

Greece: A franchise disclosure law is soon expected

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For the last two years the Greek Government explores the question as to whether franchising should be regulated or not. There is a history behind this question. More specifically there has been a line of cases where franchisees suffered severe damages as a result of fraudulent behavior of some franchisors. The main problems have been identified in the pre-contractual stage of the relationship where franchisors either presented on purpose to prospective franchisees a fully supported business opportunity (while at the same time the situation was far different) in order to gain illegal profit, or omitted to present the real background of the business proposition for the same reason.

The impact of such failure cases on the market has been substantial and the reputation of franchising has been badly harmed. The Ministry of Development of the Greek Government in cooperation with the Franchise Association of Greece are now looking for a new law to regulate for the first time the pre-contractual stage of the franchise relationship.

A draft has already been produced and same has been submitted to the Board of Directors of the Franchise Association of Greece for its initial comments.

The new law is expected to include definitions of franchising, franchise contract, know-how, entry fee, royalties, and services.

As the draft is based on the Italian law regulating franchising, the definitions are expected to have as follows:

- (1) "Franchising" is a continuous commercial cooperation between two legally and economically independent parties based on a contract whereby the one contracting party ("the franchisor") grants to the other contracting party ("the franchisee"), against consideration, the license to use a set of intellectual and industrial property rights including trademarks, trade names, distinctive signs, industrial designs, know-how, patents, commercial secrets and, finally, technical and commercial consulting and assistance. By the franchise contract, the franchisee may operate in a specific geographical territory or point aiming at the distribution of specific goods and/or the provision of specific services. Franchising is a sui generis relationship not to be confused with or connected to other methods of distribution, commercial agency and employment either by analogy or by any other method of interpretation.**
- (2) The franchise contract may be related to any field of economic activity.**
- (3) In the franchise contract:**

- (a) "know-how" means a set of patented practical information, resulting from the experience of and testing by the franchisor, which is secret, substantial and identified;
 - (aa) "secret" means that the know-how, as a set of information or in the precise configuration and assembly of its components, is not generally known or easily accessible;
 - (bb) "substantial" means that the know-how includes information which is of importance for the franchisee for the purpose of use, sale or distribution of goods and services identified under the agreement;
 - (cc) "identified" means that the know-how must be described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;
- (b) "entry fee" means a fix amount of money either obviously related to economic value and to the potential development of the system, or representing the pre-contractual cost of the franchisor for every new franchise contract, or finally, being a combination of both, which is paid by the franchisee at the moment the franchise contract is signed;
- (c) "royalties" means a fee for the licensing of the franchise as a set of rights, or for the provision of services to the franchisee by the franchisor or for both in combination, either by means of a fix rate to be paid periodically in fix rates, or by means of a percentage required by the franchisor to the franchisee and related either to the annual business turnover or to the total amount of annual purchases of the latter;
- (d) "goods" means goods manufactured or supplied by the franchisor or according to his instructions and marked with the franchisor's name;
- (e) "services" means the services as same are defined and mentioned in the franchise contract which are provided by the franchisor to the consumers.

The provisions regarding the franchise contract as well as the total provisions of the law are expected to apply also:

- (a) to the master franchise agreement, whereby an undertaking ("the franchisor") grants to the other one ("the master franchisee") being a legally and economically independent from the former, against a direct or indirect consideration, the license to operate a franchise either alone or by stipulating franchise agreements with third parties ("franchisees") within a specific geographic territory, and
- (b) to the corner franchising, whereby the franchisee undertakes its exclusive commercial activity at a space which is part of a larger space contractually dedicated for this purpose to the franchisee.

As to the form of the franchise contract it is expected that same must be concluded in writing, otherwise it is null and void.

There is a long discussion as to the intention of the legislator to provide that for a franchisor to set up a franchise network he must have tested his system on the market for a reasonable period of time and with at least one outlet operated either by the franchisor or by another third party. The question is what "reasonable time" means and how same shall be interpreted by courts. The same obligation apply also to the master franchisee.

Further if the contract is defined for a limited term, the franchisor should grant the franchisee a minimum term because of the importance and the potential of the relationship which would allow the franchisee to amortize his investments, and in any case not shorter than three years, except in the case of earlier termination of the contract due to one of the parties not fulfilling his contractual obligations.

It is expected that the new law shall provide that the franchise contract should include at least the following:

- (a) the financial obligations of the franchisee vis-a-vis the franchisor that the franchisee shall undertake before the commencement of his activity and also during the contractual term,**
- (b) the way of calculating and paying the royalties, possible advertising expenses and other one off or periodical payments to the franchisor, as well as a possible indication of minimum turnover that the franchisee should achieve,**
- (c) the possible exclusive territorial rights accorded to the franchisee (territorial exclusivity) either in comparison to other franchisees of the system, or in comparison to possible sales networks or sales points operating directly by the franchisor,**
- (d) the details of the know-how provided by the franchisor to the franchisee,**
- (e) the eventual criteria to acknowledge the contribution of know-how by the franchisee to the creation and evolution of know-how, which, however, do not annul the basic principle that the evolution of any kind of know-how becomes an integral part of the franchisor's system,**
- (f) the conditions for the contract's renewal, termination or assignment, and**
- (g) the post contractual obligations of the contracting parties.**

As to the pre-contractual obligations of the franchisor it is expected that the following obligations shall be included:

- (1) At least thirty days before the stipulation of a franchise contract, the franchisor must provide the prospective franchisee with a standard type Offering Memorandum including a full copy of the franchise contract to be signed together with the following annexes, except**

those for which objective and specific confidentiality requirements exist, which, however, shall be mentioned in the contract by name.

- (a) basic information relating to the franchisor to include his corporate name, copies of the balance sheets of the franchisor of the three last years or since the commencement of his activity if operating from less than three years, corporate and tax good standing and, in case of a non-resident franchisor only a certificate of good standing, the organizational structure of the franchisor, the experience of his personnel and the details of the services provided by the franchisor by means of technical and commercial support, creation and decoration of the sales point and, finally, training,**
 - (b) information relating to (aa) trademarks used by the franchisor in the frame of his franchise system to include their registration or filing with the Trademarks Authority of the Ministry of Development, or the license by which third owners of trademarks assigned same to the franchisor, or, finally, any document evidencing specific use of a trademark in the frame of the franchise system, (bb) commercial names, distinctive titles, industrial designs and patents used by the franchisor in the frame of the franchise system to include their registration or filing with the appropriate Authorities therefore where it is either necessary or possible,**
 - (c) an analytical and synthetic description of the elements characterizing the system and the activity of the operating franchise,**
 - (d) a list of the franchisees currently operating in the network as well as a list of the franchisor's direct outlets,**
 - (e) indication of the variation, year by year, of the number of franchisees, including their place of operation in the last three years or from the date of setting up the franchisor's business, if this was from less than three years before,**
 - (f) amount and description of the initial average investment of the franchisee,**
 - (g) a short description of any judicial or arbitral proceedings raised in relation to the franchise system either raised by franchisees or third parties or public authorities against the franchisor, or closed during the last three years in relation either to the challenging of ownership over the intellectual or commercial rights or the copyright attached to the system of the franchisor, or to the violation of the legislation of any country relating to private data and terrorism.**
- (2) The above obligations under paragraph 1 items (a), (b), (c), (d) and (e) are expected to apply to the master franchisee vis-a-vis the prospective franchisee, no matter if the franchise contract is governed or not by Greek law, however, in relation to the obligations of paragraph 1 item (f) the master franchisee it is expected to have the**

additional obligation to include in the information the respective activity of his non-resident franchisor outside Greece.

- (3) The importance of confidentiality is substantial for the protection of the franchisor's know-how. During the pre-contractual phase of the relationship between franchisor and prospective franchisee and before the delivery of the Standard Offering Memorandum to the prospective franchisee, the franchisor may ask the prospective franchisee to sign a confidentiality agreement both in relation to the negotiations and to the know-how, and such agreement may include every type of lawful penalties in case of violation of its provisions by the prospective franchisee and shall be in full force no matter if the franchise agreement shall be finally executed or not between the parties involved.**
- (4) Resignation of the franchisee from his rights deriving from the above items (1) and (2) may not be agreed between the parties.**

As to the pre-contractual behavior obligations of the parties, the following obligations are expected to be included in the new law:

- (1) During the pre-contractual period the franchisor must behave towards the prospective franchisee with loyalty, fairness and good faith and timely provide the prospective franchisee with any data and information that the latter should hold as necessary or useful for the purposes of entering into the franchise contract unless in case of objectively confidential information or if a disclosure would violate third parties' rights.**
- (2) The franchisor must justify to the prospective franchisee any possible failure in disclosing the information and data that had been requested by the franchisee.**
- (3) The prospective franchisor must behave towards the prospective franchisee with loyalty, fairness and good faith and timely provide the franchisor with any data and information that the latter should hold as necessary or useful for the purposes of entering into the franchise contract even if not expressly requested by the franchisor.**

Further, the master franchisee is expected to have the obligation to inform the non-resident franchisor of the obligations that the latter has pursuant to the provisions of the new law.

The new law is expected to provide for post term and non-compete contractual obligation. More specifically as to post term non-compete obligation, the following definition is expected to be included:

"Post term non-compete obligation" means the agreement providing for the limitation of the commercial activities of the franchisee after the expiration or the termination of the franchise agreement,

together with a provision providing that such obligation shall be valid in case of the following cumulative conditions:

- (a) it has been agreed in writing;
- (b) it relates to goods or services competitive to those of the franchise agreement;
- (c) it relates to the point where the franchisee was practicing his commercial activity for the duration of the franchise agreement;
- (d) it is necessary for the protection of know-how licensed to the franchisee by the franchisor for use during the franchise agreement;
- (e) it is limited to one year following the expiration or termination of the franchise agreement.

As to the non-compete contractual obligation we are expecting to see the following definition of such obligation:

“Non-compete contractual obligation” means the agreement providing for the limitation of the ability of the franchisee both in relation to the purchase and disposition of goods or services competitive to those of the franchise agreement, and in relation to the source of supply of such goods or services,

together with a provision stipulating that the non-complete contractual obligation shall be valid in the case of the following cumulative conditions:

- (a) it has been agreed in writing;
- (b) it relates to the limitation of the ability of the franchisee to purchase and dispose goods or services competitive to those of the franchise agreement and/or relates to the limitation of the ability of the franchisee to purchase and dispose the goods or services supplied to him by suppliers others than the franchisor or the suppliers indicated by the franchisor;
- (c) the duration of such obligation shall not exceed the duration of the franchise agreement and its possible renewals;
- (d) it is practically difficult for objective quality rules to be defined because of the nature of the goods or services supplied;
- (e) the supervision of the compliance with the above rules by the franchisor has a considerably high cost due to the possibly large number of franchisees in a franchise network;
- (f) the franchisee is not prohibited from purchasing the goods or services of the franchise agreement from other franchisees of the same franchise network.

Finally, the provisions of the new law are expected to apply to any franchise and master franchise contract operating on the territory of Greece at the entering into force of the law and that franchise and master franchise agreements that came into force before the entering into force of the law and not been concluded in writing should take the writing form

within one year from the date of entering into force of the law. Also that franchise and master franchise agreements that have been concluded in writing before the date of entering into force of the law, should be put in conformity with the provisions of the law in case of deviation from those.

The international business community is quite anxious to become aware of the provisions of the new law as same shall determine whether the existing as well the future activities of foreign franchisors in Greece shall be affected or not.