

Switzerland

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Overview

1 What forms of business entities are relevant to the typical franchisor?

Swiss law provides for a number of legal forms which are eligible for franchisors in order to set up their business. The most common forms however, are the limited liability company (GmbH) and the stock corporation (AG). In order to set up a limited liability company a minimum capital of 20,000 Swiss francs is required, which must be fully paid either in cash, by contribution in kind or by set-off. The company capital may be divided in contributions with a par value of at least 100 Swiss francs each. As regards the stock corporation, the minimum share capital amounts to 100,000 Swiss francs, which is divided into shares with a nominal value of at least 0.01 Swiss francs. Upon incorporation, however, a contribution of at least 20 per cent of the par value of each share must be made; in all cases the contributions made shall total at least 50,000 Swiss francs. The board of directors decides upon the subsequent performance which may be done in cash, by contributions in kind or by set-off. Both the limited liability company and the stock corporation offer limited liability and therefore the companies' members (shareholders) are not personally liable to creditors, but rather only to the extent of their contributions. If the franchisor seeks a listing on the stock exchange, the stock corporation would be the form to choose.

2 What laws and agencies govern the formation of business entities?

The formation of business entities is governed by the Swiss Code of Obligations (*Obligationenrecht* – OR). Limited liability companies as well as stock corporations must be registered with the commercial register at their domicile. The Commercial Register Ordinance (HRegV) governs the technicalities of the registration.

3 Provide an overview of the requirements for forming and maintaining a business entity.

A GmbH or an AG are established by the founders declaring in a notarised deed, the foundation of the company by adopting the articles, by appointing the bodies and by subscribing to the contributions or shares. The articles shall in particular define the name and registered office of the company, the business purpose and the company capital.

4 What restrictions apply to foreign business entities and foreign investment?

According to the Federal Act governing the Acquisition of Real Estate by Persons resident abroad (BewG, usually referred to as Lex Friedrich) the acquisition of real estate by Swiss business entities, which are controlled by individuals or companies resident abroad or by Swiss resident foreigners who are not EU/EFTA-citizens, is restricted. The acquisition of real estate for the business activities of the company is allowed.

5 Briefly describe the aspects of the tax system relevant to franchisors. How are foreign businesses and individuals taxed?

Switzerland is a confederation of 26 cantons (states) with about 3,000 municipalities. Taxes are levied not only by the federal authorities but also at the cantonal and municipal level. Resident individuals are subject to personal income and net wealth taxes. Partnerships (and similar groups of persons without legal personality) are transparent for tax purposes, the partners being taxed individually. Non-residents deriving income from Swiss sources may be subject to certain withholding taxes. Income taxes are levied by the confederation and also by the 26 cantons and their municipalities. The federal income tax is regulated in the Federal Direct Tax Act (DBG). There is no federal net wealth tax. The cantonal and municipal income and net wealth taxation is settled in cantonal tax laws.

Resident companies are subject to the federal corporate income tax, the cantonal or municipal corporate income taxes and the cantonal or municipal capital taxes. Non-resident companies deriving income from Swiss sources may be subject to certain withholding taxes or be liable to corporate income tax in respect of such income. The federal corporate income tax rate is 8.5 per cent flat. The cantonal tax rates vary considerably. The rates mentioned in the cantonal tax laws are usually subject to cantonal and municipal multipliers. In Switzerland, all taxes due by corporate taxpayers are deductible for purposes of determining the tax base. As this is different from most other countries, Swiss tax rates should not be compared 1:1 with foreign tax rates.

Basically, the Swiss value added tax (VAT) system is in line with the 6th Directive of the European Union. Deliveries and services rendered in Switzerland by a taxable person are in principle subject to VAT. Taxable persons are entrepreneurs exercising a business activity in Switzerland if their turnover exceeds 75,000 Swiss francs per year. The legal form of the business has basically no influence on liability to VAT. All persons (also private individuals) must pay VAT if they import services for more than 10,000 Swiss francs per year. In addition, any person (including private individuals) importing goods from abroad is subject to VAT if he or she is liable to customs duties. The ordinary VAT rate is 7.6 per cent, but there are reduced rates for lodging services (3.6 per cent) and for the personal consumption of food, pharmaceuticals, newspapers, etc (2.4 per cent). Services related to know-how or licensing are deemed to be ordinary services and therefore also subject to VAT.

6 Are there any relevant labour and employment considerations for typical franchisors? What is the risk that a franchisee or employees of a franchisee could be deemed employees of the franchisor? What can be done to reduce this risk?

There is a certain risk that a franchisee is deemed as an employee depending on the relationship between the partners, as the legal status of a franchisee is usually on the limit between independence and economic or personal dependency (or even subordination), which

often leads to the assumption of an employment relationship. Individuals (not enterprises) are considered to be independent contractors if they are principally free to determine their activity and bear the entrepreneurial risk. The Federal Supreme Court confirmed the analogue application of the employee's right of termination according to the OR in a case of clear subordination and factual dependence of the franchisee (BGE 118 II 157). In case the franchisee does not act on its own account and risk, he could also be deemed an agent, who is legally privileged as regards the right to commissions, the right of retention or the notice period in case of termination of the agreement.

7 How are trademarks and know-how protected?

In Switzerland, trademarks may be protected in two ways: franchisors can register trademarks nationally with protection in Switzerland, or if the trademark is already registered abroad, the protection may be extended to Switzerland (international trademark). The World Intellectual Property Organization (WIPO) in Geneva is responsible for registering and administering international trademarks. In Switzerland, trademarks registered in the Swiss register are protected as well as the international trademarks with protection extended to Switzerland. The Swiss Trademark Act (MSchG) is based on a liberal concept of trademarks. Basically, all graphically representable signs may be used as trademarks in the legal sense as long as they distinguish a good or service from that of a competitor's. A trademark is always protected only for the classes of goods and services for which it is registered.

Know-how as an abstract term is not directly protected by the Swiss Trademark Act (MSchG) or by the Swiss Copyright Act (URG). However, by qualifying know-how as confidential information, it is usually protected by the franchise agreements itself (confidentiality clauses) and therefore also by the OR. Furthermore, in case of unfair competition by using the franchisor's know-how, it is also protected by the Swiss Unfair Competition Act (UWG).

8 What are the relevant aspects of the real estate market and real estate law?

There are no separate regulations which apply for franchisors only. Besides the restrictions mentioned in question 4, the general rules of the Swiss Civil Code (*Zivilgesetzbuch* – ZGB) as regards the acquisition of real estate and the general rules of the Swiss Code of Obligations as regards the agreements are applicable.

Laws and agencies that regulate the offer and sale of franchises

9 What is the legal definition of a franchise?

Franchises are not specifically defined by Swiss law. According to Swiss legal authorities and the Swiss Federal Court, franchise agreements include sales of goods and services through independent distributors or entrepreneurs, but under a uniform distribution concept. The individual franchisee sells manufactured goods and services which are produced or provided by the franchisor on their own account and at their own risk, but following the sales and marketing concept provided by the franchisor and receiving his assistance, training and advice as well as using his label, trademarks, equipment or other property rights. The franchisor usually reserves the right to issue directives and maintain control of the business activity of the franchisee.

10 Which laws and government agencies regulate the offer and sale of franchises?

There are no laws or government agencies that especially regulate the offer and sale of franchises. The offer and sale of a franchise is regulated by the general provisions of the ZGB, the OR and to some extent consumer law, unfair trade or antitrust law.

11 Describe the relevant requirements of these laws and agencies.

Please see question 10.

12 What are the exemptions and exclusions from any franchise laws and regulations?

Please see question 10.

13 Does any law or regulation create a requirement that must be met before a franchisor may offer franchises?

No.

14 In the case of a sub-franchising structure, who must make pre-sale disclosures to sub-franchisees? If the sub-franchisor must provide disclosure, what must be disclosed concerning the franchisor and the contractual or other relationship between the franchisor and the sub-franchisor?

Swiss law does not provide for any special pre-sale disclosure in connection with (sub-)franchise agreements. Therefore, the general provisions of the contract law as stipulated in the OR and in the ZGB are applicable. All relevant facts of a franchise agreement (*essentialia negotii*) must be disclosed by the franchisor to the potential franchisee, the disclosed information needs to be true and the negotiation has to be serious. If the franchisor violates its duty of disclosure, the potential franchisee is entitled to claim damages. The courts however, take into consideration the experience and knowledge of the franchisee. The ethics code of the Swiss Franchise Association (self-regulation body) even provides for advanced duties on a non-binding basis (eg, disclosure of all relevant information at least 20 days before closing).

The sub-franchisor needs to disclose information to its own franchisee about its master-franchise and especially lay out the mutual obligations, particularly regarding intellectual property rights.

15 What is the compliance procedure for making pre-contractual disclosure in your country? How often must the disclosures be updated?

There is no given compliance procedure under Swiss law for pre-contractual disclosure. It is however, advantageous for the franchisor to disclose all relevant information to the franchisee in writing. The ethics code of the Swiss Franchise Association may be a guideline in this respect.

16 What information must the disclosure document contain?

As Swiss law does not provide for any special pre-sale disclosure (see question 14), it is advisable from a practitioner's point of view to disclose the following issues: main concept and idea of the franchise, intended term of the franchise agreement, experience with the current franchising concept (also regarding legal issues like pending law suits and the possibility of being deprived of intellectual property), extent of the franchisee's independence and of the franchisor's influence on the daily business and support from the franchisor during the contractual relationship (and even beyond).

17 How do the relevant government agencies enforce the disclosure requirements?

There are no government agencies that especially regulate or enforce the disclosure requirements.

18 What actions can franchisees take to obtain relief for violations of disclosure requirements? What are the legal remedies for such violations? How are damages calculated? If the franchisee can cancel or rescind the franchise contract, is the franchisee also entitled to reimbursement or damages?

As stated above (see question 14), the franchisee may claim damages in case of a violation of the franchisor's disclosure duties. The franchisee is entitled to claim that it should be placed in the position as if the franchisor had met its duties to disclose. Consequently, the franchisee is entitled to terminate the franchise agreement and the franchisor may be ordered to reimburse the fees and expenses incurred in connection with the franchise (any income will be deducted therefrom).

19 In the case of sub-franchising, how is liability for disclosure violations shared between franchisor and sub-franchisor? Are individual officers, directors and employees of the franchisor or the sub-franchisor exposed to liability? If so, what liability?

Sub-franchisors are liable for their own acts and omissions and are not exposed to liability for a third person's behaviour (ie, the franchisor). The sub-franchisor could however, file a claim and have recourse against the franchisor if it violated its own duty to disclose information in relation to the sub-franchisor and the latter had to bear the consequences of this behaviour.

Furthermore, no individual officer, director or employee of the franchisor is liable to the franchisor's business partners provided, however, that the franchisor is an incorporated enterprise.

20 In addition to any laws or government agencies that specifically regulate offering and selling franchises, what are the general principles of law that affect the offer and sale of franchises? What other regulations or government agencies or industry codes of conduct may affect the offer and sale of franchises?

Please see question 10.

21 What other actions may franchisees take if a franchisor engages in fraudulent or deceptive practices in connection with the offer and sale of franchises? How does this protection differ from the protection provided under the franchise sales disclosure laws?

See question 17 regarding civil procedures. As regards criminal proceedings, the franchisee could file a complaint against the franchisor.

Legal restrictions on the terms of franchise contracts and the relationship between parties involved in a franchise relationship

22 Are there specific laws regulating the ongoing relationship between franchisor and franchisee after the franchise contract comes into effect?

The ongoing relationship between franchisor and franchisee is mainly regulated by the Swiss Civil Code and the Swiss Code of Obligations. As regards the general terms and conditions, which play an imminent role in franchises, Swiss law does not know any specific code in this regards, in contrary to most European countries. General terms and conditions are subject to the general criteria as set out in the the Swiss Unfair Competition Act (UWG). General terms and conditions are deemed to be adopted globally by the contractual partner (ie, franchisee), provided they are not unusual, unclear or abusive. Individual agreements differing from the standard terms precede the provisions in the general terms and conditions.

23 Do other laws affect the franchise relationship?

Like the offer and sale of franchise, the franchise relationship itself is mainly regulated by the general provisions of the ZGB, the OR and to some extent, intellectual property laws (trademarks and patents) and unfair trade or antitrust laws.

24 Do other government or trade association policies affect the franchise relationship?

The Swiss Franchise Association as a self-regulating body provides for some standard business policies, but the membership is not mandatory. However, as it is the case in other branches, the membership may have a certain positive impact on the quality perception of the franchisor.

25 In what circumstances may a franchisor terminate a franchise relationship? What are the specific legal restrictions on a franchisor's ability to terminate a franchise relationship?

Franchise relationships (as other common contractual relationships) end by lapse of time, by termination ex parte or upon mutual agreement. A termination ex parte usually occurs by proper notice of termination. However, under certain extraordinary circumstance, Swiss law provides for the possibility of a termination without notice in case of good cause. A good cause is legally assumed whenever an ongoing contractual relationship is unbearable for one partner (franchisor or franchisee). Such termination without notice has to occur within a reasonable time since the beginning of the serious incompatibility, otherwise the relationship may not be deemed as unbearable. Claims for compensation may be possible in case of improper termination of the franchise relationship.

26 In what circumstances may a franchisee terminate a franchise relationship?

Please see question 25. The termination of a franchise relationship by the franchisee is subject to the same legal restrictions as is the case of termination by the franchisor.

27 May a franchisor refuse to renew the franchise agreement with a franchisee? If yes, in what circumstances may a franchisor refuse to renew?

The conclusion or renewal of a franchise agreement is subject to the parties' mutual agreement. However, if one party has started to invest based on the other party's promises or declaration of intention to renew the franchise agreement, a later refusal to renew the franchise agreement may lead to claims for compensation.

28 May a franchisor restrict a franchisee's ability to transfer its franchise or restrict transfers of ownership interests in a franchisee entity?

A franchisor may of course restrict the franchisee's ability to transfer a franchise itself or its ownership interest in a franchisee entity. Such restrictions may be included in the franchise agreement and such transfers are commonly subject to the franchisor's prior written consent according to the franchise agreement.

29 Are there laws or regulations affecting the nature, amount or payment of fees?

The nature, amount or payment of fees are not affected by any Swiss law or regulation and are subject to negotiations between the parties. As a general rule, the fees should be equivalent to the value of the services rendered by the franchisor.

Update and trends**Swiss Copyright Act**

In October 2007, a revision was approved in order to implement the WIPO Copyright Treaty in the Swiss Copyright Act, a process started in 2004 with the release by the Swiss Federal Council of a draft project. The amended Swiss Copyright Act (URG) and the respective copyright ordinance went into effect on 1 July 2008. In a nutshell, the Swiss Copyright Act has been adapted to the digital era. It provides for the approval by the author, interpreter, producer and broadcaster to make protected work accessible via the internet and for technical measures (eg. copy interlock) in order to prevent the unauthorised use of works. Furthermore, broadcasters benefit from the simplified acquisition of title if they wish to make their own archive accessible on the internet. Finally, an independent observer for technological measures has been created in order to act as an arbitrator between those who make use of technological measures and those who use copyright protection.

Decision of the Federal Supreme Court

In a decision of the Federal Supreme Court from 17 June 2008 (BGE 134 I 303), the question had to be decided whether service stations of a Swiss subsidiary of an international oil company had to be considered from a fiscal point of view as permanent establishments (*Betriebsstätte*) in a conflict between two cantons (states) on their respective cantonal taxing power. Based on the principle of prohibition

of inter-cantonal double taxation, a taxable person may not be subject to taxation in two or more cantons (states). Basically, the corporate income and capital tax are levied only in the canton where the main fiscal domicile is located. According to the Federal Tax Harmonisation Act (StHG) and based on the practice of the Court, a permanent establishment requires a continuing facility which is part of an extra-cantonal company and has a qualitatively and quantitatively significant activity. The Court qualified the contractual relationship between the Swiss parent company and its service stations as franchise. The Court however, admitted that there are so many different franchising models that a clear legal qualification of such agreement is not possible. The Court stated that obviously the service stations (franchisees) are taxable in their canton of domicile. But even if – as it was the case here – their respective facilities were owned by the Swiss parent company (franchisor), each service station still had enough independence to use the facilities for their own purposes. Hence, the Court decided that the service stations (franchisees) acted in their own name and risk and therefore do not qualify for a permanent establishment in the sense of the Tax Harmonisation Act. The Swiss parent company's (franchisor's) corporate taxes will therefore continue to be levied at 100 per cent in the canton of its own domicile.

- 30** Are there restrictions on the amount of interest that can be charged on overdue payments?

Interest rates are subject to negotiation between the contracting partners. In the absence of an agreement, the Swiss Code of Obligations provides for a standard rate of 5 per cent per annum for overdue payments, even if the parties agreed on lower interest rates. As regards consumer credits, Swiss law provides for a maximum interest of 15 per cent; regarding ordinary credits, a flexible maximal rate between 18 per cent to 20 per cent is applicable based on the practice of the Federal Supreme Court and taking into consideration some cantonal regulations.

- 31** Are there laws or regulations restricting a franchisee's ability to make payments to a foreign franchisor in the franchisor's domestic currency?

No.

- 32** Are confidentiality covenants in franchise agreements enforceable?

Confidentiality covenants are indeed enforceable according to Swiss law. The franchisor may ask for an interim injunction and claim damages in case a breach of such duty by the franchisee.

- 33** Is there a general legal obligation on parties to deal with each other in good faith? If so, how does it affect franchise relationships?

It is a legal assumption and a principle of Swiss law that parties deal with each other in good faith. The parties are therefore legally committed to behave according to this principle and courts decide on the assumption that the parties exercise their rights according to said principle.

- 34** Does any law treat franchisees as consumers for the purposes of consumer protection or other legislation?

Franchisees are not explicitly treated as consumers in any specific law. Swiss material as well as procedural law provides for special particular rights and duties for consumers but there is no uniform definition of this term. However, a company active in the franchising business will hardly be qualified as a consumer.

- 35** Must disclosure documents and franchise agreements be in the language of your country?

According to Swiss law, the language of documents and agreements is subject to the parties' own discretion. However, in case a Swiss court is competent to decide on claims arising out of the franchise agreement, the documents will have to be translated into the court's official language. Bear in mind that Switzerland has four official languages (German, French, Italian and Romansh) and that the court's official language depends on the region it is located.

- 36** What restrictions are there on provisions in franchise contracts?

Swiss law is based on the principle of freedom of contract and therefore the parties may negotiate franchise contracts freely, even if there is an increasing number of restrictions and regulations that need to be followed. Major restrictions are provided by the antitrust and competition regulations (see question 37) or regarding the acquisition of real estate by foreigners (see question 4). General restrictions may also be found in the ZGB, for example, regarding the prohibition of infinite agreements or the principle of good faith (see question 33), or the OR, for example, regarding the requirement of written form.

- 37** Describe the aspects of competition law in your country that are relevant to the typical franchisor. How are they enforced?

The protection of competition is in principle performed by using the instruments provided by the Swiss Cartel Act (KG). The Competition Commission is responsible for the implementation of said instruments. According to the KG the tasks of the Competition Commission are combating harmful cartels, monitoring dominant companies for signs of anti-competitive conduct, enforcing merger control legislation and preventing the imposition of restraints of competition by the state. Whenever a practice seems to hinder competition in an unlawful way through a concerted behaviour of market actors, abuse of dominant position or merger, the Competition Commission acts directly against the originator. The Competition Commission may act on its own behalf or upon notification.

Therefore, any practice foreseen in a franchise agreement that hinders competition in an unlawful way (eg. price-fixing, restriction of cross-supplies, exclusive areas, etc) may be contested and investigated by the Competition Commission.

38 Describe the court system. What types of dispute resolution procedures are available relevant to franchising?

Switzerland is a civil law jurisdiction. Because of Switzerland's federal structure, the 26 cantons (states) have a considerable degree of law-making authority. Accordingly, the court system and the procedure is primarily a cantonal matter. The Swiss court system is traditionally divided into civil, criminal, and administrative courts. Civil courts are responsible for civil and commercial matters. The Swiss Federal Supreme Court is primarily a court of last resort.

Within the limitations of Swiss procedural law (especially Swiss International Private Law (IPRG) and the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial

Matters (LugÜ), franchisors and franchisees may agree on arbitration proceedings or on different jurisdictions and applicable laws.

39 In what respects, if at all, are foreign franchisors treated differently from domestic franchisors?

Foreign franchisors are in general not treated differently from domestic franchisors. There are however, areas like the acquisition of real estate (see question 4) or residence and work permits where foreigners (especially if they are not domiciled in the EU/EFTA) are subject to some restrictions compared with residents.

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