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Franchising in Ireland is the 19th article in Wiley Rein's International Franchise Development Series. The International Franchise Development Series offers a broad overview of franchise regulation and the legal issues confronting franchisors seeking to expand into certain countries from the combined legal perspective of U.S. and local counsel.

Franchising in Ireland

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Introduction

The island of Ireland comprises two separate jurisdictions, the Republic of Ireland and Northern Ireland, with a combined population of 6.62 million people. Although franchisors can and do develop the entire island as one territory, separate franchise agreements are needed for each jurisdiction to take account of differing local law requirements, currencies and tax regimes. This article deals with the Republic of Ireland (hereafter referred to as Ireland). Ireland is a member of the European Union (EU) and of most major international organizations. Northern Ireland, being part of the United Kingdom, is subject to the United Kingdom's decision to leave the EU. When the exit process is triggered, it may give rise to additional issues which need to be considered in that context.

Irish law is based on common law. Ireland is also English speaking. In terms of taxation, corporation tax is levied at a rate of 12.5% and applies to all Irish corporate trading profits. The franchise industry is represented in Ireland by the Irish Franchise Association, whose stated objective is to develop and promote best practices in franchising and create an environment within which franchised businesses can grow. The Association is a self-regulated body within the sector, with a standards-based approach to its membership.

There are no restrictions facing foreign franchisors, nor are any approvals required when a franchisor enters the Irish market. A non-Irish entity does not have to overcome any restrictions in granting master franchise or development rights to a local franchisee. Similarly, there are no restrictions on foreign franchisors owning equity in a local business or in owning real property.

Franchising in Ireland is in a growth phase, with the numbers participating in the industry increasing each year.

Legislation

There is no statutory or legal definition of a franchise agreement under Irish law, and the parties are free to draft the franchise agreement in whatever way they choose. Franchise agreements have tended to adopt either the UK or US format of agreement, depending on the country of origin of the franchise. An Irish franchise agreement does not have to be executed in any particular language or notarized and is exempt from stamp duty. In addition, there are no mandatory clauses in a franchise agreement. It can be executed under hand (*i.e.*, as a simple contract which is not a deed), or under seal (*i.e.*, as a deed under seal), although agreements are generally executed under seal.

Pre-contractual disclosure

Ireland does not have any franchise-specific laws or regulations, nor are there any disclosure requirements. There is no concept of "good faith" in contract negotiations, and parties are free to conclude whatever bargain they wish. This assumes that both parties are commercial entities. Typically, a potential franchisee or master licensee executes a confidentiality agreement or undertaking prior to entering into negotiations for a franchise, and such agreements are fully enforceable.

Registration

There is no requirement to register a franchise agreement. Parties are free to select whatever governing law and jurisdiction they wish to apply in the agreement. In practice, a master license will be subject to the governing law and jurisdiction of the master franchisor, with any unit franchise agreement being subject to local Irish law.

Consumer protection

Franchise agreements are invariably concluded between two or more commercial entities. Assuming this is the case, it is impossible to envision a situation where a franchisee could be categorized as a consumer. If a franchisee was deemed to be a consumer, the provision of the Unfair Terms in Consumer Contracts Regulations 1995 would come into play.

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Competition law, including restrictive covenants and termination

The format of Irish franchise agreements typically follows the form of agreements that are in standard use in the UK and the US. The franchisor generally modifies its franchise documentation to reflect local law requirements. Typically, if a franchise agreement complies with the requirement of the EU Block Exemption Regulation (BER),[1] it will comply with local Irish competition law requirements. There are, however, certain specific provisions that require review in each case.

Although there are no specific Irish franchising statutes, the restrictions set forth in the Irish Competition Act 2002 apply to franchise agreements. Section 4 of the Competition Act 2002 (the 2002 Act) incorporates Article 101(1) of the Treaty on the Functioning of the European Union (which prohibits anti-competitive agreements) into Irish law. On the face of it, given the extensive restrictions generally included in a standard franchise agreement, such agreements will fall foul of the prohibition in Section 4(1) of the 2002 Act.

Section 4(3) of the 2002 Act permits the Competition Authority (now the Competition and Consumer Protection Commission (CCPC) to declare in writing that, in its opinion, a specified category of agreements, decisions or concerted practices complies with the conditions set out in Section 4(5) of the 2002 Act. These are agreements, decisions or concerted practices which, having regard to all relevant market conditions, contribute to improving the production or distribution of goods or provision of services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.

Pursuant to Section 4(3) of the 2002 Act, the CCPC has made a number of Declarations concerning Vertical Agreements. The most recent Declaration[2] (the Declaration) came into force on 1 December 2010 (and it expires on 1 December 2020). This Declaration closely resembles the BER. The 2002 Act also authorizes the CCPC to publish Notices concerning practical compliance guidance. In December 2010, the CCPC published a Notice (the Notice) for the purpose of guidance with the application of the Declaration.

Application of the Declaration

The Declaration applies to vertical agreements containing provisions that relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers. The Declaration applies on condition that in relation to the contract goods or services those provisions do not contain restrictions on competition having the same object or effect as vertical restraints not covered by the Declaration.

Market share

The Declaration applies on condition that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services.

Prohibited clauses

The Declaration contains a number of prohibited clauses. If these are included in an agreement, they will take the agreement outside the scope of the Declaration and render the agreement prohibited and void. These are clauses that directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

a. the restriction of the buyer's ability to determine its sale price. This, however, does not affect the ability of suppliers to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from or incentives offered by any of the parties;

b. the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a supplier's ability to place restrictions on the buyer's place of establishment, may sell the contract goods or services except:

   - the restriction of active sales to the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer where such restriction does not limit sales by the customer of the buyer;
   - the restriction of sales to end-users by a buyer operating at the wholesale level of trade;
   - the restriction of sales by the members of a selective distribution system to unauthorized distributors within the territory reserved by the supplier to operate that system; and
   - the restriction of the buyer's ability to sell components supplied for the purposes of incorporation to customers who would use them to manufacture the same types of goods as those produced by the supplier.

There are other prohibited clauses relevant to selective distribution systems operating at the retail level of trade.

Permitted restriction – not to compete

The Declaration does not apply to the following obligations:

a. any direct or indirect non-compete obligation the duration of which is indefinite or exceeds five years;

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[1] EU Commission's Block Exemption Regulation No. 330 of 2010.

[2] Competition Authority Declaration in respect of Vertical Agreements and Concerted Practices Decision No. D/10/01 dated 1 December 2010.

b. any direct or indirect obligation causing the buyer after termination of the agreement not to manufacture, purchase or resell the goods or services; or

c. any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing as suppliers.

A non-compete obligation that is tacitly renewable beyond a period of five years shall be deemed to have been concluded for an indefinite duration.

The time limitation of five years does not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer. This has led some franchisors to consider investing in property, either by acquiring or by leasing the franchise premises. However, it is expensive to do this. Accordingly, in appropriate circumstances, if required, a franchisor may be able to enforce a non-compete provision for longer than the five-year term.

In relation to any direct or indirect obligations causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services, a derogation applies where the following conditions are fulfilled:

a. the obligation relates to goods or services that compete with the contract goods or services;

b. the obligations limited to the premises and land from which the buyer has operated during the contract period;

c. the obligations as indispensable to protect know-how transferred by the supplier to the buyer; and

d. the duration of the obligation is limited to a period of one year after termination of the agreement.

This derogation is without prejudice to the possibility of imposing a restriction that is unlimited in time on the use and disclosure of know-how that has not entered into the public domain, and the Declaration applies in such cases.

Termination

There are no restrictions on the ability of a franchisor to take over a franchisee's business after termination, unless such a takeover would give rise to a competition law concern, such as, for example, too great a market share concentrated in one party. In that event, it would be necessary to obtain mergers approval. Similarly, there are no restrictions on international franchisors taking shares in a franchisee's business.

In terms of leases, there are no restrictions on franchisors holding leases and subletting these to franchisees for the duration of a franchise agreement. In fact, many franchisors seek to control leases as, in doing so, they will also control the locations from which the franchise business operates if the franchise agreement terminates. Generally, the landlord's consent will be required for an assignment, and, under statute, this cannot be unreasonably withheld. ■

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