

Legal treatment of franchise in Northern Macedonia and Republic of Kosovo

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Abstract

In this paper, franchise is treated as a way of transferring knowledge and experience as well as trademarks. The concept of exclusivity is most often defined as a method of marketing goods and services. Of course this kind of definition is insufficient. Franchising is more than a method of distribution, a specific way of financial impoverishment of meaning without an investment of its capital by the franchise. The business people franchising system gives the experience and the right approach to the methods and enables them to gain from the brand reputation that defined the reputation. This paper aims to highlight the importance of legal treatment, as the franchisor enables the legal circulation not only of goods and services but also of rights such as trademarks. The focus of legal treatment is on the Republic of Northern Macedonia and Kosovo. For these two countries, we have also presenting franchise data. In this paper besides the historical aspect, I am also analyzing the legal sources related to franchising in the European Union. These two states have an obligation to bring their legal systems into line with those legal sources that apply to European Union law.

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JEL Classification: K12, K22

1. Meaning of franchise

The most widespread definition of Franchise is that “Franchise is an agreement between a business (product or service) with another business, to give to the latter the exclusive rights to sell its product in a certain territory”. According to the International Franchising "franchising is an is a continued report where the franchisor provides licensed privilege to do business as well as assistance in organizing, training, and managing" in exchange for a free-lance for the supplier. In other words, the franchisee is a legal contract that allows a business to provide or create a freelance business product, name, brand, or an idea of the independent businessman. With this contract the granter of franchisor is transferred to the franchisee, with certain compensation, for a certain period of time to use the particular goods or services (firm, rights, appearance, etc.), such as and business skills and experience, subject to predetermined conditions, and the franchisee is obliged to advise, assist, educate staff and earn the right to supervise.³ Typical

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franchising is simply a contract between the seller and the buyer - a contract that allows the buyer (franchisor) to sell the product or service to the seller (franchisee). The Franchising offers to people the opportunity to own, manage and run their own business without having to take all the involved risks.⁴ The European Franchising Code of Ethics states that “Franchising is a system of marketing of goods and/or services and/or technology based on a close and on-going collaboration between legally and financially separate and independent undertakings, the Franchisor and its individual Franchisees, whereby the Franchisor grants its individual Franchisee the right, and imposes the obligation to conduct a business in accordance with the Franchisor's concept”.⁵ The foregoing definitions in principle it indicates that the franchisee deals with the sale of know-how, the transfer of business secret and the transfer of business and transfer of technology for practicing any particular business. This requires the establishment of the legal relationship between the provider and the franchisee. Franchising, in its various forms, continues to present businesses with one way of achieving profitable and successful international growth without the need for either substantial capital investment or a broad managerial infrastructure. In sectors as diverse as food and beverages, retail, hospitality, education, health care and financial services, it continues to be a popular catalyst for international commerce and makes a strong and effective contribution to world trade⁶. A franchise is a business relationship in which franchisor is granting the right of sale of certain products or services within the designated territory in certain time period, or gives the franchisee the right to use his trade name, trade mark or brand, products or services, and franchisee uses his productive or service business knowledge and experience, or the way of doing business (depending on the franchise)⁷. Franchising at its best is a partnership which establishes trust, opens communications, and accrues benefits to both the franchisor and its franchisees⁸. The franchising as an investment method of contractual business showed characteristics of a stable financial instrument to which the global financial crisis had no significant effect⁹. Franchising is the sale of know-how, which is transmitted through a manual and is a business secret. The franchisee transfers business technology to the franchisee¹⁰

⁴ Established in Chicago, USA, in 1960, the International Franchise Association (IFA) has taken on serious responsibilities to develop standardized contracts, codes of conduct, with a view to developing and advancing the franchising contract as in international relations as well as national ones.

⁵ The European Code of Ethics for Franchising: full text (last amended: 2003)

⁶ M. Abell, *The Franchise Law Review*, 2015, Law Business Research Ltd., p.vii.

⁷ Suzana Baresa1, Zoran Ivanovic, Sinisa Bogdan, *Franchise business as a generator of development in Central Europe*, „Journal of Economics”, 8 (3): 281–293, p. 282.

⁸ Antonowicz, Alicija, *The Dissemination of Franchising all over the World: an Attempt to Assess the Scale of the Phenomenon*. „Problems of Management in the 21st century”, 2 (December), 2011, 8–18. http://www.scientiasocialis.lt/pmc/files/pdf/Antonowicz_Vol.2.pdf (accessed June 15, 2017).

⁹ S. Miljkovic, *Significance of Legal Norming of Pre-Contractual Disclosure of Information for Franchise Contracting*, „Balkan Social Science Review”, Vol. 4, December 2014, p. 91.

¹⁰ N. Stoimilova, *Франшизингот и лизингот во поддршка на развојот на малите претпријатија (Franchising and Leasing in Support of Small Business Development)*, Stip, 2016, p.19.

2. The advantages and disadvantages of franchising

Franchising has its advantages and disadvantages for both the franchisor and the franchisee. For the franchisors, franchising is one of the possible means to have in disposal the investment capital without the need to control the procedure. After carefully designed and implemented correctly, franchisors are able to rapidly expand their product across countries and continents using franchisees' capital and resources, and can gain profits depending on their contribution to those societies. Franchise or is exempt from certain obligations that are expressed in establishing a representation, such as; obtaining the necessary license and permits. In some jurisdictions, some permits (especially alcohol licenses) that are granted more easily to local applicants, whereas the companies outside their jurisdiction find it more difficult, if not impossible, to obtain this license. For this reason, hotel and restaurant chains that sell alcohol often have no alternative but franchising if they want to expand their services to another province or state. As franchising disadvantages for franchisors are considered, the limited number of eligible franchisees, as in each city or region there will be only a limited number of people who have the ability and desire to create franchisees in a given industry, compared to the number of individuals who would be capable of competently managing a representation. Successful franchising requires an evaluation process to evaluate the limited number of potential franchisees, unlike the evaluation that would have to be made if there was a need to hire a direct (control) worker. An incompetent manager leading a representation can be easily replaced as long as the dismissal of an incompetent franchisee is more difficult than local laws and agreements. The incompetent franchisor can easily undermine public trust in the franchisor brand by providing non-qualitative products and services. If the franchisor is charged with any legal violence, he will personally face legal consequences; however, the franchisor's reputation may be damaged.

For the franchisee (franchisee user), the possibility of developing and managing a business is created that if it had not been the franchisee, they would not have had this opportunity. This is due to the fact that the franchisor does not need to invest to start a business as he is already offered a product or service already created, so his only obligation is to manage the dealership adequately. Franchisors often provide franchisees with special training, which is otherwise not possible for people who want to start their own business unless they pay for such training. For example, McDonald's franchisee provides its implementers with a 2-3 week visit and stay at the headquarters of the famous Illinois Company, in order to enable them at every stage of the company's professional work. The disadvantages for the franchisor are considered: the relationship between the franchisor and the franchisee may be conflicted if either party is incompetent or acts in bad faith. An incompetent franchisor can destroy his franchisee by not adequately promoting the brand. Franchising contracts are unilateral contracts whose provisions usually

favour the franchisor in the event of a dispute with the franchisor¹¹. This may even count as one of the reasons for not buying a franchise. The franchisor has very few legal tools in use if the franchisee charges for something. Most franchisees make franchising contracts by infringing their rights in federal and state laws, which in some cases allow the franchisor to even choose where and under what right the lawsuit will be processed. Loss of control is considered a major shortcoming for franchisees. As long as they gain the use of the system, branding, assistance, training, marketing, the franchisor is required to follow the system and obtain permission from the franchisor for any changes. For these reasons, franchisors and entrepreneurs are very distinct. Pricing, and operating the franchising business, also incurs a lot of costs, because in this case the franchisor must necessarily maintain the same quality of products and services as does the franchisee. Standards set by the franchisor with regard to premises arrangement, change of uniforms, etc., and are impossible.

3. Types of franchisees

There are several types of franchisees:

- a) Business format franchises;
- b) Product franchises;
- c) Franchises of manufactured products;
- d) Alliance of business opportunities.

With business format franchises, which are even more common, the company expands by supplying freelance businessmen with a well-established business, including name and brand. Franchising plays an important role in the EU economy. Business format franchising is the latest incarnation of a long established business structure. Its importance is acknowledged by a wide range of institutions and it has emerged as an important vehicle for entrepreneurship that has appeal to large corporations and small businesses alike. The 9971 or so franchise networks operating in the EU and the 405 000 or so outlets make a substantial contribution to the GDP of a number of member states, with a roughly estimated total turnover of €215 billion (USD 300 billion)¹². The brand, name, mark or symbol that identifies the products or services to distinguish them, promise of quality or satisfaction by identifying and defining a product or service. In this case, the franchisor assists the franchisee in the management of the dealership, provided that the franchisor also transfers the franchisee the contractual payments. In these cases, the franchisor often buys funds from the franchisee. Fast food restaurants of this type are considered. With manufactory franchisees, the franchisor gives the manufacturer the right to manufacture and sell products using his name and brand. To be able to exercise this right, shop owners must pay a fee or purchase a minimum quantity of products. Alliance business opportunities means when a freelance businessman

¹¹ A. Jashari, *E drejta afariste kontraktore*, Tetove, 2017, p. 278.

¹² M. Abell, *The Regulation of Franchising in the EU*, „Elgar Intellectual Property Law and Practice”, 2013, p. 26.

buys and distributes products from a company. The company in this case provides the business owner with clients and accounts whereby the business owner in this case pays the company royalties.

4. Historical-judicial treatment

Early franchising dates back to the Middle Ages when the Catholic Church franchised a deal with tax collectors who kept some of the money raised for themselves and gave a portion to the church. This was a practice until 1562, but as such it was extended in many countries. For example, in the 17th century England's franchisors were granted the right to sponsor markets and fairs. Then we had a slight increase in franchising, at least until the turn of the 19th century, when it was first introduced in the US sewing. His effort, though not very successful (because the company did not make enough money though he sold a lot), is considered the first franchise in the US. Then after Singer, General Motors Corporation established a successful franchise operation aiming to capital rising. Perhaps the father of modern franchising is David Liggett. In 1902, Liggett called a group of pharmacists to join a pharmacy cooperative. As he explained to them, they could increase profits by paying less for their purchases, especially if they set up individual manufacturing companies. His idea was to produce a private label product. About 40 drug dealers deposited \$ 4,000 of their own money and adopted the name "Rexall". Sales intensified, and Rexall became a franchisor. This chain as such was a good example to follow. Subsequently, until 1970, there will be other, even more numerous, cases those who failed with the goal of quick enrichment, but some even exceeded the limits of success, such as Ray Kroc, founder of McDonald's hamburger chain, and one of the most paradigmatic franchisors who called franchising a "new version of the American Dream." "He founded the franchise operation in 1955, following the acquisition of franchise rights by Dick and Mac McDonald, who started the chain. After 15 years McDonald's will be represented by 1500 representatives. A later example of franchising was John S. Pemberton's 1886 Coca-Cola franchising. The franchise developed especially in the late 1930s, when Howard Jonson chain-started franchise motels, whereas the 1950s a huge surge in franchise chains was in perspective, including most restaurants and motels. In this regard, McDonalds is undoubtedly the most successful in the world with many restaurants and other franchise connections. Based on franchising in economics in 1991-1993, from a study by the University of Louisville, franchising enabled America to come out of the crisis it was in at the time. Consequently, when good jobs are lost to the economy, the franchisee undertakes them because the potential franchisees seek to acquire jobs and benefit from the acquisition of franchising rights. Franchising is a business model used in more than 70 industries and generating more than \$ 1 trillion in US dollars each year, so today it is considered that franchising will continue to grow, particularly in the national economy.

5. Legal-normative treatment of franchise

In most European countries Franchising is not adopted by legal provisions, but general principles are still applied from the contractual law, general business conditions, general commercial practices, and other sources of commercial law. There is no franchise adopt in the Republic of Macedonia with a separate law. Franchising in the Republic of Macedonia is defined by the Decree on the Group Exclusion of Vertical Agreements, as well as by an Act of the Commission for the Protection of Beauty named as the Guidelines for Vertical Restrictions.¹³ In Albania, franchise provisions are incorporated into the Civil Code.¹⁴ In Europe, the first country to approve Franchise Legislation was France, which in 1989 adopted the Law no. 89-1008, concerning the development of commercial and craft enterprises and the improvement of their economic, legal and social environment. The text of this law was then incorporated into the French Commercial Code. The Commercial Code also adopts the relationships between the franchisor and the franchisee in the provisions regulating consumer protection.

In international law, some special rules for Franchising are known. The two most important acts drafted by the legal experts within UNIDROIT are recognized as:

- a) A Guide to Master International Franchise Agreements, changed from 1998 amended in 2007; and
- b) The model franchise disclosure law of the year 2002.

Overall, as a solid and structured legal document, the UNIDROIT Guide is divided into twenty (20) chapters and three (3) annexes, providing a thorough examination of the drafting of the Master Franchise Contract. This guide addresses the essential elements of the Master Franchise, the types, nature and rights of the contract, the terms of the contract, the role of the parties, sub-franchise, intellectual property, know-how, sales and transfers, realization and consequences, such as and many other issues.¹⁵ Model franchise law is a more flexible law than international conventions, as it is not mandatory, but is considered an auxiliary instrument for states to create legislation based on the principles embedded in the text of the law itself. The Model Law is made up of 10 articles, and an explanatory report explaining what is the purpose of each provision (s) by interpreting the provisions in order to assist legislators if the provision in question is national and necessary.¹⁶ The European Code of Ethics for franchising, as a major source for adopting the rights and obligations of parties to the Franchise Agreement that are bound in the territory of Europe or whose parties are companies registered in the territory of European countries. The original text was adopted in 1972 by the General

¹³ Decree on the Group Exclusion of Vertical Agreements on Exclusive Right, Exclusive Distribution Right, Exclusive Purchase and Franchising Right, Official Gazette No. 91, from 2005; Commission notice-Guidelines on Vertical Restraints, Official Journal C 140, 19.05.2010

¹⁴ Chapter XX articles 1056-1064

¹⁵ Model Franchise Disclosure Launch, Explanatory Report, UNIDROIT, 2002

¹⁶ See more Unidroit.org/instruments/franchising/modelwash.html, consulted on 1.10.2019.

Assembly of the European Federation for Franchising. The Code serves in Europe as a basis for adopting the rights of the parties. The Code as a whole is mandatory for all the members of the European Franchise Federation. Any member of the association may supplement the Code through the Interpretations of the provisions which deal with the franchise if the parties have reached the agreement.¹⁷ There is no unified legal source on franchising in the European Union.¹⁸ Only six of its member states have separate franchise laws; France (1989), Spain (1996), Romania (1997), Italy (2004), Sweden (2004), Belgium (2005). In the European Union during 2013 there were approximately 3700 franchise providers through 145,000 locations with a turnover of 75 billion euros. Leading the transition was Hungary with 400 franchising chains, 50% of which were local. Following were Poland and Slovenia with about 120 franchises and Croatia with over 120 franchise providers, of which 30 were local. There is no up-to-date and complete set of franchising economic data in all or even most EU member states. This in itself suggests that franchising is not reaching its full potential in the EU. The latest figures released by the European Franchise Federation are about 2009, but they deal with only 18 member states and the information provided to them is incomplete and inaccurate. A careful examination of these figures and a selection of other sources suggest that franchising in the EU currently accounts for around US \$ 300 billion. Franchising is not well established in many of the newer and newer member states less economically developed in the EU. Figures show that franchising is heavily focused on about a quarter of EU member states, which account for \$ 250.4 billion (180 billion euros) of a total turnover of \$ 300 billion - United Kingdom, Germany, France, Spain and Italy. In other words, less than 25% of EU member states account for about 83.5% of EU franchise turnover.¹⁹ In China, as in other countries, the law plays an important role in improving the environment for franchising.²⁰

6. The current state of franchising in Northern Macedonia

In Northern Macedonia, there is insufficient knowledge of franchising, and this directly affects the development of many businesses. The franchise systems in Macedonia are very few. These are: Mango, Diners, Fornetti, Domino's Pizza, Goodis, Holiday Inn, Germanos, Coca Cola, Pepsi, Coca Cola, Holiday Inn, Burger King, Helen Doron²¹ and others. The only franchisee donor from Macedonia is Alkaloid, which managed to sell the Caffetin brand in Russia. The franchise system in the Republic of Macedonia continued in 2016, with the renowned Hilton signing

¹⁷ See more <http://www.eff-franchise.com/77/regulation.html>, consulted on 1.10.2019.

¹⁸ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31988R4087>, consulted on 1.10.2019.

¹⁹ www.fieldfisher.com/publications/2012/05/franchisings-underperformance [May 21, 2015]

²⁰ Wang, Zhu, & Terry, Wang, Z. J., Zhu, M., & Terry, A., *The development of franchising in China*, „Journal of Marketing Channels”, 15(2-3), 2008, p. 167-184.

²¹ Helen Doron English is a global institution with over 30 years of success in teaching English to children of all ages. Nowadays, over 1.5 million students speak English, all thanks to Helen Doron English.

an exclusive agreement to open Double Tree by Hilton in Skopje with Stone Bridge Hotel. There are many circumstances that affect franchise providers not to have an interest in contracting with customers in Macedonia. The current state of franchising in Northern Macedonia. Starting from the fact that developing a franchisee-based business is not easy since before you become part of a particular franchising system, certain conditions have to be met that in many cases are specific and burdensome, and they all depend on the subject matter of the franchise, and in many cases are difficult to complete. This has been the case on several occasions in Northern Macedonia. For example, the well-known restaurant "American Restaurants Hutters", as a condition of opening a restaurant in Macedonia, requires a place in a junction area, where a minimum of 30,000 vehicles pass within a 5-mile space each day to have one agreement with a minimum of 100 thousand inhabitants, the annual income of the population per capita should not be less than \$30.000 and provide parking for 200 cars. Or the famous fashion brand "Escada", as a condition to enter the Macedonian market has requested the location of a store in a space where there will be stores at least 3-4 brands of this range. Eligibility in two cases by a franchisee user in Macedonia is impossible to obtain, due to the circumstances. In the Republic of Northern Macedonia, it is necessary to take measures to affirm franchising. In this regard, through certain activities, such as various articles published in various media and the organization of various conferences, with which they can be better informed about the importance of franchising. Undoubtedly, the establishment of various franchising associations that could protect the interests of members is extremely important. Possibility of implementing various projects that would be financed by the state or by some foundations and international associations, also affects the development of franchising. However, taking into consideration the rapid development of franchising legal relations, its role and importance in the economic development of each country, especially developing countries, it is imperative to create greater security for participants in franchising legal relations, independently adopting franchising. This will create greater assurance for franchisees (franchisees) that content in particular its secret elements due to legal remedies will be preserved. It is true that many rights and obligations between the parties to the franchising contract are adopted with contract. However, it is very difficult for a contract to adopt all matters without exception. In these circumstances, when certain issues are not adopted with contract (as a special act), the application of legal provisions comes into play. In Northern Macedonia, in order for local companies to be franchise providers, they must work to improve the structural quality by making greater efforts to develop a more-qualified and professionally well-trained staff.

7. The current state of franchising in Kosovo

There is insufficient knowledge of franchising in the Republic of Kosovo. There are authors who have begun writing about franchising in theory,²² but the

²² See. A. Krasniqi, *Franchising Contract Alternative for Investment Growth*, „Journal of Business Administration”, no. 2, Peja, 2010.

lack of other actions to promote franchising, considering its importance and role in developing many businesses that require both knowledge and experience to develop them. All this has resulted why in Kosovo there is no franchise agreement entered into. It is therefore necessary to take measures to affirm the franchising. In this regard, it is first necessary for the competent national authorities to organize various international conferences and seminars for local and foreign franchisees (as franchisor providers), where many issues related to franchising and the possibility of co-operation between local investors and foreign franchisees can be addressed. Above all, foreign franchisees would be informed about normative legal treatment in Kosovo, which could be considered as a sufficient framework to provide foreign franchisees with legal support. Thus, in Kosovo, except for the Law on Protection of Competition, issues related to franchising are operationalized in the "Guidelines on Vertical Agreements", which as a whole is fully harmonized with the European Commission Guidance.²³ In this guidance, the franchise contract is defined as an agreement where the franchisor usually provides the franchisee with commercial assistance or technical contracts, such as procurement services, training, real estate advice, financial planning, etc., as long as the agreement lasts.²⁴ This contract assists the franchisor to resell the products offered by the franchisor or a designated provider by the franchisor or to use those products and sell the products resulting from this use. The Instruction also defines in a taxable manner the legal effects of the contract, both the obligations of the franchisor and the obligations and rights of the franchisee.²⁵

8. Conclusion

Franchising enables the development of plants with less risk. Therefore, the perspective of business development in the future will depend on the cooperation of the parties (franchisees and users).

It will also be a challenge for countries such as Northern Macedonia and Kosovo to create conditions for franchise development, as it is considered as a model that it shall generate incomes to the economies of the states and it shall also provide new jobs, thus reducing unemployment.

The opportunities offered by technology and the Internet greatly influence the development of the franchisee, as is the case with increased sales due to electronic sales.

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²³ European Commission Notice (2000/C291/01) "Guidance on vertical restraints" (32000Y1013 (01), OJ C 291, 13.10.2000, pp. 1-44.

²⁴ *Ibid.*

²⁵ *Ibid.*

4. Antonowicz Alicija, *The Dissemination of Franchising all over the World: an Attempt to Assess the Scale of the Phenomenon*. „Problems of Management in the 21st century”, 2 (December), 2011, 8-18.
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