

Legal 500

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Switzerland

Franchise & Licensing

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This country-specific Q&A provides an overview of franchise & licensing laws and regulations applicable in Switzerland.

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Switzerland: Franchise & Licensing

1. Is there a legal definition of a franchise and, if so, what is it?

A franchise has no legal definition in Switzerland and is considered as an innominate contract, as it falls under no express legal classification. As no legal definition is available in the law, the Swiss Federal Supreme Court provided in its rulings a description of the main characteristics of a franchise contract: franchising agreements are designed for the distribution of goods and services through independent traders or entrepreneurs but following a standardised distribution scheme. The individual franchisee distributes on its own account and at its own risk the goods and services produced or provided by the franchisor. In its activity however, the franchisee follows the standardised sales and advertising scheme developed by the franchisor. Furthermore, the distributor benefits from the franchisor's assistance, advice and training. It also uses the franchisor's name, trademarks, equipment or other proprietary rights. The franchisor usually reserves itself the right to give instructions and to exercise a certain level of control over the franchisee's business.

Finally, there are no legal differentiations between the different types of franchising contracts. Every contract and case has to be looked at in its specificity and the applicable law is chosen either by the parties or according to the particularities of the contract, if no choice of law has been made.

Switzerland therefore applies a liberal legal approach to franchising and offers a favourable environment for this type of business activity.

2. Are there any requirements that must be met prior to the offer and/or sale of a franchise? If so, please describe and include any potential consequences for failing to comply.

In Switzerland, there are no formal legal requirements prior to the signing of a franchise contract. It is however recommended for the franchisor to ensure a minimum viability of the franchising system in order to avoid possible compensation claims from future franchisees. This minimum viability is subject to lower standards if the system is newly implemented and in the starting phase, whereas higher standards apply if the franchising system

has already been functioning for some time. Every case has to be examined independently, also with a focus on the situation of the franchisee. As a general rule however, the franchisor has always to act in good faith when presenting its concept as well as the business prospects and opportunities to potential candidates. If not, it might be held accountable for misleading its contractual partner.

3. Are there any registration requirements for franchisors and/or franchisees? If so, please describe them and include any potential consequences for failing to comply. Is there an obligation to update existing registrations? If so, please describe.

There are currently no registration requirements for franchising structures or agreements in Switzerland. In this regard however, the specific type of business should be taken into account, as some activities in Switzerland are subject to approval from the authorities. The following non-exhaustive list shows typical areas where economic actors need approval before initiating business:

- Finance & Insurance
- Employment agency & staffing
- Security
- Trade and sale of alcoholic beverages
- Gambling & lotteries
- Health services.

In addition, as in most cases franchisors and franchisees operate under their own legal entity, they have to register the company in the respective cantonal ledger. The registration of the brand/logo under which the business operates is of course also required.

4. Are there any disclosure requirements (franchise specific or in general)? If so, please describe them (i.e. when and how must disclosure be made, is there a prescribed format, must it be in the local language, do they apply to sales to sub-franchisees) and include any potential consequences for failing to comply. Is there an obligation to update and/or repeat

disclosure (for example in the event that the parties enter into an amendment to the franchise agreement or on renewal)?

There are no specific legal rules on disclosure for franchising contracts. These agreements however need to follow the general contract rules as established by the doctrine and jurisprudence. Both parties to an agreement have therefore pre-contractual duties and behavioural guidelines. The concrete pre-contractual disclosure duty depends on the specificities of the contract. A disclosure is usually mandatory when it can be expected in good faith from the contracting parties. It is common to insert into the contract a clause specifying that the franchisee has been duly informed on any relevant information and has taken the decision to engage into the business relationship with full knowledge of its consequences and obligations. During the discussions and negotiations prior to the signing of a franchise contract, the code of conduct of Swiss Distribution (previously Swiss Franchise Association SFA) provides more clarity on what can be expected from the franchisor in this respect: by stating that the franchisor should inform and make available to the franchisee in advance, any information and documents of relevance for their future cooperation and which may help the franchisee in making his/her decision to enter into a binding agreement with full knowledge of the matter. More specifically, the franchisee must be able to assess the profitability, the risks as well as the advantages and drawbacks of the system and be in the position to make proper use of the transferred know how. Failure to disclose relevant information to the franchisee before signing the contract could give grounds to a valid claim for compensation or in some cases justify the early termination of the agreement.

Pre-signing disclosure is also required from the franchisee and includes for example information on the background, professional experience, credit history and ability to run the business.

The proof of concept is also a core element for the franchisor before it considers launching a franchise business. The franchisor should have successfully run its business model for a certain period of time before implementing a broader distribution system, also with the aim at preventing potential claims from franchisees. It is therefore recommended for the franchisor to ensure a certain level of viability of the system before engaging in a long-term business cooperation.

The good faith principle also applies to the disclosure requirements in the course of the contractual relationship. It is therefore advisable to include in the

agreement the specifics regarding disclosure between the parties to avoid any uncertainty (e.g. the access to the franchisee's books etc.).

In Switzerland, there is no mandatory language for contracts. Parties to an agreement can therefore freely choose to draft the contract in one of Switzerland's official languages (German, French, Italian or Romansh) or any other language of their choice. Central in this context is that all parties to the agreement have the same interpretation of the provisions contained therein, as the understanding of terms in a foreign language can often differ between the parties.

5. If the franchisee intends to use a special purpose vehicle (SPV) to operate each franchised outlet, is it sufficient to make disclosure to the SPVs' parent company or must disclosure be made to each individual SPV franchisee?

Under Swiss law, a legal entity is regarded and accounted for on its own. Switzerland has no regulations on groups of companies, except on some specific issues like consolidation etc., therefore each company is considered as a separate entity with its own interests and independently from a parent or sister company. Disclosure of elements made to the parent company of possible SPVs are not deemed to be made to the SPVs themselves. The parent company should, in principle, following the agreement with the franchisor, enter into agreements with the SPVs and disclose to them the relevant information and documents. Contracts between the parent company and the SPVs should therefore be made at arm's length.

6. What actions can a franchisee take in the event of mis-selling by the franchisor? Would these still be available if there was a disclaimer in the franchise agreement, disclosure document or sales material?

Issues raising from non-disclosure or incorrect disclosure of information prior to the signing (as described above) of the franchise agreement do not automatically lead to the cancellation of the agreement. The franchisee can however claim for compensation for the losses it has suffered.

Lack of disclosure of relevant information during the contract allows the franchisee to terminate the agreement earlier or ask for compensation for breach of contract.

A waiver of liability is generally possible in the contract or in the terms and conditions for minor and moderate faults. However, a waiver of liability for intentional misrepresentation or gross negligence is invalid.

7. Would it be legal to issue a franchise agreement on a non-negotiable, "take it or leave it" basis?

If the same contract is used for a multitude of partners, which is usually the case for franchises, standardized, non-negotiable terms and conditions are admissible under Swiss law. However, the Swiss Unfair Competition Act can help the weaker party to invalidate one-sided clauses in a pre-drafted agreement. Also, unclear provisions will be interpreted in the most favourable way for the non-redacting party, who in this case will be the franchisee. Unusual clauses that cannot reasonably be expected to appear in a franchising agreement are to be considered invalid, unless specifically brought to the attention of the franchisee, for example by using bold characters.

Accordingly, the franchisee should at least have the opportunity to ask questions and negotiate to some extent contractual clauses in order to avoid a later legal dispute over the validity of certain provisions in the contract.

8. How are trademarks, know-how, trade secrets and copyright protected in your country?

In Switzerland, the Trade Mark Protection Act protects registered trademarks from a misuse by third parties. The trademark has to be registered with the Swiss Federal Institute of Intellectual Property (IPI) and is protected for renewable periods of ten years.

Copyrights are protected by the Copyrights Act and do not need registration. The protection begins with the creation of the literary or artistic work. In order to be protected by law, literary or artistic works as well as computer programs need to possess an individual distinct character. Photographs however are protected independently from their individual character. Exceptions to the protection are: private use, citations, back-up copies and reporting of current events.

Trade secrets are not protected by a dedicated law in Switzerland. However, various laws, especially civil and criminal laws, contain provisions protecting and covering trade secrets. A trade secret is considered as such and therefore protected when it is not a publicly available

information and for which the owner has taken measures to safeguard its secret character. Such measures could be the following: restricted access (safe, special areas, passwords etc.), confidentiality clauses in contracts or defining a limited circle of persons with access to the information.

9. Are there any franchise specific laws governing the ongoing relationship between franchisor and franchisee? If so, please describe them, including any terms that are required to be included within the franchise agreement.

There is no specific law governing franchising agreements in Switzerland. General provisions on bilateral contracts and the relevant case law are applicable to franchising agreements.

10. Are there any aspects of competition law that apply to the franchise transaction (i.e. is it permissible to prohibit online sales, insist on exclusive supply or fix retail prices)? If applicable, provide an overview of the relevant competition laws.

In Switzerland, the Cartel Act prevents vertical and horizontal agreements (franchising agreements among others) that refrain or eliminate competition on the relevant market. Vertically and horizontally organised distribution systems that for example fix retail prices or divide the territory fall under the assumption that they refrain or eliminate competition on the market and are therefore not permitted. It is at this point still possible for the franchisor to prove that there is no competition restriction on the market and that the terms of the agreement are justified for reasons of economic efficiency. Furthermore, vertical distribution systems which contain clauses that are not price or territory related are not considered as harmful by the competition commission, unless a market share of 15% is reached.

11. Are in-term and post-term non-compete and non-solicitation clauses enforceable?

According to the doctrine, article 418d of the Swiss code of obligations is relevant regarding non-compete and non-solicitation clauses in franchising contracts. This provision gives the franchisor the right, if a non-compete clause is provided for in the contract, to file for compensation in case of breach by the franchisee. The compensation in case of a breach will be calculated

based on the loss of profit resulting from the unfair competition which, however, might be difficult to prove in certain cases. A post-contractual non-competition clause must be limited to a maximum of 3 years and limited to a pre-defined territory. It should also precisely define the scope of activity which is excluded.

12. Are there any consumer protection laws that are relevant to franchising? Are there any circumstances in which franchisees would be treated as consumers?

No specific law in this regard specifically regulates franchising in Switzerland. General consumer protection provisions and jurisprudence apply. Provisions on consumer loans, warranties, terms and conditions as well as product liability for example have to be considered. Generally, franchisees are not qualified as consumers in Switzerland.

13. Is there an obligation (express or implied) to deal in good faith in franchise relationships?

As seen under point 4 above, there is a general obligation to deal in good faith with your business partner, regardless of the type of contract. This rule obliges the parties to deal in good faith in a franchise relationship. The parties must therefore observe for example a general duty of care, comply with certain disclosure requirements etc. Non-compliance with this general principle might trigger the liability of the offending party.

14. Are there any employment or labour law considerations that are relevant to the franchise relationship? Is there a risk that the staff of the franchisee could be deemed to be the employees of the franchisor? What steps can be taken to mitigate this risk?

A franchisee could be regarded as an employee of the franchisor under certain circumstances. The main criteria is the control over the franchisee. The more the franchisee is subordinated to the franchisor, the higher the risk for a reclassification. Accordingly, in order to mitigate that risk, it is advisable to leave a certain autonomy to the franchisee, in particular in respect of ordinary business risks, the workforce, working capital, rent, finances etc. and to limit as much as possible the franchisor's supervision to the compliance with the guidelines and the concept. Also, the franchisor should refrain from intervening directly into the franchisee's daily

business and from giving instructions to the franchisee's employees.

15. Is there a risk that a franchisee could be deemed to be the commercial agent of the franchisor? What steps can be taken to mitigate this risk?

Under Swiss law, the franchisee is not considered as an agent of the franchisor, unless the franchisee is authorized to facilitate or conclude, on a regular basis, business transactions for the account and in the name of the franchisor. In order to avoid such a constellation, the franchisee should conclude transactions on its own behalf and in its own name. According to Swiss regulations, an agent is entitled to a certain compensation upon termination of the contractual relationship based on the customer basis and profit generated by the agent's activity, which will benefit to the principal in the future. As of today, this regulation does not apply to franchisees, but it is not excluded that a court would rule in the same direction. So there is a risk that a franchisor has to compensate its franchisee at the end of the contract, especially if the franchisee has significantly contributed to the notoriety and expansion of the brand in its territory.

16. Are there any laws and regulations that affect the nature and payment of royalties to a foreign franchisor and/or how much interest can be charged? Are there any requirements for payments in connection with the franchise agreement to be made in the local currency?

Switzerland does not have provisions limiting the payment of royalties to a foreign franchisor, save some tax considerations for related parties, which is normally not the case in a franchising relationship.

17. Is it possible to impose contractual penalties on franchisees for breaches of restrictive covenants etc.? If so, what requirements must be met in order for such penalties to be enforceable?

Contractual penalties in franchise agreements are allowed under Swiss law, but a judge could reduce the agreed amount if it seems exaggerated and is jeopardizing the franchisee's business activity. Consequently, penalties should be proportionate and not excessively punitive. Of course, the appropriateness should be assessed on a case by case basis.

18. What tax considerations are relevant to franchisors and franchisees? Are franchise royalties subject to withholding tax?

In Switzerland, usual corporate taxes apply to franchisors and franchisees, including profit and capital tax, or income and wealth tax if the franchisee is operating under its own name. Royalties originating in Switzerland are not subject to any withholding tax. A withholding tax is however applied to cross border dividends. The statutory rate of Swiss WHT is 35%. Relief, if any, is generally granted by refund. With respect to dividends between qualifying related companies, a mere notification/reporting procedure may be requested for the fraction of the Swiss WHT exceeding the residual WHT (which is 0% in many cases).

19. How is e-commerce regulated and does this have any specific implications on the relationship between franchisor and franchisee? For example, can franchisees be prohibited or restricted in any way from using e-commerce in their franchise businesses?

There is no specific law in Switzerland which regulates e-commerce. References to e-commerce can however be found in the Unfair Competition Act (UCA) and in the Ordinance on Price Disclosure (OPD). Art. 3 par. 1 lit. s UCA states that whoever offers goods, works, or services by means of electronic commerce is required to: 1) clearly and completely indicate its identity and contact address; 2) indicate the different technical steps that must be followed in order to conclude the contract; 3) make available appropriate means for identifying and correcting input errors prior to the placing of an order; and 4) acknowledge receipt of the customer's order immediately by electronic means. The OPD determines the duty to disclose prices to consumers and the level of transparency required (e.g. the prices have to be in Swiss Francs and all non-eligible costs as public fees or copyright royalties must be included in the disclosed price of goods and services). Contrary to EU law, the customer has no right of withdrawal with regard to a distance contract concluded under Swiss law. It is important to note however that these provisions only apply to sales of services or products to end-consumers and not between business partners. Accordingly, they are of no relevance in the context of the business relationship between franchisor and franchisee. In light of the fact that there is no specific law on franchise business, the parties to a franchise contract are free to regulate their partnership and can therefore agree to prohibit or restrict

the use of e-commerce by the franchisee, even though this would seriously impede the franchisee's future business.

20. What are the applicable data protection laws and do they have any specific implications for the franchisor/franchisee relationship? Does this have any specific implications in the franchising context?

Switzerland has passed a law on data protection in 1992 which has recently been amended in order to align with EU regulations. This revision will allow Switzerland to maintain its adequacy in terms of level of protection for processing personal data and still be compliant with the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108), which it has ratified, and the Directive (EU) 2016/680. Swiss regulations are consequently very similar to European laws and have an impact on franchise businesses as well, for example in connection with the transfer of sensitive data to a franchisor located in a country with limited protection. Obviously, franchisees have to protect, document and restrict access to sensitive customer data.

21. Is the franchisor permitted to restrict the transfer of (a) the franchisee's rights and obligations under the franchise agreement or (b) the ownership interests in the franchisee?

As already mentioned, Swiss law is very liberal as far as the contents of the agreement between franchisor and franchisee are concerned. Therefore, the parties are free to create their own contractual framework, tailor made to the specificities of their business relationship. Accordingly, the franchisor may restrict the transfer of the franchisee's rights and obligations or his/her ownership interests. The most common regulation in Swiss franchise contracts provides that the franchisee can only transfer the rights and obligations in the agreement with the express consent of the franchisor.

22. Does a franchisee have a right to request a renewal on expiration of the initial term? In what circumstances can a franchisor refuse to renew a franchise agreement? If the franchise agreement is not renewed or it if it terminates or expires, is the franchisee entitled to compensation? If so,

under what circumstances and how is the compensation payment calculated?

If a renewal is not foreseen in the contract, the franchisee has no right to the renewal of the franchising contract.

If the franchisee, in good faith, has valid reasons to believe that the contract would be renewed based on the information and indications provided by the franchisor, it may ask for compensation should the agreement not be renewed.

For possible compensation regarding the client basis and notoriety created by the franchisee during the contract for the benefit of the franchisor, please kindly refer to point 15.

23. Are there any mandatory termination rights which may override any contractual termination rights? Is there a minimum notice period that the parties must adhere to?

If the contract does not include a termination clause, the doctrine applies the legal termination notice period of six months.

According to the jurisprudence, the contract can be, in any case and at any time, terminated for cause. Such causes result in the breach of the mutual trust between the parties, making it unbearable for one party to continue the cooperation with the other. A typical example is when the franchisee tries to defraud the franchisor by not declaring its sales turnover in order to reduce the royalties.

Lastly, any contract can be amended with the consent of all parties. In the case of a significant and unexpected change in external circumstances, the judge may amend or even terminate the contract. This could be the case if the changes clearly and disproportionately impact the ability of one party to perform its obligations under the agreement.

24. Are there any intangible assets in the franchisee's business which the franchisee can claim ownership of on expiry or termination, e.g. customer data, local goodwill, etc.

The parties are free to regulate this topic in the franchise agreement, as there are no stringent provisions under Swiss law. Generally, the franchisor reserves the right on ownership of all intangible assets created in the course of the business relationship. Please note however that

sensitive personal data of customers can only be transferred to third parties with the consent of these persons.

Please refer to point 15 regarding the right of the franchisee for compensation for an increased consumer basis generated by the franchisee.

25. What due diligence should both the franchisor and the franchisee undertake before entering into a franchise relationship?

In case of a foreign based franchise system, which is very common in Switzerland, the franchisee should ascertain that the business is viable in our country through a market survey. A professional and state of the art business plan developed in close cooperation with the franchisor should also be part of the due diligence process for the franchisee. The history and track record of the franchise system should definitely be scrutinized carefully. On the franchisor's side, a thorough assessment of the franchisee's ability to conduct a business independently and sufficient financial means (including credit history) to invest in the franchise should be an essential part of the due diligence process.

26. How widespread is franchising and what are the most active sectors? Are there any specific economic, cultural or regulatory issues that make franchising particularly attractive?

Franchising remains limited in Switzerland, although it is an expanding business model in our country. Main reasons for this is that the country is small in size and divided in three linguistic regions, making it more difficult for a franchise system to cover the entire territory. The most active sectors are the traditional ones: food & beverage, personal and medical care, clothing, real estate agencies and language schools etc. As mentioned, the liberal approach to contractual law and the freedom granted to the parties to regulate their relationship make it attractive for many franchise businesses to initiate operations in our country. The high standard of living and average income makes it also interesting for foreign franchisors, especially those active in the upper price segment.

27. Is there a national franchising association? Is membership required? If not, is membership commercially advisable? What are the additional

obligations of the national franchising association?

Swiss Distribution (previously Swiss Franchise Association SFA) is the association in Switzerland for distribution, licensing and franchising. The membership is of course optional but stands for quality, excellence and sustainability in the franchise business, as each member must comply with minimal standards set by the association, namely by adhering to the Code of Conduct. You can visit the website of Swiss Distribution using the following link: www.swissdistribution.org.

28. Are foreign franchisors treated differently to domestic franchisors? Does national law/regulation impose any debt/equity restrictions? Are there any restrictions on the capital structure of a company incorporated in your country with a foreign parent (thin capitalisation rules)?

Foreign and domestic franchisors are treated equally in Switzerland. Swiss law requires however that Swiss companies register at least one resident in Switzerland with full representation rights. Switzerland has thin capitalization rules which are, in principle, only applicable to related parties. The Swiss Federal Tax Administration has issued a circular letter which provides for debt-to-equity ratios as safe harbour rules. This letter defines how hidden equity is assessed for annual capital tax purposes and profit adjustments.

29. Are there any requirements for payments in connection with the franchise agreement to be made in the local currency?

Transactions between the parties can be conducted in the currency the parties agreed upon. No prescription obliges to use the Swiss currency, except of course in connection with the public authorities (taxes etc.). Furthermore, after the revision of the corporate law presumably entering into force in January 2023, limited liability companies will be able to be incorporated with a registered capital in foreign currency.

30. Must the franchise agreement be governed by local law?

In Switzerland, parties to a contract can freely choose the governing law if the contract is of international character. This is the case when a contract has a connection to a

foreign country, for example when one party is located outside of Switzerland. However, although contract law is mainly of concessionary nature, some general principles of law have mandatory character and prevail over foreign laws (e.g. the right to be heard in legal proceedings). Finally, labour contracts are governed by the law of the country in which the worker usually performs its work.

31. What dispute resolution procedures are available to franchisors and franchisees? Are there any advantages to out of court procedures such as arbitration, in particular if the franchise agreement is subject to a foreign governing law?

Among many other jurisdictions, Switzerland is internationally recognised as an arbitration venue. A significant number of complex international contracts choose Swiss law as their governing law. Furthermore, as mentioned above, Swiss law is highly liberal and flexible, which makes it interesting for business transactions. In Switzerland, mainly two institutions are of relevance as far as arbitration is concerned: the International Chamber of Commerce with its ICC rules and Swiss Arbitration with its Swiss Rules. Besides, following the revision of the Federal Act on International Private Law, parties can now submit arbitration related proceedings to the Federal Supreme Court in English as well. With regard to the enforceability of arbitration awards, Switzerland has ratified the New York Convention without reserves and recognises therefore awards issued in the signatory countries.

32. Does local law allow class actions by multiple franchisees?

Class actions are not possible under Swiss law.

33. Must the franchise agreement and disclosure documents be in the local language?

As seen under point 4, the language of such documents depends on the mutually agreed terms set out in the contract.

34. Is it possible to sign the franchise agreement using an electronic signature (rather than a wet ink signature)?

If the parties choose to have a signed agreement (not mandatory in Switzerland), the signature can be completed in an electronic way. The requirements of the

Federal Act on the electronic signature need to be observed in order to ensure the authenticity of a document. This is accomplished through certification and can be checked by third parties online.

35. Can franchise agreements be stored electronically and the paper version be destroyed?

It is possible to store documents electronically. However, it is highly recommended to keep original copies with the original signatures for evidence purposes in case a dispute arises.

Furthermore, Swiss courts will in the coming year move to a paperless communication system, implying that filings be submitted electronically.

36. Please provide a brief overview of current legal developments in your country that are likely to have an impact on franchising in your country.

In the context of the revision of the company law entering into force in January 2023, new or revised provisions will create a more flexible environment for the set up of legal entities. The decision-making process for corporate bodies will also gain in flexibility, notably through digital communication and storage. Also, it will be possible to

create a share capital in a foreign currency. Furthermore, it will be possible to hold board meetings and general assemblies in an entirely digital setting. These changes will provide more overall flexibility to structures based in Switzerland.

As far as franchising is concerned, there are no signs as of today that Swiss lawmakers will regulate this type of businesses.

37. In your opinion, what are the key lessons to be learned by franchisors as a consequence of the COVID-19 crisis?

The main lessons to be learned from the pandemic can be summarized in two words: flexibility and communication. The pandemic has forced companies and organisations to communicate in a fast and concise way in order to adapt to the changed environment. Companies that have invested during the pandemic to increase their digital communication with consumers did surely invest in their future. As the legal environment is also adapting to these changes, an increasing number of digital solutions will be made available for use.

38. Do you foresee any significant commercial or legal developments that might impact on franchise relationships over the next year or so?

N/A

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