



# ICLG

The International Comparative Legal Guide to:

## Franchise 2018

**4th Edition**

A practical cross-border insight into franchise law

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# Portugal

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## 1 Relevant Legislation and Rules Governing Franchise Transactions

### 1.1 What is the legal definition of a franchise?

There is no definition of franchising provided by law; however, a franchise is usually presented by most authors as the contract whereby the producer of goods and/or services grants to a third party, upon consideration, the marketing of its goods and/or services, through the use of its trademark and its distinctive signs of commerce in accordance with the business model, method and guidelines laid down by this, providing to the franchisee, in addition, knowledge and assistance for the marketing of the goods and/or services which are the subject of the franchising.

### 1.2 What laws regulate the offer and sale of franchises?

Besides general law there are no specific laws regulating the offer and sale of franchises.

### 1.3 If a franchisor is proposing to appoint only one franchisee/licensee in your jurisdiction, will this person be treated as a “franchisee” for the purposes of any franchise disclosure or registration laws?

One of the characteristics of a franchise is the attribution of a territory for the franchisee to carry out the franchised activity. Nothing prevents the franchisor from appointing only one franchisee for the entire Portuguese territory and, therefore, this person shall be treated as a franchisee for all applicable purposes, including disclosure and registration laws.

### 1.4 Are there any registration requirements relating to the franchise system?

There are no franchise registration requirements in Portugal. Nevertheless, attention should be paid to certain activities carried out by a franchisee that may require registration or the obtaining of authorisation to carry out such activity (for instance, in order to carry out the activity of postal or financial services, authorisation of the regulatory authority of the sector is required).

### 1.5 Are there mandatory pre-sale disclosure obligations?

There are no mandatory disclosure obligations in Portugal, besides the general obligation of the franchisor to provide the franchisee with all the elements and information necessary to carry out the franchised activity.

Nevertheless, the European Code of Ethics for Franchising (“European Code of Ethics”), which obliges members of the European Franchising Federation and has been applicable in Portugal since January 1991, establishes in articles 3.3 and 3.4 some disclosure obligations with which the franchisor must comply.

### 1.6 Do pre-sale disclosure obligations apply to sales to sub-franchisees? Who is required to make the necessary disclosures?

There are no mandatory disclosure obligations in Portugal which are applicable to the sale of a sub-franchise, besides the obligations mentioned in question 1.5 above. Thus, the disclosure of such information to sub-franchisees may always require the cooperation of the franchisor.

### 1.7 Is the format of disclosures prescribed by law or other regulation, and how often must disclosures be updated? Is there an obligation to make continuing disclosure to existing franchisees?

No, the law does not prescribe any format for disclosures, besides the obligation for the information constituting the clauses of the franchise agreement to be provided by the franchisor in written form (see the European Code of Ethics, articles 3.3 and 3.4).

The only obligation, established in the law, which may imply continuing disclosure to the existing franchisee is the obligation of the franchisor to provide the franchisee with all the elements and information necessary to carry out the franchised activity.

### 1.8 Are there any other requirements that must be met before a franchise may be offered or sold?

There are no specific laws governing the sale and purchase of a franchise. Please note, however, article 2.2 of the European Code of Ethics.

### 1.9 Is membership of any national franchise association mandatory or commercially advisable?

The membership of a national franchise association is not mandatory but is commercially advisable because these types of collective entity generally promote and provide support to their members and they are usually very good networking channels.

### 1.10 Does membership of a national franchise association impose any additional obligations on franchisors?

The membership of a national franchise association will impose on the franchisors only the obligations deriving from the fact that the franchisor is a member of such association.

### 1.11 Is there a requirement for franchise documents or disclosure documents to be translated into the local language?

No, there is no such requirement.

## 2 Business Organisations Through Which a Franchised Business can be Carried On

### 2.1 Are there any foreign investment laws that impose restrictions on non-nationals in respect of the ownership or control of a business in your jurisdiction?

No; however, in some sectors (e.g. aviation), European Union (“EU”) law can impose restrictions.

### 2.2 What forms of business entity are typically used by franchisors?

If the franchisor is based abroad, it is not necessary to create a new business entity to carry on the franchise business in Portugal; however, if the franchisor decides to use a local business entity to manage the franchising activity in Portugal, the most common forms of entity are the limited responsibility company and the branch: the former is an autonomous corporate entity owned by the franchisor; the branch or permanent representation is an extension of the parent company without independent legal capacity, although, under the law, it is allowed to carry out some legal acts on behalf of the parent company.

If the franchisor is already locally based, the most common business entity used is the limited liability company – usually a company with shares (*sociedade anónima*) or a limited partnership company (*sociedade por quotas*).

### 2.3 Are there any registration requirements or other formalities applicable to a new business entity as a pre-condition to being able to trade in your jurisdiction?

The incorporation of a limited liability company follows a legal procedure which includes the approval of the corporate name by the National Register of Legal Entities (“RNPC”), the conclusion of the document of incorporation of the company, the deposit of the share capital in a company’s bank account previously created for that purpose, and the registration of incorporation of the company at the Company’s Registry Office.

Although the company in formation may practise some legal acts before its incorporation and registration, it is only once it is listed on the Register that the company acquires legal personality.

The creation of a branch follows a simpler procedure, including the registration of the resolution of the parent company which decides upon the creation of the branch and the deposit of the capital funds allocated to the branch, if applicable.

Both the limited liability company and the branch must register the start of their business activities with the tax authorities, and are then subject to compliance with the tax obligations provided for in the law.

Moreover, the foreign legal representatives of the company or the branch will have to obtain a Portuguese tax number to be registered in such capacity at the Companies’ Registry Office.

## 3 Competition Law

### 3.1 Provide an overview of the competition laws that apply to the offer and sale of franchises.

Portugal, as a Member State of the EU, fully complies with the EU legislation (notably articles 101 and 102 of the Treaty on the Functioning of the European Union) and the case law of the EU courts, including competition law.

Regarding national legislation, the Portuguese Competition Act – Law 11/2012 – does not contain specific references to franchising. However, the Competition Act shall be applicable if any questions are raised regarding the restrictive practices or other competitive concerns involving franchise agreements. It is worth noting that the Competition Act deems the European Block Exemption Regulations (notably Regulation 330/2010, “VBER”) applicable to purely national situations.

Decree-Law 166/2013, which establishes the legal regime applicable to individual restrictive trade practices, may also apply to franchise situations.

### 3.2 Is there a maximum permitted term for a franchise agreement?

There is no maximum permitted term. However, it should be mentioned that although a franchise agreement usually includes territorial exclusivity provisions, there may be some applicable restrictions – to be individually considered – regarding their potentially anti-competitive effect.

### 3.3 Is there a maximum permitted term for any related product supply agreement?

There is no maximum permitted term. Notwithstanding, if there is an exclusivity obligation or an obligation to purchase 80% of the products to be sold to the franchisor or its designated suppliers, the term should not be longer than five years in order to benefit from the VBER.

### 3.4 Are there restrictions on the ability of the franchisor to impose minimum resale prices?

The franchisor’s imposition of resale prices on the franchisee may be considered a hard-core restriction under European and Portuguese competition law. The imposition of minimum resale prices is prohibited, whether these are direct or indirect. It may lead

to the invalidation of the agreement and to the imposition of a fine of up to 10% of the turnover and claims for damages.

There are a few exceptions to the prohibition on resale price maintenance. The VBER Guidelines give the example of fixed resale prices that are necessary for the launch of a new product or to implement a short-term low price campaign.

### 3.5 Encroachment – are there any minimum obligations that a franchisor must observe when offering franchises in adjoining territories?

The Portuguese legal system is governed by the principle of good faith in contractual relationships. Therefore, there is an obligation for the parties to act and deal with each other in good faith, fairness and reasonableness. This applies to both the negotiation and execution of contracts. If the franchisor agrees to confer a benefit to the franchisee, then the former should not do anything that substantially deprives the latter of the satisfaction and fulfilling of such benefit.

In order to avoid or mitigate the risk of violation of the territory, it is advisable that the franchise agreement clearly specifies and defines the exclusive geographical territory that is granted to the franchisee.

If, in any event, this situation leads to an abrupt termination of the commercial relationship or refusal of supply, competition law and Decree-Law 166/2013 may apply, and the practice may be deemed forbidden considering previous contractual relationships, the contract itself and the general rules of commerce.

### 3.6 Are in-term and post-term non-compete and non-solicitation of customers covenants enforceable?

Non-compete obligations are those which preclude a franchisee from developing a competing business, and those which require the franchisee to purchase from the franchisor/franchisor's designated suppliers more than 80% of the franchisee's total purchases by the franchisee. The former category can be either in-term or post-term.

Regarding in-term, where there is a transfer of know-how and intellectual property rights, non-compete clauses may be permissible for the duration of the franchise agreement, whereas they are usually permitted for up to five years. Other conditions apply: any non-compete clause must be directly related to the franchise; transfer of know-how or intellectual property rights must not be the object of the agreement; and it should not include any hard-core restrictions.

As to post-term, if the obligation is deemed indispensable to the protection of know-how transferred by the franchisor, a one-year post-termination non-compete clause is permitted provided that it is limited to the products and services of the franchise and to a certain geographical area.

## 4 Protecting the Brand and other Intellectual Property

### 4.1 How are trade marks protected?

The trademark registry in Portugal is not mandatory. However, it is highly advisable. The registration of a trademark is made in the National Institute of Industrial Property ("INPI"). Registration is not an automatic act. As mentioned above, the registration of a national trademark in Portugal shall be carried out by means of filling out a registration form (model), in the INPI. The request is published online in the Bulletin of Industrial Property, followed by

a period for objection. An administrative process begins later, the duration of which may be several months, ending with a decision to grant or refuse registration.

If the trademark applied for does not incur any of the prohibitions to its registration, the INPI will grant the same for a period of 10 years from the date of the request, renewable for successive periods of 10 years.

The registration of a trademark obtained in Portugal does not protect the trademark in any other country.

If the aim is to extend the protection of the trademark to other countries, the holder of the trademark may, in each one of them, submit applications directly for its registry. There is also the possibility to apply to the countries of the EU for protection, by means of a European Union Trademark, or to the member countries of the Madrid System, by means of the international Registry of Trademarks.

### 4.2 Are know-how, trade secrets and other business-critical confidential information (e.g. the Operations Manual) protected by local law?

The industrial secret is not exactly a protection system (there is no registry, nor is a certificate of accreditation of any right awarded), but it is a legal obligation on certain persons assigned to a company or group of companies. If a company has its own method of making or developing the activity of production of its products, and if it has developed processes which are not known by others and which provide added value to its business, it is possible to protect them by embedding in all contracts confidentiality clauses of industrial secrecy. Generally, there are also added penalty clauses for non-compliance (which requires the payment of a monetary amount).

The secrets of a business are not to be confused with its know-how. We are in the field, first and foremost, of industrial or production secrets and trade secrets. The secrets of a business are more restricted than its know-how. The strategic options of a company in a specific market may be secret, but not its know-how.

In this way, the franchise agreement shall not imply, as a rule, the transmission of business secrets. One formula of production, for example, may not be transmitted to the franchisee; on the contrary, the raw material (which incorporates the secret) may be provided by the franchisor with a view to the manufacture of the product to be marketed.

In Portugal, trade secrets are protected by the legal regime on unfair competition, pursuant to article 318 of the Industrial Property Code.

### 4.3 Is copyright (in the Operations Manual or in proprietary software developed by the franchisor and licensed to the franchisee under the franchise agreement) protected by local law?

Computer software programs that have creative character have a protection similar to that afforded to literary works (Decree-Law 252/94 of 20<sup>th</sup> October, rectified by the Declaration of Rectification n° 2-A/95 of 31<sup>st</sup> January, amended by Decree-Law 334/97 of 27<sup>th</sup> November).

In the absence of any special provision, a copyright extension expires 70 years after the death of the creator. Copyright is acknowledged and fully valid and effective regardless of registry, deposit or any other formality (article 12 of the Code of Copyright and Related Rights). Despite this, for proof of entitlement, the author will still have to proceed with the registry of the work at the General Inspection of Cultural Activities.

As with industrial property law, there is a considerable level of harmonisation on this subject. In fact, the Portuguese legal system operated, through Decree-Law 252/94 of 20<sup>th</sup> October, the transposition of Directive 91/250/EEC of 14<sup>th</sup> May on the legal protection of computer programs; this was, however, revoked by Directive 2009/24/EC of the European Parliament and of the Council of 23<sup>rd</sup> April. Under this Directive, computer programs are: any type of program, even those which are incorporated into the equipment; as well as the preparatory design work leading to the development of a computer program, provided that the preparatory work is likely to result in a computer program at a later stage.

Directive 2009/24/EC for the establishment of a minimum level of protection and standardisation, provides that Member States shall grant protection for computer programs under copyright as literary works, without prejudice to other forms of protection.

In conjunction with industrial property rights and intellectual property rights – and, in some cases, promoted by these – the franchise agreement usually includes several clauses restricting competition.

## 5 Liability

### 5.1 What are the remedies that can be enforced against a franchisor for failure to comply with mandatory disclosure obligations? Is a franchisee entitled to rescind the franchise agreement and/or claim damages?

From the franchisee's perspective, it is recommended that the franchising agreement provides for clauses properly designed to regulate the consequences of a breach of the agreement on the part of the franchisor. General law stipulates that parties can agree freely to the content of contracts, within the limitations of the mandatory provisions of the law; in this regard, parties may agree the legal mechanisms to settle situations where a breach has occurred and the compensation of the non-defaulting party for damages occurred.

Even if such clauses are not expressly written into the agreement, general law provides that a breach of the agreement which, by its seriousness or repetition, jeopardises the continuity of the contractual legal relationship, grants the non-defaulting party the right to terminate the agreement with immediate effect (providing that no other timeframe was contractually settled); however, the non-defaulting party should notify the defaulting party of its intention to terminate the agreement and justify the legal reason(s) for such termination.

On the other hand, general law also stipulates that if actions or omissions constituting the failure of a party cause damage to the other party, the latter has the right to monetary compensation for the damages suffered if such damage cannot be repaired in kind.

### 5.2 In the case of sub-franchising, how is liability for disclosure non-compliance or for misrepresentation in terms of data disclosed being incomplete, inaccurate or misleading allocated between franchisor and master franchisee? If the franchisor takes an indemnity from the master franchisee in the Master Franchise Agreement, are there any limitations on such an indemnity being enforceable against the master franchisee?

In the context of the freedom granted to parties to a franchise agreement, such parties may agree on the content of the contractual clauses as they wish, the limitation being that such clauses cannot be contrary to the law. In this sense, the franchisor and the master franchisee are allowed to stipulate the terms of the agreement that

governs the legal relationship of master franchising, as well as the consequences of inadequate transmission of information or knowledge from the franchisor when this results in damage to the sub-franchisees. If the parties do not stipulate anything on master franchising in this respect, please see our response to question 5.1.

In principle, there are no legal limitations on the enforceability of an indemnity right granted to the franchisor against the master franchisee; however, despite the fact that Portuguese law prohibits the renouncing of general indemnity rights in advance, it is legally possible to limit in advance the amount of the indemnity to maximum amounts, provided that those amounts do not in fact constitute an advance renunciation of indemnity rights, or establish in advance a minimum amount for the indemnity in a penalty clause.

### 5.3 Can a franchisor successfully avoid liability for pre-contractual misrepresentation by including disclaimer clauses in the franchise agreement?

It is not possible to avoid pre-contractual liability, but it is possible to minimise its effects; please see our response to question 5.2.

### 5.4 Does the law permit class actions to be brought by a number of allegedly aggrieved claimants and, if so, are class action waiver clauses enforceable?

Class actions (*acção popular*) are permitted by Portuguese law in order to defend or punish infringements related to public health, consumers' rights, quality of life, the environment, cultural heritage and the public domain. They are, however, rarely used. These class actions include an opt-out mechanism by default.

Class actions are an expression of the constitutional right of access to the courts and, as such, cannot *a priori* be contractually waived. Such a waiver would be null and void and not enforceable.

## 6 Governing Law

### 6.1 Is there a requirement for franchise documents to be governed by local law? If not, is there any generally accepted norm relating to choice of governing law, if it is not local law?

There is no legal requirement for franchise documents to be governed by Portuguese law, and the assignment of a jurisdiction agreement is accepted by Portuguese law provided it is contractually valid and does not infringe mandatory laws. However, if an analogy of the situation can be drawn from a specific case, as the Supreme Court of Justice and some authors have understood, we may consider the application of article 38 of the Agency Legal Framework (Legislative Decree 178/86 of 3<sup>rd</sup> July), which establishes that for an agreement that is carried out exclusively or mostly in the national territory, a legal framework which differs from Portuguese law will only be applied with regard to its termination if the same is found to be more advantageous to the franchisee.

### 6.2 Do the local courts provide a remedy, or will they enforce orders granted by other countries' courts, for interlocutory relief (injunction) against a rogue franchisee to prevent damage to the brand or misuse of business-critical confidential information?

As a general rule, and notwithstanding the specific protective orders established in Portuguese law, it is possible to demand that

Portuguese courts take conservative or anticipatory measures which are specifically adequate to ensure the effectiveness of a threatened right, provided that the applicant shows itself to have a founded fear that others may cause a serious and possibly irreparable injury to that right.

The decisions issued by a court of another Member State of the EU regarding civil and commercial matters, including provisory measures such as protective orders in accordance with all the applicable requirements, are recognised in Portugal without any formalities and a decision issued by a competent court of a Member State which is enforceable therein may be executed in Portugal without any declaration of enforceability being necessary.

Regarding non-EU countries, and in the case that there is no applicable treaty or convention, any decision issued by the respective courts is only effective in Portugal after having been reviewed and confirmed by the competent Portuguese court.

## 7 Real Estate

### 7.1 Generally speaking, is there a typical length of term for a commercial property lease?

Usually, commercial leases have a term of five or 10 years, which can be renewed by agreement of the parties. However, it all depends on the activity the tenant wishes to carry out in the leased premises. In some sectors, when the initial fit-out/investment costs are very significant, the term can be 20 years or more. Portuguese lease law does not allow a term longer than 30 years. Notwithstanding the existence of a term, parties have the liberty to determine the possibility of terminating the lease prior to its term and the rules applicable to such termination.

Although the initial term of the lease cannot be longer than 30 years, it can be renewed several times for periods of up to 30 years. In addition, it is possible to enter into a lease agreement with no term (in such case, both parties can terminate the lease at any time without the need for a justification, by giving prior notice as set out in the law).

### 7.2 Is the concept of an option/conditional lease assignment over the lease (under which a franchisor has the right to step into the franchisee/tenant's shoes under the lease, or direct that a third party (often a replacement franchisee) may do so upon the failure of the original tenant or the termination of the franchise agreement) understood and enforceable?

Even though this is not common procedure, it is possible for the franchisor or a third party to step into the franchisee/tenant's shoes under the lease, by means of an assignment of the franchisee/tenant's contractual position to the franchisor or the third party. This assignment, however, requires the authorisation of the property owner, which can be provided in the original lease agreement or when the franchisee/tenant wishes to assign its position. The franchisor or the third party that assumes the tenant's position will assume all the rights, obligations and liabilities of the former tenant to the property owner.

The landlord's authorisation is not required in cases where the franchisee/tenant sells its business, by transfer of its goodwill (including leased premises and everything inside these), and as long as the third party that acquires it continues to carry out the exact same activity in the leased premises that was carried out by the former tenant. Although the property owner's consent is not

required in this case, the former is entitled to a pre-emption right in the acquisition of the tenant's goodwill.

### 7.3 Are there any restrictions on non-national entities holding any interest in real estate, or being able to sub-lease property?

There are no restrictions in the law preventing non-national entities from holding real estate assets or sub-leasing real estate properties. Thus, in order for foreign entities to carry out an activity or to hold a real estate asset in Portugal, they are required to have a Portuguese taxpayer number. In addition, property owners may require additional guarantees in the case of non-compliance with the lease agreement by such entity.

### 7.4 Give a general overview of the commercial real estate market. Specifically, can a tenant reasonably expect to secure an initial rent free period when entering into a new lease (and if so, for how long, generally), or are landlords demanding "key money" (a premium for a lease of a particular location)?

In commercial leases, landlords often demand the payment of several months' rent in advance (the law allows the payment of three monthly rents in advance) and a deposit (with no limit on the amount) to guarantee compliance with the lease by the tenant. However, it is normal to negotiate a rent-free period when the initial fit-out/investment costs of the tenant in the leased premises are very significant. In such cases, it is also usual to negotiate, after the rent free period, an annual increase of the rent which is higher than the one resulting from the applicable annual coefficients, in order to compensate the property owner for the rent-free period.

The negotiation of a rent free period is easier and more common in some parts of Portugal, especially smaller cities, due to the balance of supply and demand. However, in the main cities, such as Lisbon and Porto, and in prime locations, this is becoming more difficult, given the great increase in demand for commercial real estate properties and the growth of the real estate market in such locations. In such cases, property-owners usually require payment of rent in advance and the provision of several guarantees such as the payment of a deposit that regularly goes up to six months' rent (depending on the term of the lease agreement).

## 8 Online Trading

### 8.1 If an online order for products or request for services is received from a potential customer located outside the franchisee's exclusive territory, can the franchise agreement impose a binding requirement for the request to be re-directed to the franchisee for the territory from which the sales request originated?

The case described is considered a passive sale, which is the one where the client is located outside the franchisee's territory but approaches the franchisee directly. Conversely, in an active sale the franchisee is the one who actively approaches the client.

European competition law establishes that every franchisee must be allowed to use the Internet to sell its products or offer its services. This is considered by the European Commission to be a form of passive selling. Therefore, if the franchise agreement includes such limit, the entire agreement may be deemed void and unenforceable and the parties can be subject to fines and potential third-party damages procedures.

## 8.2 Are there any limitations on a franchisor being able to require a former franchisee to assign local domain names to the franchisor on the termination or expiry of the franchise agreement?

There are no limitations on the assignment of local domain names, as long as the parties agree to such assignment and such obligation is expressed in the franchise agreement to remain effective after the termination of the agreement.

## 9 Termination

### 9.1 Are there any mandatory local laws that might override the termination rights that one might typically expect to see in a franchise agreement?

There are no mandatory laws in Portugal that might override the termination rights in a franchise agreement. Termination rights are usually established by the parties in the franchise agreement; if not, general law will be applicable.

## 10 Joint Employer Risk and Vicarious Liability

### 10.1 Is there a risk that a franchisor may be regarded as a joint employer with the franchisee in respect of the franchisee's employees? If so, can anything be done to mitigate this risk?

In principle, there is no risk, as the franchisee will run an independent business, hiring and managing its own employees.

However, in Portugal, as in other jurisdictions, the qualification of the relationship as an employment or independent services contract will depend, eventually, on the specific circumstances of the situation and the ability to evidence that the franchisor is indeed managing the franchisee's employees directly and acting as their employer.

In order to avoid the risk of qualification of the relationship as an employment contract, the franchisor should not take actions that are usually typical of an employer and the franchise contract should not include any clauses that allow the interference of the franchisor in the recruitment, selection or managing of the franchisee's employees.

### 10.2 Is there a risk that a franchisor may be held to be vicariously liable for the acts or omissions of a franchisee's employees in the performance of the franchisee's franchised business? If so, can anything be done to mitigate this risk?

Yes, there is such a risk.

The recent Law No. 28/2016, of 23<sup>rd</sup> August – which came into force on 22<sup>nd</sup> September 2016 – amended the Portuguese Labour Code and expanded the joint liability of the contractor (and its managers, administrators or directors, as well as companies with reciprocal corporate interests, in a controlling relationship, or affiliated companies) and the subcontractor, for (i) the compliance with legal provisions and possible infractions committed by the subcontractor who performs all or part of the contract in the contractor's facilities or under his responsibility, and (ii) the payment of the respective fines.

Therefore, a franchisor may be jointly liable for the acts or omissions of a franchisee's employees in the performance of the franchisee's business.

In order to avoid such risk, the franchisor should implement control mechanisms, which allow verifying compliance with the contracts by the franchisee.

## 11 Currency Controls and Taxation

### 11.1 Are there any restrictions (for example exchange control restrictions) on the payment of royalties to an overseas franchisor?

There are no restrictions on the Portuguese side. However, Portuguese-domiciled legal entities shall report on a monthly basis to the Bank of Portugal, for statistical purposes, their economic or financial operations entered into abroad, including, amongst others, the transfer of funds to or from a foreign bank account to the extent such transfers reach or exceed, on an annual basis, the amount of €100,000.00. The entity responsible for proceeding with this filing with the Bank of Portugal is the Portuguese-domiciled legal entity, and the filing shall include information about the type of transaction, amount, currency and country of payment. Accordingly, any payment of royalties by a Portuguese-domiciled company to an overseas franchisor is subject to this reporting whenever the same reach or exceed, on an annual basis, the amount of €100,000.00.

### 11.2 Are there any mandatory withholding tax requirements applicable to the payment of royalties under a trade mark licence or in respect of the transfer of technology? Can any withholding tax be avoided by structuring payments due from the franchisee to the franchisor as a management services fee rather than a royalty for the use of a trade mark or technology?

Non-resident companies are subject to Portuguese corporate income tax (*Imposto sobre o Rendimento das Pessoas Colectivas*, "CIT") only on Portuguese-sourced income, which comprises income obtained herein through a permanent establishment ("PE"), and certain types of income owed by resident entities or local PEs of non-resident entities, such as income derived from intellectual or industrial property, know-how, technical assistance or from the supply of other services rendered or used within the Portuguese territory (with certain exceptions).

Under domestic tax law, income derived from intellectual or industrial property, know-how, technical assistance or from the supply of other services, obtained by non-residents without a PE herein, is liable to withholding tax, over the income's gross amount, at a rate of 25%. Under certain conditions, this rate may, however, be increased to 35%, notably regarding certain income owed to entities domiciled in "blacklisted jurisdictions".

Withholding tax over said payments may, however, be reduced or avoided pursuant to the provisions of a double tax treaty ("DTT") signed between Portugal and the country of residence of the beneficiary of the income.

Income qualified as royalties for DTT purposes (e.g. income derived from a trademark licence, from other intellectual or industrial property rights or from the transfer of know-how) may benefit from a reduced withholding tax rate that, in general, may be 5% or 10%.

Royalties owed by Portuguese-resident companies to EU-associated companies may further be exempt from withholding tax in Portugal,

pursuant to domestic rules that transposed the regime of Council Directive 2003/49/EC of 3<sup>rd</sup> June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (the “I&R Directive”).

Among other requirements, in order for the I&R Directive’s regime to apply, the Portuguese company paying the royalties and the EU receiving company should qualify as “associated companies”. This condition is met when (i) there is a direct participation between the two companies of at least 25% of the capital of the other, or (ii) when a third company has a direct minimum holding of 25% in the capital of both the company paying the royalties and the company receiving the royalties. In any of these cases, the relevant shareholding should be held for a minimum uninterrupted period of two years. Royalties paid before the two-year minimum holding period has elapsed shall be subject to withholding tax, though the beneficiary of the income may be entitled to a refund of the tax withheld once said period elapses.

A similar withholding tax relief regime is also applicable to the payment of royalties between Portuguese- and Swiss-resident associated companies, pursuant to the terms of the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments.

### **11.3 Are there any requirements for financial transactions, including the payment of franchise fees or royalties, to be conducted in local currency?**

The financial transactions, including the payment of franchise fees or royalties can be carried out in currencies other than Euros. Regarding other requirements, please see the response to question 11.1.

## **12 Commercial Agency**

### **12.1 Is there a risk that a franchisee might be treated as the franchisor’s commercial agent? If so, is there anything that can be done to help mitigate this risk?**

The Supreme Court of Justice and some authors have understood that when the situation warrants analogy, the legal regime of the agency agreement (legislative Decree 178/86) can be applied to a franchising agreement, in particular with regard to issues related to the termination of such an agreement.

In this regard, compensation for clientele in particular must be taken into account; this is usually due to an agent after the expiry of the agency agreement, and is based on the principal of keeping the advantages which arose from the customers previously attracted by the agent during their tenure at the agency.

The risk of applying this legal scheme to franchising agreements arises especially in cases where there is a greater integration of the franchisee in the network of the franchisor.

To minimise the risk, it is important to adopt business and legal models which evidence that the franchisor will not obtain any advantage because of customers attracted by the franchisee after the termination of the franchise agreement.

## **13 Good Faith and Fair Dealings**

### **13.1 Is there any overriding requirement for a franchisor to deal with a franchisee in good faith and to act fairly in its dealings with franchisees according to some objective test of fairness and reasonableness?**

There is no specific requirement for a franchisor to act in good faith or fairly towards the franchisee. However, there is a general principle that rules the Portuguese legal system, which is the principle of good faith in contractual relationships. Therefore, there is an obligation for both parties in an agreement – including a franchise agreement – to act and deal with each other in good faith and according to the principles of fairness and reasonableness. In addition, under article 2.4 of the European Code of Ethics, both franchisor and franchisee shall act with loyalty and fairness in their contractual relationship and solve their disputes with loyalty and good faith by direct negotiation and communication.

## **14 Ongoing Relationship Issues**

### **14.1 Are there any specific laws regulating the relationship between franchisor and franchisee once the franchise agreement has been entered into?**

There are no specific laws regulating the relationship between the franchisee and the franchisor, besides Decree-Law 178/86 of 3<sup>rd</sup> July, which can be analogously applicable to franchising and provides some rules regarding the relationship between the parties during the execution of the agreement (although not all the provisions are applicable to franchise agreements).

In addition, the Portuguese Civil Code regulates the relationship between the parties in all agreements and contains general principles and obligations that should be respected in the execution of all kinds of agreements, franchise agreements included.

Depending on the type of activity and sector of the franchising, several regulatory rules may be applicable to both the franchisor and the franchisee, in order to be able to legally carry out their activities in Portuguese territory.

Finally, other legislation can be applicable and bind the parties in the execution of the agreement and their activities, including: (i) the Data Privacy Rules; (ii) the Advertisement and Publicity Code; (iii) the Consumer Protection Law; (iv) the General Contractual Clauses Law; and (v) the Selling of Consumer Goods and Related Guarantees Law, among others.

## **15 Franchise Renewal**

### **15.1 What disclosure obligations apply in relation to a renewal of an existing franchise at the end of the franchise agreement term?**

There are no additional disclosure obligations applicable to a renewal of an existing franchise, besides those referred to in question 1.4 above; neither are there any which apply at the end of the franchise agreement term. There is, however, an obligation of secrecy and confidentiality of the franchisee at the end of the agreement, regarding the information, documents and know-how provided by the franchisor for the execution of the franchising.

**15.2 Is there any overriding right for a franchisee to be automatically entitled to a renewal or extension of the franchise agreement at the end of the initial term irrespective of the wishes of the franchisor not to renew or extend?**

There are no mandatory rights for a franchisee or a franchisor in relation to the automatic renewal or extension of the franchise agreement at the end of its initial term or any subsequent term. Renewals or extensions of the term depend upon the agreement of both parties.

**15.3 Is a franchisee that is refused a renewal or extension of its franchise agreement entitled to any compensation or damages as a result of the non-renewal or refusal to extend?**

The franchisee is not entitled to any compensation resulting from a refusal to renew or extend its franchise agreement, unless otherwise established in such agreement. There is, however, a possibility for the franchisee to claim client compensation if there is a similarity between the franchise and the agency agreement and if the franchisee provides a decisive and well-known contribution to the increase and optimisation of the franchisor's clientele. In addition, franchisors usually tend to negotiate the terms of the franchise agreement in order to dispel the applicability of this type of compensation at the end of the agreement.

## 16 Franchise Migration

**16.1 Is a franchisor entitled to impose restrictions on a franchisee's freedom to sell, transfer, assign or otherwise dispose of the franchised business?**

Restrictions on the selling, assignment or disposal of the franchise business can be imposed on the franchisee; franchising is generally seen as an *intuitu personae* agreement, but these restrictions must be expressly provided for in the franchising agreement.

**16.2 If a franchisee is in breach and the franchise agreement is terminated by the franchisor, will a "step-in" right in the franchise agreement (whereby the franchisor may take over the ownership and management of the franchised business) be recognised by local law, and are there any registration requirements or other formalities that must be complied with to ensure that such a right will be enforceable?**

If the franchisor's step-in right in case of termination is validly agreed between the parties it will, in principle, be recognised by Portuguese law; however, in practical terms, to ensure the step-in right's effectiveness, the procedure should be sufficiently detailed in the agreement and a set of ancillary documents should be required, to empower the franchisor to carry on with the transfer even without the cooperation of the franchisee (including powers of attorney, escrow or deposit of shares, etc.).

**16.3 If the franchise agreement contains a power of attorney in favour of the franchisor under which it may complete all the necessary formalities required to complete a franchise migration under pre-emption or "step-in" rights, will such a power of attorney be recognised by the courts in the country and be treated as valid? Are there any registration or other formalities that must be complied with to ensure that such a power of attorney will be valid and effective?**

A power of attorney ("PoA") will be valid and recognised by the Portuguese courts if it complies with the local legal requirements. It should be noted that PoAs concluded abroad under foreign law must be legalised under the Hague Convention on the Recognition and Enforcement of Foreign Judgments, to which Portugal is one of the subscribers, or at the Portuguese consulate with jurisdiction over the country or city where the PoA was completed. The PoA does not need to be registered.

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