



**COUNTRY
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United Kingdom

FRANCHISE & LICENSING

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

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UNITED KINGDOM FRANCHISE & LICENSING



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

There is no legal definition of a franchise in the UK. Common law would regard a franchise agreement as a hybrid contract which incorporates various elements from other commercial contractual arrangements. However, the European Franchise Federation ("EFA") defines franchising as:

[A] system of marketing goods and/or services and/or technology, which is based upon a close and ongoing collaboration between legally and financially separate and independent undertakings, the Franchisor and its Individual Franchisees, whereby the Franchisor grants its Individual Franchisees the right, and imposes the obligation, to conduct a business in accordance with the Franchisor's concept.

This definition has been adopted by the British Franchise Association ("BFA") and might be taken into consideration by a court in determining the definition, if required.

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 the UK the principle of 'buyer beware' applies, meaning that it is the buyer's responsibility to undertake sufficient due diligence on the transaction they are entering into. There are no specific statutory requirements that must be met prior to the offer and/or sale of a franchise.

If the franchisor is a member of the BFA, then the franchisor must have operated at least one pilot unit for a reasonable time prior to granting franchises to demonstrate that the business concept is successful.

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 no specific registration requirements for franchisors and/or franchisees. However, all UK companies and LLPs must register with the Registrar of Companies and will be subject to official requirements, such as the filing of annual accounts.

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 disclosure requirements in relation to franchising in the UK. However, pre-contractual disclosure is considered to be good practice and the BFA members need to comply with the pre-contractual disclosure requirements in the BFA's Code of Ethics. The BFA also requires franchisors to avoid ambiguity in any advertising to prospective franchisees.

Similarly, where a franchisor does decide to make voluntary pre-contractual disclosures it must ensure that it discloses all material information and that it is accurate and not misleading. A properly drafted disclosure document can be a helpful tool to fend off claims by franchisees for misrepresentation.

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?

As there are no specific disclosure requirements in relation to franchising, English law does not dictate to whom disclosure should be made or require certain types of disclosure.

That said, if a franchisor issued a disclosure document voluntarily, then, provided the SPV is a wholly owned subsidiary of the parent company and there is an overlap of directors and officers, disclosure made to the parent should also constitute disclosure to the SPV.

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?

Where there has been an untrue statement of fact made by the franchisor, which induces the franchisee to enter into the franchise agreement and subsequently causes the franchisee to suffer loss then the franchisee may be able to claim for misrepresentation. Misrepresentation can be innocent, negligent or fraudulent. Depending on the type of misrepresentation, the franchisee can claim rescission of the franchise agreement with reimbursement of fees and other amounts paid, or damages.

It is common for franchise agreements to contain disclaimers and clauses that seek to limit liability for pre-contractual statements and misrepresentations. However, the courts have shown a willingness in the past to find ways around such clauses to protect franchisees where such clauses are considered to be unreasonable or unenforceable. Recent case law has indicated a strong desire from the courts to protect vulnerable or inexperienced franchisees. Exclusion clauses that purport to exclude liability for fraudulent misrepresentation are always unenforceable.

The best protection for a franchisor to avoid misrepresentation claims is to ensure that its sales personnel are "on message" and do not make claims, in particular about the earning potential/profitability of the franchise, which are not based on facts. Franchisors should also take care when approving franchisees to avoid particularly vulnerable franchisees or franchisees

who are intending to accept heavy financial burdens, such as high levels of debt.

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

The general laws that govern commercial relationships, including the Unfair Contract Terms Act 1997, apply equally to franchise agreements. Therefore, although it is legal to issue a franchise agreement on a non-negotiable basis, the courts can take this into consideration when determining whether clauses within the franchise agreement are reasonable or unfair. This will, to an extent, depend on the bargaining positions and experience of the parties. In addition, if any clauses are ambiguous due to poor drafting, the clause will more likely be interpreted in favour of the franchisee if the franchise agreement was issued on a non-negotiable basis.

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

As a general rule, it is always advisable for a franchisor to register its trademarks as it provides more straightforward recourse against infringers and gives greater security and confidence for franchisees. The BFA requires that the franchisor must either own or have the legal right to use the network's trade name, trademark or other distinguishing feature and this applies to all BFA members.

Goods and services trademarks should be registered under the Trademarks Act 1994 at the UK Intellectual Property Office. Despite Brexit, it is also still possible to obtain a community trademark, which would be universally applicable throughout the European Union. A community trademark registration must be filed at the Office for Harmonization in the Internal Market in Alicante, Spain, or an international registration (designating the countries in which it is desired to protect the mark) through the World Intellectual Property Organization under the Madrid Protocol.

However, under common law there is also protection available for unregistered trademarks under the tort of "passing-off". This covers a situation where a person takes advantage of another's reputation by adopting a similar name or implying a link with their products or services. However, it can be difficult to bring a claim for passing off and, in order to be successful, the claimant must demonstrate strong goodwill in the brand and must

show that the false imitation on the part of the defendant has resulted in the claimant suffering loss. This can be difficult to prove in practice.

Most franchisors keep the bulk of their know-how in an operations manual. This manual is protected by copyright, which subsists automatically and does not require registration.

The operations manual also tends to contain the franchisor's trade secrets and these are typically protected through confidentiality and non-use provisions in the franchise agreement. The protection of trade secrets through the common law of confidence has been supplemented by the Trade Secrets (Enforcement, etc.) Regulations 2018, which implemented the EU Trade Secrets Directive (2016/244/EU). This provides greater remedies for breaches of trade secrets and enables trade secrets to be enforced independently of contractual agreements.

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 are no franchise specific laws that govern the ongoing relationship between franchisor and franchisee.

There are, however, a range of generally applicable laws that will apply to franchise agreements, such as contract, intellectual property, real estate and competition (anti-trust).

In addition, the Fair Trading Act 1973 and the Trading Schemes Act 1996, which relate to "pyramid selling" schemes, potentially apply to multiple-layer franchise arrangements, i.e. where there are three or more "levels". This is most common in a master franchise structure where there is a franchisor, a master franchisee and sub-franchisees.

The Trading Schemes Regulations 1997, a piece of secondary legislation issued under the Trading Schemes Act 1996, applies to network arrangements and contains onerous pre-sales advertising requirements, a cooling-off period, and the right for a member to withdraw on short notice. The Trading Schemes Regulations do not apply where either the franchise operates as a single-tier trading scheme (franchisor and one level of franchisees below it) or all of the franchisees are VAT-registered at all times (Trading Schemes (Exclusion) Regulations 1997).

It is, therefore, essential that appropriate provisions are included in the franchise agreement to ensure that the exemptions apply to protect the network.

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.

There are significant pieces of European legislation that regulate competition and these apply to franchise agreements. In particular, Article 101 of the Treaty on the Functioning of the European Union ("TFEU") regulates agreements, decisions and concerted practices that may affect trade between Member States of the European Union ("EU").

Article 101 was adopted into UK domestic law by virtue of the Competition Act 1998 ("CA"). The Competition and Markets Authority ("CMA") is the principal enforcement agency in the UK. The EU Commission only becomes involved if the suspected infringement affects trade between Member States. It is crucial that the franchise agreement does not breach the terms of either the TFEU or the UK's Competition Act, otherwise the provisions in question are void and fines may be imposed by the regulators.

Franchise agreements can affect competition, particularly if they contain territorial sales restrictions and pricing obligations. However, not all franchise agreements fall under article 101 TFEU if they are not of sufficient size and scale to be deemed relevant. Additionally, vertical agreements (including franchise agreements) are exempt from article 101 TFEU if they come within the terms of the 2022 Vertical Restraints Block Exemption ("VBER").

The key competition law issues to consider as regards a franchise agreement are listed below.

Prohibition of Online Sales

There is a key distinction in UK and European competition law between active and passive selling and franchisors should be aware of this distinction. Active sales occur if the franchisee has actively sought out a customer, whereas passive sales are a result of the franchisee responding to an unsolicited enquiry from a customer. Franchisors must not prevent franchisees from undertaking passive sales outside of their prescribed territory in the franchise agreement. This is a 'hard-core' restriction and violation of this principle

means that the franchise agreement will lose the benefit of the VBER.

The EU Commission considers internet sales to be passive sales which cannot be prohibited. As a result, franchisors cannot prohibit franchisees from operating their own websites, though they can impose quality standards.

Exclusive Purchase Obligations

Exclusive purchase obligations are a restriction on competition pursuant to Article 101(1) TFEU as they restrict a franchisee in its choice of suppliers.

A requirement for a franchisee to source a minimum of 80% of its product supplies from the franchisor or a supplier approved by the franchisor for a period exceeding five years will be void and unenforceable unless the franchisee operates from premises owned or leased by the franchisor from independent third parties in which case the five-year period can be increased to the length of the lease the franchisor grants to the franchisee.

This provision would potentially make all product tying clauses unenforceable. However, following the European Court of Justice's decision in the Pronuptia case (Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis [1986] EUECJ R-161/84), a non-compete obligation tying the goods or services purchased by the franchisee is not restricted where the obligation is necessary to maintain the common identity and reputation of the franchised network, provided that the duration of the non-compete obligation does not exceed the duration of the franchise agreement.

Even if a purchase tie is both longer than 5 years and does not satisfy the Pronuptia test, the restriction will only be caught by Article 101(1) of the TFEU and/or the CA if it has an appreciable effect on competition. Where the parties' respective market shares, assuming that they are not competitors, are less than 15%, a franchise agreement will be covered by the Commission's de minimis notice and all non-hardcore restrictions will be treated as non-appreciable, including product ties of a longer duration than 5 years.

Pricing fixing

A clause whereby a franchisor seeks to fix the prices at which a franchisee sells its goods or services (also referred to as "resale price maintenance") is regarded as a 'hard-core' restriction on competition and its inclusion can invalidate the entire franchise agreement.

There are, however, some price restrictions that are

permitted – for example, franchisors may set a maximum price or can recommend prices provided they are not compulsory. In addition, it is permissible to fix the resale price as part of a short-term promotional campaign (generally of 4-6 weeks' duration). Care should be taken to avoid indirect resale price maintenance, for example granting franchisee's an additional discount of wholesale prices if they adopt the franchisor's recommended price.

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

While these clauses can be enforceable, they require careful drafting and are subject to restraint of trade and general contract law principles. Post-term non-competes must be reasonable in terms of time and geographical extent. Subject to the exemption mentioned below, the TFEU prohibits all non-compete obligations although they are not a 'hard-core' restriction, meaning that only the clause containing the restriction is void and unenforceable and not the franchise agreement in its entirety.

The VBER provides an exemption to the general prohibition under the TFEU, permitting in-term non-compete obligations of five years' duration. In addition, as mentioned above, this five-year period can be increased to match the length of the franchisee's lease if the franchisor owns the premises from which the franchisee operates or leases them from third parties not connected with the franchisee.

Post-termination non-compete covenants are prohibited, unless a franchisor's 'know-how' is dependent on them. This know-how must be classed as 'secret', and this can be difficult for franchisors to prove. If characterised as secret, a post-termination non-compete covenant may be included for a period of one year to restrict competition from the premises at which the franchisee operated his business.

Non-solicitation clauses applicable to the employees of the franchisor or other franchisees in the network, are also valid and enforceable for a period of up to one year.

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. Franchisees are not likely to be treated as consumers for the purposes of consumer protection law.

Companies are never considered to be consumers, even if an individual sets up a company for the sole purpose of entering into the franchise agreement.

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

There is no statutory duty of good faith under English contract law. However, judgments in a number of recent cases have reignited the debate over whether or not English law recognises a general duty of good faith in commercial contracts, including franchise agreements. Until recently, a growing line of authorities from the English courts suggested that a duty of good faith will be implied into certain types of agreements as a matter of law. This special category of agreement is referred to as “relational contracts”. Whether an arrangement will be considered a “relational contract” will depend on the facts and context of each arrangement, but it is likely that most franchise agreements will be considered to be relational contracts. For further information on “relational contracts” please see response to question 31. However, more recent court cases have questioned what an implied duty of good faith actually means and the extent to which a duty of good faith would, if present in a contract, imply any specific terms into that contract beyond those expressly agreed by the parties.

Further, members of the BFA are subject to a general duty of good faith and fair dealing which requires both franchisor and franchisee to commit to resolving complaints, grievances and disputes in good faith through fair and reasonable direct communication and negotiation and, where necessary, to resolve the dispute through mediation and/or arbitration.

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?

Like any other employer, franchisors and franchisees must comply with UK employment law in relation to their own employees, including provisions relating to discrimination and equality. Following Brexit there is no longer freedom of movement between the UK and the EU member states and there is now a new points-based immigration system for all employees who are foreign nationals from outside the UK (excluding the Republic of

Ireland).

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?

The Commercial Agents (Council Directive) Regulations 1993 (“Regulations”) (implementing Directive 86/653/EEC on self-employed commercial agents) define a “commercial agent” as “a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person” or to “to negotiate and conclude such transactions on behalf of and in the name of that [person]”.

Under a typical franchise arrangement the franchisee sells products or provides services in its own capacity as a principal, and not as an agent on behalf of the franchisor. In such circumstances the Regulations would not apply.

If, unusually, a franchisee is selling products (not services) as an agent on behalf of the franchisor and falls within the definition of a commercial agent above, then the Regulations would apply. Note that following Brexit the Regulations are under review and may be revoked in the near future.

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?

There are no laws and regulations (such as exchange control restrictions) in the UK that impact on the payment of royalties to a foreign franchisor.

There is further no statutory maximum rate of interest for overdue payments. However, the interest rate must be reasonable.

If no interest rate is agreed in the franchise agreement, the Late Payment of Commercial Debt (Interest) Act 1998 stipulates a rate of 8% per annum over the official interest rate announced by the Bank of England from time to time.

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?

For many years English law has distinguished between penalty clauses (which are unenforceable) and “liquidated damages” clauses, which are enforceable provided that the specified sum is “a genuine pre-estimate of loss”.

Following the Supreme Court joint judgment in the cases of *Cavendish Square Holding BV v Talal El Makdessi* and *ParkingEye Ltd v Beavis*, there is now greater flexibility for a franchisor to impose contractual penalties on its franchisees provided there is either a clear commercial justification for including such a penalty clause or where circumstances justify the imposition of an additional financial burden to protect the franchisor’s “legitimate interests”.

The Supreme Court set a new test which recognises that a party will often have a legitimate interest which does not have to be a genuine pre-estimate of loss. This legitimate interest can be protected by a contractual penalty provided that a franchisor can demonstrate that it is using the penalty clause to protect a legitimate interest and the penalty is neither exorbitant or unconscionable. The following principles now apply:

- it is no longer necessary for the penalty to be a genuine pre-estimate of loss;
- a franchisor relying on the penalty clause does not have to suffer a loss;
- the predominant purpose of a clause can be to act as a deterrent against a certain breach of the franchise agreement; and
- the penalty does not just have to be a specified financial amount. A party can, for example, withhold deferred consideration or require the transfer of certain property as the consequence for breach.

As the Supreme Court in the *El Makdessi* judgment also referred to the importance of considering the circumstances in which the parties entered into the contract, it is likely that “penalty clauses” will have more chances of being enforced in large scale, multi-unit domestic franchising and international franchising where the franchisees are more likely to be well-advised parties of comparable bargaining positions to the franchisor.

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

There are no tax rules specific to franchisors.

UK companies, partnerships, LLPs and sole traders are

subject to UK tax by reference to their accounting periods.

An overseas franchisor is generally not subject to UK tax on its business profits unless (1) it carries on a trade or business through a permanent establishment in the UK (i.e. a branch office); or (2) it receives certain UK-sourced income that is subject to UK withholding taxes (for example, certain interest or royalty payments).

It is therefore important that any support provided by an overseas franchisor to its UK franchisees does not cause the franchisor to have a permanent establishment in the UK.

Royalties that are payable under a franchise agreement to an overseas franchisor that has no permanent establishment in the UK are generally subject to withholding tax which would be deducted by the franchisee before making payment to the franchisor. An overseas franchisor may be able to claim tax relief under the various double taxation treaties that the UK has entered into. For example, at the time of writing, payments from an EU based franchisee to an EU based franchisor are exempt from withholding tax. Whether this position will continue after Brexit will depend on the degree of future divergence between the UK and the EU. Notwithstanding the foregoing, tax grossing-up provisions are generally enforceable in England.

As mentioned in our response to question 9, it is important that a franchisor requires its franchisees to register with HMRC (the UK tax authority) for VAT in order to avoid the application of the Trading Schemes Act 1996.

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?

The manner in which e-commerce is operated in the UK is heavily regulated and, for now, EU legislation has been adopted with little variation. Regulation focuses on ensuring that consumer terms are fair and that consumers are provided with all the information they require in order to make an informed purchasing decision. Within a franchise relationship competition law has a strong influence on the extent to which franchisors can control their franchisees’ e-commerce activities. Again, competition laws in the UK are generally aligned with those in the EU and e-commerce sales are regarded

as “passing sales”. Consequently, a franchisor cannot prevent its franchisees from operating e-commerce sites and if a customer from outside the franchisee’s exclusive territory places an order with the franchisee the franchisor cannot prevent the franchisee from fulfilling such order. The franchisor may, however, impose quality controls on its franchisees’ e-commerce sites.

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?

The United Kingdom implemented the General Data Protection Regulation (2016/679) (“EU GDPR”) by passing the Data Protection Act 2018 (the “Act”) and the EU GDPR has been retained in UK domestic law as the UK GDPR. For now, the key principles, rights and obligations in the EU GDPR remain the same in the UK GDPR.

Franchisees and franchisors are subject to the obligations placed on them by the UK GDPR with respect to any personal data that they process and the data subjects have rights over the handling of their data. ‘Personal data’ means any information relating to an identified or identifiable natural person, a ‘data subject’, such as a customer, a supplier or an employee.

The UK GDPR regards franchisees and franchisors as data ‘controllers’, in that they alone or jointly determine the purposes and means of processing personal data and data ‘processors’, as they process personal data on behalf of other data controllers, such as their suppliers.

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?

In the UK, there are no statutory legal constraints on a franchisor’s ability to restrict a franchisee’s right to assign its rights and obligations under the franchise agreement or its power to transfer its ownership interests in the franchisee business. However it is entirely possible to impose such restrictions within the terms of the franchise agreement, subject to the parties’ agreement.

This being the case, it is usual for a franchise agreement to include provisions that require the franchisor’s

consent prior to any transfer by the franchisee. The franchisor will typically impose certain criteria that must be met by any proposed transferee. Such controls are crucial so that the franchisor can ensure quality standards are maintained across the franchise network. It is also typical for the franchisor to have a right of first refusal for itself or its nominee.

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?

Unless the franchisor grants the franchisee an express right of renewal in the franchise agreement, a franchisee will not have an automatic right to request a renewal.

It is, however, common practice to include at least one right of renewal within the franchise agreement. The right is often subject to the franchisee meeting certain pre-agreed conditions and it is not common to charge a renewal fee (although not prohibited by law). If the franchisor refuses to renew the initial term in breach of a specific right of renewal, the franchisee could claim contractual damages for breach.

Although the BFA Code does not require a right of renewal to be included in the franchise agreement, it does require that if there is one, its basis is clearly set out.

Unless the franchisee is, unusually, acting as a commercial agent it will not be entitled to compensation on expiry or termination of the franchise agreement. If the franchisee is acting as a commercial agent the Regulations provide that it may claim compensation or an indemnity from the franchisor on expiry or non-renewal of the franchise agreement.

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?

Although it is not common for the franchisee to be provided with an express right of termination under the

franchise agreement, the franchisee has a common law right to terminate a franchise relationship where the franchisor has committed a repudiatory breach of the contract. In order for a franchisee to exercise this termination right, it must provide clear evidence that the franchisor (through its actions) no longer wishes to be bound by the franchise agreement. This is a high threshold.

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.

A well drafted franchise agreement will stipulate that any improvements or modifications developed by the franchisee in respect of the franchise system, any materials produced or data (including customer data) collected or generated by or on behalf of the franchisee and any goodwill in the trademarks shall vest in the franchisor and the franchisee shall execute any document required to effect a transfer of such materials to the franchisor.

Without such express provisions a franchisee will be entitled to claim ownership of any copyright materials (including customer lists) and/or goodwill that it has generated through the operation of its franchise business.

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

UK law does not require either party to undertake any specific requirements in relation to due diligence although it is crucial for both parties. The franchisor should conduct a thorough examination of the franchisee including their character, their business experience and their financial capital, ensuring that the franchisee has the financial resources to set up and operate the franchise business without over-extending itself.

Likewise, the franchisee should conduct its own due diligence on the franchisor by speaking with other franchisees in the network, asking about franchisee failures, testing the robustness of any financial statements given and ensuring it obtains independent legal advice in relation to the franchise agreement.

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?

The franchise sector is very mature in the UK, with an increasingly large pool of experienced multi-site, multi-brand operators able to develop franchise systems on a regional basis,

The most recent British Franchise Association and NatWest Survey conducted in 2022, found that the franchising industry contributed £15.17.2 billion per year to the UK's GDP, employing 620,000 people. The most active sectors in the UK continue to be personal services, food and beverage and hotel and leisure.

There are a number of factors which make the UK a particularly attractive market for franchises. Notably the regulatory regime in relation to franchises is lighter than most other jurisdictions. This allows franchisors and franchisees greater freedom over the terms of their franchise agreements. The use of the English language also makes the UK an attractive destination for concepts developed in other English-speaking markets such as the United States, Australia and New Zealand. Also, as mentioned above, the maturity of the franchise sector in the UK means there is a good supply of professional, experienced operators that are capable of developing multi-site operations.

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?

The BFA is the national franchising association in the UK and many reputable franchisors are members. Membership is not required, but is often seen as a "seal of approval" for having a tried and tested franchise system and may help recruitments efforts.

Membership does come at a price as the BFA requires its members to comply with the BFA's Code of Ethics. The BFA Code provides additional standards of ethical behaviour that affect various aspects of the franchise relationship, in particular in relation to advertising, recruitment and the requirement to exercise fairness throughout the relationship and in dispute resolution.

Franchisors wishing to join the BFA are initially assessed

and must be periodically re-accredited to ensure their continued compliance with the BFA Code.

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 ownership and investment in the United Kingdom is subject to very few regulations. There are no general restrictions on foreign ownership of UK assets or companies and immigration rules for individuals are relatively benign.

No distinction is made between the treatment of a foreign and a domestic franchisor save in respect of taxes. For further details, please see response to question 18.

The UK does impose sanctions and embargoes against a prescribed list of countries and individuals, groups or organisations based in or connected with those countries. The UK's position is broadly in line with that of the EU and the UN

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

There are no exchange controls or restrictions on foreign currency payments in the UK. However, the currency, rate and time of the conversion for payments, and provisions dealing with withholding taxes, should be clearly specified in the franchise agreement.

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

The parties to a franchise agreement are free to choose the governing law although certain internationally mandatory laws will be applicable, even where the agreement is not governed by English law. It is therefore important to obtain English law advice, even if the franchise agreement is governed by a foreign law.

In practice franchise agreements tend to be governed by local law so that potential franchisees have easy access to qualified lawyers that are able to advise them on its terms.

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?

In England and Wales, before issuing court proceedings, the parties should follow the pre-action protocols detailed in the Civil Procedure Rules. Depending on the value, the claim will be heard in the county court or the High Court and the claimant is required to prove their case on the balance of probabilities. However, in Scotland there is no requirement to follow a pre-action protocol before raising court proceedings. Depending on the value, a claim would be held either in the local sheriff court or in the Court of Session in Edinburgh. The test of proof is the same as for England and Wales (i.e. on the balance of probabilities).

Alternative dispute resolution is encouraged as an alternative to court hearings, and the BFA operates a mediation and arbitration scheme to resolve franchising disputes. It is usual for franchise agreements to include a provision that obliges parties to go through an internal escalation procedure before commencing court proceedings.

There are no UK-specific advantages or disadvantages to arbitration. As well as the BFA arbitration service mentioned above, parties often choose arbitration before the London Court of International Arbitration. The UK is a signatory to the New York Convention on the Mutual Recognition of Arbitral Awards, and so arbitral awards can be enforced through the Convention protocols.

Where the franchise agreement is subject to a foreign law, arbitration could be the better choice to foreign court proceedings depending on whether there exists an agreement on the reciprocal enforcement of judgments between the country in which the foreign judgment is issued and the UK.

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

In England and Wales there are various procedures in the Civil Procedure Rules by which a group of claimants can bring a collective action. In addition, there are a number of further procedures applicable to claims in specialist tribunals only, such as the Competition Appeal Tribunal.

The Civil Procedure Rules sets out three procedures by which a group litigation can be brought:

- the court can use its general (and discretionary) case management powers under Part 3 of the Civil Procedure Rules to consolidate multiple claims brought by multiple claimants; or
- the court can join multiple claims together by making a Group Litigation Order (also known as a 'GLO') under part 19 of the Civil Procedure Rules, provided that each of the claimants has a cause of action raising common, or related, issues of fact or law; or
- a representative claimant can bring a claim on behalf of other claimants under part 19 of the Civil Procedure Rules, provided that all such other claimants have the same interest in the claim as the representative claimant.

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

There is no statutory requirement that the franchise agreement has to be in English (and, as discussed above, no requirement in the UK to issue a pre-contractual disclosure document), but it seems obvious that a franchisor should ensure that the contractual documents and disclosure document (if any) are issued in a language that the franchisee understands and is competent in.

The BFA Code further requires that the franchise agreement must be translated into the official language of the country of the franchisee. Of course, this is only relevant for members.

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

The legislation governing the use of electronic signatures across all EU Member States is known as 'eIDAS', or fully named 'EU Regulation 910/2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC'. Since eIDAS is an EU 'regulation' it required no enacting legislation at a national level and automatically came into force in all Member States on 1 July 2016. The UK has also passed the Electronic Identification and Trust Services for Electronic Transactions Regulations 2016 ("EITSET Regulation") which came into force on 22 July 2016. These repealed the Electronic Signature Regulations 2002, which implemented the old E-Signature Directive into UK law and amended relevant sections of the Electronic

Communications Act 2000 (ECA 2000) which dealt with electronic signatures under the previous regime.

Under English law, in the absence of a statutory requirement concerning the form of a particular contract, a contract can be created with no structural formality through email correspondence or by means of other electronic communications, such as phone text messages or messenger services.

Franchise agreements, unless they are to be signed as a deed under English law, do not need to be in any particular form and as a consequence there are no restrictions on the use of electronic signatures. Where franchise agreements are to be signed as deeds, the signature of the signatory has to be witnessed by someone physically present when the document is signed.

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

Although scanned copies of original documents are admissible in court proceedings in the UK provided their integrity can be shown, there is always a risk that the authenticity of a scanned copy might be called into question in a way which only the original can resolve.

In civil proceedings (in England, Wales and Northern Ireland), a statement contained in a document can be proved either by producing the original document (primary evidence), or by producing a copy of the document (secondary evidence). It does not matter whether the original document is still in existence.

As secondary evidence, an electronic copy will need to be "authenticated", ie the court must be convinced that the document matches the claims made about it and the origin and integrity of an electronic copy must be established by the party wishing to rely on it. The evidential weight of the copy will depend upon the position taken by the other party, other evidence that is available, and the degree to which the 'pedigree' of the copy can be established.

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.

Brexit

Given the influence and role that European law has had on the UK, the UK's decision to leave the EU will have a

profound impact on the UK's legal framework and, potentially, on certain aspects of franchising. The future tense is used because, as yet, there has been little divergence from EU law.

In addition, European law will continue to apply where the franchise arrangement has an effect within the EU. However, with the UK no longer a member of the single market, there is scope for UK legislation to diverge from the EU position in and perhaps adopt a more UK-centric approach. Within a franchising context, changes to existing competition laws are likely to have the most profound impact.

Good Faith

Except in rare cases, English courts have traditionally refused to imply an obligation of good faith into commercial contracts. As mentioned above, recent cases had challenged this view, so much so that there is a general acceptance that a duty of good faith will be implied into a certain type of agreement, known as "relational contracts". There was much discussion over what forms a "relational contract" but in a recent case [Alan Bates and Others v Post Office Limited [2019] EWHC 606 (QB), 2019 WL 01228001], the court provided a non-exhaustive list of the characteristics that might typically be found in such a contract, including:

- there must be no specific express terms in the contract that prevents a duty of good faith being implied into the contract;
- the contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship;
- the parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain;
- the parties will be committed to collaborating with one another in the performance of the contract;
- the spirit and objectives of their venture may not be capable of being expressed exhaustively in a written contract;
- they will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships;
- the contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty;
- there may be a significant investment by one party (or both) in the venture; and
- exclusivity of the relationship may also be present.

However, more recent court cases have begun to weaken the influence of an implied duty of good faith. Primarily, those cases have questioned whether such a implied duty would have any meaningful impact on the agreed terms of the franchise agreement.

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

There are many lessons to be learned from the COVID-19 crisis but above all it is the need for franchisors to expect the unexpected. This does not mean they should have a ready-made plan to cater for all eventualities but rather they should have the agility and flexibility to adapt to whatever crisis is thrown at them. Some practical thoughts are as follows:

If not already done so, franchisors should prepare a business continuity plan (BCP) to identify possible risks and model possible responses to those risks. The BCP should cover the full spectrum of the business from customer engagement across the various channels; operational support, logistics, warehousing, inventory planning, supplier relationships; call centres, tech, warehouse facilities etc. Once developed the BCP should be kept under constant review and adapted to cater for changes in the business.

The COVID-19 crisis demonstrated the effectiveness of early communication and collaboration with franchise networks. The franchisees forms an essential part of the franchisor's business and therefore consider consulting with them on the creation of the BCP and any modifications. The sooner the members of the network are aware of the franchisor's crisis response the more likely they will be to respond swiftly at the relevant time. It will also provide much needed reassurance for their franchisees.

Financial pressure on some networks has been immense during the crisis, with outlets closed or operating at reduced capacity. Franchisors might consider what business interruption insurance they require franchisees to obtain and consider taking out a group policy with contributions from each franchisee to ensure such insurance is always in place.

If not already done, consider establishing an association of franchisees as a more formal means by which information can flow up and down between franchisor and its network. In the UK, for example, these forums provide a means by which franchisors can circulate information about governmental support in the form of furlough schemes and business interruption loan

schemes.

The crisis also has an impact on the franchisor's system itself, either temporarily during the crisis or long-term as consumer attitudes change, possibly permanently. The clearest examples in the UK has been the explosion of online options, particularly within the retail and food and beverage sectors. The time has now passed for franchisors to be reluctant to allow their franchisees to use online channels to distribute products and services. Franchisors should urgently look to re-structure their franchise offering to ensure online is front and centre.

Flexibility is paramount, therefore franchisors should look to their contractual arrangements with franchisees to ensure they have sufficient latitude to adapt during a crisis. During the crisis itself franchisors were asked to help struggling franchisees by waiving performance targets (such as turnover or opening targets) or reducing fees. Understandably, during the crisis there was much focus on force majeure clauses and frustration of contracts. Unfortunately many force majeure clause were found to be wanting, presumably drafted on the basis they would never be used. So franchisors should examine these clauses and build them into their BCP.

The final lesson to learn is not to forget the impact of the COVID-19 crisis. Once infection rates recede and economies re-open, it would be all too easy for franchisors to revert to their previous ways of operating. That would be a mistake. This crisis provides a catalyst

for innovation and change. Those franchisors who grasp this moment will be well placed to survive whatever future difficulties come their way.

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

No, it is unlikely that there will be any significant commercial or legal developments that might impact on franchise relationships over the next year or so. As mentioned above, there is now scope for divergence from EU law but any such divergence is likely to be slow and peripheral. Certainly there appears to be no appetite to dismantle the existing competition (anti-trust) framework that imposes the most significant constraints on franchise relationships.

The English courts will sporadically determine cases in favour of the franchisee, raising questions over the efficacy of historically "franchisor-friendly" provisions. However, these cases are invariably exceptional, decided primarily on the specific facts at hand, typically where the franchisor has acted in a manner that the court is simply unwilling to sanction. Recent court cases have shown a general reluctance by the English courts to interfere with the contractual terms agreed by franchisor and franchisee.

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