THE FRANCHISE LAW REVIEW

TENTH EDITION

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PREFACE

The term franchise, used without contextual reference or an accompanying definition, is extraordinarily plastic and uncertain. As Humpty Dumpty explained to Alice in *Through the Looking Glass*: 'When I use a word, it means just what I choose it to mean – neither more nor less.' One hundred-plus years ago, you would expect it was part of a discussion about stringing electrical lines or laying streetcar tracks along urban streets, or later, the sale of equipment or machinery with a manufacturer's brand name and possibly some territorial exclusivity. If a non-business question was involved, the franchise topic was a women's ability to vote or the age a person had to attain to have a right to vote. Reduced to its lowest common denominator, franchise referenced a right involving a business or a transaction whose terms (and government-imposed limitations, if any) were typically a matter of freedom of contract.

By the middle of the 20th century, franchising took on a different, more complex meaning and grew exponentially. Commonly used terms such as partnership, dealer, distributor and agent did not capture the full scope of the intended relationship and were often inapplicable. In addition, most entrepreneurial innovators in franchise concepts were focused principally on brand, broader elements of brand identity, uniformity and the means of achieving those results. These goals, often reflected in restrictions, controls and allocation of function between franchisor and franchisee, were used to frame provisions in franchise contracts and associated documents. They were accepted by prospective franchisees as part of the pathway to success. Less evident was the fact that many franchisees needed support on an ongoing basis and that the franchisor – as the 'creator and keeper of the flame' – was the expected and essential source of that guidance and direction, which may not have been supplied.

A franchise, on the franchisor's side, did not simply mean contract, fees, royalties, expansion and certain profit; it involved much more, including compliance, authority to impose system changes and broad reservations of rights to engage in future conduct. On the franchisee's side, the belief in mutually aligned objectives and financial success was sometimes difficult to maintain. The franchise contract, which often grew in complexity to address each new problem, was, and is, essential, but it is not sufficient. The keyword for successful franchising is no longer only rights; at its core is an ongoing relationship.

Of course, success usually breeds imitation with less qualified and responsible players on both sides. While the number and variety of franchise offers and locations continues to grow, the promise of franchising as an engine of economic growth and benefit is often questioned by franchisees, their lawyers, legislators, regulatory agencies and others. A variety of statutory and administrative solutions to actual, perceived and sometimes created problems abound. Some are useful. However, in some jurisdictions, the result is a crazy quilt of requirements,

exemptions and efforts at insufficient or uncritical probing of the nature and extent of any significant issue, the source or sources of complaint, and the long-term impact of legislative or regulatory solutions.

That said, there are responsible individuals who seek reconsideration of the premise that structured disclosure of franchise agreement terms and related information (as in the grandfather of regulatory effort, the 1978 US Federal Trade Commission Franchise Disclosure Rule), without mandating specific contract provisions, provides a sufficient basis for an informed decision, while others point to the enactment of added relationship laws (such as California's 1981 Franchise Relations Act and its subsequent amendment) to argue that it demonstrates benefits without adverse effects on franchising and that the approach should be adopted and enlarged.

What seems to be without question is that just as departures from basic contract law principles to fashion franchise-specific rules raise serious questions, existing legal rules of general applicability in a jurisdiction should also usually apply to franchise agreements (unless pre-empted by law).

It is also essential to recognise that laws and regulations often have unintended effects. When Schwinn determined that effective marketing of its bicycles by franchised dealers required out-of-the-box personalised set-up as a brand-defining element, it became an issue in US antitrust litigation that went to the US Supreme Court. Surprisingly, the Court applied the ancient rule against restraints on alienation, and held that independent dealers could not be restricted in the sale of items they had purchased – but consignees could be fully controlled. Did the decision strike a blow for franchisee freedom? The result: independent dealers who valued the Schwinn product became consignees, with attendant cost and status changes.

Many business transactions have asymmetric features, franchises among them. Legislation or regulation that aim to create a level playing field do not change the facts. If consumer demand for a franchise is created by the franchisor, the potential franchisee may accept the terms even if he or she preferred a modification. If the franchisee negotiates and walks away from the offer, is it always a sound choice? If the franchisor adopts the change and it increases the franchisor's costs, who pays? The franchisees (including those who did not care) in higher fees? The franchisor's shareholders? Deductions from managements' salaries?

Asking, and answering, these questions in a careful and forthright manner is the challenge for today and tomorrow. But it must be placed in context. Notwithstanding legislation and regulation and the risk of new or enhanced requirements, new franchise offerings are ubiquitous in almost every jurisdiction; the pool of potential franchisees has not diminished; and the number of newly opened franchised locations reflects continual net growth. In sum, it is reasonable to conclude that the foundational elements of modern franchising are – and will continue to be – sound.

Remember, this review is intended as a broad, first-level survey of principles and practices in a substantial number of jurisdictions. It will, we hope, be useful in helping to identify issues and shape further enquiry. Its scope will also help to underscore the fact that effective franchise law compliance programmes are an essential element of risk management and client education (as well as having potential salutary effects in affecting the sanctions imposed when companies and individuals find themselves under scrutiny). The review is not a compendium of answers to actual problems that arise in the course of business activity. Answers require detailed review and evaluation. Franchise laws are not only complex as

written and interpreted; they often call for fact-intensive enquiry and analysis by experienced counsel. Those caveats notwithstanding, it is a body of information of value to anyone concerned with franchise questions that arise on a regular basis.

Alan H Silberman
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Chicago
July 2023

Chapter 8

SWITZERLAND

Christophe Rapin, Vincent Jäggi and David Ginolin[1]

I INTRODUCTION

Franchising is a well-known distribution model in Switzerland. There are no government reports or official statistics available on the extent of franchising in Switzerland.

According to a study conducted by the Swiss Franchise Association (SFA),[2] recently rebranded 'Swiss Distribution', the Swiss market reached 250 to 300 franchisors (with up to five franchisees each) in 2015, the vast majority of which expected to grow in the future. Key international franchisors have a presence in Switzerland.

According to Swiss Distribution, franchising is primarily present in retail, health and wellness, followed by gastronomy and fashion. The consulting and real estate sectors also include franchises, although to a lesser extent. Swiss Distribution has 25 member franchisors and master franchisees, the majority of which are active in catering and retail.

II MARKET ENTRY

i Restrictions

There are no specific restrictions on foreign franchisors entering the local market or granting a master franchise or development rights to a local entity.

A foreign franchisor may freely incorporate a company (e.g., a corporation (SA or AG) or a limited liability company (Sàrl or GmbH)) in Switzerland or acquire shares and control such a company, regardless of their domicile or nationality. At least one member of the board of directors of a corporation, or respectively a manager of a limited liability company, or a member of the top management entitled to represent the company with sole signature power, must reside in Switzerland. If the company has granted collective signing powers, two members must reside in Switzerland.

Foreign franchisors must observe the restrictions imposed by the Federal Act on the Acquisition of Real Estate by Persons Abroad (BewG). According to the BewG, 'persons abroad' (i.e., physical or legal persons domiciled or having their registered office abroad, as well as persons acting on their behalf) may acquire real estate in Switzerland, whether directly or through a special purpose vehicle, under conditions verified in an authorisation procedure. However, according to the BewG, the purchase of real estate for commercial use is generally not subject to authorisation. Hotels, retail premises, offices and manufacturing halls, for instance, are considered commercial use.

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2 https://www.swissdistribution.org.

ii Foreign exchange and tax

The Swiss franc is freely convertible. There are no specific foreign exchange controls in Switzerland, therefore a franchisee based in Switzerland faces no restriction on, for example, the ability to make payments to a foreign franchisor in the domestic currency of the latter.

A franchise agreement is not specifically regulated in Switzerland for tax purposes. Cross-border aspects of franchise agreements entered into with a franchisor or a franchisee located in Switzerland have to be reviewed in detail.

Switzerland tends to be an attractive place for foreign investors (including franchisors) and has developed a wide nexus of double taxation agreements with over 100 countries, notably to avoid double taxation of incomes to be paid by a Swiss company to a foreign business partner.[3] These double taxation agreements provide for different regulations regarding the categories of income that could be relevant in franchise agreements, such as royalty payments, interest, dividends or capital gains. Switzerland is seeking to extend its double taxation agreement network further.

III INTELLECTUAL PROPERTY

i Brand search

National protected trademarks registered in Switzerland can be researched in the Swissreg database made publicly available by the Swiss Federal Institute of Intellectual Property.[4]

This database contains trademark, patent and design registry data, as well as protected topographies. This database notably provides information on the trademarks' status (e.g., description, filing date, filing status, expiry date, details of the owner, and registered goods and services according to the Nice Classification).

However, international trademark registrations with effect in Switzerland are not contained in this database. International trademark registrations are available in the online register of the World Intellectual Property Organization (WIPO).[5]

ii Brand protection

The Swiss Trademark Protection Act (TmPA) provides that any sign, such as words, letters, numbers and graphics, distinguishing the goods or services of one company from those of another, may be registered as a trademark. Registration grants the holder an exclusive right to use the trademark on the registered goods and services for a 10-year period, which may be renewed an unlimited number of times.

However, well-known trademarks within the meaning of Article 6 bis of the Paris Convention benefit from protection for not only registered goods and services, but also any non-registered ones.

The Swiss Federal Institute for Intellectual Property oversees processing applications for registration. The application may be filed by the holder of the right to use the trademark, without any requirement as to residence, headquarters or nationality being applicable. Since Switzerland is party to the Madrid International Trademark System, the national registration can be supplemented by an international registration handled by the WIPO in Geneva.

3 https://www.sif.admin.ch/sif/en/home/bilateral-relations/tax-agreements/double-taxation-agreements.html.

4 https://www.swissreg.ch.

5 http://www.wipo.int/madrid/monitor/en.

No proof of use of the trademark is required for registration. However, to avoid trademarks being registered as a reserve, the trademark must be used for its protection to take effect. If the owner does not use the trademark during the five years following registration, the owner's right shall be forfeit if non-use is not justified, and action may then be brought to cancel the registration.

Trademark registration is subject to the payment of a filing fee (for the initial protection period of 10 years) of 550 Swiss francs for a registration in up to three classes of goods and services.

Upon the filing of a trademark, the Federal Institute of Intellectual Property (IPI) assesses whether there are any formal or substantive deficiencies in the application. The IPI may object to an application (e.g., if the trademark application is descriptive within the registered categories of services and goods or is misleading). The applicant is granted the possibility of remedying the deficiencies.

Once the verification of the trademark is completed, the IPI will publish the trademark in the Official Gazette and the Swissreg database, allowing a third party to file an opposition for the registration of the Swiss trademark. The opposition must be submitted in writing to the IPI with a statement of reasons within three months of publication of the registration (see Section III.iii).

If no one opposes the registration, the IPI will issue the trademark registration certificate.

iii Enforcement

Unauthorised use of a trademark identical or confusingly similar to a registered trademark shall be deemed to be an infringement. In a case of this kind, Swiss law provides injunctive or prohibitive civil actions as well as other protective measures. The owner of the trademark may also demand financial compensation by means of a request for royalties, compensation in the form of damages or the repayment of profits made by the infringer.

Furthermore, the TmPA provides for criminal sanctions, upon complaint, of any unlawful use of another's trademark by a sentence of up to one year's imprisonment.

In addition to civil and criminal remedies, the TmPA enables the owner of a trademark to oppose the entry in the register of an infringement of its trademark within three months of the publication of the infringement registration.

In Switzerland, know-how is neither protected by specific legislation nor by Swiss regulations protecting intellectual property. In cases of unfair competition through the unauthorised use of know-how developed by the franchisor with respect to its franchising concept, the Federal Act against Unfair Competition does, however, allow the franchisor to file a complaint. The case of unfair competition is then punishable by a pecuniary penalty or a sentence of up to three years' imprisonment.

Know-how may also be protected by a clause in the franchise contract qualifying it as confidential information. The disclosure of the know-how could then be pursued through the legal means available in cases of breach of contract. In addition, the Swiss Criminal Code (SCC) punishes, upon complaint, the breach of manufacturing or trade secrecy with a pecuniary penalty or imprisonment of up to three years.

iv Data protection, cybercrime, social media and e-commerce

Data protection

If a franchisor or a franchisee incorporated in Switzerland collects and processes clients' personal information, it must comply with the Federal Act on Data Protection (FADP) and, notably, this requires the unambiguous consent of the data subject.

If a franchisee located in Switzerland actively targets customers in the EU or EEA or if it monitors their behaviour, it should also comply with the General Data Protection Regulation (GDPR), even though Switzerland is not a member of the EU or the EEA.

According to Article 6 of the FADP, personal data may not be disclosed outside Switzerland if this would seriously endanger the privacy of the data subjects, in particular because of the absence of legislation guaranteeing adequate protection.[6] In the absence of legislation guaranteeing adequate protection, personal data may be disclosed abroad subject to the following conditions:

a sufficient safeguards, in particular contractual clauses, ensure an adequate level of protection abroad;

b the data subject has consented in the specific case;

c the processing is directly connected with the conclusion or the performance of a contract and the personal data is that of a contractual party;

d disclosure is essential in the specific case either to safeguard an overriding public interest or for the establishment, exercise or enforcement of legal claims before the courts;

e disclosure is required in a specific case to protect the life or the physical integrity of the data subject;

f the data subject has made the data generally accessible and has not expressly prohibited its processing; and

g disclosure is made within the same legal person or company or between legal persons or companies that are under the same management, provided those involved are subject to data protection rules that ensure an adequate level of protection.

On 8 September 2020, the Swiss Federal Data Protection and Information Commissioner found that the Swiss–US Privacy Shield does not provide an adequate level of protection for data transfer from Switzerland to the United States pursuant to the FADP. This decision poses major hurdles for internationally active businesses as it drastically restricts the transfer of personal data to the United States.

By contrast, on 27 August 2021, the Swiss Federal Data Protection and Information Commissioner confirmed that it recognises the new EU standard contractual clauses (SCC) published by the European Commission on 4 June 2021 as standard clauses under the FADP. Parties to a franchise agreement exporting personal data from Switzerland to third countries may use the new SCC as contractual safeguards in their agreements to ensure data protection.

Cybercrime

There is no generally applicable requirement pursuant to Swiss law for a franchisor or a franchisee to implement safeguards against cyberattacks or to report incidents to an authority when operating a business in Switzerland.

6 The list of countries offering adequate protection is available at https://www.edoeb.admin.ch/edoeb/en/home/data-protection/handel-und-wirtschaft/transborder-data-flows.html.

Notwithstanding the foregoing, Article 7 of the FADP in conjunction with Articles 8 and 9 of the Ordinance to the FADP provide that personal data must be protected against unauthorised processing, destruction, loss, technical faults, forgery, theft or unlawful use through the implementation of adequate technical and organisational measures.

Social media and e-commerce

In Switzerland, there is no specific legislation on social media and online activities. Generally speaking, the rules in the online context are based on the general rules. In the same vein, e-commerce is mainly governed by the Swiss Code of Obligations (CO), the Federal Law Against Unfair Competition and the Order on the Indication of Prices (OIP).

The provisions of the CO applicable to sales contracts in bricks and mortar shops are applicable in an e-commerce context. Under Article 184 et seq. of the CO, a sales contract may be entered into electronically with a simple click. However, Swiss law does not provide for any withdrawal period or other right of return once the order of products has been placed in an e-commerce transaction. Some exceptions apply in the financial services sector, in particular with respect to the provision of consumer credit (e.g., Article 16 of the Consumer Credit Act: withdrawal period of 14 days). Moreover, the revised Swiss Insurance Contract Act, which came into force on 1 January 2022, will provide for a policyholder's right of revocation, to be exercised within 14 days (not applicable to collective personal insurance policies, provisional cover notes or agreements with a term of less than one month). The parties may, however, agree on such provisions on a voluntary basis.

The Federal Act Against Unfair Competition provides in Article 3 Paragraph 1 Letter (s) the information requirements for an online store not to be considered to be acting unfairly. Online stores must:

a indicate clearly and in full their identity and contact address, including email;
b indicate the various technical steps resulting in entering into a contract;
c provide the appropriate technical tools making it possible to detect and correct entry errors before sending an order; and
d immediately confirm the customer's order by email.

Article 8 of the Federal Act Against Unfair Competition also prohibits the use of improper general terms and conditions (T&Cs) that expose the consumer to a situation of unjustified disproportion (see Section IV.i).

The OIP regulates how prices must be displayed and advertised to consumers in business to consumer transactions (e.g., regarding discounts or charges and duties not included in the advertised prices).

IV FRANCHISE LAW

i Legislation

There is no franchise-specific legislation that regulates franchising activities in Switzerland.

Franchise agreements are mainly governed by the general provisions set out in the Swiss Civil Code (CC) and the CO, as well as the United Nations Convention on Contracts for the International Sale of Goods, if not waived. Indeed, the franchise contract is not governed by any specific set of statutory provisions but is an innominate or, depending on the circumstances, a 'mixed' contract combining elements of several nominate contracts regulated by the CO, in particular the provisions on employment contracts, agency agreements or lease

contracts. Therefore, depending on the structure of the relationship between franchisor and franchisee, relevant provisions on nominate contracts may additionally apply and govern some aspects of the transaction (e.g., termination and related consequences).

The GDPR, the FADP (see Section III.iv) and the Swiss laws on intellectual property (Section III.i–iii) may also apply to franchise agreements.

Where the franchise agreement is governed by general T&Cs, the case law developed by the Federal Supreme Court regarding the adoption and interpretation of the T&Cs must also be taken into account. In particular, the T&Cs must be validly incorporated in the contract to be effective and in any case the agreement between the parties has priority over the T&Cs' content. Moreover, the Federal Act against Unfair Competition prohibits the use of T&Cs to create a significant and unjustified imbalance between the rights and obligations of a business and a consumer to the latter's detriment.

ii Pre-contractual disclosure

There is no specific pre-contractual statutory disclosure regulations pursuant to Swiss law in a franchise context. The general provisions of the CO and the CC are therefore applicable. However, according to the principle of good faith, not only must all the information disclosed during the pre-contractual phase be true, but the prospective franchisee must also receive all the necessary information concerning the projected contractual relationship. As a general rule, for evidential reasons, it is recommended to keep a written record of the information transmitted.

Swiss Distribution stipulates specific pre-contractual disclosure obligations, which are binding for its members only (i.e., soft law). The franchisor member of Swiss Distribution is thus required to provide the prospective franchisee with a copy of the code of ethics of this association and full written information concerning the terms of the franchise agreement within a reasonable period before the execution of the franchise agreement. According to guidelines published by Swiss Distribution, the franchisee must in addition receive information on, inter alia, the relevant market for the franchise activity, the description of the products and services to be franchised, the franchisor's organisation and business activity, the franchisor's experience in the franchised activity, and other distribution channels for the contractual products and services.

Swiss law recognises and applies the *culpa in contrahendo* doctrine. If the franchisor, in breach of the principle of good faith, hides information that would have discouraged the franchisee from entering into the franchise contract with the franchisor, the franchisee may rescind or cancel the contract and claim for damages, which have to be evidenced. The franchisee's damage is equivalent to the difference between the current wealth of the franchisee in its capacity as the injured party and the wealth the franchisee would hypothetically dispose of without the damaging event (i.e., the conclusion of the franchise agreement). Claims based on *culpa in contrahendo* are only admitted exceptionally by the Swiss courts. The experience and knowledge of the franchisee in business remains a key criterion when assessing those claims.

iii Registration

There is no specific registration requirement for franchises, nor a state registry of franchisors.

However, apart from the statutory obligations applicable to the different types of business entities (corporations, limited liability companies, and so on) to register in the commercial

register, any commercial activities performed by natural persons require registration in the commercial register if they generate 100,000 Swiss francs or more annually pursuant to Article 931 Paragraph 1 CO.

iv Mandatory clauses

Franchise agreements are innominate contracts governed by the principle of the freedom of contract. However, depending on the structure of the relationship between the franchisor and franchisee, (mandatory) statutory provisions governing nominate contracts may apply, notably regarding the employment, agency or lease aspects of the relationship that are under dispute.

In Switzerland, even though franchisees are considered independent entrepreneurs rather than employees of the franchisor, the Swiss Federal Court has confirmed the application by analogy of labour law provisions providing for compensation of the employee in the event of wrongful termination in a case where the franchisor held a particularly dominant position in relation to the franchisee, whose entrepreneurial freedom was limited.[7]

In a case concerning an exclusive distribution contract,[8] the Swiss Federal Court ruled that Article 418u Paragraph 1 of the CO, which provides for the payment of a goodwill indemnity to the agent upon termination of the agency agreement, was applicable by analogy, as the distributor had the same position as an agent. Article 418u may apply by analogy when the distributor is closely integrated into the sales organisation of the supplier and has limited autonomy (because of minimum purchase requirements, minimum stock requirements, duty to disclose business records, duty to tolerate unilateral changes of prices and conditions, and so on) and the clientele of a distributor is likely to follow the supplier and its contractual products after termination of the distribution agreement, rather than the former distributor.

This judgment may suggest that a franchisee might, in the same way, be protected as an agent even in the case of tenuous subordination to the franchisor. We have, however, not seen reported any decision from the Swiss Federal Court granting a goodwill indemnity to a franchisee. In addition, if the franchisee is bound by a non-competition undertaking, part of Swiss legal doctrine is of the opinion that the franchisee may be entitled to special remuneration when the franchise agreement is terminated.

The Federal Court has neither decided on nor outlined a position on either of the latter two points.

v Guarantees and protection

Swiss law does not provide any specific guarantee or protection for franchisees other than the general principles regarding the good faith disclosure of the relevant information by the franchisor as set out in Section IV.ii.

V TAX

i Franchisor and franchisee tax liabilities

Swiss tax law does not contain any regulations specific to franchising activities.

7 BGE 118 II 157.

8 BGE 134 III 497.

According to the Swiss federal system, tax powers and revenues are shared between the Confederation, the cantons and the municipalities. Businesses and individuals are therefore taxed on all three levels.

While the Swiss Confederation (federal level) is competent exclusively in the areas provided for by the Swiss Constitution, the cantons are sovereign in tax matters, which means in particular that they have a general competence to collect taxes, determine tax-exempt amounts and set tax scales and rates. Thus, the level of taxation and the tax burden vary between cantons and each canton has the power to influence its tax competitiveness directly. This system has developed a domestic tax competition and led to relatively low tax rates in comparison with other jurisdictions.

Legal entities residing in Switzerland are subject to tax as soon as they are entered in the commercial register or if they have their effective place of management in Switzerland (if the entity is incorporated abroad).

The most relevant tax liabilities for franchisors and franchisees relate to corporate income tax and value added tax (VAT).

Corporate income tax

Corporate income tax is levied at the federal, cantonal and municipality level – relative tax rates are, for the majority of the cantons, flat tax rates applying on the taxable profit of a legal entity (progressive tax rates are the exception).

Depending on the location, it is not unusual to expect a rate of income tax of between 14 and 17 per cent.

Taxable income is determined through the statutory accounts – or, in the case of a foreign company, the branch accounts. The assessment for income tax is made on net profit after tax (tax expenses being deductible in Switzerland) as shown in the statutory financial statements pursuant to the CO accounting standards.

Companies that are not incorporated in Switzerland but are active in the country through a permanent establishment or a branch are only taxed on profits generated by the Swiss activity or on real estate assets located in Switzerland. According to a judgment of the Swiss Federal Court,[9] a franchisee does not operate a permanent establishment on behalf of the franchisor, even if the premises belonging to the franchisor are leased to the franchisee. Except for the taxation of an eventual rental income, no tax obligations arise for franchisors in the cantons where their franchisees are domiciled with regard to the franchise agreement as such.

VAT

Swiss VAT is only collected at the federal level.

Since January 2019, foreign entities with a turnover of at least 100,000 Swiss francs from deliveries in Switzerland have been subject to domestic tax.

Taxable persons are required to register and are responsible for declaring the tax due. The standard VAT rate is 7.7 per cent (8.1 per cent as of 1 January 2024). Reduced rates are applied to some services and products, namely accommodation (at a rate of 3.7 per cent; 3.8 per cent as of 1 January 2024) and essential goods and services such as non-alcoholic beverages, food, medicines and books (at a rate of 2.5 per cent; 2.6 per cent as of 1 January 2024).

9 BGE 134 I 303.

ii Tax-efficient structures

As a franchise agreement is not specifically regulated for tax purposes, a tax-efficient structure must be assessed on a case-by-case basis, taking into account the specific aspects of the prospective franchise relationship (contractual services or products, real estate aspects, tax residence of franchisor and franchisee, money flows anticipated, and so on).

The Swiss electorate agreed in May 2019 on a corporate tax reform. The reform aims to align the Swiss tax system with international standards regarding corporate taxation. In general, the reform increases the tax burden of large companies while reducing that of small and medium-sized enterprises (SMEs). As of 1 January 2020, special privileges are no longer granted to internationally active companies. To maintain a fiscally attractive business location, the reform has introduced, among other things, the option to introduce a deduction of up to 50 per cent of research and development costs at the cantonal level and a 'patent box' system allowing profits from inventions to be taxed at a reduced rate on the cantonal level.

Those incentives are potentially relevant in the context of a franchising business involving significant intellectual property rights.

VI IMPACT OF GENERAL LAW

i Good faith and guarantees

The principle of good faith as set out in Article 2 of the CC plays an important role as each contracting party shall act in good faith when exercising its rights or performing its obligations. In the context of a franchise agreement, the duty of good faith triggers the following consequences:

a negotiating seriously: the parties must have a serious intent to contract when negotiating a franchise agreement;

b disclosure of information: the franchisor shall disclose the relevant information for the franchisee to assess the franchising opportunity (see Section IV.ii); and

c interpretation of the franchise agreement: in contrast to common law jurisdictions, the interpretation of franchise contracts pursuant to Swiss law tends to focus on the real intention of the parties rather than on the terms of the contract. Indeed, should a provision of a franchise contract require interpretation, a judge will first seek to establish the real and common intention of the parties, adopting an empirical approach. When the actual intent of the parties cannot be ascertained, the provision is to be interpreted in accordance with the principle of trust and in accordance with the rules of good faith. The judge will then give the unclear provision the meaning that a person placed in similar circumstances, and having a similar background as that of the parties, would reasonably do.

ii Agency distributor model

Franchising is a specific type of distribution agreement. As mentioned in Section IV.i and IV.iv, specific provisions of the CO relating to agency agreements may potentially apply by analogy to franchising agreements depending on the structure of the relationship between the parties and the issue at stake (such as claims for the payment of a goodwill indemnity pursuant to Article 418u of the CO).

iii Employment law

In Switzerland, franchisees, even when entering into a franchise agreement as a natural person (without incorporating a corporation to run the franchise), are considered to be independent entrepreneurs.

However, in certain circumstances where the franchisor has held a particularly dominant position in relation to the franchisee, whose entrepreneurial freedom was limited, the Swiss Federal Court has confirmed the application by analogy of labour law provisions providing for compensation of the employee in the event of wrongful termination.[10] The application of employment law provisions needs to be assessed on a case-by-case basis.

iv Consumer protection

There is no specific legislation on general consumer protection. However, various provisions of the CO (e.g., with respect to the warranties on purchased goods) or sets of rules (e.g., the Consumer Credit Act) define the concept of consumer and aim to protect consumers. According to Article 3 of the Consumer Credit Act, a consumer means any natural person who concludes a consumer credit agreement for a purpose other than their commercial or professional activity.

Even when running a franchise business as a natural person, a franchisee may not qualify as a consumer and derive any related protections, as a franchisee is not operating in an area outside its business activity.

v Competition law

Swiss competition law is governed by the Federal Cartel Act (CartA), the Federal Act on Price Supervision and the Federal Act against Unfair Competition.

Foreign competition law, in particular EU law and, more specifically, Regulation EU No. 2022/720 of 10 May 2022 and the EU Guidelines on Vertical Restraints, may also be relevant for entities operated in the EU from Switzerland, based on the theory of the effect on a relevant territory.

On 12 December 2022, the Swiss Competition Commission (ComCo) published a notice concerning the assessment of vertical agreements (CommVert; thus replacing the previous version of the CommVert that was in force as of 28 June 2010 and revised on 22 May 2017) containing detailed rules that must be taken into account when setting up franchise relationships. Guidelines have also been published to provide further information. In substance, the CommVert is similar to Commission Regulation (EU) No. 2022/720 of 10 May 2022. The ComCo Guidelines are in substance based on European practice, in particular the *Coty* case.[11]

However, in the *Gaba* case,[12] the Swiss Federal Court refused to apply an EU regulation on technology transfer agreements under Swiss law. The extent to which companies can use the practice in the EU as a model is thus subject to discussion.

In the same vein, the judgment of the Swiss Federal Court of 4 February 2021 (published on 21 April 2021)[13] in the matter *Sanction Order: Hors-Liste Medikamente (Preisempfehlungen)*

10 BGE 118 II 157.

11 ECLI:EU:C:2017:941.

12 BGE 143 II 297.

13 BGE 147 II 72.

has confirmed that ComCo and Swiss courts have a stricter practice on non-binding price recommendations than the corresponding rules under European competition law. This case dealt with the non-binding price recommendations communicated by Pfizer for its erectile dysfunction drug, Viagra, to the attention of its retailers, namely pharmacies and doctors, via an electronic system. This system was designed in such a way that the current price recommended by Pfizer automatically appeared in the retailers' cash register system when scanning the barcode of the products. The Swiss Federal Court concluded that the price recommendations constituted a concerted practice within the meaning of Article 4 Paragraph 1 CartA. Even though the price recommendation was non-binding and Pfizer had not exerted any pressure on its retailers or offered them special incentives to comply with them, the electronic transmission of the price recommendations constituted an illicit coordination. This coordination was causal for the retailers' price as more than 50 per cent of the retailers complied with those price recommendations (89.3 per cent of the pharmacies and 81.7 per cent of the doctors).

The CommVert provides a series of presumptions, justificatory grounds and rules on cross-supplies, non-compete obligations, know-how and prices. For example, a franchise agreement is deemed to be illegal and invalid if it provides for a minimum or fixed price for a product or for the allocation of territory between different franchisees by preventing passive sales by other franchisees into those territories. In line with BGE 147 II 72, the CommVert in particular provides for stricter rules than those applicable within the EU with regard to price recommendations.

Internet sales are now handled in the same manner as physical sales pursuant to the CommVert, meaning that they are considered as active sales as long as the website specifically targets customers in an individual territory, for example by operating an internet site whose top-level domain corresponds to specific territories, or offering on an internet site languages commonly used in specific territories, when these languages are different from those commonly used in the territory in which the franchisee is established. Consequently, a general prohibition of online sales in franchise agreements qualifies as an illicit hardcore restriction.[14] Other restrictions may also qualify as hardcore restrictions, such as technical geoblocking measures, rerouting customers or restricting sales to customers located outside the contractual territory based on the information provided (e.g., foreign credit cards) as those restrictions achieve the same goal to restrict passive sales to customers located outside a contractual territory.

If a franchise agreement is found to contain illegal clauses, the parties may be fined up to 10 per cent of the turnover achieved in Switzerland in the preceding three years. Under the leniency programme, however, companies have the option to avoid or reduce the threat of antitrust sanctions by making a leniency application, which is provided for by the CartA. The first undertaking providing information can avoid the whole of the sanction.

Finally, a revision of the CartA and the Federal Act against Unfair Competition came into force on 1 January 2022. This revision implements the fair price initiative, which aims to enable the purchase of products outside of Switzerland in potentially more favourable purchasing conditions. The revision establishes various new behavioural obligations for companies that are powerful relative to their market, prohibits discrimination while procuring goods and services abroad and prohibits geoblocking practices. The revised provisions may have a material impact on franchising activities in Switzerland.

14 Order of WEKO re Electrolux and V-Zug dated 11 July 2011.

As of 1 July 2023, a new revision of the Federal Cartel Act will extend the limitation periods to prosecute violations of amicable settlements and administrative orders, as well as violations of the obligation to provide information and violations relating to concentrations of undertakings.

vi Restrictive covenants

A covenant not to compete is generally enforceable pursuant to Swiss law, subject to the foregoing.

The CommVert generally considers the following to be per se illicit:

a throughout the term of the franchise agreement: a direct or indirect non-compete obligation of indefinite duration or exceeding five years, except when:
- the goods or services are sold by the franchisee from the premises and land owned by the franchisor or leased by the franchisor to third parties unrelated to the franchisee; and
- the non-compete obligation does not extend beyond the period during which the franchisee uses such premises and land; and

b post termination: imposition of direct or indirect obligations prohibiting the franchisee from manufacturing, purchasing, selling or reselling goods or services after the termination of the franchise agreement, unless all of the following conditions are met:
- the obligations concern goods or services in competition with the goods or services that are the object of the franchise agreement;
- the obligations are limited to the premises from which the franchisee has carried out its activities during the term of the franchise agreement;
- the non-compete obligations are essential for the protection of know-how transferred by the franchisor to the franchisee; and
- the duration of the obligations is limited to one year from the expiry of the franchise agreement.

Confidentiality covenants throughout the term of the franchise agreement and following its term are generally enforceable pursuant to Swiss law. In the case of a breach of a confidentiality undertaking, the non-breaching party may initiate a civil action to order compliance with the clause and claim damages.

It is recommended to link the confidentiality clause to a penalty clause stipulating that any breach of the confidentiality undertaking will entail the payment of a contractual penalty by the breaching party, without prejudice to the right of the non-breaching party to claim additional damages or to request cessation of the breach. Such a penalty clause helps to avoid the additional difficulty of quantifying the specific damage effectively suffered by the non-breaching party as the result of this breach. Depending on the information revealed to a third party, a breach of confidentiality may, furthermore, constitute a criminal act.

vii Termination

The parties may freely agree on the term and termination, as well as the renewal terms, of a franchise agreement provided that those terms are not considered excessive pursuant to Article 27 of the CC, or immoral or contrary to public order pursuant to Article 20 of the CO.

As stated above, depending on the specific circumstances, provisions related to a regulated contract may be applicable, such as Article 418u of the CO on the compensation of goodwill generated by the agent, or provisions of employment law.

As mentioned above, a non-compete covenant may in any event be limited to one year post term. The other conditions are mentioned in Section VI.vi.

The termination or expiry of the franchise agreement may trigger various contractually agreed consequences, such as an option right granted to the franchisor to take over the franchisee incorporated as a company (i.e., through a share deal) or the lease of the premises of the franchisee.

With respect to the assignment of the lease of the franchisee, Article 263 of the CO gives the franchisee as a tenant of commercial premises a right to transfer its lease to a third party (e.g., the franchisor) subject to the written consent of the landlord, which can be denied only with good cause (e.g., if the franchisor as the assignee of the lease lacks the financial capacity to pay the rent or wishes to operate the premises in breach of the contractually agreed use). In the case of a transfer of lease, Article 263 Paragraph 4 of the CO provides that the tenant (assignor) is released from its obligations towards the landlord. However, it remains jointly and severally liable with the assignee of the lease until such time as the lease ends or may be terminated under the contract or by law, but in any event for no more than two years.

viii Anti-corruption and anti-terrorism regulation

There is no specific legislation on prevention of fraud, anti-corruption or money laundering with respect to franchising activities.

The Anti-Money Laundering Act applies to financial intermediaries and governs the combating of money laundering and terrorist financing. It ensures the exercise of due diligence in the conduct of financial transactions. Franchisees may be subject to the Anti-Money Laundering Act pursuant to Article 2 Paragraph 1 Letter (b), which provides that natural persons and legal entities marketing goods commercially and accepting cash in so doing fall within its scope of application.

Consequently, franchisees must fulfil the following duties if they accept more than 100,000 Swiss francs in cash in the course of a commercial transaction, pursuant to Article 8a of the Anti-Money Laundering Act:

a verification of the identity of the customer;

b establishing the identity of the beneficial owner;

c duty to keep records; and

d clarification of the economic background and purpose of a transaction if:

- it appears unusual, unless its legality is clear; or
- there are indications that assets are the proceeds of a felony or an aggravated tax misdemeanour under Article 305 bis Paragraph 1 bis of the SCC or are subject to the power of disposal of a criminal organisation,[15] or serve the financing of terrorism.[16]

However, those duties are not applicable for payments in excess of 100,000 Swiss francs made through a bank or another financial intermediary.

15 Article 260 ter SCC.

16 Article 260 quinquies Paragraph 1 SCC.

Corruption, including bribery in the private sector, is punished by the SCC pursuant to Article 322 ter of the SCC. The SCC sanctions both active and passive bribery.

ix Dispute resolution

Forum

A franchise agreement usually provides for a choice of law and an exclusive place of jurisdiction, or an arbitration clause. Those provisions are usually enforceable in the applicable jurisdiction.

Switzerland is a particularly popular seat of arbitration. Arbitration provides tailor-made dispute resolution and is particularly suitable for disputes that the parties wish to resolve in all discretion or that involve lots of documents in a foreign language. Swiss law fully recognises the coexistence of state judgments and arbitral awards, whether they are rendered to parties based in Switzerland or abroad.

Furthermore, the Swiss Arbitration Centre (the successor of the Swiss Chambers' Arbitration Institution[17]) offers means of dispute resolution based on the Swiss Rules of International Arbitration.

However, Swiss courts have a good reputation and are particularly suitable for commercial disputes. Before opting for an arbitration clause in their franchise agreement templates, foreign franchisors should evaluate whether arbitration would be advantageous in their particular situation. For example, the costs of arbitration remain high despite the absence of appeal if the dispute involves a small monetary amount. It is recommended to reserve this mode of dispute resolution for disputes involving large sums of money or that must be kept secret.

Mediation (ad hoc or institutional mediation; e.g., pursuant to the Swiss Rules of Mediation of the Swiss Arbitration Centre)[18] is a recognised form of alternative dispute resolution to be initiated as a preliminary step or during pending litigation. To that extent, the Swiss Code of Civil Proceedings (SCCP) provides provisions articulating the relation between mediation and judicial proceedings in civil matters,[19] but does not govern the mediation process itself. As a general rule, initiating a mediation process requires the consent of all parties involved. However, some franchise agreements provide for an escalation process, including compulsory mediation as a preliminary step to arbitration or litigation before Swiss courts.

Procedure

There is no specific procedure or industry practice for franchising disputes. Typically, proceedings may be conducted successively in three levels of courts. The cantons usually provide for two levels of courts. In civil matters, the cantons may introduce commercial courts as the sole cantonal instance for commercial matters. Sole cantonal instances further exist in all cantons for disputes in connection with intellectual property rights, antitrust and unfair competition law.

17 Effective as of 1 June 2021, the Swiss Chambers' Arbitration Institution (SCAI) was restructured and renamed the Swiss Arbitration Centre. The Swiss Arbitration Centre is a Swiss company whose shareholders are the Swiss Arbitration Association and the Swiss Chambers of Commerce participating in SCAI.

18 https://www.swissarbitration.org/Mediation/Mediation-rules.

19 Articles 213–218 SCCP.

The Swiss Federal Court, the highest court in Switzerland, acts as the final ordinary Swiss court of appeal.

It is difficult to outline a typical timeline, as this depends on the competent courts, the submissions of the parties and the expert opinions to be requested. Litigation in Switzerland may be costly and time-consuming. With respect to disputes arising out of the performance of a franchise agreement, it can easily take between 12 and 18 months to obtain a first instance judgment and much longer in complex cases.

Remedies

A franchisor may obtain an interim or permanent injunction to prevent a former franchisee from continuing to trade in breach of an enforceable non-compete provision or from using the franchisor's trademarks or other intellectual property rights (see Section III.iii).

A franchisor trademark owner may also demand financial compensation by means of a request for royalties, compensation in the form of damages or repayment of the profits made by the party infringing its trademark.

Losses are generally recoverable as damages if they are caused by a breach of contract or a breach of law. To qualify to be claimed as damages pursuant to Swiss law, losses must meet the test of natural and adequate causation: in light of general experience, the alleged breach of contract is generally of a nature to cause the loss at stake. Under Swiss law, the party claiming damage must generally quantify and substantiate in detail the specific damage suffered. In exceptional circumstances, where such quantification is not possible, the court or arbitral tribunal may estimate the damage suffered, provided that the claiming party has proven that it suffered some loss.

Enforcement

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards entered into force in Switzerland in 1965. Swiss courts readily recognise foreign arbitral awards from another Convention country on this basis. Indeed, Swiss courts are reluctant to review an arbitral tribunal's determination on the merits, and interpret narrowly the grounds on which enforcement may be denied.

Noteworthy franchising disputes

We have not seen reported any noteworthy franchising disputes in Swiss jurisdictions over the past year.

VII CURRENT DEVELOPMENTS

The ongoing reforms of existing legislation and proposals for new legislation are likely to change the regulations impacting franchises.

A total revision of the Swiss Data Protection Act (DPA) was passed by the Swiss Parliament on 25 September 2020. The purpose of the DPA revision (which originally came into force in 1992) was to adapt the outdated law to today's social and technological conditions and to align the DPA with the GDPR. The revised DPA is scheduled to enter into force on 1 September 2023. The revised DPA will introduce some significant changes for businesses (including franchises), including:

a the revised DPA will only cover the data of natural persons to the exclusion of that of legal persons;

b the principles of 'privacy by design' (which requires developers to integrate the protection and respect of users' privacy into the very structure of the products or services that collects personal data) and 'privacy by default' (which ensures the highest level of security as soon as products or services are released, by activating by default, i.e., without any intervention from users, all the measures necessary to protect data and limit its use) will be introduced; and

c keeping a register of processing activities will be mandatory, although the ordinance will allow some exemptions for SMEs whose data processing presents limited risk of harm to the data subject.

On 29 November 2020, the Swiss electorate rejected the responsible business initiative, which aimed to legally oblige corporations based in Switzerland to incorporate respect for human rights and the environment into their business activities in Switzerland and abroad. A counterproposal from the government, with similar objectives but less intrusive sanctions, has been adopted. Consequently, Swiss companies of public interest (i.e., listed companies and companies in the financial sector supervised by the Swiss Financial Market Supervisory Authority) that have at least 500 full-time employees on an annual average (together with the companies they control in Switzerland and abroad) and that exceed either total assets of 20 million Swiss francs or an annual turnover of 40 million Swiss francs, have increased their reporting and due diligence requirements to ensure that their business activities comply with human rights and international environmental standards. These companies must report annually on certain non-financial matters (environmental, social and governance (ESG) matters) including environmental concerns (e.g., carbon dioxide emissions), social and employee concerns, human rights and the fight against corruption. An implementing ordinance on due diligence and transparency in relation to minerals and conflict-affected areas and child labour (DDTrO) entered into effect on 1 January 2022, together with the new Articles 964a et seq. CO. The new due diligence requirements apply for the first time for the financial year beginning in 2023. Consequently, the first ESG reporting must be issued in the first semester of 2024 with respect to financial year 2023.

In that context, the government also published in March 2022 a draft ordinance that specifies the climate-related reporting obligations to be integrated into the general ESG report. The ordinance is scheduled to enter into force on 1 January 2024. On 25 August 2021, the the government released a broad framework for a possible introduction of a screening regime of foreign direct investments. Under the contemplated investment control regime, acquiring control over Swiss companies by foreign investors shall be subject to review in certain industries if the companies provide non-substitutable services or if state entities in security-relevant areas are critically dependent upon them. It is still unclear which industries or sectors would be subject to notification and approval requirements for foreign private investors. Regardless of the sector, a notification and approval requirement is envisaged for any investments by foreign states or state-related actors. A draft bill was issued on 18 May 2022 for public consultation until 9 September 2022. There is widespread scepticism about the proposal, especially as it reduces Switzerland's attractiveness as a business location. The Federal Council has therefore instructed the Federal Department of Economic Affairs, Education and Research to draft legislation by the end of 2023 that is limited to investments that are most critical to security.

On 24 November 2021, the government published a preliminary draft for the revision of the Swiss Federal Cartel Act and opened the consultation process. The main objective of

the proposed revision is the modernisation of Swiss merger control, by changing the current qualified market dominance test to the significant impediment to effective competition test. The merger control regulations are to be adapted to the standards already prevailing in the EU, and the threshold for prohibiting a transaction will thus become lower. In addition, the proposed revision clarifies the assessment of hardcore agreements by reintroducing the effects control of hardcore anticompetitive agreements. In reaction to the introduction by the *Gaba* case of the concept of per se significance of certain agreements, a parliamentary motion requested to take into account both qualitative and quantitative criteria when assessing the significance of hardcore anticompetitive agreements. The preliminary draft aims also to strengthen the civil enforcement of competition law and to modify the cartel administrative procedure. Indeed, the revision contemplates extending the possibility of civil action to end customers suffering damage resulting from unlawful agreements between undertakings.

The public consultation on the preliminary draft ended on 11 March 2022. On 24 May 2023, the Federal Council unveiled its draft legislation for partial revision of the Swiss Federal Cartel Act and adopted the related dispatch. This draft legislation will now be deliberated in the Swiss Parliament. Entry into force is expected in 2024 at the earliest.