rights and know-how transferred by franchisors;</li> <li>3. To submit to the control, supervision and instruction by franchisors; to comply with all requirements set forth by franchisors on designing and arrangement of places of sale of goods or provision of services;</li> <li>4. To keep secret the franchised business know-how even after the expiration or termination of commercial franchise contracts;</li> <li>5. To stop using trademarks, trade</li> </ol>



		<p>names, business slogans, logos and other intellectual property rights (if any) or systems of franchisors upon the expiration or termination of commercial franchise contracts;</p> <p>6. To manage their activities in accordance with the commercial franchise system;</p> <p>7. Not to sub-franchise without permissions of franchisors.</p>
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### 3.2.3.6 Registration requirement

Vietnam is one of only a limited number of countries imposing a registration requirement. The other jurisdictions requiring registration include Indonesia, Mexico, Spain, China, Macau, Malaysia, Moldova, Croatia, Barbados, and 15 US States. However, the subject matters to be registered are not the same across these countries. Vietnam requires the registration of franchise activities, whilst the registration is of the franchisor in China, and of the disclosure document in South Korea for example.<sup>28</sup>

In addition, in Vietnam only foreign franchisors are subject to the obligation of having their franchises registered. The registration obligations imposed only on foreign franchisors is clearly not only disrupting a unified regime for both domestic and foreign franchisors, but also is violating Vietnam's national treatment commitment under the GATS.

- Procedure of registration

The procedure to register commercial franchising from abroad into Vietnam is the following:

Before conducting commercial franchising in Vietnam, foreign traders (including traders operating in export processing zones, non-tariff areas or separate customs areas as stipulated by Vietnamese laws) intend to franchise into Vietnam, including primary franchisor and expected secondary franchisor, must submit franchise registration dossiers to the Ministry of Industry and Trade under the provisions of Decree No. 35/2006 /ND - CP, which was amended and supplemented by Decree No. 120/2011/ND - CP and the guidance in Circular No.09/2006/TT - BTM .

A dossier of registration of commercial franchising shall comprise:

- (1) An application for commercial franchising registration (made according to form MD-1 in Annex II issued with Circular No. 09/2006/TT-BTM);
- (2) A written description of the franchise disclosure document (FDD)/commercial franchise (made according to the set form in Annex III issued with Circular No. 09/2006/TT-BTM, legalized by consular authorities, translated into Vietnamese and notarized in accordance with Vietnamese law);
- (3) A copy of the foreign trader's business registration certificate or paper of equivalent validity, certified by a competent agency of the place where the

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<sup>28</sup>Binh (2012)

foreign trader is set up (legalized by consular authorities, translated into Vietnamese and notarized in accordance with Vietnamese law);

- (4) A notarized copy of the industrial property right protection title in Vietnam or a foreign country, in case of licensing industrial property subject matters for which protection titles have been granted (legalized by consular authorities, translated into Vietnamese and notarized in accordance with Vietnamese law);
- (5) Papers proving the approval of the primary franchisor's permission of franchise in case the trader registering franchising is the secondary (legalized by consular authorities, translated into Vietnamese and notarized in accordance with Vietnamese law).

- Settlement duration

For incomplete and improper dossiers, within two working days after receiving the dossiers, Commercial Division 1 (Domestic Market Department, MOIT) shall prepare written notices to dossier-submitting traders, requesting the supplementation and completion of the dossiers.

Within 5 working days after receiving complete and valid dossiers, Commercial Division 1 shall submit Department Leader to “consider” registering traders’ commercial franchising in commercial franchising registration books, and send traders written notices thereon.

If refusing to register commercial franchising, within 5 working days after receiving complete and valid dossiers, Commercial Division 1 shall prepare written notices thereon, clearly stating the reasons therefore.

Article 20, paragraph 1(c) of Decree 35 distinguishes between incomplete and invalid dossiers. The term “invalid dossier” is too vague to provide sufficient legal clarity and certainty for applicants. The incompleteness of a dossier can be easily judged on the basis of the exhaustive listing of the 5 criteria mentioned above; it is difficult to understand the concept of “invalidity” of a dossier if the “completeness” of a dossier in terms of the 5 requirements is fully met. The Domestic Market Department has given one example when a dossier would be considered “invalid”: one of the required documents is not consular legalized as regulated in the Decree. However, consular legalization is itself part of the listed requirements, therefore failure to provide such document would trigger incompleteness of the dossier rather than lack of validity.

While no application for registration has been refused so far it would seem appropriate to provide more precise language in the franchise law in order to avoid the possibility of any discretion in the registration process.

- Changes in registered information

Change in registered information are to be notified to MOIT in writing within 30 days after the change occurs.

- Revocation of registration

Revocation of registration happens when the trader terminates its business operation or shifts to another business line or has its business registration certificate or investment certificate withdrawn.

- Registration fees

The registration fees are stipulated in Decision 106/2008/QĐ-BTC (November 17, 2008) of the Ministry of Finance on collection, management and use of fees for registration of franchising activities, as follows:

- New registration: VND 16,500,000.
- Amendment of a franchise registration: VND 6,000,000.
- Re-issuance of a franchise registration: VND 500,000.

### **3.2.3.7 Reporting requirement**

Under Decree 120, a Vietnamese franchisor, whether it grants franchises to a foreign or Vietnamese entity, is no longer required to register its franchising activities with state agencies. Instead, the Vietnamese franchisor must report its franchising activities to the provincial SOIT where it is registered to operate. There is no specific provision under Decree 120 that specifies the content of the report, and the procedure by which the report is filed. Due to the lack of implementing regulations, the report requirement appears not to be fully operational.<sup>29</sup>

### **3.2.3.8 Sanctions**

A violation of the franchisor regarding disclosure requirements can lead to a monetary fine as regulated in Article 95 of the Decree No. 185/2013/ND-CP of the Government dated November 15, 2013 providing the penalties on administrative violations in commercial activities, production of, trading in counterfeit or banned goods and protection of consumer rights.

### **3.2.3.9 Administration**

Vietnam's law provides for governmental control over franchising: Article 4 of Decree 35 mandates various governmental authorities to ensure "State management of commercial franchising".

The regulatory authorities of franchising activities include:

- (a) The Ministry of Industry and Trade (MOIT) is the central regulatory authority for franchising activities. The MOIT has authority to provide guidance for implementation of policies and legislation on franchising, and to organize the registration of franchises.
- (b) The Department of Industry and Trade (DOIT) are the provincial agencies of the MOIT. The DOITs supervise franchising in provinces and centrally-run cities. The

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<sup>29</sup>Russin&Vecchi International Legal Counsellors: The Legal Framework for franchising in Vietnam, Ho Chi Minh City, April 2013

DOITs also receive reports submitted by Vietnamese franchisors who franchise their business to Vietnamese or to foreign franchisees

### 3.3 Vietnam's international commitments on franchising services

According to Vietnam's international commitments, foreign-invested enterprises engaged in goods purchase and sale and activities directly related to goods purchase and sale shall be unallowed to conduct commercial franchising for goods items such as “Cigarettes and cigars, books, newspapers and magazines, video records on whatever medium, precious metals and stones, pharmaceutical products and drugs, explosives, processed oil and crude oil, rice, cane and beet sugar”.

In franchising field a joint venture with a Vietnamese partner(s) is required, and foreign capital contribution shall not exceed 49%. As of 1 January 2008, the 49% capital limitation shall be abolished. As of 1 January 2009, foreign participation in franchising opened to fully foreign-owned.

Foreign service providers were entitled to establish branches providing franchise services in Vietnam after January 11, 2010 except that the chief of the branch has to be a resident in Viet Nam.

### 3.4 Analysis of the current franchise regulation

In general, Vietnam’s legal framework on franchising is quite complete and in-line with international practice. However, by taking a closer look at the effectiveness and feasibility in applying such framework in practice, several weaknesses can be seen as follows:

- It still fails to cover all aspects of franchising. Among the others, administrative sanctions against violations in the area of franchising are included in only one article of the Decree on dealing with administrative violations in commercial activities (such as Article 50 Decree 06/2008/NĐ-CP, and then Article 95 Decree 185/2013/NĐ-CP) and these provisions are too general with fines being rather symbolic than proportionate with the nature and scale of the actual franchise.
- Inadequate management of different forms of franchising: franchising is classified into two categories - local franchising and inward and outward franchising - depending on territorial scope of the franchise. However, franchising from Export Processing Zone, Non-tariff Zone and specific customs zones stipulated by Vietnam’s laws outward or vice versa needs to be place under management. Vietnam’s current legal documents related to franchising have no specific and clear provisions in this regard.
- Franchisees are not protected properly: for example, Article 16.1 Decree 35/2006/NĐ-CP which has been amended and supplemented by Decree 120/2011/NĐ-CP provides that Franchisee has the right to unilaterally terminate franchising contract in case Franchisor fails to fulfill any obligations provided in Article 287 Commercial Law. Referring to obligations of franchisor in Article 287 and comparing to cases where franchisor has right to unilaterally terminate franchising contract in Article 16.2 Decree 35/2006/NĐ-CP which has been amended and supplemented by Decree 120/2011/NĐ-CP, the rights of

franchisee are not ensured yet. In particular, if the franchisee is insolvent of bankrupt, franchising contract shall be terminated before the due date. However, in case franchisor falls into this situation, no solution is envisaged in the law, meaning that the franchisee has the right to continue with the franchising contract until the due date or is forced to terminate such contract.

- Annual reporting requirement causes some issues to the franchisors: All contents of Part B of the FDD which shall be annually reported to the registration body take a lot of time to prepare (such as annual audited financial statements). The franchisor only has 15 days to prepare, execute and submit the report. Fiscal year may not end on 31 December. Franchisor's audited financial statement may not be completed by the 15 January deadline...
- Cases in which registration of commercial franchising is not required (domestic commercial franchising; Vietnam-to-overseas commercial franchising) must be reported to provincial-level Industry and Trade Departments but the detailed requirements of the report are enumerated unclearly in a legal document.
- Vietnamese law on franchising has not any regulations on the franchisee's right refusal purchase goods or materials from source is appointed by the franchisor and there are not any limitations for the franchisor's right in appointment the source supplying goods, material for the franchisee. Consequently, the franchisor, in fact, often require the franchisee purchase goods, material from the franchisor certain supplier under reason that to ensure uniform of the franchise system. This is the reason which bind the franchisee in the too tight obligation, and in some view infringe the independent in the franchisee's business, concurrently, it may constitute the competition restricted action to the entity outside the franchise system.
- State management agencies still have difficulties in ensuring their close and continuous oversight on franchising activities and implementing Vietnam's law enforcement due to unclear regulations on franchising as mentioned above such as detailed requirements of the report in case in which registration of commercial franchising is not required, etc.

In sum, together with the development of franchising in Vietnam, the related legal framework has been improved in the spirit of integration. The system of legal documents is helping complete the legal framework for the establishment and development of commercial franchises in Vietnam. However, this framework needs to be further studied and improved in order to enable more efficient management and at the same time pave the way for stronger development of this specific form of business, especially in relation to the procedure of franchising registration by foreign actors. Furthermore, Vietnam needs to develop a clearer and sufficient legal corridor, which is able to address the above-mentioned shortcomings.

#### 4. Assess the positive impact on the economic and social Vietnam since the promulgation and enforcement of legal documents related to franchise<sup>30</sup>

Franchising is a highly effective tool for economic development and international integration in developing countries. The economic impacts of global franchising on the host countries are generally identified as job creation and increase of output, widened tax base, economic modernization, balance of payments' adjustments, development of small and medium enterprises (SMEs) and entrepreneurship, as well as acquisition of dynamic capabilities and skills.

Franchising in emerging markets offers the host countries certain advantages. These economic benefits include obtaining foreign currency with little capital outlay, increases in employment, and thereby, growth in the franchisor's tax base and gross domestic output. Also, franchise growth and development spawn entrepreneurial development comprised of small and medium enterprise networks. Certainly, "home grown" franchises are more likely to develop. There is a resulting increase in the knowledge base of the business population concerning product distribution, market management, and modern marketing techniques, all of which increase the skill base of local labour. There are increasing efficiencies that result from innovation and rationalization in all sectors of the economy – retail, wholesale, and manufacturing. This leads to further development of the host country's infrastructure, particularly in the areas of transportation and supplies.

On the other hand, retail franchising may have adverse effects on the host market. Retail franchising can sometimes supplant traditional and local cultural elements, which over time can lead to homogenization and westernization of consumer preferences, especially among the youth. International retail franchising often has the effect of displacing local industry, particularly "mom-and-pop" stores. These stores cannot effectively compete with the distribution and marketing expertise of multinational franchisors. At the national level, franchising can negatively influence the host country's balance of payments over time because of the repatriation of fees and royalties by the franchisor.

The overall impact, however, is likely to be positive in the long term.

There is reason to believe that international franchising has no dissimilar impacts on Viet Nam's socio-economic development.

A precise socio-economic impact assessment of the evolution of the legislative framework on franchising is difficult to make. The first reason is that there exists no direct causal link between the adoption of the franchise-specific regulations and the development of the franchise market. While it is clear that the shift from the TTA-focused regulation to the franchise-specific legislation had a positive impact on the development of this market segment, as it created an enabling regulatory environment, the actual evolution of the sector – the level of capital inflow, GDP contribution, the increase in the number of franchises, job creation etc. – is not necessarily attributable to

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<sup>30</sup> This section heavily draws on Alon, Falbe, and Welsh (2006)

the franchise law. Demand and offer shape the franchise market, and the law just makes things easier or worse.

The second reason for the difficulty of making a quantitative socio-economic impact assessment is related to data availability both at macro and micro levels. Unfortunately in Vietnam no economic study was undertaken which would trace down the impact of franchising legislation and that of franchising itself on employment, balance-of-payments, taxes, etc. The very few studies on franchising and the economy limited themselves to describing the evolution of the franchise sector since the adoption of the franchise law (in terms of number of franchises, types of franchises, etc.) without establishing a link between the two.

Nevertheless, it is clear that the franchise law introduced in 2006 had a very positive impact on the evolution of franchise businesses. This form of entrepreneurship needed a specific enabling framework without which the demand for foreign franchises would not be fully met.

## **5. Problems and challenges**

### **5.1 Problems encountered by governmental bodies in implementing the current Franchise Regulation**

- Regulation on the registration of domestic franchising has now been aborted with the issuing of the Decree No. 120/2011/ND-CP causes difficulties for governmental bodies:

In terms of domestic franchising and franchising from Vietnam to overseas, traders are still required to follow report regime and send to the Department of Industry and Trade in their localities. However, the State management is facing difficulty because there have been few reports from traders sending to the governmental bodies.

Reporting of franchises are very important to state management activities. If these activities are effective then the State shall be able to timely produce appropriate policies to support this business model in the coming time.

Furthermore, recognizing the important role of different parties in franchising, Circular No. 09/2006/TT-BTM and Decree No. 120/2011/NĐ-CP provide that local franchising must be reported to the Department of Industry and Trade by January 15th at the latest every year. However, this regulation has not been fully complied. For examples, by January 15th 2015, only 05 businesses have submitted their report to the Department of Industry and Trade of Ho Chi Minh city. From this experience, we can see that the role of and cooperation among different parties in franchising have been inadequate. This also shows that state management activities in local areas have not been strict enough. Therefore, management instruments must be developed by relevant agencies in order to regulate franchising market and drive future policies.

- Some regulation on duties of governmental bodies cannot be fully implemented:

As stipulated in the Circular No. 09/2006/TT-BTM, the Ministry of Industry and Trade shall establish a website page and software for management of information on the status of registration of franchising activities and a system for on-line registration of

franchising activities in order to receive application files via the internet, and at the same time guide implementation by Departments of Industry Trade and by business entities. However, although the statistics on franchise registration have been implemented and published on the Internet, the number of the statistics is small compared to the reality. The system for on-line registration of franchising activities in order to receive application files via the internet has not been implemented.

- Limited legal regulations and governmental attentions paid to examining, controlling, administrative sanctions in regards to domestic franchising. Therefore, the effective law enforcement by the governmental bodies in terms of domestic franchising are weak and inadequate. To solve the problems, state management agencies have to ensure close and continuous oversight by amending current regulations or issuing new ones to examine, control and set administrative sanctions on franchising activities nationwide.

## 5.2 Problems encountered by foreign and Vietnamese franchisors / sub-franchisors and franchisees with respect to current Franchise Regulations<sup>31</sup>

In the absence of a Vietnamese franchise association, which could channel the voice of the industry, this section relies on presentation of problems of franchise regulations by two law firms actively engaged in franchise contracts in Vietnam.

### Registration requirement:

Decree No. 120/2011/ND-CP issued on 16 December 2011, effective from 1 February 2012, has created a situation whereby domestic franchising and franchising from Vietnam to abroad vs. franchising from abroad into Vietnam do not require registration and are subject to reporting requirement only (to the provincial Department of Industry and Trade), whilst foreign franchising from abroad to Vietnam is subject to registration. This is discrimination against foreign franchisors and foreign franchising services.

### Franchise Disclosure Document (FDD):

General Assessment of the Prescribed FDD Form contained in Circular No. 09/2006/TT-BTM:

- Lacks necessary instructions to complete the FDD form.
- Lacks a table of contents and definitions section to facilitate readability (as well as assisting in drafting).
- Certain section titles are unclear (e.g., those pertaining to fees).

In Part B of the FDD uncertainty abounds:

- There is no guidance on how detailed should the disclosed information be.
  - For example: Working experience of the franchisor's directors (Section I.2). Do the authorities have discretion to deny registration if they deem the directors' working experience as insufficient? Or is the disclosure of such information a mere formality?

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<sup>31</sup> Tran Manh Hung: Franchising: Problem, Dispute and Recommendation, MOIT – USAID STAR Plus Workshop on Franchising: Challenges and Opportunities, 12 June 2012 | Ho Chi Minh City



- Section II (Initial fees payable by the franchisee) and Section III (other financial obligations of the franchisee): it is not clear whether this refers to the fees payable to the franchisor only *or* all entities relevant to the franchise?

#### Consularization Requirement:

Most of the franchise application documents are subject to consularization requirement which is time consuming and costly.

#### Annual Reporting Requirement:

The annual reporting on the items in Part B of the FDD form ((Annex III), Circular No. 09/2006/TT-BTM) is prescribed by a footnote. It says: “Business entities should annually report the information in this Part to the registration body at the latest by 15 January.”

Several issues have been raised by law firms:

- There is no prescribed report form.
- The content of the report is not précised.
- With regard to financial statement, the FDD form requires the inclusion of an “audited financial statement for the most recent year”. It is not clear whether an annual report should include an audited financial statement for the most recent year or for the previous year.
- Regarding the legal basis, it is doubtful whether a provision contained in a footnote of an attached document (annex) to a circular could be considered a binding legal provision.
- The time of submission is tight and not realistic. The franchisor only has 15 days to prepare, execute and submit the report. In addition, with respect to the audited financial statement, problem may arise from the fact that the fiscal year may not end on 31 December. Moreover, the franchisor’s audited financial statement may not be completed by the 15 January deadline.

#### Treatment of intellectual property rights:

Decree 35 makes trademark registration a precondition to start franchising. In particular, the Decree states: “The transfer of the right to use objects of industrial property in a franchise contract *shall be governed by the law on industrial property*”. This is problematic because the Vietnamese IP Law does not statutorily require that all marks licensed for use in Vietnam must be registered or recognized by the NOIP. Furthermore, if marks are not registered or recognized, there are risks that the parties should be aware of. Therefore the lack of registration or recognition of the IP should not be a bar to operating franchising activities.

### Unclear criteria between franchises and distribution arrangements:

The Commercial Law provides a broad definition of a franchise. Business arrangements other than franchises, like distribution or agency agreements linked with IP or technology transfer agreements, could potentially fall under the Commercial Law's definition of a franchise.

The problem is that there is very little guidance as to when an arrangement is deemed as a "franchise" as compared to other business arrangements. Thus, foreign businesses cannot be sure when they have to register a particular arrangement as a franchise, and when they do not.

### Unclear guidance on compliance with competition laws in franchising activities:

The issue is that the franchising law provides liberty to the franchisor to control operation of the franchisee's business, while competition law contains provisions that could restrict or prohibit such control by the franchisor.

### Rights of concerned parties to request for deregistration of franchising activities:

Often, master franchisors would engage an area developer (i.e. a sub-franchisor) for multiple countries, such as those in Southeast Asia. It's unclear how concerned parties (e.g. master franchisor and trademark owners) can deregister franchising activities of its sub-franchisor or area developer, even if the master franchise agreement is terminated or the sub-franchisor no longer has the commercial rights to operate the franchising activities under the master franchise agreement.

The problem is that of a "rogue franchisee": a master franchisor might want its sub-franchisor to deregister so that the area developer cannot continue carrying on the franchising activities in Vietnam where it no longer has the contractual right to do so.

## **6. Best practices in international franchise regulations**

In the quest for better regulation, law makers and regulators often compare their own jurisdiction's rules with the "best practice" or at least with practices converging towards what is considered better than others. However, there exists no objective basis to declare one regulation representing "best practice" or better practice, mainly because there is no causal link between regulation and economic performance; for example no one can say that a particular franchise law is better than another one because in the former jurisdiction there are more franchise contracts than in the latter. The proof of this is that many countries have buoyant franchise markets without having any franchise regulation.

Regulations should address local needs, and be tailored to the requirements of national markets. Therefore this section does not advocate the adoption by Vietnam of any particular regulation of any particular country. The objective is simply to show the variety of regulations used in different jurisdictions.

There are only some 30 countries in the world where franchising is regulated by specific franchise laws. The franchise-specific laws are categorized as competition law regulations, foreign trade or investment regulations and core franchise regulations. Competition law regulations seek to prevent vertical restraints and are concerned with issues such as the tying in of peripheral or unconnected goods, price maintenance, exclusivity and so on. The EU regulations through Article 101 of the Treaty on the Functioning of the European Union and the Vertical Restraints Block Exemption are the primary example for competition-regulation of franchising.

Foreign trade and investment regulations of franchising can be mainly found in developing countries. “Core” franchise regulations are concerned with the way that franchises are sold and particularly with the creation of what might be called “pre-contractual hygiene”.<sup>32</sup> These regulations focus upon areas of potential abuse in franchising, namely pre-contractual disclosure and the in-term relationship between the franchisor and its franchisees. “Core” franchise regulations are generally symptomatic of more developed markets and are found in the USA, Australia, Canada, Brazil, Taiwan, Georgia, Mexico, France, Spain, Italy, Belgium and Sweden.<sup>33</sup>

Non-specific laws affecting franchising used around the world include trademark laws, commercial agency laws (which can be found in Europe, Mideast, and Latin America), technology transfer laws, foreign exchange control laws, tax laws and anti-bribery laws, and other laws.

Despite the common elements that can be found in “core” franchise regulations, they exhibit a great variety in terms of depth of regulation (i.e. the extent to which they are prescriptive or mandatory vs. freedom left to the parties in deciding about the content of their contracts, or the mandatory items of the disclosure documents), the role of the regulator or State in allowing or disallowing franchises, etc. In this section we provide a brief panorama of the most prevalent methods of regulations around the world for various matters that can also be found in the Vietnamese franchising law. It should be emphasized that the descriptions here are not exhaustive and the reader is advised to consult the full regulation of a given country and make a contextual analysis in order to assess the regulation concerned.

## 6.1 FDD content<sup>34</sup>

All of the countries that require pre-contractual disclosure take a similar approach to the issue, although the details tend to vary. The influence of the American UFDD is generally evident and there are few significant material differences between it and the general requirements in countries such as France, Spain, Italy, Belgium, Sweden, Brazil, China and Vietnam. However, the detailed requirements do vary.

All jurisdictions take a similar approach to the information that needs to be disclosed namely, details of the franchisor, the commercial terms and details of the agreements. However, the details tend to vary in a number of aspects particularly as regards the terms of the franchise agreement, the identity and experience of the franchisor and the

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<sup>32</sup> Abell (2015)

<sup>33</sup> Abell, Hero and Toop (2012)

<sup>34</sup>This section is from Abell, Hero and Toop (2012) pp. 4-6.

franchise network. The information to be disclosed by the different jurisdictions is in general terms very similar.

#### (1) Basic details of the franchisor

Every country with franchise specific disclosure legislation requires the franchisor to give some basic details about its business. The amount of detail, which has to be disclosed, varies from rudimentary information about the franchisor (like in Indonesia or Japan), to more detailed information about the franchisor's business experience, its history of development and information about the business experience of the main people involved on the franchisor's side such as its directors and manager. Not surprisingly the countries with pure franchise regulations such as Canada and Malaysia require a franchisor to provide more franchise specific information than others.

#### (2) Description of the franchise and of the market

Almost all disclosure countries require the franchisor to give a short description of the franchise in question. In addition, some countries also require the franchisor to provide details of the territory or the market where the franchise is supposed to operate such as Brazil and Vietnam.

#### (3) Financial information about the franchisor

Although the requirements regarding this item do not seem to be as strict as the ones set out in the US UFDD in that the bankruptcy history of the franchisor and its affiliates usually does not have to be disclosed (with the exception of Brazil, Canada, China and Malaysia), most disclosure countries require the franchisor to provide the prospective franchisee with balance sheets and financial statements for the last 2- years with the exception of Japan, Mexico and Taiwan.

#### (4) Details of the franchise network

Most disclosure countries require the franchisor to give details about the franchise network, including providing the prospective franchisee with names and addresses of existing franchisees and information about franchisees who left the franchise network. The period which needs to be covered varies from 12 months before the franchise agreement is signed (in Brazil) to 3 years in the case of Canada.

#### (5) Litigation details

Details concerning litigation which has to be provided can be divided into franchise related litigation and general civil or criminal litigation regarding the franchisor and its directors or managers involved in the sale of the franchise. Some disclosure countries follow this distinction and refer to two separate items (e.g. Canada or China), other simply refer to details about litigation in general, depending how detailed the disclosure laws are.

#### (6) Initial Fee, initial investment and continuing fees

Most disclosure laws list the disclosure of fees and other payments which have to be made in accordance with the agreement as separate disclosure items (with the

exception of Indonesia). Nevertheless, all disclosure countries require the franchisor to disclose the amount of initial fees and ongoing fees which are payable to the franchisor. Japan and Taiwan also explicitly require the franchisor to specify under which circumstances the initial fee is repayable to the franchisee. When it comes to giving details about the initial investment that the franchisee will have to make, not all countries require the franchisor to do so. Like the UFDD Belgium and Canada require the franchisor to disclose during which period the franchisee's initial investment will be amortised. The disclosure laws of Indonesia, Japan and Taiwan do not even require the disclosure of the initial investment.

#### (7) Earning claims

With the exception of the Canadian and Japanese franchise legislation, no disclosure legislation mention earning claims. In Canada and Japan it is optional for the franchisor to make such claims in the disclosure document. The only condition is that if earning claims are made, they have to have a reasonable basis. Franchisors in Canada are also required to include the material assumptions underlying the preparation and presentation of the earnings claim and they have to indicate the place where the prospective franchisee would be able to inspect substantiating documents.

#### (8) Restriction on the franchisee

Restrictions on the franchisee during the ongoing relationship consist of restrictions on the goods or services that can be provided by the franchisee, non-competition covenants and restrictions on the sale of the franchisee's business. The general rule is that restrictions on the franchisee's economic freedom of action have to be disclosed in every country. Similar to the litigation item, some countries with more sophisticated disclosure laws list the restrictive covenants which have to be disclosed separately (e.g. Canada or Malaysia), other simply refer to "the general obligations of the franchisee" (e.g. Indonesia) or "conditions or limitations on the franchisee's business" (e.g. Korea).

#### (9) Descriptions of the obligations that the parties owe towards one another

Although there is a primary focus on information that has to be provided about the obligations of the franchisee, the obligations of the franchisor, in particular with regard to training and assistance during the pre-opening, but also regarding continuing support during the ongoing franchise relationship have to be disclosed to prospective franchisees.

#### (10) Purchase ties and personal involvement of franchisee

If the franchisee is required to purchase certain goods from the franchisor, then this generally has to be disclosed, even though it might not be specifically mentioned in the disclosure law, but would fall under the broad heading "obligations of the franchisee". The Canadian franchise legislation goes even a step further in that a franchisor not only has to disclose whether the franchisee has to purchase certain goods exclusively from it, but also any rebates on products that are sold on to the franchisee this way. In addition, any details about the franchisees personal involvement has to be given, if required under the franchise agreement (as in Brazil, Canada, Malaysia and Vietnam where this is a separate disclosure item).

### (11) Details about franchisor's IP rights

Only the following countries deal specifically with the disclosure of IP-related items: Brazil, China, Indonesia, Malaysia, Mexico, Taiwan and Venezuela.

### (12) Details of financing arrangements offered by the franchisor

Japan, Malaysia, Canada and Indonesia require the franchisor to disclose details about any financial arrangement offered to the prospective franchisee. In addition, a franchisor is also required in Japan to disclose whether it is prepared to provide financial assistance to a franchisee which finds itself in a difficult financial position.

### (13) Exclusivity

Most disclosure countries require the franchisor to specifically disclose whether the franchise granted is exclusive or non-exclusive and whether the franchisor retains the right to operate corporate units in the territory granted (like in Japan).

### (14) Unusual country specific disclosure items

In Brazil, franchisors have to give a profile of the "ideal" franchisee in the disclosure document, detailing in particular about its business experience and the educational background.

Under the Mexican franchise law, the franchisor has to provide detailed information about the method of calculation for determining profit margins and franchise commissions. This is a very burdensome requirement for franchisors.

In Taiwan, the franchisor has to give information about its management program in the franchisee's areas of operation.

## 6.2 Sanctions of non-compliance with disclosure requirements<sup>35</sup>

The consequences of failure to comply with the disclosure requirements vary. It generally entitles the franchisee to walk away from the agreement provided it acts within a reasonable period of entering into the agreement. Some jurisdictions also impose fines for failure to comply. Certain jurisdictions enable the government to take the initiative although most simply grant the right to remedy to the franchisee.

In Australia, for enforcing the disclosure requirements the ACCC relies upon receiving complaints from persons who consider that disclosure requirements have not been met. After the ACCC have investigated and found a breach of the Franchising Code of Conduct, it may seek administrative resolution, issue an infringement notice (a fine), seek enforceable undertakings or instigate court proceedings.

In Belgium, franchisees may apply to the courts for an order in respect of any failure to respect the mandatory pre-contractual legal requirements. If such an order is made within a period of two years after the signature of the contract, the court must annul the contract if the franchisee so requests. The court will require the franchisor to repay to

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<sup>35</sup> Source: Zeidman (2014)

the franchisee all royalties received as well as paying damages in respect of any loss and damage suffered by the franchisee

In Colombia, where there are no disclosure obligations, if the franchisee demonstrates that damage has been incurred because the franchisor omitted important information that could only be obtained through disclosure, termination and actual damages plus loss of profits may be obtained.

In Indonesia, there are no regulations regarding enforcement of the disclosure requirements, except the enforcement of the disclosure registration itself. An administrative sanction in the form of a written warning will be imposed on the franchisor or franchisee, or both, that does not comply with the prospectus and franchise agreement registration requirements. The written warning will be served a maximum of three times: each warning will be served two weeks after the date of the previous warning letter. A fine of up to 100 million rupiah will be charged if the franchisor or franchisee, or both, fail to respond to the registration requirements within two weeks of the third warning letter's expiry date.

In the United States, legal remedies for violations of disclosure requirements are regulated differently at federal and State levels. At federal level, Federal Trade Commission (FTC) rules do not grant aggrieved franchisees right to bring a legal action. Only the FTC itself can take action; it may bring civil actions, which seek monetary penalties, injunctive relief and consumer redress. The FTC can require rescission, reformation, payment of refunds or damages, or some combination of these. The FTC can also issue cease-and-desist orders for franchisors who fail to comply with franchise laws. Civil penalties for violations of FTC enforcement orders can be up to US\$11,000 for each violation. On the other hand, State registration or disclosure laws provide a private right of action for franchisees; these laws also authorize the state administrator directly, or through the state attorney general, to bring an action on behalf of the people of the state to enjoin unlawful acts or practices or to enforce compliance with the franchise laws. Available remedies under state franchise laws include denial or revocation of state franchise registration, consumer redress in the form of actual and sometimes consequential damages, or rescission, injunctions, civil penalties, and criminal sanctions for willful violations.

### 6.3 Timing of disclosure requirements<sup>36</sup>

The time at which disclosure must be given tends to range between 10 and 20 days before signing although this does vary in some jurisdictions. In Brazil the offering circular must be delivered to a prospective franchisee at least 10 days prior to the execution of a franchise agreement. Malaysia and Taiwan opt for the same period, whilst Korea requires only 5 days and other countries require longer. The Canadian states all require 14 days, China 20 days and Mexico a rather excessive 30 days. Japan and Indonesia lay down no minimum period of time. The trigger from which the due date for disclosure is calculated is generally the same. In Brazil, China, Mexico, Malaysia, Taiwan it is the execution of the franchise. However, in Vietnam it is the conclusion of the franchise contract.

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<sup>36</sup>Source: Abell, Hero and Toop (2012)

#### 6.4 Standard clauses in franchise contracts<sup>37</sup>

A number of countries insist that a franchise agreement contains certain standard clauses. There are a wide variety of approaches and no general trend or pattern can be identified other than a general desire for comprehensiveness.

In Indonesia, a franchise agreement must contain the following clauses:

- (a) The name, address and domicile of the company of each party;
- (b) The name and position of each party authorized to sign the agreement;
- (c) The name and type of right over intellectual property, invention or a unique business characteristic, for example a management system, a selling or display method or a distribution method which constitutes a special characteristic which is the object of a franchise;
- (d) The rights and obligations of each party and the aid and facility given to a franchisee;
- (e) The marketing area;
- (f) The period of the agreement and the method of and the requirements for the extension of the agreement;
- (g) The method for settling a dispute;
- (h) Mutually agreed basic provisions which may result in the termination or expiration of an agreement;
- (i) Compensation in the event of agreement termination;
- (j) The procedure for the payment of compensation;
- (k) The use of domestically produced goods or materials produced and supplied by small scale enterprises;
- (l) Nurturing guidance and training for franchises.

Malaysia takes a less detailed approach and simply prohibits discrimination between franchisees in respect of the charges offered or made for franchise fees, royalties, goods, services, equipment, rentals or advertising services if such discrimination will cause competitive harm to a franchisee who competes with a franchisee who receives the benefit of the discrimination, unless it can be objectively justified. It also requires that termination must be for good cause, be by written notice, and offer an opportunity to remedy a breach cited as cause for termination must be given. A franchisor refusing to renew or extend a franchise at the end of its term must compensate the franchisee if it does not waive the post termination restrictive covenants or give the franchisee six months prior notice of the termination or non-renewal.

#### 6.5 Minimum Term<sup>38</sup>

Only two jurisdictions impose a minimum term for the franchise agreement. Both take on a foreign trade investment approach to the regulation of franchising. In Malaysia the franchise agreement must be for a minimum period of five years. In Indonesia, in contrast to the provision in the former decree which stated that that a franchise agreement had be for a minimum period of 5 years, this period is now extended for Master Franchise Agreements to at least 10 years. Interestingly, the franchise business certificate which the registrant receives (the "Surat Tanda Pendaftaran Usaha Waralaba"

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<sup>37</sup>Source: Abell, Hero and Toop (2012)

<sup>38</sup>Source: Abell, Hero and Toop (2012)



(the 'STPUW') is only valid for 5 years, although it can be extended if the franchise agreement is still valid.

## 6.6 Registration requirements<sup>39</sup>

Some jurisdictions require the franchisor to register relevant details and the documentation with a government agency. In developing markets this seems to be to enable the government to monitor franchisors doing business in the market whilst in more developed economies (such as the USA and Spain) it is to ensure transparency and maintain a certain level of quality.

In China franchisors who sell franchises need to file relevant information with the competent commercial authority. If a franchisor wants to sell franchises in just one province, the information has to be filed at the local office of the MOFCOM of that province. For cross-province franchising the application has to be filed with MOFCOM itself. Registration has to be made within 15 days after the execution of the franchise agreement

In Russia, franchise agreements must be registered with the tax authorities which maintain the register of Commercial Concessions in order to be valid against third parties. Termination of a franchise agreement prior to its expiration must be registered by the franchisor.

In Indonesia, the franchise law provides that the franchisee rather than the franchisor must register the franchise agreement and disclosure statement within 30 days of the effective date of the franchise agreements. Failure to register results in the revocation of the franchisee's trade license

In Malaysia both the franchisor and the franchisee are required to become involved in the registration process. The franchise agreement, the letter of intent (which has replaced the disclosure document originally provided for), the operations manual, the training manual, a copy of the latest audited accounts and financial statements, and other documents must be registered with the Registrar of Franchises for approval before the franchisor can sell or offer to sell a franchise. The franchisee of a foreign franchisor must also register itself. The problem here is that approval can take up to six months so delaying the franchisor's ability to franchise considerably. Failure to register can result in penalties between and up to 5 years imprisonment. In addition to which the court can declare the franchise agreements null and void, order the franchisor to refund any payment obtained from the franchisee and prohibit the franchisor from entering into any new franchise agreement.

In Mexico although the disclosure document does not need to be registered with the government authorities, franchisors must record all franchise agreements at the Mexican Institute of Industrial Property on execution. The franchise agreement will not be registrable unless it is in writing and contains certain minimum provisions.

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<sup>39</sup>Source: Abell, Hero and Toop (2012)

## 7. Country case studies

The chapter contains case studies of six countries to show how their respective regulations address issues similar to those that can be found in the Vietnamese franchise law. The countries selected are Australia, Brazil, Indonesia, Philippines and two EU Member States, namely Belgium and France.

### 7.1 Australia

The franchising sector is primarily regulated by the *Competition and Consumer Act 2010* (CCA). The Franchising Code of Conduct (Franchising Code) is a mandatory industry code prescribed by regulation under the CCA. The Code was reviewed in 2013 and the a new Code, the “Competition and Consumer (Industry Codes—Franchising) Regulation 2014”, was adopted in 2014, which applies as from 1 January 2015.<sup>40</sup>

#### 7.1.1 Definition of franchising

Franchise is defined by the Code as including:

- (a) the rights and obligations under a franchise agreement;
- (b) a master franchise;
- (c) a subfranchise;
- (d) an interest in a franchise

Section 5 of the Code defines a **franchise agreement** as an agreement:

- “(a) that takes the form, in whole or part, of any of the following:
  - (i) a written agreement;
  - (ii) an oral agreement;
  - (iii) an implied agreement; and
- (b) in which a person (the **franchisor**) grants to another person (the **franchisee**) the right to carry on the business of offering, supplying or distributing goods or services in Australia under a system or marketing plan substantially determined, controlled or suggested by the franchisor or an associate of the franchisor; and
- (c) under which the operation of the business will be substantially or materially associated with a trade mark, advertising or a commercial symbol:
  - (i) owned, used or licensed by the franchisor or an associate of the franchisor; or
  - (ii) specified by the franchisor or an associate of the franchisor; and
- (d) under which, before starting or continuing the business, the franchisee must pay or agree to pay to the franchisor or an associate of the franchisor an amount including, for example:
  - (i) an initial capital investment fee; or
  - (ii) a payment for goods or services; or
  - (iii) a fee based on a percentage of gross or net income whether or not called a royalty or franchise service fee; or

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<sup>40</sup>The text of the Code can be accessed at <https://www.comlaw.gov.au/Details/F2014L01472>

- (iv) a training fee or training school fee;  
but excluding:
- (v) payment for goods and services supplied on a genuine wholesale basis; or
- (vi) repayment by the franchisee of a loan from the franchisor or an associate of the franchisor; or
- (vii) payment for goods taken on consignment and supplied on a genuine wholesale basis; or
- (viii) payment of market value for purchase or lease of real property, fixtures, equipment or supplies needed to start business or to continue business under the franchise agreement.”

In addition, each of the following is taken to be a franchise agreement:

- (a) the transfer or renewal of a franchise agreement;
- (b) the extension of the term or the scope of a franchise agreement;
- (c) a motor vehicle dealership agreement.

### 7.1.2 *Pre-contractual requirements/FDD*

The Code (Part2, Division 2) prescribes the following disclosure requirements before entry into a franchise agreement:

- 1) According to Section 8, the franchisor must create and maintain a disclosure document, which must be in the prescribed form, not only as to the information to be disclosed but also as to the layout of the document. Franchisors must update their disclosure document at least annually within four months of the end of each financial year.
- 2) Section 9 requires that the franchisor give the following documents to a franchisee or prospective franchisee:
  - (a) a copy of the Code; and
  - (b) a copy of the disclosure document; and
  - (c) a copy of the franchise agreement, in the form in which it is to be executed;
- 3) The timing of the disclosure is at least 14 days before the prospective franchisee:
  - enters into a franchise agreement or an agreement to enter into a franchise agreement; or
  - makes a non-refundable payment (whether of money or of other valuable consideration) to the franchisor or an associate of the franchisor in connection with the proposed franchise agreement.

The more than 20 pages long content description of the disclosure document<sup>41</sup> requires information on:

- 1) Information pertaining to the franchisor and its associates or directors, including address details;
- 2) Business experience
- 3) Litigation history;
- 4) Payments to agents for the recruitment of franchisees;

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<sup>41</sup>Annexure 1 of the Code.

- 5) Details of existing franchisees and details of the number of franchises transferred, terminated, not renewed, bought back by the franchisor and franchises that have ceased to operate (including details of past franchisees) for the preceding three financial years;
- 6) Master franchises;
- 7) Intellectual property ownership;
- 8) Franchise site or territory selection procedures;
- 9) Supply of goods or services to a franchisee;
- 10) Supply of goods or services by a franchisee;
- 11) Supply of goods or services—online sales;
- 12) Sites or territories;
- 13) Other payments;
- 14) Marketing or other cooperative funds;
- 15) Financing;
- 16) Unilateral variation of franchise agreement;
- 17) Arrangements to apply at the end of the franchise agreement;
- 18) Amendment of franchise agreement on transfer of franchise;
- 19) Earnings information;
- 20) Financial details.

In addition to the disclosure statement, Section 11 requires that franchisors must give prospective franchisees an “information statement” (in the form set out in the Annexure 2 of the Code), which summarizes key franchising “risks and rewards.

### *7.1.3 The Franchise Contract*

No compulsory content of franchise agreements is prescribed by regulations.

The Franchising Code of Conduct:

- prohibits franchisors from preventing franchisees from forming an association or associating with other franchisees;
- prohibits provisions in franchise agreements requiring a franchisee to sign a general release of the franchisor from liability towards the franchisee and a general waiver of representations; and
- requires that the complaint handling and dispute resolution procedure specified therein be included in the franchise agreement.

### *7.1.4 In-term relationship/conduct issues*

The new Code introduced the requirement that each party to a franchise agreement acts in “good faith” in respect of any matter regarding a franchise agreement (e.g. disputes) or the new Code. This obligation applies not only during the term of a franchise agreement, but also during pre-agreement discussions and negotiations and disputes after termination. Parties cannot “contract out” of the good faith obligation.

The Code adopts the common law meaning of “good faith”, but provides the following non-exhaustive list of matters which the court may take into account:

- Whether a party has acted honestly and not arbitrarily; and

- Whether a party cooperated to achieve the purposes of the agreement.

The Code specifies that the obligation does not prevent a party from acting in its own "legitimate commercial interest". It also states that the absence of a renewal / extension right in favour of the franchisee does not mean the franchisor has failed to act in good faith.

Some examples of conduct, which might be challenged in the context of the good faith obligation, include:<sup>42</sup>

- Conduct which is not in pursuit of legitimate commercial / business interests, such as conduct which is strategically motivated to put a franchisee out of business
- An arbitrary / unreasonable exercise of contractual discretion
- Conduct which effectively renders the franchisee's interest under the franchise agreement worthless
- Failure to give serious and genuine consideration to the other party's position in a negotiation
- Deliberate failure to disclose relevant information, for example in a dispute or pricing context
- The purported termination of a franchise agreement by relying on technical or minor breaches in circumstances where the breaches are not the real motive for the termination.

#### *7.1.5 Registration requirements*

There is no registration requirement of franchise or franchisor.

#### *7.1.6 Reporting requirements*

Franshisors or franchisees have no reporting obligationsneither vis-à-vis the ACCC nor other authorities.

The only reporting requirement is towards franchisees: the Code requires the franchisor to prepare and distribute an annual financial statement detailing all of the marketing fund's receipts and expenses for the financial year within four months of the end of the financial year and have that statement audited (unless 75 per cent of franchisees resolve otherwise within three months of the end of the financial year), and give a copy of the statement and the auditor's report to each franchisee within 30 days after preparing each.

#### *7.1.7 State administration*

The Australian Competition and Consumer Commission (ACCC) is the government agency that administers and enforces the Competition and Consumer Act and the Franchising Code of Conduct.

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<sup>42</sup><http://www.hunthunt.com.au/news-and-publications/cc/franchising-code-of-conduct>

### 7.1.8 Enforcement/Sanctions

Fines of up to AUD51'000 apply for certain breaches of the Code, including the “good faith” requirement and the obligation to create and maintain a disclosure document (and other disclosure document obligations). The ACCC can also issue infringement notices of AUD8'500 per breach.<sup>43</sup>

## 7.2 Brazil

In Brazil, the offer and sale of franchises is regulated by:

- the Franchise Law<sup>44</sup> (Law No 8.955 of 15 December 1994), with respect to disclosure requirements;
- the Industrial Property Law, which concerns the trademarks involved; and
- INPI Normative Act No. 135/1997 with respect to filing requirements and procedures.

### 7.2.1 Definition of franchising

According to the Franchise Law, business franchises are systems whereby franchisors grant franchisees – in exchange for certain direct or indirect remuneration, and not characterizing a labour bond – the right to use a trademark or patent along with exclusive or semi-exclusive distribution rights for products or services, and the possibility to have the right to use business deployment and administration technology, or operating systems developed or held by franchisor

### 7.2.2 Pre-contractual requirements/FDD

The Franchise Law sets out rules on the information that franchisors must disclose to potential franchisees before entering into any preliminary or definitive franchise agreement. According to the Franchise Law, the FDD (or “offering circular”) must be handed in writing, drafted in clear and accessible language, and contain details on the potential business. The FDD must include the following information:

- 1) The complete name of the franchisor and all related companies, as well as respective trade names; addresses for each named company; the business form; and a brief history;
- 2) Financial statements and balance sheets for the past two years;
- 3) Precise description of all pending litigation, worldwide, related to the franchise system which may affect the continuation of the franchise business. This includes suits involving the franchisor, related companies such as controlling companies or sub-franchisors, and owners of licensed trademarks, patents, and copyrights;
- 4) Detailed description of the franchise with a general description of the business activities to be performed by the franchisee;
- 5) Detailed description of the “ideal franchisee,” including education and experience, as well as mandatory and preferred characteristics;

<sup>43</sup><http://www.hunthunt.com.au/SiteMedia/W3SVC1265/Uploads/Documents/2014-11Franchising.pdf>

<sup>44</sup>The text of the franchising law can be accessed at [http://www.planalto.gov.br/ccivil\\_03/leis/18955.htm](http://www.planalto.gov.br/ccivil_03/leis/18955.htm)

- 6) Requirements for the franchisee's direct involvement in the operation and administration of the business;
- 7) Total estimated initial investment for acquisition, installation, and startup of franchise operations; amount of initial fees (membership, affiliation, franchise fee, security deposit, guaranty, etc.); estimated value of the premises, equipment, and initial stock; and payment terms;
- 8) Clear information on any periodic fees or other amounts payable by the franchisee to the franchisor or a third party, with a description of the rights, products, or services for which the fees are paid. The information must include any relevant calculations or formulae, and specifically indicate:
  - Royalties-periodic compensation for use of the system, the trademark, or services provided by the franchisor;
  - Equipment rental or lease of premises;
  - Advertising fee, or any similar payment;
  - Minimum insurance, and any other amounts owed that are linked to it;
- 9) Complete list of all franchisees, sub-franchisees, and sub-franchisors, including any that left the system within the last twelve months, with name, address, and phone number;
- 10) Whether the franchisee is guaranteed exclusivity or right of first refusal in any particular territory or activity and, if so, under what conditions; whether the franchisee will have the right to sell products or provide services outside its territory or outside of Brazil;
- 11) Detailed information regarding franchisee's requirement purchase goods, services, or materials deemed necessary for establishment, operation, or management of the franchise from suppliers designated and approved by the franchisor, including a complete list of those suppliers;
- 12) Description of products and services offered by the franchisor to the franchisee with respect to:
  - Supervision of the chain;
  - Orientation or guidance in how to operate the business, and other services to the franchisee;
  - Franchisee training, including content, duration, and cost;
  - Training of franchisee's employees;
  - Franchise manuals;
  - Assistance with analysis and selection of location for franchise;
  - Layout and architectural plans for the facility;
- 13) Status of National Institute of Industrial Property (INPI) registration for any trademarks or patents franchisee will be authorized to use;
- 14) Existence of post-agreement non-disclosure requirements for trade secrets or business knowledge the franchisee will have access to during the operation of the franchise, as well as post-agreement non-compete requirements;
- 15) Model standard franchise agreement and a standard preliminary franchise agreement, if applicable, with full text, including exhibits and expiration dates.

Franchisees must receive the FDD at least 10 days before they execute a definitive or preliminary franchise agreement, or pay any fees to franchisor or to any company or person related to the franchisor. The Law does not provide for an updating obligation.

There is no requirement in the Franchise Law that the document be in Portuguese.

### *7.2.3 The Franchise Contract*

There are no requirements as to the content of the franchise agreement.

### *7.2.4 In-term relationship/conduct issues*

The Franchise Law does not contain any relationship provisions.

The ongoing relationship between franchisor and franchisee are regulated by the franchise agreement and general principles of Brazilian law in all material aspects that may affect such relationship (i.e., civil, criminal, tax, etc.).

### *7.2.5 Registration requirements*

There are no specific registration requirements targeting franchises as such.

Recording (registering) cross-border franchise agreement with the INPI is not required, but is recommended. Recordation enables the agreement to be enforceable against third parties, enables remittance of royalties out of Brazil and allows franchisee to deduct such royalties as operational expenses for income tax purposes. In addition, it serves as prima facie evidence of Brazilian antitrust compliance.

INPI filing procedures may be pursued by the foreign franchisor or by the local franchisee. According to the Industrial Property Law, the INPI shall have 30 days to review the registration request and render a final decision. In reviewing franchise agreements, the INPI considers aspects pertaining to tax, foreign trade, foreign exchange, profit distribution, antitrust and other legislation. They check whether royalties charged are compatible with international market standards and provide advice to the parties, when required. Once approved by the INPI, the franchise agreement must be registered with BACEN to enable franchisees to remit royalties out of Brazil.

The FDD is not required for recordation, only a Statement of Delivery. This is important because the recordation documents are part of the public record, but the FDD remains private. The Statement should include a declaration by the franchisee that the FDD was received in accordance with the Franchise Law.

### *7.2.6 Reporting requirements*

There are no reporting requirements.

### *7.2.7 State administration*

INPI is the government entity responsible for matters involving industrial property rights, examination of trademark applications, issuance of letters patent, certification of licensing agreements involving industrial property rights, and registration of domestic and cross-border franchise agreements.

### *7.2.8 Enforcement/Sanctions*



Brazilian governmental bodies with jurisdiction over franchise agreements (i.e. the INPI and BACEN, as the case may be) do not have specific powers to enforce disclosure requirements. In case of breach, franchisees shall turn to courts or arbitration.

### 7.3 Indonesia<sup>45</sup>

Franchising in Indonesia has been regulated since 1997. Recent changes to the franchise regulations contain some controversial and prima facie protectionist rules, which may have an adverse impact on foreign trade. The offer and sale of franchises are currently regulated by the following acts:

- Government Regulation No. 42 of 2007 dated 23 July 2007 on Franchising (Regulation No. 42) and its implementing regulation;
- Regulation of the Minister of Trade No. 53/M-DAG/PER/8/2012 dated 24 August 2012 on Implementation of Franchising (Regulation No. 53);
- Decree of the Director General of Domestic Trade No. 138/PDN/KEP/10/2008 dated 31 October 2008 on the Technical Guidelines for the Implementation of Franchising (Decree No. 138);
- Modern Store Franchising (Regulation Number 68/M-DAG/PER/10/2012 – Regulation 68) of the Minister of Trade; and
- The Development of Partnerships in Franchising for Food and Beverages Services Business Activities (Regulation Number 07/M-DAG/ PER/2/2013 – Regulation 07) of the Minister of Trade.

Preconditions of franchising include that the franchisor must have been in business for five years. Its franchise business must still be in operation and must be profitable. A franchisee that has been granted the right to sub-franchise must have at least one company-owned operation.

#### 7.3.1 *Definition of franchising*

The Order Implementing the Medium-mall Retail Business Act of the Minister of Trade (Article 1(1)) defines a franchise as “an agreement in which one party is given the right to utilize and/or use the right over the intellectual property or invention or unique business characteristics owned by another party against a fee on the basis of the requirements stipulated by the said other party in the framework of providing and/or selling goods and/or services.”

#### 7.3.2 *Pre-contractual requirements/FDD*

Prior to entering into a franchise agreement, a franchisor must provide a prospectus disclosing its business data or information to a franchisee at least two weeks before the execution of the franchise agreement.

As a minimum, the following information must be included in the disclosure document:

- the identity of the franchisor, covering information provided in the identity cards or passports of shareholders, commissioners and board of directors (if the franchisor is a business entity);

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<sup>45</sup> Kartakusuma and Teguh (2014)

- the business legality of the franchisor, covering information on the franchisor's business license;
- the business history of the franchisor, covering information regarding the establishment of the franchisor, business activities and the development of the franchisor's business;
- the organizational structure of the franchisor, covering the management hierarchy, from commissioners, shareholders and board of directors to the organizational structure of the operating division;
- the audited balance sheet for the past two years;
- the number of franchise businesses, covering the number of outlets owned by the franchisor;
- the list of franchisees; and
- the rights and obligations of:
  - the franchisor, such as the right to receive royalties and the obligation to provide continuous assistance to the franchisee; and
  - the franchisee, such as the right to use the franchisor's intellectual property rights or business characteristics and the obligation to keep confidential the intellectual property rights and business characteristics.

There is no continuing disclosure obligation, but in practice it is advisable to continuously send updates for the disclosure document to each prospective franchisee and the MOT.

The disclosure document may be in English. If the FDD is made in a foreign language, an Indonesian version of the same must be prepared. As required under Regulation 53, a sworn translator in Indonesia must translate the prospectus into Bahasa Indonesia. Both the foreign and the Indonesian versions must be signed by the franchisor and franchisee.

### 7.3.3 *The Franchise Contract*

A franchise agreement must contain the following clauses:

- (a) The name, address and domicile of the company of each party;
- (b) The name and position of each party authorized to sign the agreement;
- (c) The name and type of right over intellectual property, invention or a unique business characteristic, for example a management system, a selling or display method or a distribution method which constitutes a special characteristic which is the object of a franchise;
- (d) The rights and obligations of each party and the aid and facility given to a franchisee;
- (e) The marketing area;
- (f) The period of the agreement and the method of and the requirements for the extension of the agreement;

- (g) The method for settling a dispute;
- (h) Mutually agreed basic provisions which may result in the termination or expiration of an agreement;
- (i) Compensation in the event of agreement termination;
- (j) The procedure for the payment of compensation;
- (k) The use of domestically produced goods or materials produced and supplied by small scale enterprises;
- (l) Nurturing guidance and training for franchises.

The regulations do not require a minimum term for a franchise agreement, and although the regulations state that the validity of the Franchise Registration Certificate (*Surat Tanda Pendaftaran Waralaba* or STPW) is five years, a term of less than five years is acceptable by MOT and STPW will be adjusted to mirror the term stated in the franchise agreement.

In general, the parties should provide in the franchise agreement the circumstances that may give rise to termination of the franchise relationship. Under article 1266 of the ICC, a party may not unilaterally terminate an agreement without the consent of the competent court. Consequently, the franchise agreement should provide a clause waiving article 1266 of the ICC and allowing unilateral termination, by reason of breach, default or any other reason. The franchise agreement may also be terminated with the consent of both parties.

Like the disclosure document, the franchise agreement may be in English. If it is made in a foreign language, an Indonesian version of the same must be prepared. As required under Regulation 53, the franchise agreement must be translated into the Indonesian language by a sworn translator in Indonesia. Both the foreign and the Indonesian versions must be signed by the franchisor and franchisee.

Law No. 24 of 2009 on the National Flag, Language, Emblem, and Anthem enacted on 9 July 2009 (Law No. 24 of 2009) stipulates that the Indonesian language must be used in, among other things, agreements entered into by Indonesian parties. If the agreement involves foreign parties (such as a foreign franchisor and an Indonesian franchisee), the agreement can be executed in dual language (namely, using Bahasa Indonesia and the language of the relevant foreign party or the English language). Further, Law No. 24 of 2009 provides that if a contract entered into by foreign and Indonesian parties is executed in dual language, all versions have the same validity as the original.

Clean-Break Statement: where a franchise agreement is terminated early, the MOT will require a "Clean-Break Statement" (CBS) before it will deregister the franchise. A CBS is basically a declaration by the franchisor and franchisee that they have no outstanding obligations to each other. Where no CBS is available, a final court decision is needed in its place. If the franchise is exclusive, then another franchisee cannot register an exclusive franchise agreement for the same goods or services in the same territory, and cannot legally operate, until that deregistration has been completed.

#### 7.3.4 *In-term relationship/conduct issues*

Under Regulation 53 a franchisor may not appoint a franchisee with which it has a direct or indirect control relationship. Such measures mean that this would be a relationship with common shareholders rather than a management relationship. Hence, a franchisor

cannot appoint a subsidiary or affiliate as its franchisee. Further, both franchisor and franchisee can only operate in business activities specified in their business licenses, i.e. the franchise business should be the line of business specified in their corporate documents (articles of association or bylaws) and the technical licenses issued by the relevant technical ministry.<sup>46</sup>

Indonesian competition law is not applicable to franchise relationships as franchises are exempt from the provisions of Indonesia's Antitrust and Unfair Business Competition Law (article 50B of Law No. 5 of 1999 on the Prohibition against Monopolistic Practices and Unfair Business Competition). The Indonesian Supervisory Commission on Business Competition (the Commission) has formulated franchise guidelines (Regulation No. 6 of 2009 on Guidelines for Exemptions from the Implementation of the Anti-Monopoly Practices and Unfair Business Competition Law for Agreements Related to Franchises (Guidelines)). The Guidelines serve as a clarification of article 50B that deals with matters relating to agreements for intellectual property such as franchising, licensing, patent, trademark, copyright, industrial designs, integrated circuits and trade secrets. Franchise agreements must not contain provisions that may result in monopolistic and unfair business practices.<sup>47</sup>

### *7.3.5 Registration requirements*

Registration is required for the franchisor and the FDD.

A franchisor must register with the Ministry of Trade (MOT) before it enters into a franchise agreement with a franchisee. As part of the registration process, the franchisor must submit to the MOT an application form, together with the FDD and the proposed franchise agreement.

An application form must be submitted with a copy of the prospectus and details of the franchisor's business legality. Regulation No. 53 requires that for the prospectus to be registered with the MOT it must be legalized by a notary public, with an attached statement or reference letter issued by the relevant trade attaché or Indonesian consulate in the home country of the franchisor. Also, a prospectus in a foreign language must now be sworn translated into the Indonesian language. The information provided in the application for a franchisor certificate includes, among other things, the franchisor's name, country of origin, franchised products or services, types of intellectual property rights owned and the name of the person responsible for the franchisor and his or her contact details.

If MOT approves the form and content of the Application, it will issue a Franchise Registration Certificate (STPW) valid for five years, which may be renewed every five years for the same term.

The franchisee must apply for a franchise operating license by registering the franchise agreement and the registered disclosure document with the Directorate General of Domestic Trade of MOT, following signature of the franchise agreement.

See Clean-Break Statement in 7.3.4 for deregistration.

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<sup>46</sup> Kartakusuma and Teguh (2014)

<sup>47</sup>Idem.

### *7.3.6 Reporting requirements*

All franchisors and franchisees contracting with foreign franchisors must submit annual business activity reports to the Ministry of Trade, while franchisees contracting with foreign sub-franchisors, domestic franchisors, or domestic sub-franchisors submit reports to the local trade office. - See more at: <http://www.legal500.com/c/indonesia/developments/21506#sthash.3NNJzHbS.dpuf>

In particular, Article 10 of Regulation 68 requires that “Franchisor and Franchisee for Modern Store business type must report any changes in the number of outlets/stores owned and managed by them (company owned outlets) and/or franchised to the Director General of Domestic Trade with attention to Director of Trading Business Development of Ministry of Trade with a copy to the Head of Agency who responsible for trade at the provincial and district/municipality.”

Also, Regulation 58 requires franchisors and franchisees in the restaurant, diner, bar/tavern or cafe business to report to the Ministry of Trade any change in the number of outlets that are self-owned and self-managed, franchised or opened through a capital participation system.

### *7.3.7 State administration*

The Ministry of Trade is in charge of managing franchise regulations, registration of franchisors and FDDs, issuance of licenses, and enforcement of restrictions (see trade restriction in 7.3.9 below).

### *7.3.8 Enforcement/Sanctions*

There are no regulations regarding enforcement of the disclosure requirements, except the enforcement of the disclosure registration itself. An administrative sanction in the form of a written warning will be imposed on the franchisor or franchisee, or both, that does not comply with the prospectus and franchise agreement registration requirements. The written warning will be served a maximum of three times: each warning will be served two weeks after the date of the previous warning letter. A fine of up to 100 million rupiah will be charged if the franchisor or franchisee, or both, fail to respond to the registration requirements within two weeks of the third warning letter’s expiry date.

The franchise law does not provide for remedy for the franchisee. Any remedy the franchisee wishes to have should be provided in the franchise agreement.

Remedies specified in the contract are not the sole and exclusive remedies to which a party is entitled in the event of a breach. There are also provisions in the ICC that allow a party to claim for losses suffered outside any contractual relationship,

### *7.3.9 Trade regulations in franchising*

Indonesia is among the very few countries that impose restrictions on foreign franchising with the intent to provide protection to local production of goods and restrict the presence of foreign franchisors in the distribution sector.

Regulation of the Minister of Trade No. 53/M-DAG/PER/8/2012 regarding the Implementation of Franchising (“Regulation 53”) entered into force in August 2012 has the objective to increase the participation of local SMEs in franchise supply chains, among others by reducing importation and increase local manufacturing and supply of goods and services in the franchise sector.

Regulation 53 requires franchisors to cooperate with local small and medium businesses (SMEs) as franchisees or suppliers, if they can satisfy the franchisor’s requirements. Regulation 53 imposes a requirement on franchisors and franchisees to use “local components for at least 80% of the raw materials, business equipment and merchandise used in the franchise” (the “80% Rule”), which will be measured by number of items (not by value).<sup>48</sup> This “domestic product” requirement has caused concern for international franchisors, particularly those with a product driven franchise system, which relies on the ability to import products into Indonesia.<sup>49</sup>

According to Regulation 53 compliance with these requirements is to be ensured by submitting an annual report by the franchisor and the franchisee to the Ministry of Trade, which will be evaluated by an “Assessment Team”.

The minister of trade may exempt a franchise from this requirement in certain cases, based on the recommendation of the Assessment Team. In certain cases, the franchise business may also sell up to 10% supplementary goods out of their total offered items. However, there are no further guidelines on how the cooperation with SMEs is to be implemented, or how the recommendation will be issued or what may be considered ‘certain cases’. The satisfaction of those requirements by the parties to a franchise arrangement should be provided in the annual report submitted by the franchisor and franchisee to the Ministry of Trade.<sup>50</sup>

Other specific franchise regulations impose limitations on the number of outlets managed or owned by a franchisor and a franchisee:<sup>51</sup>

Restrictions on Modern Store Outlets: Regulation 68 provides that a single company cannot have more than 150 company-owned outlets. Additional outlets may be established if 40% of the additional outlets are franchised to a local micro, small or medium enterprise (MSME). This means that for every 10 additional outlets, four must be franchised to an MSME. However, this restriction applies only to modern store outlets that are minimarkets (up to 400 m<sup>2</sup> of store space), supermarkets (up to 1,200 m<sup>2</sup> of space) and department stores (up to 2,000 m<sup>2</sup> of space). Large-scale modern stores such as hypermarkets and wholesalers are exempt.<sup>52</sup>

Restrictions on F&B Outlets: Regulation 07 limits the number of self-managed or owned outlets for franchisors and franchisees in the F&B businesses (restaurants, bars, and cafés) to a maximum of 250 outlets. Any additional outlets must either be franchised or operated by way of cooperation with capital participation. Additional outlets must be

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<sup>48</sup>Idem.

<sup>49</sup> Payne and Drakes (2013)

<sup>50</sup> Kartakusuma and Teguh (2014)

<sup>51</sup> Idem.

<sup>52</sup><http://www.nortonrosefulbright.com/knowledge/publications/120793/franchises-in-indonesia-ten-things-to-know>

franchised to a local MSME. If, however, a franchisor or franchisee wants additional company-owned outlets, then it can use a capital investment structure and invite a local MSME to inject capital in these additional outlets. The MSME must inject (i) at least 40% of total capital investment in outlets requiring capital of less than 10 billion rupiah, and (ii) at least 30% of total capital investment in outlets requiring capital in excess of 10 billion rupiah.<sup>53</sup>

In order to protect smaller enterprises, a franchise business may not be conducted unless the city or area has been “opened” specifically for franchise activities by the Ministry of Trade. (This regulation does not apply to provincial capitals.) The precise location of franchise activities (whether in a traditional market or in a modern shopping mall) is also regulated, as is the ability to appoint franchisees for the same products or services on adjacent sites at a particular location.<sup>54</sup>

## 7.4 The Philippines

There is no franchise-specific legislation in the Philippines. The Intellectual Property Code, particularly as it covers technology transfer arrangements (TTAs), is, however, made applicable to franchise agreements. Aside from the Intellectual Property Code, the Civil Code applies to franchise agreements. Book IV of the Civil Code on Obligations and Contracts provides the applicable provisions concerning the execution, validity, interpretation and enforcement of contracts including franchise agreements. Also applicable is the competition law, which takes a restrictive view of many restrictions, imposed on vertically integrated relationships such as franchising and so clauses imposing full line forcing and product ties are restricted.<sup>55</sup>

### 7.4.1 Definition of franchising

As there are no franchise-specific regulations in the Philippines, there exists no legal definition of a franchise. However, the “Advisory on Due Diligence to be Undertaken by a Prospective Franchisee” (DTI Advisory) of the DTI defines a franchise agreement as:

*“a written contract or agreement between two or more parties by which a Franchisor grants the Franchisee the right to engage in the business of offering, selling or distributing goods or services under a marketing plan/system/concept, for a certain consideration. Unless otherwise provided, said right includes the use of a trademark, service mark, trade name/business name, know-how, logo-type advertising, or other commercial symbols associated with a particular business.”*

As franchise agreements are considered TTAs, the definition of the latter is relevant. TTAs are contracts or agreements involving the transfer of systematic knowledge for the manufacture of a product, the application of a process, or rendering of a service including management contracts; and the transfer, assignment or licensing of all forms of intellectual property rights, including licensing of computer software except computer software developed for mass market.<sup>56</sup>

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<sup>53</sup>Idem.

<sup>54</sup> Kartakusuma and Teguh (2014)

<sup>55</sup> Certeza (2015)

<sup>56</sup> Negre and Solivas-Dayacap (2014)

#### 7.4.2 Pre-contractual requirements/FDD

There is no mandated FDD per se in the Philippines.

Under the provisions of the Civil Code and established jurisprudence, a party must disclose to the other party any “material fact” during contract negotiations. If it is proven that the other party would not have entered into the contract had it known about the undisclosed material fact, the courts have ruled that there is a failure of consideration that absolves the innocent party from compliance. Furthermore, the Civil Code also requires that every person must, in the exercise of his or her rights and in the performance of his or her duties, act with justice, give everyone his or her due, and observe honesty and good faith. This duty to act in good faith carries with it the corresponding duty, during contract negotiation, to disclose to the other party anything that would materially affect the party’s consent to the contract.<sup>57</sup>

#### 7.4.3 The Franchise Contract

Franchise agreements are considered as technology transfer arrangements (TTAs).<sup>58</sup> Any contract awarding a franchise to an entity in the Philippines must take into account the provisions of Republic Act 8293 (the Intellectual Property Code).<sup>59</sup> The IP law enumerates several provisions, termed ‘prohibited clauses’, as being anti-competitive and that therefore should not be allowed in TTAs. It also prescribes certain contractual provisions that must appear in TTAs. A violation of any of the two previous provisions makes the TTA unenforceable.

The prohibited clauses are listed in Section 87 of the IP Code. This reads as follows:

*“Section 87. Prohibited Clauses. - Except in cases under Section 91, the following provisions shall be deemed prima facie to have an adverse effect on competition and trade:*

*87.1. Those which impose upon the licensee the obligation to acquire from a specific source capital goods, intermediate products, raw materials, and other technologies, or of permanently employing personnel indicated by the licensor;*

*87.2. Those pursuant to which the licensor reserves the right to fix the sale or resale prices of the products manufactured on the basis of the license;*

*87.3. Those that contain restrictions regarding the volume and structure of production;*

*87.4. Those that prohibit the use of competitive technologies in a non-exclusive technology transfer agreement;*

*87.5. Those that establish a full or partial purchase option in favor of the licensor;*

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<sup>57</sup> Certeza (2015)

<sup>58</sup> Idem.

<sup>59</sup> [http://www.lawphil.net/statutes/repacts/ra1997/ra\\_8293\\_1997.html](http://www.lawphil.net/statutes/repacts/ra1997/ra_8293_1997.html)



*87.6. Those that obligate the licensee to transfer for free to the licensor the inventions or improvements that may be obtained through the use of the licensed technology;*

*87.7. Those that require payment of royalties to the owners of patents for patents which are not used;*

*87.8. Those that prohibit the licensee to export the licensed product unless justified for the protection of the legitimate interest of the licensor such as exports to countries where exclusive licenses to manufacture and/or distribute the licensed product(s) have already been granted;*

*87.9. Those which restrict the use of the technology supplied after the expiration of the technology transfer arrangement, except in cases of early termination of the technology transfer arrangement due to reason(s) attributable to the licensee;*

*87.10. Those which require payments for patents and other industrial property rights after their expiration, termination arrangement;*

*87.11. Those which require that the technology recipient shall not contest the validity of any of the patents of the technology supplier;*

*87.12. Those which restrict the research and development activities of the licensee designed to absorb and adapt the transferred technology to local conditions or to initiate research and development programs in connection with new products, processes or equipment;*

*87.13. Those which prevent the licensee from adapting the imported technology to local conditions, or introducing innovation to it, as long as it does not impair the quality standards prescribed by the licensor;*

*87.14. Those which exempt the licensor for liability for non-fulfilment of his responsibilities under the technology transfer arrangement and/or liability arising from third party suits brought about by the use of the licensed product or the licensed technology; and*

*87.15. Other clauses with equivalent effects. (Sec. 33-C (2), R.A 165a)."*

The mandatory clauses are contained in Section 88 of the IP Code, which reads as follows:

**"Section 88. Mandatory Provisions.** - *The following provisions shall be included in voluntary license contracts:*

*88.1. That the laws of the Philippines shall govern the interpretation of the same and in the event of litigation, the venue shall be the proper court in the place where the licensee has its principal office;*

*88.2. Continued access to improvements in techniques and processes related to the technology shall be made available during the period of the technology transfer arrangement;*

*88.3. In the event the technology transfer arrangement shall provide for arbitration, the Procedure of Arbitration of the Arbitration Law of the Philippines or the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) or the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC) shall apply and the venue of arbitration shall be the Philippines or any neutral country; and*

*88.4. The Philippine taxes on all payments relating to the technology transfer arrangement shall be borne by the licensor. (n)”*

#### *7.4.4 In-term relationship/conduct issues*

The Civil Code of the Philippines is the main repository of laws relating to contracts and the obligations of parties related thereto. Since there are no franchise-specific laws defining and establishing the relationship of the parties in the Philippines, franchising is mainly a creature of contracts. As such, the Civil Code provisions on obligations and contracts apply to franchise agreements.<sup>60</sup>

Articles 19 and 1159 of the Civil Code impose a duty of good faith on the franchise relationship.

#### *7.4.5 Registration requirements*

While the IP Code, as it deals with TTAs, does not require prior registration of the same, it nonetheless requires that those containing any of the prohibited provisions mentioned in the law or otherwise fail to contain the mandatory provisions must be registered and approved by the Documentation, Information and Technology Transfer Bureau, otherwise the TTA shall be automatically considered unenforceable.<sup>61</sup>

#### *7.4.6 Reporting requirements*

There is no reporting requirement.

#### *7.4.7 State administration*

Not applicable.

## **7.5 Belgium**

There is no legislation in Belgium that specifically governs franchise agreements. Therefore, franchise agreements are regulated by ordinary Belgian law of contract (mainly under the Belgian Civil Code) and are subject to national and EU rules on competition law.<sup>62</sup>

The most important statutes are the Law of 6 April 2010 Relating to Market Practices and Consumer Protection, and the Law on the Protection of Economic Competition

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<sup>60</sup> Certeza (2015)

<sup>61</sup> Idem.

<sup>62</sup> Clevenbergh, Fierens, Verborgh, and Lang (2015)

consolidated on 15 September 2006 and modified by the provisions of the Law of 6 May 2009 making general amendments. These laws transpose into Belgian statute the applicable EU legislation.<sup>63</sup>

The only area in which franchising is specifically regulated is the pre-contractual phase. These regulations are stipulated in the Disclosure Law (made part of Section 2 of Book X of the Belgian Economic Code). The legislator did not mention franchising as such in the Disclosure Law, instead it refers to “commercial partnership agreements” in general.<sup>64</sup>

### 7.5.1 *Definition of franchising*

There is no definition of “franchise” in statute law. According to jurisprudence, a franchise involves the distribution of goods and services in any network using a common trademark, together with know-how transmitted to the franchisees while foreseeing that certain (technical) assistance will be given by the franchisor for the benefit of all the franchisees.<sup>65</sup>

The “Law relative to pre-contractual information in the framework of agreements of commercial partnership” (in force as of 1 February 2006) uses the following definition of commercial partnership:

*“The present law applies to agreements of commercial partnership concluded between two parties, who each act in their own name and own interest, whereby one of the parties concedes to the other party the right, in return for a fee of any nature, direct or indirect, to use in view of the sale of products or the providing of services, a commercial formula (“system”) which includes one or more of the following:*

- *a common brand,*
- *a common commercial name,*
- *the transfer of know-how,*
- *the providing of commercial or technical assistance.”*

### 7.5.2 *Pre-contractual requirements/FDD*

Belgium has one of the most draconian franchise regulations in the European Union. The pre-contractual disclosure requirements include the provision of a detailed market analysis by the franchisor, even if it is based outside of the country.

The Law on Pre-Contractual Information regarding Agreements to Form a Commercial Business Relationship (the Law of 19 December 2005) regulates the pre-contractual information that must be provided by all franchisors to candidate franchisees at least one month before the signature of the contract. The Law requires that a draft contract and a pre-contractual information document must be provided setting out certain information in accordance with a mandatory list. Failure to respect the requirements of the Law will entitle the franchisee to invoke nullity of the contract for a period of two years starting from the date of signature of the contract. There are no particular requirements concerning the franchisor company’s own experience, either as regards a

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<sup>63</sup> Demolin, Demolin, Simpelaere, and Hawkes (2014)

<sup>64</sup> Clevenbergh, Fierens, Verborgh, and Lang (2015)

<sup>65</sup> Demolin, Demolin, Simpelaere, and Hawkes (2014)

minimum number of company-owned operations or a minimum period for establishment of franchisor company-owned operations.

The Law sets out the information that must be given to the franchisee at least one month before the signature of the contract. This information is given in a pre-contractual information document (PID) prepared by the franchisor, which is valid for the duration of the contract. New disclosures must be made, in the required form, at least one month before the signature of any renewal of the contract.

Besides the draft franchise contract itself, a PID has to be provided that is divided into two parts. The first part must set out the “main contractual obligations” of the yet-to-be-concluded franchise agreement, such as the remuneration of the franchisor (royalties, etc.), the consequences of the franchisee’s failure to comply with its obligations, the conditions for renewal, the non-competition restrictions, etc. The second part of the PID aims to give the prospective franchisee the necessary information for it to make a correct assessment of the commercial opportunity. This requires disclosure of certain information such as the history and state and ‘perspectives on the market’ from both a local and general point of view, history and experience of the franchise network, perspectives on the expansion of the network, etc. The main new feature of the PID is that the franchisor must disclose not only its ‘direct remuneration’, but also how its ‘indirect remuneration’ is calculated. Indirect remuneration is the amount it receives from third parties in relation to the franchise agreement (e.g., the principle of a margin on the products sold by the franchisor to the franchisee).<sup>66</sup>

The items to be included in the PID are the following:<sup>67</sup>

(1) The important contractual provisions, insofar as they are to be included in the commercial relationship, namely:

- whether or not the franchise agreement is concluded *intuitu personae* (i.e., in consideration of the active participation of particular natural person(s));
- the obligations (i.e., the significant contractual terms);
- the consequences of a breach of the contractual terms (e.g., failure to achieve a contractual commercial target);
- the manner of calculating the fee(s) owed by the franchisee, and how that calculation may be revised during the course of the contract and at its renewal;
- any non-compete clauses, their duration and conditions;
- the length of the franchise agreement and the conditions for its renewal;
- the conditions of notice and of termination of the franchise agreement, notably in relation to expenses incurred and investments made;
- the right of pre-emption or the purchase option of the party granting the franchise, and the rules for determining the value of the business at the time that this right or option is exercised; and
- the exclusive rights reserved by the franchisor.

(2) Facts contributing to the correct understanding of the franchise agreement:

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<sup>66</sup> Clevenbergh, Fierens, Verborgh, and Lang (2015)

<sup>67</sup> Demolin, Demolin, Simpelaere, and Hawkes (2014)

- the name or correct designation of the party conceding the franchise as well as its contact references;
- if the contract rights are being granted by a corporate person, the identity and the status of the physical person acting on its behalf;
- the nature of the activities of the party conceding the franchise;
- the intellectual property rights whose use is being granted;
- where available, the annual accounts of the last three accounting years of the party granting the franchise;
- the franchisor's experience of operating the franchise, and its experience of operating the commercial formula independently of any franchise agreement;
- the history, current status and future prospects of the relevant commercial market on which the activities are exercised, both from a general and local point of view;
- the history, current status and future prospects of the franchise network's market share, both from a general and local point of view;
- for each of the last three years, as the case may be, the number of franchises belonging to the Belgian and international network, as well as the expansion prospects for the network;
- for each of the last three years, as the case may be, the number of franchise agreements signed, the number of agreements terminated at the initiative of the franchisor, the number of agreements ended by franchisees, as well as the number of agreements that were not renewed at the end of their term; and
- the expenses that the franchisee agrees to incur and investments it agrees to make at the beginning and during the course of the agreement, detailing their amount, purpose and their depreciation term, the investment timetable and how these amounts will be treated at the end of the contract.

### *7.5.3 The Franchise Contract*

There is no legislation in Belgium imposing the inclusion of certain mandatory clauses in franchise agreements.

### *7.5.4 In-term relationship/conduct issues*

There are no specific laws regulating the ongoing relationship between franchisor and franchisee after the franchise contract comes into effect.

### *7.5.5 Registration requirements*

Under Belgian law, no specific registration requirements apply to franchise agreements.

### *7.5.6 Reporting requirements*

None.

### *7.5.7 State administration*

There are no specific regulatory authorities that are entrusted with regulating franchising.

## 7.6 France

France was the first European country to adopt a franchise-specific law – the *loi* Doubin – although paradoxically, it does not actually use the word franchising.<sup>68</sup> As in the case of Belgium, national franchise regulations are subject to EU rules on competition law.

### 7.6.1 Definition of franchising

There is no legal definition of a franchise in French law. Nevertheless, franchising is viewed, generally speaking, as the “reiteration of a commercial success”. According to case law and to various legal commentators, a franchise may be defined as an agreement by which two independent companies or persons proceed to cooperate, in such a way that one of them (the franchisor) provides the other (the franchisee) with its distinctive signs (trademark, commercial sign), original and permanently improved know-how and ongoing commercial and technical assistance.<sup>69</sup>

The definition of franchise of in the European Code of Ethics for Franchising (see in point 3.2.3.1 above), adopted by the French Franchise Federation may be taken into consideration by French courts.<sup>70</sup>

### 7.6.2 Pre-contractual requirements/FDD

Article L330-3 of the French Commercial Code requires any party who makes available to another person a trade name, trademark or trade sign in consideration of an exclusivity or quasi-exclusivity commitment by the other party, to provide to that other party at least 20 days before the execution of a contract a document giving accurate information allowing the other party to make an informed commitment. Because a franchisor will in most cases require the franchisee to trade under its distinctive signs on an exclusive basis and sometimes by procuring most of its products or services from the franchisor or parties designated by the franchisor, this provision applies almost systematically to franchising transactions.<sup>71</sup>

Articles L330-3 and R330-1 of the Commercial Code provide for a very precise list of information that must be disclosed to the franchisee. The disclosure document must contain, notably, the following information:<sup>72</sup>

- on the franchisor: company name, location, description of its activity, capital, registration number, bank accounts (this may be limited to the five main bank accounts), identity of the entrepreneur or of the managers, all indications regarding their professional references, date of the company’s creation, principal stages of its evolution over the past five years, annual financial statements of the last two last financial years, or the annual reports for the past two years if the company’s securities are publicly traded;

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<sup>68</sup> Mellerio (2015)

<sup>69</sup> Schulte (2014)

<sup>70</sup> Idem.

<sup>71</sup> Mellerio (2015)

<sup>72</sup> Schulte (2014)

- on the licensed trademark: registration, registration number, date of acquisition of the trademark or date and duration of the licence of the trademark, if applicable; on the state and prospects of the market (general and local);
- on the network: list of the member companies with indication of the operating mode, list of the companies (maximum 50) located in France with which the franchisor concluded the same agreement and the date of conclusion or renewal, or both, of such agreements, indication of the number of companies which have left the network during the previous year and of the reason why they left the network (termination, expiration, etc.), indication of the presence within the business area of the franchisee of any commercial premises where the products or services concerned are sold; and
- on the contract: the term and conditions of renewal, cancellation and assignment of the contract and the scope of the exclusive rights.

The document must also mention the nature and amount of the expenses and investments related to the commercial name, sign or trademark that the franchisee must pay out before exploiting those IP or commercial rights.

The franchisor's pre-contractual information obligation is the subject of extensive case law in France, in circumstances where the franchisee's business is unsuccessful and the franchisee alleges that he or she has been misled by the franchisor on the financial prospects of the franchised business. According to the Doubin Law, the franchisor is required to give a presentation on the state and development perspectives of the relevant market. In cases where the franchisee complains about the lack of forecast figures, French courts tend to adopt the following approach: the law does not require the franchisor to provide a local market survey and a forecast income statement to the franchisee. However, if the franchisor does provide a market survey and forecast figures to the franchisee to allow it to build its business plan, such information must be fair and accurate. Where a court considers that the lack of (or inaccuracy of) information has deceived the franchisee (which will often be the case where the actual turnover is significantly below the forecast figures, for example by more than 30 per cent), it may hold the franchise agreement as null and void and in some cases find the franchisor liable for damages, if the latter has committed misrepresentation. If the misrepresentation of the franchisor or the error of the franchisee cannot be demonstrated, a judge may nonetheless grant damages to the franchisee for the loss suffered (covering the costs and investments incurred by the franchisee but not the profit he or she was expecting to make on the basis of the figures provided by the franchisor). This will be the case particularly where the franchisee has become bankrupt because of a structurally loss-making business.<sup>73</sup>

### 7.6.3 *The Franchise Contract*

To constitute a franchise agreement under French law, the agreement needs to provide for three essential obligations on the part of the franchisor, namely (1) the licensing of intellectual property rights to the franchisee, (2) the provision of substantial know-how, and (3) the supply of commercial and technical assistance by the franchisor. The franchisee's obligations may be more or less detailed (bearing in mind agreements subject to French law are traditionally shorter than English ones) but should include at a

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<sup>73</sup> Mellerio (2015)

minimum the financial conditions, including the entry fee and the franchise royalty payable by the franchisee.<sup>74</sup>

#### *7.6.4 In-term relationship/conduct issues*

There are no specific French laws that govern the entire franchisor– franchisee relationship in ongoing franchise contracts. Nevertheless, it should be noted that general contract rules apply, as well as certain specific rules relating to distinct contractual obligations within the framework of the franchise relationship (for example, licenses of intellectual property rights).<sup>75</sup>

#### *7.6.5 Registration requirements*

No specific registration requirement applies to companies solely on the basis that they are franchisees.

#### *7.6.6 Reporting requirements*

#### *7.6.7 State administration*

There are no government agencies specifically dedicated to the regulation of the offer and sale of franchises.

## **8. Recommendations**

The following recommendations are being made by the PMU experts:

### **(1) Improve institution and policies on commercial franchise in Viet Nam**

1.1. In order to protect the franchisee’s rights, and to restrain franchisor’s infringement action, Vietnamese law need implementing and amending under ways:

*For the law on commercial contracts:*

(i) Amending, supplementing and detailing regulations on the franchisee’s right being provided information, such as implementing the information in the franchise description (the main stage in development the franchise system, information about history of the franchisor’s business); implementing regulations on the franchisor’s responsibility in the case of failure the duty of providing information.

(ii) Making clearly the franchisor’s duty in technical assistance; emphasize the good faith, honest principle in carry on franchise: Defining the kind of technical assistance by the franchisor, such as, organizing regular training seminars, reviewing sales techniques, launching new products and training management, and updating safely procedures. Defining detail level of assistance by the franchisor to help the franchisee carry on franchise. Making clearly the franchisor’s obligation in the case of failure the duty of technical assistance, such as compensation duty, voidable the contract. Specially, in the

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<sup>74</sup> Idem.

<sup>75</sup> Schulte (2014)



case of making serious result, such as serious loss, control deeply to the franchisee's business that influence on independence of the franchisee's management.

*For the competition law:*

(i) Determining clearly the limitation of franchisor's right in requirement the franchisee to purchase goods, material from the franchisor or the supplier selected by the franchisor: Supplement information about the main stage in development the franchise system; Supplement information on the goods/services distributed by the franchisor as well as distribution agreements between the franchisor with other in the intended franchisee's territory. Supplement information about history of the franchisor's business. For example: whether or not the franchisor has reorganization, in the situation of bankruptcy. This information will help the intended franchisee to evaluate ability in business and development of the franchisor as well as the franchise system.

(ii) Determining clearly the franchisee's right in fixing the resale price and gives the particular limitation on the franchisor's recommendation for the resale prices of the franchisee's goods/services.

1.2. To complete the legal framework for the establishment and development of commercial franchises in Vietnam and enable more efficient state management such as:

- Detailed requirements of the report in case in which registration of commercial franchising is not required,
- Requirements on annual reporting requirement should be enumerated clearly in a legal document; should not apply to all contents of Part B of the FDD as annual audited financial state; submission deadline should be extended to 31 March.
- Stricter regulations should be issued to help more efficient state management by examining, controlling and setting administrative sanctions in terms of franchising service.
- More regulations on adequate and detailed franchise dossiers in general and on FDD in particular.

## **(2) Study and improve models of organizations supporting franchising in Viet Nam:**

- Establish a franchise association in Viet Nam:  
As other franchise association in the world, the Franchising Association of Vietnam will be a non-profit organization and has the operational criteria in order to benefit, protect and support the interests of the members and promote franchising Vietnam. The establishment of the Franchise Association in Viet Nam is an important measure, contributing to promote franchising development with higher quality.
- Establish a consultation center for commercial franchising and franchise dispute conciliation committee...

## **(3) Identify trademark systems, products, models, intended procedures for transfer to future franchisees; identify training program, training location, operation process, control process, consultation process.**

Obviously, the franchising activities can be implemented with all products, services. The goal of this solution is the build quality and optimum transfer initiative for the franchise in the future.

**(4) Strengthen training, quality improvement of human resource involved in franchising.**

DMI expert makes the following recommendations:

**(1) Remove the registration requirement.**

Abolish the registration requirement, which is applicable only to foreign franchisors/franchising. This measure is discriminatory, as it is not applied to domestic franchisors, thus it is inconsistent with Vietnam's GATS obligations and specific commitments. Vietnam undertook to grant full national treatment for franchising services. In addition, there is no apparent economic reason why foreign franchisors/franchising should be subjected to the registration requirement while domestic franchisors are not.

**(2) Apply the reporting mechanism to all franchising.**

This recommendation follows from the above explanation. Since domestic franchising is subject to reporting requirement, this less onerous mechanism should suffice for foreign franchising too.

**(3) Remove uncertainties from the Franchise Disclosure Document (FDD).**

Issue clear and detailed instructions on preparing the FDD.

Consult the Franchise Rule Compliance Guide of the US's Federal Trade Commission available at: <http://business.ftc.gov/documents/franchise-rule-compliance-guide>

Consult Franchising Code of Conduct compliance manual for franchisors and master franchisees of the Australian Competition and Consumer Commission at: <http://www.accc.gov.au/content/index.phtml/itemId/816482>

**(4) Abolish the onerous consularization requirement.**

The consularization, which applies to most of the franchise application documents, is an onerous process. It is therefore recommended to remove the consularization requirement and to accept notarized documents instead.

**(5) The annual reporting requirements on the items in Part B of the FDD form:**

- Should be enumerated clearly in a legal document.
- Should not apply to all contents of Part B of the FDD.
- Franchisor should not be required to submit annual audited financial statements.
- Submission deadline should be extended to 31 March.

**(6) De-link the registration of intellectual property rights from the registration of franchises.**

In order to remove the incoherence between the requirements of franchise registration and the law on industrial property, the evaluation of franchise registration dossiers should not be dependent on IP rights registration.

Franchising regulations should make it clear that the lack of registration or recognition should not be a bar to operating franchising activities.

**(7) Franchises vs. distribution arrangements:**

There should be a clear guidance on what should be interpreted as the “business method” which identifying businesses as franchise, not distribution, agency or other similar arrangement. In addition as fee, which the franchisee have to pay to become a franchisee, is a significant distinction between franchise and other similar arrangement, thus, such fee should be added as an element for franchise as well.

**(8) Relationship between competition laws and franchising regulations:**

As the statutory language in competition legislation is broad and leaves open the possibility of the authorities misapplying competition law to franchise relationships in a manner that is inconsistent with the spirit of the franchise law, the competition authorities should provide clear guidance on whether the franchisor could do certain activities, e.g. fix retail prices, control the quality or volume of goods and services, restrain investment and require prior consent for sub-franchising.

**(9) Rights of concerned parties to request for deregistration of franchising activities**

Provide more legal bases for cancellation of franchising activities to include the case where the MOIT finds that the entity that has registered a franchise in Vietnam no longer has the rights to operate the registered activities.

The regulations may set out different types of evidence that the MOIT may use to determine whether the entity no longer has relevant rights, such as a court decision or arbitration award.

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## Annex 1: Franchise Disclosure Document Form

### “Annex III

#### Written description of commercial franchise

This written description of commercial franchise includes certain information necessary for the intended franchisee to thoroughly consider before concluding the franchise contract. The intended franchisee should note:

- \* Without no other agreements, the intended franchisee has at least 15 days to study this description and other relevant information before concluding the franchise contracts.
- \* Carefully study the Commercial Law, Decree No. 35/2006/ND-CP and this description; discuss with other traders who used to operate or is currently operating their business in the mode of commercial franchise; self-assess the source of financing and the capacity to meet the requirements of this business mode.
- \* The intended franchisee should seek for independent advisor on legal, accounting and business aspects before concluding the franchise contract.
- \* The intended franchisee should attend training courses, especially when the franchisee has no prior experience in this business mode.

#### Part A<sup>[1]</sup>

##### I. General information about the franchisor

1. Business name of the franchisor.
2. Address of the franchisor’s headquarter.
3. Telephone number, fax (if any).
4. Establishment date of the franchisor.
5. Information on whether the franchisor is the original franchisor or the secondary.
6. Business type of the franchisor.
7. Franchise field.
8. Information on franchising registration with the competent agency<sup>[2]</sup>.

##### II. Goods/service trademark and intellectual property

1. Franchisee’s rights to use goods/service trademark and any object of intellectual property.
2. Details of goods/service trademark and rights to objects of intellectual property registered under the law.

#### Part B<sup>[10]</sup>

##### I. Information about the franchisee

1. Organization structure.
2. Name, tasks and experience of franchisor's members of the board of directors.
3. Information about franchisor's department in charge of commercial franchise.
4. Franchisor's experience in franchise business
5. Information on litigation related to franchisor's commercial franchising within one (01) year.

## II. The initial fee the franchisee must pay

1. Type and amount of initial fee the franchisee must pay.
2. Timing of payment.
3. Circumstances where fee refund is applied.

## III. Other financial obligations of the franchisee

For each following type of fee, state clearly the fixed amount, timing of payment and circumstances where fee refund is applied:

1. Periodical fee.
2. Advertisement fee.
3. Training fee.
4. Service fee.
5. Rent payment.
6. Other fees.

## IV. Franchisee's initial investment

The initial investment shall include the following main information:

1. Business location.
2. Equipment.
3. Decoration expenses.
4. Initial must-buy goods.
5. Security expenses.
6. Other prepaid expenses.

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[10] Business entities should annually report the information in this Part to the registration body at the latest by 15 January.

#### V. Franchisee's obligations to buy or rent equipment to fit the business system as provided by the franchisor

1. Whether the franchisee has to buy items usually bought, rent certain equipment, services to fit the business system as provided by the franchisor
2. Whether it is possible to modify provisions of franchise system.
3. If it is allowed to modify franchise system, state clearly the necessary procedures.

#### VI. Franchisor's obligations

1. Franchisor's obligations before concluding the contract.
2. Franchisor's obligations throughout the business operation.
3. Franchisor's obligations to determine business premises.
4. Training:
  - (a) Initial training.
  - (b) Additional training courses.

#### VII. Description of goods/services market operated in the mode of franchise

1. Description of general goods/service market which is the object of franchise contract.
2. Description of goods/service market, which is the object of franchise contract and within the territory the franchisee is licensed to operate.
3. Potential for the development of the above-mentioned market.

#### VIII. Sample franchise contract

1. Names of contract's articles.
2. Duration of contract.
3. Conditions for contract extension.
4. Conditions for the franchisee to cancel the contract.
5. Conditions for the franchisor to cancel the contract.
6. Obligations of the franchisor/franchisee arising from the cancellation of the contract.
7. Amend the contract at the request of the franchisor/franchisee.
8. Provisions on conditions for the transfer of the franchise contract by the franchisee to other traders.
9. In case of death, declare ineligible for the franchisor/franchisee.

#### IX. Information about franchise system

1. The number of the franchisor's business establishments in operation.
2. The number of the franchisor's business establishments, which ceased operation.
3. The number of franchise contracts signed with franchisees.
4. The number of franchise contracts transferred to a third party by the franchisee.
5. The number of the franchisee's business establishments transferred to the franchisor.
6. The number of franchise contracts terminated by the franchisor.
7. The number of franchise contracts terminated by the franchisee.
8. The number of franchise contractextended/not extended.



X. Franchisor's financial statements

The financial statements, which have been, audited the latest one year.

XI. Reward, recognition to gain or organization to participate in

We commit that the business system intended for franchise has been operating for at least one (01) year, that all information in this document and any additional information and the enclosed annexes are accurate and true. We understand that making any false information in this document constitutes a violation of law.

Representative of franchisor

(Signature and seal)"

## Annex 2: Short guideline on the consolidated franchise legislation of Vietnam

### I. The implementing agency for foreign franchises

The Domestic Market Department of MOIT (Commercial Division 1) is the unit assisting leaders of MOIT with registering franchising from abroad into Vietnam.

### II. Implementing agencies for domestic franchises

Provincial-level People's Committees are tasked to perform state management of domestic commercial franchising in their respective localities.

Provincial-level Industry and Trade Departments are in charge of periodically reporting to the Ministry of Industry and Trade on commercial franchising in their respective localities.

### III. Registration and reporting

In order to perform franchising from abroad into Vietnam, the franchise must be registered with MOIT.

In order to perform franchising by Vietnamese franchisors, no registration is required. Instead, such operation is subject to reporting requirement (see point II. above). The following cases are concerned by reporting:

- (a) Domestic franchising (franchising within Vietnam);
- (b) Vietnam-to-overseas commercial franchising (franchising of Vietnamese businesses abroad).

In cases (a) (b) above, commercial franchising must be reported to provincial-level Industry and Trade Departments.

### IV. The procedures to be followed by investors to comply with all the administrative requirements on franchising

1. If you are in category (a) or (b) mentioned in point IV. above, for the reporting procedures concerning your business, please contact your provincial Industry and Trade Departments.

2. For registration of foreign franchising to Vietnam, the following procedure applies:

#### 1.1. Receipt of dossiers

- A dossier of registration of commercial franchising with the Trade Ministry shall comprise:
  - An application for commercial franchising registration (made according to a set form);
  - A written description of the franchise disclosure document (FDD)/commercial franchise (made according to a set form);

- A copy of the foreign trader's business registration certificate or paper of equivalent validity, certified by a competent agency of the place where the foreign trader is set up, in case of commercial franchises from overseas into Vietnam;

- A notarized copy of the industrial property right protection title in Vietnam or a foreign country, in case of licensing industrial property subject matters for which protection titles have been granted;

- Papers proving the approval of the primary franchisor's permission of franchise in case the trader registering franchising is the secondary franchisor;

### 1.2. Conditions for the franchisor

Upon receipt of registration dossier of franchising from abroad into Vietnam, Commercial Division 1 is responsible for checking the conditions for the franchisor as follows:

- A trader shall be permitted to grant commercial rights when the business system intended for franchise has been in operation for at least one year.

- Legal status of the trader: Such trader has registered commercial franchising with the competent agency.

- The in-business goods and services are covered by commercial rights:

- + Goods and services permitted for commercial franchising business are those not on the list of goods and services banned from business.

- + Enterprises shall be permitted to deal in goods and/or services on the list of goods and services restricted from business or those on the list of goods and services subject to conditional business only after fully satisfying business conditions and/or being granted business licenses or papers of equivalent value by the competent agency.

### 1.3. Dossier appraisal

Commercial Division 1 is responsible for appraising registration dossiers, recording appraisal results in Appraisal report on franchising registration notification and submits to Department Leader for consideration. Details as follows:

- An application for commercial franchising registration (made according to form MD-1 in Annex II issued with Circular No. 09/2006/TT-BTM);

- A written description of the franchise disclosure document (FDD)/commercial franchise (made according to the set form in Annex III issued with Circular No. 09/2006/TT-BTM, legalized by consular authorities, translated into Vietnamese and notarized in accordance with Vietnamese law);

- A copy of the foreign trader's business registration certificate or paper of equivalent validity, certified by a competent agency of the place where the foreign trader is set up (legalized by consular authorities, translated into Vietnamese and notarized in accordance with Vietnamese law);

- A notarized copy of the industrial property right protection title in Vietnam or a foreign country, in case of licensing industrial property subject matters for which protection titles have been granted (legalized by consular authorities, translated into Vietnamese and notarized in accordance with Vietnamese law);

- Document proving approval by the primary franchisor to the sub-franchise if the applicant for registration is a secondary franchisor (legalized by consular

authorities, translated into Vietnamese and notarized in accordance with Vietnamese law).

#### 1.4. Settlement duration

- For incomplete and improper dossiers, within two working days after receiving the dossiers, Commercial Division 1 shall prepare written notices to dossier-submitting traders, requesting the supplementation and completion of the dossiers.

- Within 5 working days after receiving complete and valid dossiers, Commercial Division 1 shall submit Department Leader to consider registering traders' commercial franchising in commercial franchising registration books, and send traders written notices thereon;

- If refusing to register commercial franchising, within 5 working days after receiving complete and valid dossiers, Commercial Division 1 shall prepare written notices thereon, clearly stating the reasons therefore;

#### 1.5. Registration fees

Traders granted Notification of franchising registration approval must pay the fee as prescribed by the Ministry of Finance.

Commercial Division 1 archive one copy of the receipt of franchising registration fees.

#### 1.6. Forms:

Franchising registration form (Form MD-1 in Annex II issued with Circular No. 09/2006/TT-BTM)

Written description of commercial franchise (A form in Annex III issued with Circular No. 09/2006/TT-BTM)