

FRANCHISE AGREEMENT IN SPAIN: REGULATION, OBLIGATIONS AND KEY LEGAL ASPECTS

The franchise agreement has proven to be a key tool for business expansion, allowing franchisors to expand their business through third parties and franchisees to benefit from an already proven successful business model.

The origin of the word dates back to a French term (*franchise*), which in the Middle Ages meant the granting of a privilege by the monarch through which territories and people were transformed into autonomous entities.

Although there is no unanimity on this point, it seems that the first franchise contractual relationship as it is known today was created by the company Singer around 1858, in order to sell its sewing machines.

In the Spanish context, this type of contract has gained considerable relevance in recent decades, particularly due to the competitive advantages it offers both to the franchisor and the franchisee. However, its regulation under Spanish law is complex and, in many aspects, fragmented.

This article proposes a summary of the main points of the franchise agreement in Spain through an analysis of its regulatory and jurisprudential framework.

LEGAL DEFINITION OF THE FRANCHISE AGREEMENT

The franchise agreement, as defined by the **European Code of Ethics for Franchising**, is a system for the marketing of goods and/or services and/or technology, based on close and continuous cooperation between financially separate and independent undertakings —the franchisor and its franchisees— through which the franchisor grants the franchisee the right, but also imposes the obligation, to carry on a business in accordance with the franchisor's concept.

This right authorises and obliges the franchisee —in exchange for direct or indirect financial consideration— to use the franchisor's trade name and/or registered trademark and/or service mark, the *know-how*, the technical and business methods, the procedures and other industrial and/or intellectual property rights; on the basis of the continuous provision of commercial and technical assistance, within the [framework of the franchise agreement \(in writing\) entered into between the parties for this purpose](#).

WHICH LAWS REGULATE THE FRANCHISE AGREEMENT IN SPAIN

In Spain, the franchise agreement, despite its growing importance, lacks a complete and systematic regulation in positive law.

The main regulation referring to the franchise agreement is [Law 7/1996, of 15 January, on the Regulation of Retail Trade](#), which defines franchise commercial activity in its article 62.1, describing it as that in which a franchising company grants another company, the franchisee, the right to exploit its own system for the marketing of products or services. In the following section, it sets out the content of the obligation of pre-contractual information that every franchisor must provide.

[Royal Decree 201/2010, of 26 February](#), which regulates the exercise of commercial activity under a franchise system and the communication of data to the Register of Franchisors (a register later abolished by [Royal Decree-Law 20/2018, of 7 December](#)) complements this definition, establishing the basic conditions for the activity of granting franchises and defining the elements that must constitute the minimum content of the franchise agreement, as well as the content of the pre-contractual information that must be provided to the potential franchisee.

EUROPEAN REGULATION APPLICABLE TO THE FRANCHISE AGREEMENT

At the European level, the franchise agreement also does not have a specific regulation; however, it is influenced by various regulations related to competition and trade.

Among the most relevant provisions are [Articles 101 and 102 of the Treaty on the Functioning of the European Union](#), and the current Regulation (EU) 2022/720, known as the Vertical Block Exemption Regulation, which replaced, with effect from 31 May 2022, the previous Commission Regulation (EU) No. 330/2010.

The Court of Justice of the European Union (CJEU) has also significantly contributed to shaping franchising in Europe. An emblematic case is “Pronuptia”, Judgment of the CJEU of 28 January 1996, in which the Court, examining the applicability of competition law to franchising, distinguished the franchise agreement from other distribution agreements by highlighting the importance of *know-how* and the continuous assistance of the franchisor as essential distinguishing elements.

The “Pronuptia” case is particularly relevant because its doctrine, reflected in several decisions of the Commission, later served as the basis for Regulation 4.087/1988 of 30 November, [the first regulation on vertical agreements exempt from the prohibition of restricting competition](#).

CASE LAW OF THE SPANISH SUPREME COURT ON FRANCHISE AGREEMENTS

As it is an atypical contract, Spanish case law has also played a fundamental role in the interpretation and consolidation of the rules and principles applicable to franchise agreements.

For example, in its [Judgment No. 754/2005 of 21 October](#) (Roj STS 6410/2005; case No. 555/1999), the Spanish Supreme Court, when analysing the unlawful post-contractual use of the *know-how* transmitted during a franchise agreement, provided a general description of the regulatory and interpretative framework applicable to franchise agreements. The judgment also cites the main rulings through which the Supreme Court had developed its jurisprudential doctrine on this contractual figure, highlighting the importance of pre-contractual information and the distinction between obligations of successive performance and those of single performance.

Subsequently, in its **Judgment of 4 June 2020** (Roj STS 1568/2020; case No. 4164/2017), the Supreme Court, when examining the application of the principle of the retroactive effects of contractual termination, further analysed the complex nature of the franchise relationship. It emphasised the autonomy of the parties’ will and the importance of the entry fee within the economic structure of the contract, as well as its possible proportional refund in the event of a breach by the franchisor. This judgment is also notable for referring to the jurisprudential doctrine on the termination of the contract due to reciprocal breaches and for its analysis of the transfer of *know-how* in franchising.

PRE-CONTRACTUAL INFORMATION OBLIGATION IN FRANCHISING

Pre-contractual information is one of the key elements in the regulation of franchise agreements in Spain.

According to [Royal Decree 201/2010](#), the franchisor is required to provide the potential franchisee with a series of essential data before the signing of the contract. This information must include proof of ownership or licence to use the trademark and distinctive signs, a detailed description of the franchise system, the characteristics of the market and the financial conditions of the contract, among other aspects.

The purpose of this obligation is to ensure that the franchisee can make an informed decision and thus reduce the risk of future disputes. The omission or lack of precision in this information may give rise to the nullity of the contract or to claims for damages by the franchisee.

In fact, as will also be mentioned later, the absence, insufficiency or inaccuracy of pre-contractual information is one of the main sources of disputes between the franchisee and the franchisor.

MAIN CHARACTERISTICS OF THE FRANCHISE AGREEMENT

Although, as already mentioned, it is an atypical contract mainly subject to the autonomy of the will of the parties, there are certain characteristics that qualify a franchise agreement and that are commonly repeated in contractual structures. The essential characteristics of this type of contract include:

1. **Grant of intellectual and industrial property rights**

The franchisee receives the right to use the franchisor's trademark, trade sign, emblem, patent or any other intellectual or industrial property right.

2. **Transfer of know-how**

The franchisor must transfer to the franchisee a set of technical knowledge, also known as *know-how*, which is essential for the operation of the business. It is essential that this *know-how* be "proven", meaning that there must already be at least one premises or establishment successfully using it.

3. **Continuous technical and commercial assistance**

Throughout the duration of the contract, the franchisor must provide the franchisee with technical and commercial assistance, which includes initial training and ongoing support. Normally, this obligation of the franchisor also has a dual aspect that requires the franchisee to obtain supplies exclusively from the franchisor or from suppliers designated by the franchisor.

4. **Uniformity in presentation and operation**

The contract usually provides that the franchisee must maintain a uniform presentation of the premises, vehicles and other elements related to the business, following the standards established by the franchisor. The clauses included in contracts to control compliance with this obligation by the franchisee can vary greatly: they may range from the franchisor directing or supervising the adaptation works of the premises, to the acquisition of furniture from the franchisor, the installation of management software provided by the franchisor, or even the installation of cameras on the premises with direct access from the franchisor's headquarters.

5. **Duration**

Entering into a franchise system usually involves a significant investment by the

franchisee, who must not only pay an entry fee to join the franchise but also adapt a premises or its facilities to align with the brand's image. To amortise this investment, it is necessary to carry out the activity for several years. Therefore, one of the most important aspects for the franchisee will be the minimum duration of the contract and the possibility of terminating it freely if the business does not perform as expected.

Let us now examine the main obligations of the parties.

LEGAL OBLIGATIONS OF THE FRANCHISOR IN A FRANCHISE AGREEMENT

The franchisor assumes a series of obligations that are crucial for the success of the contractual relationship. These include, among others:

1. Provision of pre-contractual information

As mentioned, the franchisor must provide all the necessary information so that the franchisee can make an informed decision. Among this information, in addition to the characteristics of the franchise and its operation, the franchisor must provide an estimate of the investments and expenses necessary to start a business affiliated with the franchise.

2. Transfer of know-how

The franchisor must communicate to the franchisee the *know-how* necessary for the operation of the business, which includes initial training and any relevant updates. Very often, franchise agreements, as drafted by franchising companies, also include in this point a consideration or reimbursement of expenses in favour of the franchisor for training courses or professional training, and even a limitation for the franchisee, who may only employ personnel previously trained by the franchisor's headquarters.

3. Continuous assistance

The franchisor must offer technical and commercial assistance throughout the duration of the contract, which includes support in business management, marketing campaigns and any other form of support necessary for the success of the franchisee. To cover part of the marketing expenses, franchise agreements usually also include a royalty or periodic fee for advertising. That is, an amount paid by the franchisee which, together with the royalties paid by other franchisees for the same purpose, forms a fund that the franchisor uses to finance marketing and advertising actions at national and international level, which ultimately benefit all affiliates.

4. Protection of the Brand

The franchisor has the obligation to protect the brand and intellectual property rights, ensuring that their value and reputation in the market are maintained. This obligation includes not only the payment of the fees required to renew the trademark registration before public authorities, but also the potential legal defence of the trademark against unlawful actions by third parties.

OBLIGATIONS OF THE FRANCHISEE IN A FRANCHISE

The franchisee, for their part, also has key obligations that must be fulfilled to ensure the proper functioning of the franchise:

1. Payment of fees and royalties

The franchisee must pay the agreed amounts, which may include an entry fee and periodic royalties based on the revenues or profits of the business.

2. Compliance with operational standards

The franchisee must operate the business according to the standards and procedures established by the franchisor, which includes adopting marketing policies, customer service standards and operational procedures, but also the exclusive use of the management programs provided by the franchisor, which also become the most effective control tool the franchisor has over the franchisee's revenues.

3. Maintenance of confidentiality

The franchisee must maintain confidentiality regarding the *know-how* and any other sensitive information provided by the franchisor. It is not uncommon to find clauses that limit the possibility of using the *know-how* even after the franchise agreement has ended and for an unlimited period of time.

5. Exclusivity and non-compete obligations

Depending on the terms of the contract, the franchisee may be required to operate exclusively under the franchisor's brand and not to compete with the franchisor within certain geographical or market parameters. The effectiveness of the non-compete clause is often extended even after the franchise agreement has ended for any reason. In this regard, it should also be recalled that the new **Commission Regulation (EU) 2022/720 of 10 May 2022**, on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of vertical agreements and concerted practices, allows the limitation of post-contractual competition provided that such limitation:

- i. Relates to goods or services that compete with the contractual goods or services
- ii. Is limited to the premises or land from which the buyer operated during the contract
- iii. Is indispensable to protect technical knowledge transferred by the supplier to the buyer
- iv. Is limited to a period of one year after the termination of the contract (Art. 5 Regulation 2022/720).

CONFLICTS AND DISPUTES IN FRANCHISE AGREEMENTS

Despite the mutual benefits that a franchise agreement can offer, there are several sources of dispute that may arise between the parties.

Let us look at the most common ones:

1. Deficient or misleading pre-contractual information

A lack of transparency or the omission of relevant information by the franchisor may give rise to legal disputes. In this regard, special attention should be paid to information regarding possible estimates of sales or operating results of the business that the franchisor may provide to the franchisee. **Royal Decree 201/2010** classifies this as optional and non-mandatory information; however, if it is provided, the franchisor will be obliged to base it on experiences or studies that are "sufficiently substantiated".

2. Unilateral modifications

Often, unilateral changes to the terms of the contract that the franchisor seeks to impose—such as increasing royalties or altering exclusivity areas—are fairly common causes of conflict.

3. Post-contractual disputes

Once the contract has ended, controversies usually arise regarding the non-payment of royalties, the grounds for termination, reciprocal breaches, the use of *know-how*, or the

prohibition of competing during the agreed period. Other disputes concern the return or use of the stock of products still held by the franchisee or the furniture acquired to adapt the business and align it with the brand.

Considering the countless disputes that may arise, both during the term of the contract and after its termination—often following a long and profitable period of mutual collaboration—it is particularly advisable to include alternative dispute resolution clauses. These may include a negotiation procedure between the parties for a minimum period and, subsequently, an attempt at mediation before an impartial third party, and finally, if it is not possible to reach an amicable agreement, an arbitration clause that allows both parties to obtain a swift decision from experts in the matter.

CONCLUSIONS ON THE REGULATION OF FRANCHISE AGREEMENTS IN SPAIN

The franchise agreement represents a very attractive and powerful tool for expanding a business (from the franchisor's side) and for starting a new activity (from the franchisee's side). Franchising is a complex contractual figure that combines elements of distribution agreements, intellectual property rights and competition law.

In Spain, despite the lack of a complete and systematic regulation, the existing rules and the jurisprudential interpretation of this figure have established a framework that allows the parties to enter into this commercial relationship with a reasonable degree of legal certainty.

However, given that the autonomy of the will of the parties continues to be the key element of this atypical contract, it is essential to have professional advice when negotiating a franchise agreement.