



WHICH EU JURISDICTIONS MOST HEAVILY REGULATE FRANCHISING?

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Franchising has been identified by the European Commission's Competition Directorate as being of great economic importance to the European Union. Indeed, European jurisprudence, such as the well-known *Pronuptia* case and decisions of the Commission including *Yves Rocher*, *ComputerLand*, *ServiceMaster* and *Charles Jourdan*, all underscore the important role of franchising in furthering the establishment of a single market in the EU. However, although European competition law treats franchising in a relatively benign manner, member state law takes a somewhat different and entirely heterogeneous approach. Eight EU member states have franchise-specific regulatory regimes, but no two are the same. The remaining 20 member states regulate franchising entirely by the application of general law, again with little homogeneity. Unexpectedly, it is some of the member states without franchising-specific legislation that most heavily regulate franchising. Those member states with Germanic legal traditions treat franchisees as quasi-employees, quasi-consumers and commercial agents. Comparative analysis of empirical data collected by the author makes it possible to determine which of these 28 member states most rigidly regulate franchising and to benchmark them against the well-established franchising regulatory regimes found in the USA and Australia.

WEIGHT OF REGULATION

In order to assess which EU member states most heavily regulate franchising in as objective a manner as is reasonably possible, each element of regulation has been identified and allotted a weighting based upon its potential impact on franchising. The resulting Franchise Regulation Evaluation Data (FRED) cannot pretend to produce an unarguable, totally objective and definitive assessment of the level of franchise regulation in the EU member states. The allotment of weighting inevitably reflects the author's judgement as to the relative importance/impact of each element of regulation. However, it does enable one to compare the relative levels of regulation in a "big picture" manner, which in turn helps one understand the overall impact of the various approaches to the regulation of franchising in the EU. It also enables one to contextualise the regulation of franchising in the EU on a global basis.

Clearly, weight of regulation does not necessarily equate to effectiveness or appropriateness of regulation. Indeed the most heavily regulated member states are not, in the author's view, the best-regulated ones.

THE FRED METHODOLOGY

Every way in which franchising can be regulated has been identified. Each such element has been awarded a value based on the impact that it potentially has upon franchising.

Pre-contractual duty to disclose information

Those countries that have franchise-specific disclosure laws have been awarded points for each individual disclosure item they require. The list of disclosure items has been compiled by reference to the disclosure requirements in the USA under the FTC Rule and in Australia under the Australian Franchising Code of Conduct. Those disclosure items that franchisors can easily comply with such as the basic details of the franchisor or the business experience of its directors and managers have been given a value of one. More onerous requirements, such as the provision of details about the target market have been given a higher value depending on how difficult it is for a franchisor to comply with them.

Countries which do not have a specific pre-contractual disclosure law mostly have a general legal duty based upon the doctrine of misrepresentation and the concept of good faith. As a rigorous application of the doctrine of good faith can be at least as arduous as a full franchise-specific disclosure requirement, it has been awarded a score equivalent to a full pre-contractual disclosure law (60 points). Although the duty to make pre-contractual disclosure (which is based on good faith) usually applies to both parties, ie, franchisor and franchisee, in reality it will only be the franchisor who will be required to make disclosure to a potential franchisee.

Mandatory pre-contractual cooling-off period

Countries with franchise-specific legislation stipulate exact time frames when disclosure has been made before entering into a franchise agreement. Although it is not very difficult for franchisors to comply with this requirement, from a procedural point of view compliance with this requirement will slow down the process of selling franchises considerably. For that reason it has been allotted a value of five points.

In Austria, Germany and the UK (under certain conditions), franchisees have a right of revocation. Although this pre-contractual cooling-off period will not apply to all franchisees and in all circumstances, it is an important feature of these jurisdictions and has therefore been included in the FRED.

Registration

Some countries require franchisors to register with governmental authorities and to update their records on a continuing basis. Compliance with this requirement can be both costly and burdensome. It has therefore been allocated a value of 10.

Other regulations application to franchising

Other items which have been identified in the above chapters and included in the FRED are:

- (a) the franchisor's liability for the franchisee's actions;
- (b) the obligation to have a piloted business before start to sell franchises;
- (c) the right of action for misrepresentation;
- (d) the statutory protection of the franchisor's confidential information;
- (e) the specific prohibition of unduly burdensome terms;
- (f) a general duty of good faith which influences the ongoing franchise relationship;
- (g) a franchise-specific duty of good faith;
- (h) the prohibition of post termination non-compete restrictions;
- (i) the prohibition of excessive post-term restrictions; and
- (j) the obligation to pay goodwill compensation to a franchisee upon termination.

With the exception of (f), (g), (i) and (j) all elements have been given a value of 10.

The duty of good faith has been awarded a maximum value of 30, depending on how strongly it influences the ongoing relationship between the parties. Countries which follow the restrictive as well as the adaptive approach have been awarded full points, whereas countries which merely follow the restrictive approach have only been awarded 15 points.

The total prohibition of post-termination non-compete restrictions has been awarded a value of 10. However, all jurisdictions require such restrictions to be reasonable. The reasonable prohibition of excessive post-term restrictive covenants has been awarded a value of five.

The most onerous (and inappropriate in the author's view) obligation imposed on franchisors, is paying franchisees compensation for the goodwill that the franchise acquired for the franchisor during the term on termination. The calculation of the amount of compensation differs from country to country, but can be substantial. This requirement to pay compensation is based on an analogy with agency law and represents a substantial financial burden to the franchisor. It has therefore been valued at 50.

Applying this methodology results in each country having an aggregate FRED score.

OBSERVATIONS FROM THE FRED SCORES

The USA has a FRED score of 118 and Australia one of 127, which places the two jurisdictions with the most complete franchise regulations in the middle of three distinct bands.

The top band of most heavily regulated EU member states, with scores of 160 to 170, are Greece (160), Portugal (165), Austria (170) and Germany (170). The influence of German law, particularly its interpretation of the duty of good faith, consumer law and commercial agency is very apparent and accounts for the high scores.

The mid-tier band, with scores of between 105 and 130 include three member states with franchise-specific regulations: Estonia (105), Spain (124) and Lithuania (130).

The lower tier, with scores of between 15 and 90, includes five member states with franchise regulations: Romania (53), France (57), Sweden (60), Italy (90) and Belgium (90). Croatia defines a franchise but does not specifically regulate it and scores 30.

The greatest regulatory burden is placed upon franchising by those EU member states that do not have franchise-specific laws but instead adopt the Germanic approach of imposing a heavy duty of good faith on franchisors and treating franchisees as quasi-employees, quasi-consumer and commercial agents.

They place a heavier burden upon franchising than both the USA and Australia, which are commonly acknowledged to have the most highly developed franchise-specific regulatory systems in the world. The most franchisor-friendly EU member states would appear to be the common law jurisdictions of the EU, Ireland and Cyprus, along with – surprisingly – five of the eight member states: Italy, Belgium, Sweden, France and Romania, which have franchise-specific laws.

ANNEXE – FRANCHISE REGULATORY EVALUATION DATA

The highest score signifies the heavy regulatory burden imposed upon franchising.

NO.	COUNTRY	FRED SCORE
1.	Austria	170
2.	Germany	170
3.	Portugal	165
4.	Greece	160
5.	Lithuania	130
6.	Australia	127
7.	Hungary	125
8.	Spain	124
9.	Slovakia	120
10.	USA	118
11.	Netherlands	115
12.	Estonia	105
13.	Belgium	90
14.	Italy	90
15.	Czech Republic	80
16.	Finland	65
17.	Poland	65
18.	Sweden	60
19.	France	57
20.	Romania	53
21.	Denmark	50
22.	Bulgaria	45
23.	Latvia	40
24.	Malta	40
25.	Cyprus	40
26.	Ireland	35
27.	UK	35
28.	Slovenia	30
29.	Croatia	30
30.	Luxembourg	15