

Expert

Franchising law

Franchising the Polish way

Contractual IP and competition issues are vital for lawful operation of a franchise distribution system



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Under Polish law franchise agreements are not subject to specific regulation. They are usually defined as a system of distribution between the franchisor and the franchisee in which the franchisee is required to resell goods bought from the franchisor and to use intellectual property rights and knowhow licensed from the franchisor. Recently franchise systems operating in Poland have come under close scrutiny from the country's competition regulator, the Office of Competition and Consumer Protection (UOKiK).

The general principle of freedom of contract is applied to franchise agreements. This means that the parties entering into the agreement may determine their legal relations at their own discretion. Therefore, in general, the parties are free to establish the content of the contract. In practice, franchising is treated as a form of business activity. The franchisee operates under its own name, bearing the economic risk of its activities. As franchisees are considered businesses, they are not covered by the protections of Polish consumer law.

Thus the most important aspects of Polish law which should be considered when drafting franchise agreements are contract law, intellectual property, and competition law.

Contract law hints

Under Polish law contracts do not have to be in writing unless there is an express provision of law requiring a specific form (for example, an agreement on transfer of copyright, an exclu-

sive copyright license agreement and any trademark licenses require written form, but a non-exclusive copyright license agreement does not require any specific form). Polish law does not require B2B agreements to be drafted in Polish. Therefore, if both parties agree, the English version is sufficient. Under Polish law parties to a B2B contract may agree to modify their contractual liability. However, liability for damage that may be caused intentionally cannot be excluded or limited. In practice, contracts limit liability by excluding specific events or specific losses or by indicating a maximum value. It is common for parties to cap their total liability under a contract, and the most typical cap is the value of the contract. Moreover, parties may agree on a contractual penalty clause, which requires payment of a certain sum for non-performance or improper performance of a non-monetary obligation—irrespective of the exact amount of the damage caused. The general rule is that if contractual damages are paid, no additional damages can be requested, but the parties may agree otherwise (and very often try to do so). The court can also mitigate contractual damages (e.g. if excessively high or if the obligation was performed for the most part).

As far as disputes are concerned, parties to a franchise agreement may choose between litigation in the state court and alternative dispute resolution (arbitration or mediation). In case of arbitration the parties usually identify the arbitration

court in the agreement. In Poland there are several permanent arbitration courts. The most renowned is the Court of Arbitration at the Polish Chamber of Commerce. The length of arbitration proceedings there is about nine months. The parties may also agree on a foreign arbitration court.

IP pointers

In Poland trademark registration is conducted by the Polish Patent Office unless the applicant decides to register a Community trademark. There are no mandatory brand searches in Poland, but the Patent Office provides online access to all published trademark applications and registrations. Registration of a trademark gives the registrant the exclusive right to use that trademark on the market. Third parties may use the trademark in their business upon obtaining a license from the holder. The license authorizes use of the trademark on the terms and for the period set out in the written document. The licensee may grant a sublicense for the use of the trademark within the scope of the authorization it has received. It is debatable whether granting of further sublicenses is admissible or not, so it would be safer to avoid that practice. The other type of license necessary to organize franchising is a knowhow license. The franchisor authorizes the franchisee to use its enterprise name, patents, and exclusive rights, but especially conceptions and techniques for running the business. Licensing knowhow which is not protected by copyright, trademark or

patent law is not formalized, and the parties are free to negotiate the terms of such a license.

Competition law tips

Recently franchise systems operating in Poland have come under close scrutiny from UOKiK. This involves analysis of mergers between companies active in this sector notified to the regulator, as well as analysis of terms of cooperation between franchisors and franchisees. For example, in 2011 UOKiK approved a merger between Eurocash SA and subsidiaries of Emperia Holding SA, but to protect competition on the FMCG market UOKiK obliged Eurocash to sell 12 of its warehouses before taking over Emperia's franchise chain. In 2014 UOKiK analyzed cooperation among several food chains operating in Poland—Piotr i Paweł, Spar, Słoneczko, and Topaz—and consented to creation of a commercial platform under the name "Lubię" which involves a nationwide logistics and purchasing system (decision of February 6, 2014, no. DKK - 12/2014).

In addition, in recent years UOKiK conducted an analysis of cooperation terms and agreements functioning within franchising systems in Poland. The regulator's explanatory proceedings (in the form of a market survey) involved such companies as Orlen and Glazura Królewska. UOKiK focused in particular on franchising systems operating in catering and fast-food chains. UOKiK revealed that it is currently conducting a dozen or more proceedings to establish whether franchise-based restaurant



From January 18, 2015, UOKiK can not only fine a company for participation in an anti-competitive arrangement, but can also fine persons from a company's management who knowingly allowed the company to engage in such an arrangement.

chains are infringing competition law.

The Sphinx case

The biggest franchising chain in Poland for casual dining is operated by Sfinks Polska SA under the name "Sphinx." The Sphinx chain encompasses 91 locations, 46 of which are franchise restaurants operated by independent businesses and 45 of which belong to the franchisor. Sfinks Polska has been listed on the Warsaw Stock Exchange since 2006. It also operates two other restaurant franchise chains, Wook and Chłopskie Jadło. In 2013 UOKiK fined Sfinks Polska for imposing fixed resale prices on its franchisees (decision of June 25, 2013, no. DOK-1/2013). As the regulator explained, it opened the case on the basis of "worrying signals" from the market. This may have involved complaints from Sphinx franchisees, Sfinks Polska's competitors, or Sphinx customers. Although antitrust proceedings in Poland are commenced solely by the decision of UOKiK, such "signals" may be sufficient for UOKiK to start looking at the case. The fine imposed on Sfinks Polska was relatively low, at PLN 464,000. However, considering that the maximum fine is 10% of the company's turnover from the prior year, Sfinks Polska could have been fined as much as PLN 17 million. The Sphinx case is the first decision UOKiK has issued on pricing provisions in franchise agreements and one of very few issued to date by any European competition authority. For the first time, UOKiK clearly presented its view of franchise systems and restrictions on franchisees that will not be accepted under Polish competition law. The Council of Ministers Regulation of March 30, 2011, Exempting Certain Types of Vertical Agreements from the Prohibition of

Agreements Restricting Competition defines a "franchise distribution system" as a distribution system where a distributor (franchisee) commits to resell goods purchased from a supplier and covered by a vertical agreement, using intellectual property rights or knowhow made available by the supplier for a fee. The regulation provides that franchise distribution systems can be exempt from vertical restrictions if the conditions set forth in the regulation are met.

In the Sphinx decision, UOKiK explained that from its standpoint franchise systems involving independent businesses as franchisees are a distribution system subject to all competition law prohibitions. UOKiK found that Sfinks Polska used certain provisions in its agreements to impose menu prices arbitrarily on Sphinx franchisees. UOKiK ruled that it was one of the most serious infringements of competition law for the franchisor to impose fixed or minimum resale prices on franchisees. UOKiK also held unlawful the provisions used by Sfinks Polska to require franchisees to participate in price promotions, lasting from two weeks to several months, during which Sfinks Polska imposed the prices at which courses had to be offered. In this regard UOKiK referred to the European Commission's Guidelines on Vertical Restraints of 2010, according to which franchisors may fix prices for the entire chain only in promotional campaigns, consisting in lowering prices, lasting for up to six weeks.

UOKiK did not question the franchisor's right to control promotional campaigns conducted by franchisees, but limited the supervision to technical and visual aspects of the promotion significant for protecting the brand and the chain's repu-

tation. UOKiK did not conclude that the franchisor cannot monitor resale prices charged by its franchisees, but stressed

that imposing fixed or minimum resale prices goes beyond what is necessary for operation of the chain, is harmful to consumers, and restricts competition among franchisees acting on local relevant markets. The franchisor may suggest resale prices to its franchisees and agree on maximum resale prices (or minimum rebates). The franchisor may also agree with franchisees to fix resale prices but only in promotional campaigns for the entire chain involving price reductions lasting for up to six weeks. The position of the Polish UOKiK in the Sphinx decision is not much different from the approach taken by other national competition authorities within the EU. Several such decisions have been issued, for example three in France (concerning perfume, Adidas shoes, and the fast-food chain La Croissanterie) and two in Germany (concerning the restaurant chain Wienerwald and the McDonald's chain).

On December 31, 2014, the Hellenic Competition Commission issued decision no. 580/VII/2013 finding that Germanos SA, a telecom retail chain, had infringed Greek competition law (Art. 1 of Law 3959/2011) and Art. 101 of the Treaty on the Functioning of the European Union in connection with its franchise network. The investigation was initiated after complaints to the Greek regulator by several franchisees. The regulator sought to determine whether Germanos, acting as a franchisor, had directly or indirectly set resale prices at its franchisee stores by applying anticompetitive contractual terms or interfering in the franchising network's day-to-day operations, or had required licensees to be supplied exclusively by the franchisor, thus limiting supplies between franchisees of the selective network. The Greek regulator concluded

that Germanos had engaged in practices that amounted to resale price maintenance and restriction of cross-supplies between distributors/franchisees within its selective distribution system, and these vertical restraints were an infringement of competition law. For these infringements Germanos was fined EUR 10.2 million. The regulator held that whenever a franchisor chooses to expand its network through independent franchisees, it must assume the risk that each member of the franchise network may follow an autonomous pricing policy. The franchisor is not allowed to enforce suggested prices or decide on the suitability of each member's pricing strategy.

Conclusions

From a competition law standpoint, franchise agreements are treated as "standard" distribution agreements. The franchisor cannot dictate or agree with franchisees on fixed or minimum resale prices they must charge. The franchisor may suggest resale prices to franchisees or agree with them on maximum resale prices, but franchisees are still free to charge or not charge the resale prices suggested by the franchisor or to charge less than the agreed maximum. As an exception, the franchisor may impose fixed resale prices on its franchisees if necessary for a promotional campaign lowering prices across the entire franchise network lasting for up to six weeks.

Although under competition law all companies participating in an anti-competitive arrangement are liable (and may be fined by UOKiK), the practice of UOKiK is to file charges and order fines only against the organizer of the system. This means that most of the potential risk rests on the franchisor. And from January 18, 2015, UOKiK can not only fine a company or companies for participation in an anti-competitive arrangement, but can also fine persons from a company's management who knowingly allowed the company to engage in such an arrangement, with a maximum fine of PLN 2 million.