Portugal

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Introduction

In General

Foreign investment has always played an important role in the Portuguese economy, and attracting foreign investment has been a goal of economic policies and national development strategies of consecutive Portuguese governments.[1] The opening of the Portuguese economy to foreign investment in the late 1970s was followed by structural reforms that included the privatization of previously sheltered public companies and monopolies in key sectors such as telecommunications and energy.

In 1986, Portugal joined the European Union (EU) and economic reform was fostered by further integration with Europe. Nevertheless, non-European investment still plays an important role and, in 2003, and following the EU Organization for Economic Cooperation and Development (OECD) guidelines, the Portuguese government enacted Decree-Law Number 203/2003 of 10 September to end discrimination between national and foreign investors in large investments.

Foreigner investors may invest in almost all economic sectors that are open to private investment and virtually no barriers exist towards foreign-owned or foreign-directed enterprises.

Although the Portuguese State still is a shareholder in several companies, more privatizations are expected as part of the commitments that Portugal has made to the EU, the European Central Bank, and the International Monetary Fund (IMF) under the agreement on Portugal's international financial assistance program.

Foreign investment operations do not need to be registered with, or authorized by, the Portuguese central or local authorities. Administrative requirements concern only specific matters such as trade marks or intellectual property rights and, when investors are Europe-based, such requirements cannot constitute

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restrictions to the right of establishment set out in the Treaty for the Functioning of the European Union (TFEU).

In addition, the Portuguese Government may grant large investment projects benefits, to both national and foreign investors, such as financial incentives and tax benefits and/or public funding. AICEP Portugal Global is the government business entity entrusted to manage and attract foreign investment, and it is entitled to receive, assess, negotiate, and contract on behalf of Portugal large investment projects eligible to benefit from the aids. Nevertheless, as member of the EU, the Portuguese Government must comply with state aid rules established in the TFEU; thus, the award of such benefits may require previous approval by the European Commission.

Commercial Distribution

In the area of commercial distribution, only agency agreements are specifically regulated. Neither distribution nor franchise agreements have specific legislation in Portugal, even though certain legal provisions are especially relevant to franchise agreements. Considering the lack of a specific legal regime applicable to franchise agreements, no license is required for franchise salesmen.

In the absence of imperative legal provisions, the parties are free to determine their own governing rules and clauses as long as these are consistent with generally applicable contractual principles.[2] In particular, when interpreting and applying contractual rules, Portuguese courts will give due consideration to the pre-contractual liability principles which require parties to act in good faith during negotiations.

Portuguese courts have often decided in this area that parties are required to provide all necessary information prior to execution of a franchise agreement, failing which statutory civil liability may arise under Portuguese law, in particular under article 227 of the Civil Code. Notwithstanding the fact that there is no specific legislation applicable to franchising, general rules of trade mark law, company law, product liability law, standard contract terms law, agency law, employment law, and consumer protection law are fully applicable to franchise agreements. Franchising also is subject to national and EU competition rules.

General contractual principles prohibit the use of false and misleading expressions concerning one's own business operations or those of another party that are of a character tending to affect the supply of, or demand for, a commodity. These principles also may be regarded as applying to franchise agreement negotiations, i.e., the franchisor must provide an accurate description of its operations. If a franchisor infringes this requirement and gives a prospective franchisee an untrue or misleading impression, this may constitute

2 The principle of freedom of contract is generally established in the Civil Code, art 41/2.

grounds for rescinding or terminating the entire agreement based on pre-contractual liability established in the Civil Code.

In the absence of particular law applicable to franchising, courts and doctrine have widely considered that the agency regime should be applicable to franchise agreements as to termination of the contract.[3] In addition, imperative rules and essential principles of Portuguese law are mandatory and thus also applicable. Franchising operations in Portugal also are bound by directly applicable legislation of the EU governing franchising.

To help undertakings to overcome difficulties resulting from the lack of objective and transparent rules applicable to franchising, the Portuguese Franchising Association (PFA) issued a Code of Ethics, in line with the European Franchise Federation Code. The members of the Association are required to comply with the Code when concluding agreements.

In the recent years, the most common form of franchising in the Portuguese market has been business format franchising, where the franchisee is granted the right to operate a business under the franchisor's trade marks, especially in the fast food industry and the service industry. There is still a well-established idea that franchising may be an advantageous form of business for those who want to benefit from the experience and know-how of the franchisor as well as its market position, while remaining as an independent company.

Although the number of international franchise brands is still relatively small, more foreign franchisors are entering the market. Between 2007 and 2009, the franchising market grew by eight per cent in Portugal.[4]

Franchise Agreements

In General

Legal doctrine and jurisprudence often distinguish franchising, licensing, and distribution based on the level of assistance and control by one party over the other.

In this context, Portuguese courts will tend to define franchising when there is a license or a grant of a right to use a trade mark in the development of an activity of distribution of products or services, and, cumulatively, the party which grants such license exercises a significant control over the activity of the other party

3 Decree Law Number 178/86 of 3 July 1986, as amended (the "Agency Law").

4 *Franchising: a Driver for Economic Growth in Europe*, European Franchise Federation, 2011, http://www.eff-franchise.com/IMG/pdf/Franchising_-_A_vector_for_Economic_Growth_in_Europe_-_2011_v472011.pdf.

and provides assistance, by way of initial and continuous training programs, in relation to such business, which will be based on the know-how of the franchisor.[5] Such know-how, normally compiled in a manual prepared by the franchisor, must be transferred to the franchisee and must be used by such franchisee when conducting its business.

Contract Term

In the absence of a legal regime applicable to franchise agreements, the common practice is to limit franchise agreement in time, and their duration often varies from five to 15 years. Portuguese doctrine and case law hold that the term of a franchise agreement should take into consideration the possibility of the franchisee achieving the return of its initial investment and the franchisor recovering the expenses that it has incurred in transferring know-how to the franchisee. In addition, franchise agreements usually grant the franchisee a right to renew the agreement if certain circumstance are met, i.e., the compliance with the obligations of the franchisee throughout the contractual term.

Transfer of Know-How

The transfer of know-how is considered one of the main obligations of the franchisor. The transfer of know-how usually entails an obligation of the franchisor to provide to the franchisee initial and ongoing training and permanent technical assistance.

Royalties and Management Service Fees

The franchise agreement will identify the fees to be paid by the franchisee to the franchisor, as well as the method of calculation and payment terms. In practice, the most common franchise fees are the entrance fee, which is paid in consideration of the franchise grant; royalties, which are currently calculated as a percentage of the gross sales of the franchise during the term of the agreement; and marketing fees.

Grant-Back of Know-How Improvements

Grant-back of know-how improvements is considered a contractual issue rather then a legal one. Portuguese law will not impede the parties from freely establishing in their franchise agreement that any improvement of know-how made by the franchisee should be granted back to the franchisor.

Additionally, it will be left for the franchisor to license any rights over the improvement that will be owned by the franchisor. However, it may happen, and

5 Decision of the Appeal Court of Lisbon of 27 September 2007, Case Number 6592/2007-6, http://www.dgsi.pt.

normally parties will so provide in the contract, that the franchisee will not be obliged to pay any royalties with consideration for such improvements.

Submission of Disputes to Foreign Courts

In practice, a franchise agreement will determine the party's choice of law and jurisdiction that will govern the rights and obligations of the parties and settle any disputes that arise out of or in connection with the franchise agreement. Portuguese civil law establishes that parties are free to agree on the jurisdiction that will decide on their disputes. According to the Civil Code,[6] choice of jurisdiction must be contained in a written jurisdiction clause and some cumulative pre-requirements should be met, as follows:

- The election of a given jurisdiction must relate to a dispute over available rights;
- It must be accepted by the law of the designated court;
- It must be justified by a serious interest of both parties or one of them, as long as it does not involve major inconvenience to the other;
- It may not fall under the exclusive competence of Portuguese courts; and
- It should be contained in a written agreement or confirmed in writing, with explicit mention of the competent jurisdiction.

EU Council Regulation (CE) 44/2001[7] also will be applicable if one of the parties in the contract is domiciled in a contracting state. Often, a franchise agreement will provide for mediation or arbitration as an alternative method of resolving the dispute, since it provides a greater flexibility and expertise. Furthermore, according to civil internal rules, Regulation 44/2001, and the 1958 Rome Convention, Portuguese courts will enforce a foreign judgment or foreign arbitration award.

Application of Foreign Law

Parties are free, according to general principles of Portuguese contractual law, to choose the applicable law to their franchise agreements. The Civil Code will accept such choice of law as long as the appointment or reference of the parties is made to a system of law whose applicability corresponds to a serious interest of both parties or in connection with any of the elements of the matter in question that would be justifiable according to private international law rules.[8]

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6 Civil Code, art 99.
7 Council Regulation (EC) 44/2001 of 22 December 2000.
8 Civil Code, art 41.

Rome Convention (Rome I)[9], article 4, also will be applied by Portuguese courts if the requirements for its application are met. Both internal law and European law establish, and Portuguese courts will take into consideration, whether the dispute matter has its closest connection with Portugal, i.e., the franchise agreement is to be performed in Portugal. Portuguese mandatory rules, such as those relating to termination of the agreement and other rights recognized as accruing to the franchisee, will be applicable, irrespective of the choice of law made by the parties in the contract.

Therefore, while the parties are generally free to choose foreign governing law clauses, it is important to ensure that the franchise agreement is executed in accordance with local practice. Portuguese courts have demonstrated a tendency to reject foreign governing law clauses where they are not satisfied that the parties expressly negotiated and agreed to such clauses, but were rather imposed by one of the parties.

Ownership of Know-How

Know-how to be transferred under the franchise agreement may, or may not, be protected by the laws of intellectual property.[10] If such know-how, considering its nature and characteristics, were protected by duly registered intellectual property rights, it would be easier for the owner of the know-how to enforce such rights and obtain its protection if infringement takes place.

If the know-how is not protected by registered intellectual property rights, its owner must ensure that it does not fall in the public domain and that it is kept as a trade secret.

Expiration of Agreement

Expiration of the agreement is a matter left for the parties to agree upon. As noted to above, there are no specific rules on franchise agreements as regards the duration of the agreement. Parties may, therefore, establish when the agreement will expire.

Portuguese doctrine and case law have, however, been of the understanding that the length of the franchise agreement should be enough to enable the franchisee from recovering its investments. Furthermore, there are a substantial number of court decisions that have established a right of indemnity for the franchisee when a franchisor has not given a reasonable notice prior to the termination of contracts with undetermined length, based on the principle of good faith and

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9 Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008, on the law applicable to contractual obligations.

10 Industrial Property Code, approved by Decree-Law Number 36 of 5 March 2003, as amended; Copyright and Related Rights Code, approved by Decree-Law Number 63 of 14 March 1985, as amended.

cooperation. Competition rules also may be of importance in this matter, in particular article 7 of the Competition Act, which establishes the prohibition of abuse of economic dependence in cases of unjustifiable termination of the agreement.

Minimum Sales Quotas

A clause establishing a minimum sales quota will generally be accepted by Portuguese courts when assessed from a civil and commercial law point of view. Such clauses establish an obligation to acquire a minimum quantity of products upon the franchisee and help the franchisor to plan its production and costs.

Minimum sales quotas also are seen as an adequate means of transferring to the franchisee the organization of its stocks. Clauses establishing a minimum sales quota should be discussed and set forth in reasonable terms and have due consideration to the characteristics of the market. Such reasonableness will be more important if there is a situation where the franchisee is "economically dependent" on the franchisor. Minimum sales quotas should be within the boundaries imposed by competition law.

Covenants Not to Compete

It is common in franchise agreements to include a restriction that prevents the franchisee from developing a similar or competitive business during the agreement and for a period of time after its termination. The validity of such clauses is not, in general, contested in Portuguese courts, as long as such clauses do not entail a violation of competition rules, as better explained below.

According to the Agency Law, the principal may establish a clause of non-competition to last a maximum of two years after termination, limited to the area in which the contract has been executed, but such clause will entail a right of indemnity for the non-competition covenant.[11] The clause also should provide for payment of a non-compete indemnity.

Official Language of the Agreement

The language of the franchise agreement is a matter to be agreed between the parties. There is a common practice to draft international agreements in the English language.

Nevertheless, the official language in Portugal is Portuguese and such language will normally be used if the franchise has no international character. If the

11 Agency Law, arts 9 and 13(g).

franchise agreement is presented in any proceedings pending in the Portuguese courts, a translation to Portuguese language should be provided by the parties to the court.

In general, most franchise agreements often impose restrictions on the transfer of shares or on the sale of the franchise by the franchisee. Such restrictions are normally based on the fact that the franchise agreement is considered as having an *intuitu personae* nature.

In fact, the choice for a certain franchisee by the franchisor in normally based on his personal and particular characteristics, as well as on the relationship based on trust and confidence between the parties. Therefore, the franchisor will normally establish a clause in the franchise agreement by virtue of which its express consent will be required for any transfer intended by the franchisee, or even that it will have a right to purchase the franchise before the offering is made available to third parties (the so-called “right of first refusal”).

The need for express consent will apply not only to the transfer of the franchise when the franchisee is an individual, but also to the transfer of ownership of shares if the franchisee is a legal entity.

Collective Advertising

Collective advertising is a matter that may be governed in the franchise agreement or in an annex to the franchise agreement, if the parties so desire. There are no specific national rules of law applicable to collective advertising.

Guarantee of Corporate Franchisee Obligations by Individual Shareholder

It may be seen quite often in franchise agreements drafted in Portugal that the shareholders of the corporate franchisee guarantee its obligations, often by a bank guarantee or, alternatively, by a personal guarantee over particular assets of the guarantor or over all his assets.

Termination, Cancellation, or Non-Renewal

In general terms, franchise agreements contain a clause specifying the circumstances in which such agreement may be terminated before the contract term, which will normally include events such as insolvency proceedings, failure to meet payment obligations, criminal convictions, or a relevant breach of contractual obligations set forth in the franchise agreement.

In the event of a breach of contract, termination is permitted without a right to an indemnity beyond general contractual principles of damages for losses and what has been contractually agreed between the parties.

Some legal commentators have, however, argued that the rules on termination of agency agreements should apply to franchise agreements arguing that the goodwill indemnity payment that is due to the agent on termination of the contract also is due under the same conditions (where new clients/business has been generated) on termination of a franchise agreement.[12]

There is some case law to support this view in other EU countries; however, Portuguese courts have generally rejected it. The view taken by the courts has been that the franchisee is generally participating in an existing organization, thereby benefiting from an established client base or following its name, brand, know-how, methods, and marketing and should not be entitled to a goodwill indemnity on termination.

As regards the consequences of termination, the franchise agreement will normally establish that, upon termination, the franchisee will no longer be entitled to use the licensed trade marks or other intellectual property rights and will be obliged to immediately return all manuals and other confidential documents provided by the franchisor.

Franchisor's Vicarious Liability for Acts of Franchisee

Considering that both franchisee and franchisor will normally act as independent entrepreneurs, the franchisor would in general not be found liable for acts committed by the franchisee. Some commentators have, however, argued that in a certain number of cases the franchisor should be held liable for acts of the franchisee, due to the closeness of the parties in a franchise system.

In this respect, some Portuguese doctrine holds that, when analyzing whether a franchisor may be held liable for acts committed by the franchisee, one should have in mind two different types of liability. On one side, the damages resulting from an inadequate management of the establishment by the franchisee should be considered his sole liability while acting as an independent company or individual from the franchisor.

On the other side, if damages suffered by third parties result from a product defect or a misconception of know-how, some Portuguese authors maintain that only the franchisor should be directly and legally responsible.

12 Several court Decisions have held that, in case of termination, prior notice to be given by the franchisor to the franchisee in order to terminate the franchise agreement should be similar to that established in agency law (Decisions of the Appeal Court of Lisbon, of 18 May 2004, Case Number 3589/2004-7, and of 2 February 2006, Case Number 9219/2004-6). However, other court Decisions have held that adequacy of prior notice should be determined on a case-by-case number basis, so that agency law provisions may not be applied as such (Decision of the Appeal Court of Lisbon, of 25 March 2004, Case Number 497-2004-2). The Supreme Court of Justice ruled, on 9 January 2007, Case Number 06 A 4416, that, in a franchise agreement, the loss of clientele is subject to indemnity only when the franchisee shows that it has contributed in a significant way to an increase of the clients of the franchisor.

Protections Available to Franchisee

Due to the lack of specific law applicable to franchise agreements, the means of protection available to the franchisee are those established by general statutory regimes. Therefore, rules on the freedom to contract,[13] principles of good faith,[14] and public order should generally be applied to franchise agreements.

Furthermore, as indicated above, there has been a common recourse to the agency law, i.e., as to the rights applicable to the franchisee upon termination of a franchise agreement. In addition, Portuguese courts have provided that unreasonable, abusive, or unfair clauses or entire contracts may be modified or be declared null and void. This may happen when the contract has not been negotiated but rather presented by the franchisor to the franchisee as a standard form.

The Law of General Contractual Clauses[15] applies to all contracts that include general conditions, i.e., clauses not subject to negotiation. Thus, a franchisor presenting the franchisee with an agreement containing general conditions that are not expressly negotiated between them may be caught by the Law of General Contractual Clauses.

The Law of General Clauses sets out a number of items that are not permitted under national law and others that must be included or expressed within the agreement. For example, an agreement cannot exclude the right to damages or include penalty provisions for defaults that are disproportionate to the damage or loss suffered.[16] As indicated above, these types of clauses may be deemed too unreasonable and may be modified or rejected by Portuguese courts. Furthermore, such general provisions in franchise agreements may be caught by competition law, in particular, rules on the abuse of economic dominance.

Finally, other general aspects of Portuguese civil law might be applicable, such as that relating to usury, which considers null any contract under which a party takes advantage of the other party's inexperience, weakness, or dependency.[17]

Competition Law

In General

Franchise agreements often contain restrictions to competition (e.g., exclusivity, selectivity, and non-compete clauses) that may raise issues under competition law. Breach of national competition law results in nullity of the agreement (or the anticompetitive clauses) in addition to potential financial sanctions imposed

13 Civil Code, art 405.
14 Civil Code, arts 227, 334, and 762.
15 Decree-Law Number 446 of 25 March 1985.
16 Law of General Contractual Clauses, arts 18 and 19.
17 Civil Code, art 282.

upon the parties in the agreement pursuant to proceedings conducted by the Competition Authority.

In Portugal, the enforcement of competition law is entrusted to the Competition Authority created in 2003 by Decree-Law Number 10 of 18 January 2003. The Competition Authority is an independent administrative authority with financial autonomy, which has broad investigative, regulatory, and sanctioning powers in antitrust matters. The powers conferred to the Competition Authority were further detailed in the Competition Act (Law Number 19/2012 of 8 May 2012)[18] applicable to all sectors of activity and, together with Decree-Law Number 10, entrusts the Authority with the enforcement of competition laws in all economic sectors.

The Competition Act does not include specific provisions concerning franchising, but it is fully applicable to franchise agreements. Any concerns about restrictive practices or other competitive concerns involving franchise agreements are dealt with under the general provisions of the Competition Act concerning horizontal and vertical agreements.

Article 9 of the Competition Act prohibits agreements between undertakings whose aim or effect is to restrict competition in the national market, while article 11 prohibits abuses of dominant positions in the national market. Article 10 establishes the criteria to exempt an agreement or concentrated practice from the prohibition set out in article 9. Article 12 of the Competition Act prohibits abusive practices by undertakings that, despite not holding a dominant position in the relevant market(s), enjoy an extensive economic power benefiting from the circumstance that their suppliers or clients do not have an alternative equivalent to them (abuse of economic dependence).

From a competition point of view, there are no major substantive differences between national and European law applicable to franchise agreements and to its specific contractual provisions, such as price and quantity fixing, territorial and customer provisions, exclusive dealing, tie-in, and other restrictive clauses.

The Competition Council (the former competition authority) early on declared that its main concern when assessing distribution agreements was to insure intra-brand competition, to avoid absolute territorial protection and to prevent intervention of the supplier in the distributor’s management in terms of prices and sales conditions.[19]

18 On 4 November 2011, the Council of Ministers approved a draft proposal for a new Competition Act. The revision is part of the commitments that Portugal has made to the European Union, the European Central Bank, and the International Monetary Fund under the agreement on Portugal's international financial assistance program.

19 Competition Council Annual Report 1988, at p 28.

National competition general provisions closely follow article 101 (the parallel of article 9 of the Competition Act) and article 102 (the parallel of article 11 of the Competition Act) of the TFEU and EU regulations. Only the prohibition of abuse of economic dependence established by article 12 of the Competition Act is not reflected in the EU competition legal regime.

It follows from the above that, when companies conduct their own assessment of compatibility of franchise agreements with Portuguese competition rules, notably the prohibition established in article 9 or the justifications laid down in article 10 of the Competition Act (the parallel of article 101(3) of the TFEU), they also should take into consideration EU standards expressed in the European Commission practice and guidelines and in the European courts' jurisprudence.

Although those standards cannot be applied mechanically, but rather with consideration for the specific circumstances of each case and the Portuguese market, the Competition Authority has itself repeatedly applied those standards in antitrust procedures and often cites them to uphold its decisions.

EU regulations were for the first time expressly applied by a competition authority to franchise agreements in Portugal in 1993. At the time, the Competition Council[20] expressly referred to EU regulations to uphold its decision according to which the agreement under assessment could not be qualified as a franchising agreement as established by Regulation 4087/88[21] because it did not present the characteristics set forth in the Regulation. Later, the Competition Council applied the criteria set forth in Regulation 4087/88 to franchise agreements to determine whether two conditions required in article 5 were met, namely:

- The restrictions established in the agreements were essential to obtain the advantages; and
- The restrictions would not have the effect of eliminating competition on a substantial proportion of the national market.[22]

Territorial Exclusivity

Territorial provisions that grant a franchisee territorial exclusivity and the franchisor an obligation not to compete actively with the franchisee may impose

20 The Portuguese authority entrusted with the enforcement of competition rules under Decree-Law Number 371 of 29 October 1993, the national competition regime repealed by Law Number 18 of 2003.

21 Commission Regulation (EEC) 4087/88 of 30 November 198, on the application of article 85(3) of the Treaty to categories of franchise agreements.

22 Competition Council of 12 December 1996, Cases 11/95 and 12/95, respectively, regarding the compatibility of distribution systems of optic products with article 5 (the equivalent to article 101(3) of the TFEU), Competition Council Annual Report 1996, at pp 77–100.

more or less strict restrictions, depending on the ability to write enforceable contracts specifying the characteristics of exclusive territory.

In principle, territorial restrictions are banned by article 4a of the Competition Act, which prohibits the limiting or controlling of production, distribution, technical development or investment, and dividing markets and sources of supply.

Although clauses may be justified when the conditions set out in Article 10 are fulfilled, prohibition of parallel imports, passive sales, or the ban of cross-supplies between distributors is considered to eliminate intra-brand competition and, therefore, are not exempt.

The Competition Council has exempted the allocation of exclusive territories to distributors and retailers of a distribution network in the *Optical Products* cases,[23] taking into account the criteria of Regulation 4087/88 on franchising agreements.[24]

However, an obligation imposed on distributors and retailers to pay the franchisor a commission of 15 per cent for any sale made to suppliers not included in the franchising agreement was considered by the Competition Council unacceptable because it restricted the choice of suppliers for no objective reason or a reason worthy of consideration.

In another case,[25] the Competition Council stated that in theory prohibition of active sales outside the territory allocated to the distributor could be exempted under article 10 if justified, for instance, by the need to prevent free riders to benefit from the distributors' after sales services.

Resale Price Maintenance

Resale price maintenance provisions may be caught under article 9 of the Competition Act, especially since the article prohibits any agreement, concerted decision, or practice whose effect is directly or indirectly to set prices or to interfere in price determination, whether to increase or decrease them.

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23 Decision of 12 December 1996, Case Number 11/95, *Multiópticas de Gestão*, Competition Council Annual Report 1995, at p 77; Decision of 12 December 1996, Case Number 12/95, *Multiópticas*, Competition Council Annual Report 1996, at p 89; Decision of 12 December 1996, Case Number 13/95, *Optivisão*, Competition Council Annual Report 1996, at p 101.

24 Commission Regulation (EEC) 4087/88, of 30 November 1988, regarding the application of article 85(3) of the EC Treaty to certain categories of franchising agreements, OJ L 359 of 28/12/1988, at p 46.

25 Decision of 3 May 2001, Case Number 1/99, Competition Council Annual Report 2001, in DR II 189, of 17 August 2002, at p 13977.

When dealing with exclusive distribution systems,[26] the Competition Council concluded that resale price maintenance or similar practices relating to sales conditions are not exemptible under article 10 as they may impair intra-brand competition. Also outside the scope of application of article 10 is compensation to distributors granted in the form of commission, discount, or any other way with the object or effect of determining, by the supplier, the final price to the consumer.[27] Likewise, a freight bonus was found to achieve a uniform consumer pricing policy, as in practice a discount over the price charged by the companies to its direct retailers was granted to distributors.[28]

Franchise agreements may nevertheless evade article 9 if they satisfy the conditions required under article 10 of the Competition Act. Recommended price lists have been permitted in the presence of inter-brand competition in the relevant market and the existence of parallel networks of authorized dealers.

In a case involving trade marks, the Appeal Court of Lisbon[29] analyzed price fixing in franchise agreements when considering “official resale price”. Although the court’s recognition that price fixing has been considered anticompetitive, notably under Regulation Number 2790/1999, it ruled that, when an undertaking becomes member of a franchise network, it agrees to comply with certain obligations that may include selling products at a given price. Competition among members of the same franchise network, therefore, becomes a non-price competition, i.e., based on other elements rather than price.

This also means that no restrictions to competition result from price fixing imposed by the franchisor upon the franchisees because it will not create imbalances among franchisees. The court concluded that price fixing will provide franchisees the possibility to finance pre-sale services with profits resulting from post-sale services which are paid in addition to the final sale price (fixed by the franchisor). The product’s final price is, therefore, not a determinant element for the consumer’s choice. Provisions imposing resale

26 Decision of 29 July 1992, Case Number 1/92, *Sureno*, Competition Council Annual Report 1992, at p 66; Decision of 1 January 1993, Case Number 3/92, *Polimaia*, Competition Council Annual Report 1993, at p 43. Although the agreement could be exempted under article 5, the Competition Council ordered the company to revise the clauses that could indirectly fix the final price.

27 Decision of 1 October 2004, Case Number 02/01, Competition Authority Annual Report 2004, at p 28, where the Competition Authority analyzed price fixing through compensations granted to distributors. In the Decision of 28 September 1988, Case Number 7/86, *SPLS*, Competition Council Annual Report 1988, at p 88, the Council concluded that price fixing on the distribution level is only allowed when the company develops its own distribution network or establishes an agent network (Competition Council Annual Report 1988, at p 29).

28 Decision of 13 July 2000, Case Number 2/99, *Unicer II*, Competition Council Annual Report 2000, at p 127; Decision of 13 July 2000, Case Number 3/99, *Centralcer II*, Competition Council Annual Report 2000, at p 63.

29 Decision of 24 February 2011, Case Number 1283/09.6TYLSB.L1-2, www.dgsi.pt.

prices also may be considered an abuse of economic dependence under article 12 of the Competition Act.

Exclusive Dealing and Covenant Not to Compete

A covenant not to compete is considered to fall in the category of prohibited practices of article 9. However, covenants not to compete do not necessarily breach competition rules resulting in the nullity of the agreement.[30] A case-by-case assessment is required, and particularities of franchise agreements need to be taken into account as anti-competitive clauses in abstract may be outside the scope of the prohibition of article 9 when analyzed within its contractual and business environment. When such covenant is indispensable to improve distribution to the benefit of the consumer and it does impose unnecessary restrictions on competition,[31] it may be justified and eligible for exemption under article 10.

In a case of exclusivity in distribution agreements, the Appeal Court of Oporto has accepted an exclusivity obligation for six years automatically renewable for equal periods of time based upon the fact that such particular agreement did not restrict competition, thus being outside the scope of article 4.[32] In another appeal, where the parties discussed the validity under competition law of a covenant by the distributor to acquire coffee exclusively from Buondi during an indefinite period of time, the same Appeal Court ruled that such obligation was not adequate to restrict competition in part of the national territory, thus lacking one of the assumptions to apply article 4 of the Competition Act.[33]

However, the Competition Authority tends to be less lenient with such restrictions. The Competition Council did not exempt exclusive purchase agreements in the *Centralcer I* and *Unicer I* cases, as they were not deemed to be necessary for the existence of a distribution system. A similar case occurred in *Same Tractors*,[34] where the Competition Council considered the obligation assumed by the distributor to acquire from Same all the spare parts to repair tractors was compatible with competition rules, but the prohibition to buy tools

30 Decision of the Appeal Court of Lisbon of 7 June 2011, Case Number 3855/05.9TVLSB.L1-7, www.dgsi.pt.

31 The Competition Council considered legitimate a refusal of the supplier to deal when the distributor did not agree to the exclusivity (Decision of 7 July 1994, Case Number 9/93, *Motomar*, Competition Council Annual Report 1994, at p 83.

32 Decision of the Appeal Court of Oporto, of 14 February 2010, Case Number 8615/08.2TBMTS.P1, www.dgsi.pt.

33 Decision of the Appeal Court of Oporto, of 9 March 2004, Case Number 0326904, www.dgsi.pt.

34 Decision of 29 September 1994, Case Number 12/94, Competition Council Annual Report 1994, at p 83.

and equipments required to maintain technical assistance to third parties was caught by the prohibition set forth in article 9.

In the *Glass Traders*,[35] the Competition Council concluded that the prohibition to purchase glass to non-members of the cooperative imposed by the statues of the Glass Traders Cooperative complied with competition law insofar such clause was essential for the cooperative to function, and the cooperative contributed to promote competition by helping the survival of very small companies in the market and improving distribution of glass and related products.[36]

In *Centralcer II* and Unicer II,[37] the Competition Council ruled that clauses included in distribution agreements that oblige exclusive distributors to use vehicles whose model, design, and colors was established by those companies, in addition to uniforms approved by them, restricted the distributors' commercial freedom and competition as such covenant prevents them from distributing other competing products.

Exclusive television broadcasting rights also were analyzed against competition rules in *SIC/PT Multimedia/TV Cabo*.[38] The parties agreed to give SIC (a Portuguese private television broadcaster) a distribution preemptive right in broadcasting cable services provided by TV Cabo (owned by PT Multimédia) for an initial period of 10 years, renewable for another five years. Consequently, before entering into any broadcasting agreement with other chains of television to broadcast programs in Portuguese and/or produced in Portugal, TV Cabo had to inform SIC of the intention along with the basic elements of the intended agreement. As a result, SIC had access to sensitive information about its competitors, providing it with an unlawful competitive advantage. The agreement also included the exclusive right granted to TV Cabo to broadcast some of SIC channels.

The Competition Authority considered that some of the clauses established in the SIC/PT Multimedia/TV Cabo agreement restricted competition. There were sufficient grounds to grant an exemption to the distribution preemptive right for a period of four years as a consequence of the positive economic balance, but the exclusivity was outside the scope of article 10.

In 2007, pursuant to a claim presented by a distributor, the Competition Authority analyzed a no-compete obligation included in distribution agreements

35 Decision of 8 February 1996, Case Number 4/94, *CACVEC*, Competition Council Annual Report 1996, at p 113.

36 The exemption was granted only for three years.

37 Decision of 13 July 2000, Case Number 2/99, *Unicer II*, Competition Council Annual Report 2000, at p 127; Decision of 13 July 2000, Case Number 3/99, *Centralcer II*, Competition Council Annual Report 2000, at p 63.

38 Decision of 23 July 2006, Case Number 14/01, *SIC/PT Multimedia/TV Cabo*, Competition Authority Annual Report 2006, at p 35.

of agrochemical products entered into by Bayer Cropscience.[39] The covenant prohibited the distributor to, directly or indirectly, promote, sale, store or develop any similar activity with agrochemical products from a competitor, receiving in return a bonus established in the distribution agreement. Because the obligation had never been effective, and Bayer assumed the commitment to amend the distribution agreements in order to eliminate such covenant not to compete, the Competition Authority closed the case, indicating, however, that such covenant was unlawful.

Exemptions

Competition law and policy in the EU distinguishes different forms of retail distribution relationships or systems, of which franchising is one. Although it may share the characteristics of selective or exclusive distribution systems, franchising agreements generally cover in addition features such as trade name, brand logos, and symbols. Furthermore, know-how is shared, continuous technical assistance to the franchisee is provided, and standardized products or services are sold according to standard business methods.

Because franchise agreements are not subject to any specific legislation in Portugal, but rather remain for the parties to determine their own governing rules and clauses as long as these are consistent with generally applicable contractual principles, the problem of determining a franchise agreement and of identifying a false franchise is of some importance to apply the exemption set out in article 10 of the Competition Act.

Franchise agreements come under the general provisions of national competition law, and potentially restrictive provisions are only accepted if justified under article 10 of the Competition Act, the equivalent to article 101(3) of the TFEU. The specific characteristics of franchising have direct legal significance for the application of competition law and may provide for additional arguments to outweigh potential restrictions to competition.

Therefore, practices referred to in article 9 included in franchise agreements may be considered justified when they have the effect of improving production or distribution, or of encouraging technical or economic progress, provided that the consumers receive a reasonable share of the resulting benefits, and that the restrictions are essential to obtain those advantages and would not have the effect of eliminating competition on a substantial proportion of the national market (the “positive economic balance” test).

39 The Decision is mentioned in the Competition Authority Annual Report of 2007, at p 49, and all information provided in this chapter refers to the summary included therein. The Decision is not available to the public.

In the absence of specific interpretations of article 10 (or article 9) of the Competition Act when applied to franchise agreements by either the competition authority or judicial courts, general national and EU principles apply in addition to the Commission Regulation (EU) 330/2010 of 20 April 2010, on the application of article 101(3) of the Treaty to categories of vertical agreements and concerted practices ("Vertical Distribution Agreements Block Exemption Regulation"), which also governs franchising agreements that fall under EU competition rules.

Franchise agreements that by analogy meet the definition and other terms established in the Vertical Distribution Agreements Block Exemption Regulation and in theory qualify for an exemption of the prohibition set forth in article 101(1) TFEU are well placed to meet the "positive economic balance" test under article 10 of the Competition Act. Article 10 should nevertheless be interpreted strictly and the Competition Authority is required to make an economic assessment to evaluate the balance between the positive aspects of the agreement under analysis and the negative effect on competition caused by it.[40]

Abuse of Economic Dependence

Article 7 prohibits abuse of economic dependence, i.e., the unfair exploitation by an enterprise or group of enterprises of a client or supplier business which is economically dependent upon it and which has no equivalent alternative. Article 12(2) establishes that, in particular, any of the behaviors prohibited in article 9 (restrictive practices), or the unjustifiable breaking off of established trading, may constitute abuses.

Experience in applying the prohibition on the abuse of economic dependence under the 2003 Competition Act is still very limited. In particular, there have been no decisions by the Competition Authority about potential abuses of economic dependence in connection with franchise agreements, and the only publicly known case of economic dependence refers to distribution of concrete.

Under the 1993 Competition Law, the Competition Council decided two cases in the beer sector where distribution agreements were analyzed and both companies found guilty of abusing from the economic dependence of their distributors.

In *Unicer*, the abuses were considered to consist in the sudden termination of the beer distribution contracts, as well as the reduction of their scope by excluding the supply to some clients that were supplied directly by Unicer.[41]

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40 Decision of 7 April 1986, Case Number 2/85, *Codifar*, Competition Council Annual Report 1985, at p 49.

41 Decision of 13 July 2000, Case Number 2/99, *Unicer II*, Competition Council Annual Report 2000, at p 127; Decision of 13 July 2000, Case Number 3/99, *Centralcer II*, Competition Council Annual Report 2000, at p 63.

In *Centralcer*, the Competition Council assessed not the unilateral amendment of the distribution agreements that allowed direct sale by Centralcer to large retailers for itself (as it increased the intra-band competition), but whether a unilateral amendment was abusive by itself.

However, since the said direct sale system had already been implemented without any complaints by the time the case was closed, the Council therefore merely imposed on Centralcer the obligation to disclose to its exclusive distributors the list of clients directly supplied by that company.

Intellectual Property

Distinct Status for Service Marks

Under the Industrial Property Code, it is possible to obtain trade marks to identify products and services or collective trade marks (for use by associations or as certification marks). In addition, it is possible to register logotypes (*logótipos*) to identify entities that produce and sell products or render services. Community trade marks also produce legal effects in Portugal, as may international trade marks, requested under the Madrid Agreement or Protocol, when no cause for refusal exists.

Under Portuguese law, there is no distinction between a product mark and a service mark. In order to protect a mark solely for services, an applicant must indicate the relevant services in the application, according to the categorization established by the Nice Classification System.

Registration

The relevant authority for registering Portuguese trade marks or patents is the National Institute of Industrial Property (*Instituto Nacional da Propriedade Industrial*, INPI). The request to register a trade mark is presented and subsequently published in the *Official Industrial Property Bulletin*. There is a two-month period in which the application may be challenged by any interested party. The applicant has a further two months in which to contest the challenge, as provided by article 17 of the Industrial Property Code.

INPI will only start examining the application after the two- or four-month period referred to above, the purpose of the examination being to ascertain and confirm whether the application is unique and cannot be confused with an already existing registered trade mark. The application is only approved following this examination, after which it is registered and published in the *Official Bulletin*.

(Decree-Law Number 125/2006 of 29 June 2006 enables the creation of the so-called "on the spot trade mark" regime, according to which it is possible to buy a pre-approved trade mark equivalent to the company name chosen, at the same time that an "on the spot firm" is incorporated.[42] As a member state of the Madrid Agreement and Protocol and of the EU, other means and procedures to protect trade marks are available in Portugal.

Licensing Restrictions

Under Portuguese law, the general rule is that industrial property rights can be freely assigned or licensed, and even future rights (i.e., resulting from industrial property right applications) may be assigned or licensed. Logotypes and trade marks can only be assigned if the transfer would not lead consumers into error or confusion and there are situations in which the assignment of a mark or logotype may only be done along with the underlying business[43] or with certain consents.

Normally, goodwill is not expressly transferred with a trade mark, but there are ways to ensure the transferee benefits from the goodwill that follows the trade mark, through non-competition clauses in the relevant contract and obligations on the transferor to provide information to the market about the transfer.

Trade mark assignment and licensing agreements must be done in writing in order to be valid. The industrial property right must be specifically mentioned. In licensing agreements, it also is necessary to indicate the limits of the license in terms of products and services, territories, the right to sublicense and the exclusivity of the license. If nothing is stated, the law assumes that the license is non-exclusive. Even when exclusivity is granted to the licensee, the license must mention whether the industrial property right owner maintains the right to also exploit the trade mark in the same territory, given that, if nothing is mentioned, it will be assumed that he can. Non-competition clauses should comply with competition rules or they may be declared (or even the entire agreement) null and void by a court (in addition to potential sanctions pursuant to proceedings conducted by the Competition Authority).

Who May Register

A request to register a trade mark may be submitted directly by the interested party (when its head office is in Portugal), or by an industrial property agent or representative duly empowered for such effect.[44] A recent amendment to the law makes it possible for an interested party domiciled outside of Portugal to file a

42 Decree-Law Number 318/2007 of 26 September 2007 established the possibility of obtaining an "on the spot trade mark" independently of the incorporation of a company. All the administrative services involved start and finish the procedural formalities on the same day, and just one personal visit is required. A registered trade mark also can be bought online, via a public access website.

43 Industrial Property Code, arts 31, 262, 263, and 304.º-P.

44 Decree-Law Number 36 of 2003, art 10.

trade mark application directly with the INPI, provided it supplies an address in Portugal and an e-mail address/fax.

Article 225 of the Industrial Property Code establishes that, for product and service marks, the entities entitled to register are industrial manufacturers or producers of the products, merchants, farmers, tradesmen, creators, and providers of services. Collective trade marks may only be registered by associations that manage or regulate certain products and/or services. Lastly, logotypes of industrial property rights may be registered by any public or private entity that shows an interest in the registration.

The trade mark may be constituted by one sign or by a set of signs susceptible of graphic representation, namely words, including personal names, drawings, letters, numbers, sounds, the shape of the product, or its package, as long as they are adequate to perform its distinctive function. Therefore, the trade mark must have distinctive character, and cannot be exclusively constituted by signs or expressions of common use in the current language or by indications that may be used in trade to designate the species, quality, quantity, destination, value, geographic origin, age, or means of production of the product or of the service to be rendered. The duration of the trade mark registration is 10 years from its date of grant, indefinitely renewable for equal periods.

Licensee's Rights

One of the main obligations in franchise agreements is the license of the franchisor industrial property rights (including trade marks, copyrights, trade secrets, and patents). It is, therefore, advisable that all licensed rights be adequately identified in the franchise agreement, as well as all the restrictions and limitations to the franchisee in the exploitation of the licensed rights.

Therefore, both registered (such as trade marks, patents, and industrial designs) and unregistered intellectual property rights (such as copyright-protected works, know-how, and trade secrets) should be listed and duly identified in the franchise agreement. As regards registered intellectual property rights, all registration information should be provided for in the franchise agreement. As for unregistered intellectual property rights, such rights should be described in the franchise agreement and usually will be detailed in a Manual of the Franchise prepared by the franchisor.

All rights and obligations concerning intellectual property rights should be addressed in the franchise agreement. Parties will usually include clauses in the franchise agreement establishing the obligation of the franchisor to maintain the validity of the intellectual property registrations and to start all judicial proceedings required to protect such rights and avoid infringements. The licensee will, therefore, be given the right to use the franchisor’s intellectual property rights related to the franchise, while also assuming the obligation to use such intellectual property rights within the limits of the rights that have been granted to him and as established by the franchisor.

Protection of Marks

Article 316 of the Industrial Property Code establishes that the industrial property has the same protections as those established for property in general. An owner of a registered trade mark may file a claim against anyone who is in infringement of his trade mark rights, namely using, without authorization, in the course of trade, a mark that is identical or similar to the one registered on products and services identical or similar to those included in the aforementioned registration and, as a consequence, causing a risk of confusion in the market.

Special protection exists in Portugal for well-known or prestigious marks. An owner of an unregistered trade mark[45] also may file a claim under the unfair competition chapter of the Industrial Property Code[46] or under the general rules of non-contractual or contractual liability set forth in the Civil Code.

Article 317 of the Industrial Property Code establishes that certain behaviors from competitors may be considered unfair competition, including any acts that mislead consumers as to the identity of the company and origin of the products or services.

Furthermore, article 318 establishes that the unlawful acquisition, disclosure, or use of trade secrets of a competitor is considered illegal.

Actions Available to Foreign Trade Mark Holder for Improper Use or Infringement

The type of actions available to a foreign trade mark holder will largely depend on the circumstance of such trade mark being registered or in force in Portugal. If the trade mark is in force in Portugal, the foreign trade mark holder may file a civil trade mark infringement proceeding against the infringer, requesting that the infringement cease and, additionally, requesting compensation in cases where damages have occurred. In situations of great urgency, it is possible to file a preliminary injunction to cease the infringing activity.

The foreign trade mark holder may instead file a criminal complaint against the infringer, given that trade mark infringement constitutes a crime under Portuguese law. This complaint would be investigated by the Portuguese public prosecution and it is for the latter to decide to bring the case to court. The plaintiff also can request compensation under this procedure.

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45 Under article 227 of the Industrial Property Code, the owner of an unregistered trade mark has a grace period of six months during which he can still register it with a priority right over subsequent trade marks.

46 Industrial Property Code, arts 316–320.

In addition, a foreign trade mark holder may file a complaint of unfair competition, which is considered a misdemeanor under the Industrial Property Code. The complaint is filed with the *Autoridade para a Segurança Alimentar e Económica*, ASAE, a police agency, and it is then decided by the INPI. In the context of franchise agreements, the improper use of a trade mark generally gives rise to a breach of contract, the consequences of which are typically resolved by either a judicial court action or arbitration (depending on what is foreseen in the agreement)

Quality Control and Products Liability

Quality Control

One of the main obligations of franchisors, according to Portuguese doctrine and case law, is the obligation to provide training and assistance to the franchisee. Quality control also will encompass periodic inspections by the franchisor of the franchisee's activities to ensure they are proper conducted.

Considering the need for the franchisor to ensure that its products are being sold, or services are being rendered, in accordance with principles and rules previously defined for that franchising, inspections are widely accepted. Nevertheless, the power to control established in the agreement cannot be exert in such a way that the franchise agreement is regarded as an employment or agency agreement.

Product Liability

The Defective Products Law[47] establishes strict liability for the manufacturer with respect to personal injury resulting from a defect in the manufactured product. If the requirements set forth in the Defective Products Law are met, the end consumer may directly claim any damages against the franchisor, irrespectively of the fact that no contractual relationship has arisen between the end consumer and the franchisor itself.

The Law will, however, not be applied between franchisor and franchisee, as independent and qualified companies. It is therefore left for the franchisee to make use of any contractual rules on rights of redress or otherwise legal rules on non-contractual liability. Particularly in international contracts, where a matter of applicable law might arise, parties should, therefore, be very careful in establishing rights of redress in the agreement, so as to ensure that, if a franchisee is faced with a claim by an end user based on product liability, he has the right to claim against the franchisor for indemnities already paid to claimants, as well as insurance coverage.

47 Decree-Law Number 70 of 26 March 2007.

Form of Business Organization

Direct Licensing of Franchisees

Excluding the acquisition of a Portuguese company, the most common form of business organization employed in Portugal is to establish a company or a branch. The most common type of companies in Portugal is the limited-liability company (*sociedades anónimas*, SA) and the limited-liability partnership (*sociedades por quotas*, Lda), which have in common the fact that shareholders' liability is generally limited to their interest in the capital share of the company.

Although less often used, there are other ways of investing in Portugal, i.e., through joint ventures and partnerships. The direct type of licensing of franchisees may be used by a franchisor in such cases where the franchisor does not need to control or supervise the franchisee's activity in depth. It has the advantage of reducing the franchisor's costs with the establishment in the place of the franchisee.

A limited-liability partnership is, in principle, required to have at least five shareholders, but a single shareholder is allowed when such shareholder is itself an SA. Registration with fiscal and commercial registry authorities is required.

The minimum capital share is €50,000, which may be paid in cash or in species. A private limited partnership (Lda) tends to be used for smaller investments, with lower capital share than in a limited liability company (the minimum required by law is €5,000 in money or in kind). A minimum of two shareholders is required, although it also is possible to set up a private limited partnership with only one shareholder, which is designated by *Sociedade Unipessoal por Quotas* (SUQ). Registration with the Commercial Registry and fiscal authorities also is required.

Holding Company

A holding company (*Sociedade Gestora de Participações Sociais*, SGPS) may be incorporated as a limited-liability company or as a private limited partnership, but is, in any case, subject to additional restrictions. The main restriction upon a SGPS relates to its corporate object that is restricted to the management of shares in other companies as an indirect way to carry on an economic activity. Although the SGPS may grant loans and provide technical, administrative and management services to its subsidiaries, it cannot engage in any of the following operations:

- Buy property, other than that required for its own offices or for the offices of the company in which it holds shares;
- Dispose of any of its participations within a year of their acquisition, unless by exchange or where the disposal proceeds are invested in other

participations meeting the same requirements or if the buyer is a company controlled by the SGPS;[48] and

- Lend to anyone other than companies in which it has a controlling interest or is a shareholder.

Foreign Branch

In order to register a company branch in Portugal, the interested party must first establish a name for the company that may not differ from the one of the foreign parent company or at least contain its corporate designation. Such corporate designation should then be registered with the National Registry of Collective Persons (RNPC), through an application.

The Portuguese branch must have a manager duly authorized by a power of attorney issued before applying for registration. The drafts of the company's bylaws must also be prepared. Furthermore, the branch should pursue registration with the Companies Commercial Registry and before fiscal authorities. The application with the Commercial Registry should contain:

- The parent company's incorporation document, issued by the relevant institution of the respective foreign country;
- A copy of the parent director's board minute attesting the opening of a branch in Portugal;
- The articles of association of the company branch; and
- A power of attorney and the translated by-laws of the parent company.

In addition, the Portuguese branch must be registered with the Social Security Services. Decree-Law Number 73/2008 of 6 April 2008 approved a special regime for the immediate creation of permanent representations of foreign companies in Portugal, i.e., the "on the spot branch" service. This regime enables a company based abroad to establish a branch in Portugal in just one day, with one visit to the relevant office.

Considering the above, a foreign branch is considered a foreign company that is registered and thus authorized to operate in Portugal. In the event of a claim against the branch, Portuguese law will be applicable. Furthermore, Portuguese law establishes that a foreign company may be sued in Portugal if it has a branch, agency, subsidiary, or permanent representation in Portugal.[49] A

48 The term "controlled" means holding more than half of the capital share and voting powers or being able to appoint more than half of the board.
49 Civil Procedure Code, art 86(2).

Portuguese branch of a foreign company is not considered a separate legal entity from its parent company; the parent will be held liable for all the debts and obligations of the branch.

Subsidiary

In general, there are no special differences between a branch and a subsidiary in Portugal. A branch is a permanent representation of a company, either at home or abroad. It has no legal personality and carries out the company's business, in full or in part. A subsidiary is a company in which the parent company has a majority shareholding and exercises management control.

The main difference is the tax efficiency of repatriation of profits. Dividends are subject to a withholding tax, and transfers of branch profits are not. While a subsidiary is considered a separate legal entity, a branch is not a legal entity distinct from its parent.

While the liability of the shareholders of a company is limited to the amount of the capital, in the case of a branch, the liability of the head office is the amount of its net worth. The costs of registering a branch are similar to those for incorporating a company.

Joint Venture

A joint venture, according to Portuguese doctrine and law, is a commercial agreement between independent companies, which purpose is to join efforts in obtaining resources to carry out a specific activity. A joint venture may be of a temporary nature or, otherwise, determine the creation of a company (the incorporated joint venture) or of a consortium (the unincorporated joint venture).

If a company is incorporated by the members of the joint venture, rules on company law cited above will apply as to the liability of its members towards third parties.

However, as the joint venture is not a legal entity, the partners will develop its business relationship based on contractual grounds.

Decree-Law Number 231/1981 of 28 July 1981 governs unincorporated joint ventures or consortia. According to the legal regime, a consortium should be concluded in writing. A lead member should be designated by the members whose main functions are to represent the consortium in contracts and transactions with third parties, receive payments, and distribute profits internally.

The legal regime further establishes that there is no presumption of a joint liability of the consortium members towards third parties, even if internally the parties have established such liability between themselves. In conclusion, it is broadly left for the parties to establish the type of joint venture to be executed. National merger control rules are applicable to the creation of full-function joint ventures[50] if one of the two alternative sets of thresholds for notification of a concentration to be mandatory is fulfilled. In case of a non-full-function joint venture, competition rules on agreements between companies apply.

Are Franchise Interests Securities?

Article 6 of the Industrial Property Code establishes that the rights from patents and models utility as well as designs or models and other trade marks are subject to seizure and attachment and can be as pledged or subject to other seizure of property.

A lender may seek a collateral assignment of the franchise agreement itself that enables the lender to succeed in the rights and interests of the franchisee upon the loan's default.

To avoid such result, franchisors should object to the use of collateral assignments, whether by generally forbidding such assignment of the franchise agreement, or by conditioning such assignment to specific conditions. The franchisor may not be left in a position where the lender continues to run the franchisee's business.

Therefore, it is useful to include, in the franchise agreement, clauses providing for the prohibition of assigning rights without the prior consent of the franchisor.

Taxation

The Corporate Income Tax (*Imposto sobre o Rendimento das Pessoas Colectivas*, IRC) is applicable to income obtained both by resident or non-resident entities. As regards non-resident entities, Portuguese law taxes only their income obtained in Portugal; as to resident entities, it taxes their global income, either from internal or external source.

Resident entities are normally taxed through the delivery of the respective Income Statement (*Declaração Modelo 22*) for their global income. Non-resident entities may be taxed either by definitive withholding tax or are obliged to the delivery of the *Declaração Modelo 22* in some situations (i.e., capital gains). For non-residents, the following rates are applicable:

- Capital gains, 25 per cent;
- Dividends, 25 per cent;[51]

50 Only the creation of a full-function joint venture on a lasting basis is considered a concentration under merger control rules.

51 This tax rate may, however, be reduced up to 10 per cent according to double-taxation treaties or Directive 2003/49/CE.

- Interest, 25 per cent;
- Royalties, 15 per cent;[52] and
- Other services, 15 per cent, except transport, communications, and financial services.[53]

Portugal has signed double-taxation treaties with 52 countries,[54] and nine are pending ratification.[55]

52 This tax rate may, however, be reduced up to five per cent according to double-taxation treaties or Directive 2003/49/CE.

53 This tax may be reduced or eliminated according to double-taxation treaties.

54 South Africa, Germany, Algeria, Austria, Belgium, Brazil, Bulgaria, Cape Verde, Canada, Chile, China, Korea, Cuba, Denmark, Slovakia, Slovenia, Spain, United States, Estonia, Finland, France, Greece, The Netherlands, Hungary, India, Indonesia, Ireland, Iceland, Israel, Italy, Latvia, Lithuania, Luxembourg, Macau, Malta, Mexico, Morocco, Mozambique, Moldova, Norway, Pakistan, Poland, United Kingdom, Czech Republic, Romania, Russia, Singapore, Sweden, Switzerland, Tunisia, Turkey, Ukraine, and Venezuela.

55 Barbados, Colombia, United Arab Emirates, Guinea-Bissau, Panama, Hong Kong, Kuwait, San Marino, and Uruguay.