

Transparency in business networks – pre-contractual disclosure obligations in franchising agreements*

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Este trabalho versa sobre a transparência nas redes de franquia, em especial os deveres de informação ao nível da formação dos acordos de franquia. Tendo em conta a sua caracterização básica, os elementos principais e as obrigações das partes, destaca-se em sede de formação destes contratos o princípio da boa-fé como fundamento de deveres de informação e de esclarecimento, cuja inobservância é suscetível de gerar responsabilidade pré-contratual por *culpa in contrahendo*. Por outro lado, se franquizador utilizar cláusulas contratuais gerais fica sujeito aos deveres de comunicação e de informação ao nível da formação do acordo, nos termos do regime jurídico dos contratos de adesão. São ainda referidos alguns instrumentos de soft law, tais como o Código Europeu de Ética no Franchising e a Unidroit Model Franchise Disclosure Law, como meios de transparência e *disclosure* nas redes de franquia. Para terminar, sugere-se que, por razões de segurança jurídica e de proteção do franquiado como parte negocial mais fraca, justificar-se-iam regras específicas para os contratos de distribuição no que respeita em especial aos deveres pré-contratuais de informação nos contratos de franquia.

Contratos; franchising; transparência; deveres de informação; responsabilidade pré-contratual.

This paper addresses transparency in business networks, notably pre-contractual disclosure obligations in franchising agreements. Taking into account basic features, main elements and obligations of the parties, in the absence of regulation specific to franchising contracts the principle of good faith is outlined as a source of duties of disclosure and information, the violation of which is capable to originate pre-contractual liability for *culpa in contrahendo*. Moreover, where franchisors use standard terms they have to comply with special duties of communication and clarification according to the regulation of standard terms. Reference is also made to soft law instruments such as the European Code of Ethics in franchising and the UNIDROIT Model Franchise Disclosure Law, as relevant tools for achieving transparency and disclosure in franchising networks. Finally it is suggested that for reasons of legal certainty and protection of franchisee as the weaker party, and taking into account comparative experiences, a regulation specific of distribution agreements could be justified concerning notably pre-contractual disclosure obligations in franchising agreements.

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Introduction

Franchising networks play an important role in Portuguese business life where different kinds of franchising agreements are concluded.

Franchising has *advantages* and *disadvantages* for both parties. Franchisers can enter into new markets without the costs and risks of establishment of setting up a business that otherwise they would have to take. It is up to franchisees to bear the costs of establishment, such as, for ex., labor and social security, rents, insurance, utilities. Moreover, based upon their industrial and intellectual property rights and know-how secrets, franchisers can exercise control over the activity of the franchisee, by means of contract terms which give franchisers almost full control over the franchisee.

As for the franchisee, despite his possible situation of economic dependence, he has the chance to explore a presumably well-succeeded and goodwill business and clientele. In order to enter into the franchising network the franchisee has to pay an initial fee and then periodic royalties for the use of the licensed business system, including know-how, trademarks and other intellectual property rights.

1. General features and special types of franchising

Despite the variety of these agreements and the relevant role played by franchising networks in the modernization of business and commercial life, Portuguese legislation does not define nor provide a special regulation for franchising contracts.¹

In *Pronuptia*, the European Court of Justice has pointed out the main features and distinguished three species of franchising agreements: production, distribution and/or services². Later on, Commission Regulation 4087/88 on the application of Article 85(3) of the Treaty to categories of franchise agreements provided that “franchise agreements consist essentially of licenses of industrial or intellectual property rights relating to trademarks or signs and know-how, which can be combined with restrictions relating to supply or purchase of

¹ António Menezes Cordeiro, ‘Do contrato de franquia (franchising): autonomia privada versus tipicidade negocial’, ROA 48 (1988), p. 63-84; António Pinto Monteiro, Contratos de agência, de concessão e de franquia («franchising»), Coimbra 1989, p. 27, Id. Contratos de distribuição comercial, Coimbra, 2009, p. 62-63.

² Judgment of 28 January 1986, C-161/84, ECR 1986, p. 353.

goods” (Recital 2). This Regulation has also defined franchise itself as “a package of industrial or intellectual property rights relating to trademarks, trade names, shop signs, utility models, designs, copyrights, know-how or patents, to be exploited for the resale of goods or the provision of services to end users” (Article 1(3)(a)).

Moreover, concerning special types of franchising, this Regulation identified three main types according to their object and distinguished franchise agreements from master franchising agreements. In fact, Recital 3 of this Commission Regulation reads, on one hand, that “[several types of franchise can be distinguished according to their object: industrial franchise concerns the manufacturing of goods, distribution franchise concerns the sale of goods, and service franchise concerns the supply of services.” On the other hand, *franchise agreement* is defined as an agreement whereby one undertaking, the franchisor, grants the other, the franchisee, in exchange for direct or indirect financial consideration, the right to exploit a franchise for the purposes of marketing specified types of goods and/or services, including at least obligations relating to: the use of a common name or shop sign and a uniform presentation of contract premises and/or means of transport (a), the communication by the franchisor to the franchisee of know-how (b), the continuing provision by the franchisor to the franchisee of commercial or technical assistance during the life of the agreement (c). As for the master franchise agreement it is considered an agreement whereby one undertaking, the franchisor, grants the other, the master franchisee, in exchange of direct or indirect financial consideration, the right to exploit a franchise for the purposes of concluding franchise agreements with third parties, the franchisees³.

In short, in master franchising the franchiser grants a license to the franchisee in order to set up, manage and control a franchise network in a certain territory; in (servant) franchising, the franchiser himself - or the master franchisee - grant licenses to end franchisees to explore the business system by setting up a franchise establishment in a certain area and timeframe.⁴

³ Commission Regulation 4087/88, Article 1(3)(b)(c).

⁴ On master franchising see notably Jaume Martí Miravalls, *El Contrato de Master Franquicia*, Madrid, 2009.

This Regulation was in force until 31 December 1990 and it was then replaced by Commission Regulation 2790/1999, which in turn has been replaced by Commission Regulation 330/2010 on vertical agreements and concerted practices. Nonetheless, the main features and types of franchising agreements had already been pointed out in *Pronuptia* and in Commission Regulation 4087/88.

In Portuguese doctrine and jurisprudence, franchising is considered a business method of vertical integration by which the franchiser integrates the franchisee into a business network. This integration takes place through franchising contracts, by which the franchiser grants to the franchisees, against a direct or indirect payment (initial fee + periodical royalties), in a certain zone or territory and in a stable period of time, the right to exploit a business system (franchise) of producing and/or selling certain goods or providing services, under and/or according to the franchiser's entrepreneurial image, know-how, technical assistance, and control^{5,6}.

2. Main elements of franchising agreements

Franchising contracts, as acknowledged by jurisprudence and literature, present basic elements, such as:

- a) contracting parties are the franchiser and the franchisee;
- b) the object of the contract is a license to exploit a business system of production and/or sale of goods and/or provision of services;
- c) the exploitation of the franchise is granted for a certain zone or territory and for a stable period of time and usually in terms of exclusivity and non-competition;

⁵ António Pinto Monteiro, *Contratos de distribuição comercial*, cit., pp. 117-125, with further references. See e.g. also L. Miguel Pestana de Vasconcelos, *O contrato de franquia (franchising)*, 2ª ed., Coimbra, 2010, pp. 23 seg., J. Engrácia Antunes, *Direito dos contratos comerciais*, Coimbra, 2009, p. 451.

⁶ As recent domestic case-law see notably Supreme Court of Justice, judgments of 9 January 2007 (Proc. 06A4416), 23 January 2010 (Proc. 589/06.OTVPRT.P1), 19 October 2010 (Proc. 2114/06.4TVPRT.P1.S1), 15 December 2011 (Proc. 1807/08.6TVLSB.L1.S1); Lisbon Court of Appeals, judgment of 21 January 2010 (Proc. 1209/08.4TJLSB.L1-2). In its judgment of 14 February 2012 (Proc. 3863/07.5TBVIS.C1), the Coimbra Court of Appeals summarized the usual elements of franchising agreements as follows: a) licenses of trademarks and other distinctive signs of the franchiser and eventually a patent license; b) transmission of know-how; c) franchiser's technical assistance to the franchisee; d) franchisee's activity control by the franchiser; e) money payments by the franchisee to the franchisor. Available at www.dgsi.pt.

- d) obligations of confidentiality and respect for the franchiser's know-how;
- e) the franchise is run under the franchiser's signs and trade-dress, and according to his know-how and technical assistance, including advertising and marketing;
- f) in order to protect the franchiser's good-will and reputation or to maintain the common identity and reputation of the franchise network, the franchisee may be bound to contract the equipment, the installations and the suppliers of goods or services to be used in the assembly or in the functioning of the franchise as established by the franchiser;
- g) the franchisee pays as remuneration an initial fee (or admittance entry fee) plus periodic royalties.

3. Obligations of the parties

Both franchisers and franchisees assume obligations in franchising contracts. As for the franchiser, the main obligation is to allow the franchisee to use the franchising distinctive signs and know-how (1), to provide him with training (2), to ensure the advertising of the franchise network at regional and international levels (3), to supply or to ensure the supply of goods that are necessary to run the franchise (4), to inform franchisees of any change in the running of the enterprise, namely the composition and presentation of the goods and conditions of sale (5), to supervise the franchise network, namely controlling and verifying the performance, by other franchisees, of duties designed to ensure the common identity and the reputation of the franchise network such as the obligation not to contract supply outside the network (6).

As for the franchisee, he has a special duty of care concerning the identity, image and good will of the franchise, including duties of negative action, such as confidentiality, non-competition and not to make advertising without previous authorization of the franchiser (1). The franchisee also has the obligation to communicate to the franchiser any new experience gained from running the franchise that amounts to an improvement to its conditions of functioning and efficiency and to authorize the franchiser and other franchisees the use such know-how (2). Moreover, franchisees have to pay the agreed remuneration

(entrance fee and periodic royalties) (3), to use the franchiser's IP objects (4), to follow his instructions concerning equipment and uniform presentation of premises and means of transport and to pursue the objective specifications of quality (5), to observe resale prices recommend by the franchiser (6), to provide post sales assistance to clients allowing the principal to inspect replacement parts and working methods used by his auxiliaries in the provision of post-sales assistance (7), to provide all information he may be asked, namely on the market situation and perspectives of evolution (8), to attend periods of training organized by the franchiser, as stipulated in the contract (9); franchisees may also assume obligations of minimum sale (10).

4. Formation of franchising contracts: general framework

Portuguese private law as codified in the Code Civil and related special acts provides special regulation for a wide range of contracts, such as, for ex., sale, donation, company, rental, borrow, services, agency, and work contracts.

However, franchising contracts are legally deemed atypical contracts in Portuguese law. Domestic legislation does not name nor provide a set of specific rules for franchising contracts. These contracts are accepted under the principle of freedom of contract provided for the Civil Code (Article 405), according to which within the limits of the law, parties are freely entitled to fix the content of contracts, to conclude contracts different from those which are provided in this code or to insert therein clauses as they may wish (par. 1); moreover, parties can also join in the same contract rules of two or more contracts, totally or partially regulated by legislation (par. 2).

For contracts in general (*rectius*, negócios jurídicos), the Civil Code provides a set of general principles and rules concerning namely the formation of the contract, capacity of parties, declarations of will, object, efficacy, as well as the regulation of certain preparatory pacts, such as promissory contracts and preference agreements, and breach of contract in general. Together with general principles and rules, certain special acts are applicable to franchising contracts, concerning notably standard terms (Decree-Law 446/85, as amended by Decrees-Law 220/95 and 249/99), product liability (Decree-Law 383/89, as amended by Decree-Law 131/2001), competition (Law 19/2012) and industrial property (Decree-Law 36/2003, as last amended by Decree-Law 143/2008).

Moreover, it's commonly understood that relevant provisions of the Agency Act may apply, by analogy, to some aspects of distribution contracts, notably commercial concession and franchising, and particularly concerning the termination of contracts.⁷

This Act does not provide specific duties to provide pre-contractual information, but the vacuum of special legislation does not mean a legal vacuum concerning the formation of franchising contracts.

5. Good faith negotiations and *culpa in contrahendo*

To begin with, the general principles and rules of contract law are to be considered. In particular, the *culpa in contrahendo* doctrine, codified under Article 227(1) of the Civil Code, is deemed to have a relevant role to play in the field of franchising⁸. According to this provision, contracting parties shall act in conformity with good-faith both in preliminary negotiations and in clause drafting, otherwise they shall be liable for compensation of damages caused with fault to one another. This legal provision establishes the principle of good-faith (*bona fides*) in objective sense, i.e., as a source of duties of care and

⁷ See António Pinto Monteiro, *Contratos de distribuição comercial*, cit., 63-4, 67-9. For recent jurisprudence, see Supreme Court of Justice, judgments of 9 January 2007 (Proc. 06A4416), 5 March 2009 (Proc. 09B0297), 25 January 2011 (Proc. 6350/06.5TVLSB.P1.S1), 27 October 2011 (Proc. 8559-06.2TBARG.G1.S1) and 15 November 2012 (Proc. 1147/06.5TBCLD.L1.S1); Coimbra Court of Appeals, judgment of 14 February 2012 (Proc. 3863/07.5TBVIS.C1); Lisbon Court of Appeals, Judgments of 22 March 2011 (Proc. 1807/08.6TVLSB.L1-7), 10 December 2009 (Proc. 6240.05.9TVLSB.L1-7), 20 December 2011 (Proc. 303024/10.7YIPRT.P1); Oporto Court of Appeals, judgments of 19 May 2010 (Proc. 6350/06.5TVLSB.P1), 20 December 2011 (Proc. 303024/10.7YIPRT.P1).

Notwithstanding the analogical application of relevant provisions of the Agency Act to franchising agreements these could be assimilated by the notion of enterprise lease - Alexandre Dias Pereira, 'Da franquia de empresa (franchising)', BFD 73 (1997), p. 251-278. The Oporto Court of Appeals, in judgment of 15 July 2009 (Proc. 589/06.0TVPRT.P1), seems to accept this opinion ("*da conjugação de todos estes traços definidores e do tipo de cláusulas existentes e em presença no contrato de franchising, somos de opinião que a renda que é paga pelo franquiado tem uma natureza em tudo idêntica à do art. 1022º do CC, ou seja, trata-se de uma renda a pagar enquanto durar o contrato e com a finalidade essencial de retribuição pelo uso e fruição da marca e dos serviços de marketing, sendo fixada logo na celebração do contrato, ainda que atualizável.*"). However, the Supreme Court of Justice has refused it in judgment of 19 October 2010 (Proc. 2114/06.4TVPRT.P1.S1: "4) *No contrato de franquia as rendas ('royalties') não representam, apenas, a contrapartida de utilização de um bem, como acontece no contrato de locação, mas incluem várias outras, como a assistência, a colocação no mercado de um produto com nome comercial firmado, e ainda amortização de equipamento, custos de gestão e da assistência prestada.*")

⁸ António Menezes Cordeiro, *Manual de direito comercial*, 2.^a ed., Coimbra, 2007, p. 692; L. Miguel Pestana de Vasconcelos, *O contrato de franquia*, cit., 78-80.

loyalty between contracting parties in negotiations⁹, the violation of which is deemed a source of liability.¹⁰

The obligation of the parties to negotiate in good faith means the obligation to provide all the pre-contractual information that is convenient and justified so that the other party decides whether and how the contract should be entered into.¹¹ The sensitive value of this obligation concerning franchising contracts has already been pointed out by the Courts.¹²

Arguments of information asymmetries as well as the contract long term character can be used to reinforce the obligation to provide pre-contractual information at the stage of formation of franchising contracts, but Courts usually ground their judgments upon the principle of good faith, due diligence and confidence.¹³

The Supreme Court delivered a judgment on 19 October 2010 (Proc. n^o 2114/06.4TVPR.T.P1.S1) according to which parties should comply with information and loyalty duties, in order to avoid situations of belief or semblance, from which damages could arise.¹⁴

In its judgment of 19 May 2009 (Proc. 8685/08-7), the Lisbon Court of Appeals hold that the duty of loyalty imposed by good faith must be observed in the preliminary negotiations of a contract and requires that parties shall omit

⁹ See notably Supreme Court of Justice, judgment of 16 December 2010 (Proc. 4/07.1TBGDLE1.S1).

¹⁰ The legal nature of liability for *culpa in contrahendo* is a disputed question. In recent judgments, the Supreme Court of Justice held that liability for *culpa in contrahendo* is a *tertium genus* of liability between breach of contract and torts - Judgments of 20 March 2012 (Proc. 1903/06.4TVLSB.L1.S1), 27 September 2012 (Proc. 3729/04.0TVLSB.L1.S1), and 20 October 2012 (Proc. 2625/09.0TVLSB.L1. S1). In doctrine see notably Jorge Sinde Monteiro, *Responsabilidade por conselhos, recomendações e informações*, Coimbra, 1989, p. 516, Luis Manuel de Menezes Leitão, *Direito das Obrigações*, I, 8^a ed., Coimbra, 2009, p. 361. On the *tertium genus* of civil liability see also e.g. Manuel Carneiro da Frada, *Teoria da confiança e responsabilidade civil*, Coimbra, 2004.

¹¹ See notably Carlos Alberto da Mota Pinto, *A responsabilidade pré-negocial pela não conclusão dos contratos*, Coimbra, 1963, Mário Júlio de Almeida Costa, *Responsabilidade Civil pela ruptura das negociações preparatórias de um contrato*, Coimbra, 1994.

¹² See e.g. Lisbon Court of Appeals, judgment of 19 May 2009 (Proc. 8685/08-7); Oporto Court of Appeals, judgment of 2 July 2009 (Proc. 373/07.4TVPR.T.P1).

¹³ See for ex. Supreme Court of Justice, judgments of 27 September 2012 (Proc. 3729/04.0TVLSB.L1.S1), and 20 October 2012 (Proc. 2625/09.0TVLSB.L1. S1). Franchising contracts which are concluded due to error of the parties, either innocent (misrepresentation) or intentional (fraud), are voidable according to the relevant provisions of the Civil Code. For ex., where breach of pre-contractual information is fraudulent the consequence is also voidability of the contract (Civil Code, Articles 253 and 254), notwithstanding liability for *culpa in contrahendo* - see Lisbon Court of Appeals, judgment of 27 September 2007 (Proc. N.º 6592/2007-6).

¹⁴ “*Pela tutela da confiança, devem as partes cumprir todos os deveres de lealdade e de informação que ao caso caibam, de modo a evitar criar situações de crença ou de aparência das quais possam emergir danos.*”

statements that conform to their beliefs and expectations but are still unproven, if they are suitable to enhance confidence in the viability of an already created project and lead a counterparty to continue the investments in view of a projected business.¹⁵

The Oporto Court of Appeals in its judgment of 2 July 2009 (Proc. 373/07.4TVPRT.P1) analyzed the obligation to provide pre-contractual information, holding that three duties arise from the obligation to act in accordance with the principle of good faith, applied on the stage of negotiations:

- a) a *duty of protection*, meaning that parties should avoid actions that could cause damages to the other party;
- b) a *duty of information*, considering the possibly relevant circumstances for a consensus with the other negotiating party, with particular intensity where she is a weaker party;
- c) a *duty of loyalty*, meaning the obligation to avoid unfair practices towards the other party, including unjustified breach of negotiations of a contract in the conclusion of which the other party had justified and legitimate expectations.

On the other hand, the jurisprudence of the Supreme Court of Justice stresses the normative value of good-faith and confidence in business transactions. In its judgment of 31 March 2011 (Proc. 3682/05.3TVSLB.L1.S1), the Supreme Court held that the refusal to sign a contract after reaching an agreement on all its terms is a matter of pre-contractual liability for *culpa in contrahendo*, not for the refusal itself but for the confidence and legitimate expectancies that have been created and then frustrated without fair justification.¹⁶

¹⁵ “O dever de lealdade integrador da boa fé que deve nortear as negociações preliminares de um contrato impõe que qualquer das partes omita afirmações, conformes às suas convicções e expectativas mas ainda não comprovadas, se as mesmas forem idóneas para reforçar a confiança já criada na viabilidade do projecto e levar a contraparte a fazer e prosseguir na realização de investimentos com vista ao negócio projectado.”

¹⁶ S.T.J., Acórdão de 31 de Março de 2011 – Processo n.º 3682/05.3 TVSLB.L1.S1 (Responsabilidade pré-contratual: aplicação do critério do interesse contratual negativo ao cálculo da indemnização pela recusa injustificada da formalização de um contrato negociado) – anotação de M.J. Almeida Costa / Henrique Sousa Antunes, RLJ, ano 141 (2012), p. 309.

Later, in its judgment of 6 November 2012 (Proc. 4068/06.8TBCSC.L1.S1), the Supreme Court of Justice pointed out that good-faith imposes duties of information, protection and loyalty in the formation of contract, and that Article 227(1) of the Civil Code includes not only the breach of negotiations but also the conclusion of ineffective contracts and the protection against undesired contracts, i.e. the conclusion of a contract which does not correspond to what the other contracting party might expect based upon erroneous information provided by the other party or omission of due clarification. However, in the opinion of the Court, in order to ascertain the fault of the parties it is required to take into account not only the principle of good faith but also other basic principles of private contract law such as autonomy of will and the equilibrium of obligations.

In our opinion, the obligation to negotiate in good faith also means that during preliminary negotiations parties shall not engage in unfair competition practices, such as misleading or deceitful statements, and breach of confidentiality (Articles 317 and 318 of the Code of Industrial Property).

6. Disputed issues, in special eligible damages in pre-contractual liability

It's not undisputed whether liability for *culpa in contrahendo* requires intentional fault, whether it only takes place in case of non conclusion of contract (e.g. unjustified breach of negotiations or refusal to sign in due form a fully agreed contract), and whether compensation shall cover only negative damages (e.g. expenses incurred due to negotiations) or also positive damages (i.e. profits or results reasonably expected to be achieved by the other party upon conclusion and due execution of the contract).

The wording of the Civil Code does not require intentional fault, nonetheless the level of fault shall be considered in assessing compensation (Article 488). Moreover, compensation should take place despite the parties have entered into the contract. For ex., expenses have been produced upon the legitimate expectation of a certain outcome, but the final result as agreed is far

lower than such investments. This solution has recently been adopted by the Supreme Court of Justice¹⁷.

On the other hand, in principle, only negative damage is to be compensated.¹⁸ The Supreme Court of Justice, in judgment of 31 March 2011 (Proc. 3682/05.3TVSLB.L1.S1), held that compensation for negative contractual damage (*dano de confiança*) is measured upon the difference between the present economic situation of the injured and the situation in which he would be in case he did not enter into negotiations, and therefore only damages consisting of expenses incurred due to negotiations would be eligible for compensation. As for expected profits and results with the conclusion and execution of the contract¹⁹ these would not be eligible for compensation, liability for *culpa in contrahendo* not being a matter of breach of contract.

Nonetheless, certain damages or economic losses, such as the loss of chance of a different business the party had to abide from, should be taken into account. The Supreme Court of Justice, in its judgments of 12 January 2009 (Proc. 08B4052) and December 2011 (Proc. 1807/08.6TVLSB.L1.S1) recognizes that, exceptionally, positive damages should be eligible for compensation, notably where the contract is voided.

In judgment of 20 March 2012 (Proc. 1903/06.4TVLSB.L1.S1) the Supreme Court of Justice seems to allow a less restrictive approach, as positive damages are placed in almost equal footing to negative damages concerning eligibility for compensation in pre-contractual liability.²⁰ However, in judgment of

¹⁷ Judgment of 15 May 2012 (Proc. 6440/09.2TVLSB.L1.S1: “A celebração do contrato ou a sua anulação, não afastam a aplicação desta responsabilidade.”). In doctrine see notably Jorge Sinde Monteiro, *Responsabilidade por conselhos, recomendações ou informações*, cit., p. 358, 360.

¹⁸ Supreme Court of Justice, judgment of 12 January 2009 (Proc. 08B4052); Lisbon Court of Appeals, judgment of 22 March 2011 (Proc. 1807/08.6TVLSB.L1-7: “Essa indemnização abrange os lucros cessantes consistentes na medida do benefício que o lesado teria auferido se não fosse a existência e subsistência do contrato (*dano negativo ou de confiança*), e não aqueles medidos pelo benefício do lesado decorrentes da prestação devida do devedor (*dano positivo ou de cumprimento*).”).

¹⁹ Mário Júlio de Almeida Costa, *Direito das obrigações*, 9ª ed., Coimbra, 2008, p. 548 (“A indemnização pelo dano positivo destina-se a colocar o lesado na situação em que se encontraria se o contrato fosse exactamente cumprido. Reconduz-se, assim, aos prejuízos que decorrem do não cumprimento definitivo do contrato ou do seu cumprimento tardio ou defeituoso. Ao passo que a indemnização do dano negativo tende a repor o lesado na situação em que estaria se não houvesse celebrado o contrato, ou mesmo iniciado as negociações com vista à respectiva conclusão.”).

²⁰ “VII - Os danos indemnizáveis, em sede de responsabilidade pré-contratual, por violação dos deveres de informação e esclarecimento, conducentes à outorga de um contrato

27 September 2012 (Proc. 3729/04.0TVLSB.L1.S1), the Supreme Court decided that pre-contractual liability may cover contractual positive damages where negotiations have a level which justifies legitimate confidence in the conclusion of the contract.²¹ Later on, in judgment of 20 October 2012 (Proc. 2625/09.0TVLSB.L1. S1), the Supreme Court of Justice held that positive contract damage may be covered by pre-contractual liability compensation, in extreme cases and according to the concrete circumstances of the case, where a global agreement already existed and only formalization of the contract was missing.²² In legal doctrine it is submitted the concept of a binding informal pre-contract²³ and it has also been argued compensation for positive damages notably in case of breach of a duty to conclude the contract.²⁴

Nonetheless, compensation for positive damages in pre-contractual liability should not be construed broadly, in particular where a legal requirement of formalization of the contract is not met. In fact, where legislation provides a special form for a contract to be validly concluded (e.g. public deed), a refusal to sign the contract in due form is a right of both parties. However, if the parties have fully agreed to the terms of the contract and moved forward with performing it, it is necessary to check whether the interests protected by the legal requirement of form are at stake where one of the parties argues the invalidity of the contract due to lack of form.²⁵ There may be a situation of *venire contra factum proprium*, which is prohibited as abuse of right (Article 334 of the Civil Code).

desvantajoso, abrangem quer o dano da confiança (interesse contratual negativo), quer o dano do cumprimento (interesse contratual positivo)."

²¹ "IV. A responsabilidade pré-contratual abarca o dano contratual negativo – o dano que o lesado não teria se não tivesse encetado as negociações – e pode abarcar o dano contratual positivo – quando as negociações tiverem atingido um nível tal que justifique a confiança na celebração do negócio."

²² "I - A responsabilidade civil pré-contratual não se confunde com a responsabilidade civil contratual, nem com a responsabilidade civil extracontratual, constituindo um tertium genus de responsabilidade civil. II - Neste tipo de responsabilidade a indemnização abrange o interesse contratual negativo, podendo, em casos limites e de acordo com as circunstâncias concretas do caso, incluir o interesse contratual positivo, se já existia um acordo global e faltava apenas a formalização do negócio."

²³ Carlos Ferreira de Almeida, 'Contrato formal e pré-contrato informal', *Comemorações dos 35 Anos do Código Civil e dos 25 Anos da Reforma de 1977*, II, Coimbra, 2006.

²⁴ See notably Paulo Mota Pinto, *Interesse contratual positivo e interesse contratual negativo*, II, Coimbra, 2009, p. 1347-8; Nuno M. Pinto de Oliveira, *Princípios de direito dos contratos*, Coimbra, 2011.

²⁵ See Almeida Costa, Sousa Antunes, *Anotação*, cit., p. 229-30, with more references.

It should be remarked that franchising contracts are atypical contracts under Portuguese private law, meaning that no legal requirement of form is provided for the validity of these contracts. Therefore, where parties have fully agreed to the terms of the contract and initiated to perform it, it seems that the contract has been tacitly concluded (Article 217 of Civil Code).

Finally, there is no deadline specific of franchising agreements to claim compensation for damages due to breach of pre-contractual information. Nonetheless, in case of *culpa in contrahendo*, the Civil Code provides a prescription term of 3 years to claim compensation for damages (Articles 227(2) and 498).

7. Franchising contracts as possible standard contracts

Where a franchising agreement contains *standard terms*, the Act on Standard Terms²⁶ shall apply. The scope of application of this Act includes general contract clauses drafted without individual previous negotiation which are subscribed or accepted respectively by indeterminate proponents or addressees as well as clauses inserted in individual contracts the content of which could not be negotiated by the other party (Article 1(1)(2)), regardless of the drafter of such clauses, including third parties (Article 2).

This Act provides an obligation of *full disclosure* of the standard terms so that in the first place the franchisee is able to know them. In fact, the proponent must communicate the general clauses in full, by adequate means and with necessary previous notice, so that, considering the importance of the contract and the extension and complexity of the clauses, their complete and effective knowledge is possible for a party with normal diligence (Article 5(1)(2)). On the other hand, the proponent has an obligation to inform and to clarify any reasonable doubt of the franchisee concerning such standard terms (Article 6).

²⁶ Decree-Law 446/85, as amended by Decrees-Law 220/95 and 249/99. See notably M.J. de Almeida Costa, *Síntese do regime jurídico vigente das cláusulas contratuais gerais*, 9.^a ed., Lisboa, 2007, Idem, António Menezes Cordeiro, *Cláusulas contratuais gerais. anotação ao Decreto-Lei n.º 446/85, de 25 de Outubro*, Coimbra, 1990; António Pinto Monteiro, 'Contratos de adesão (o regime jurídico das cláusulas contratuais gerais instituído pelo Decreto-Lei n.º 446/85, de 25 de Outubro)' ROA (1986), e 'O novo regime jurídico dos contratos de adesão/cláusulas contratuais gerais', ROA (2002); J. Sousa Ribeiro, *O problema do contrato – As cláusulas contratuais gerais e o princípio da liberdade contratual*, Coimbra, 1999.

In case the obligations to communicate and to inform/clarify are not complied with, the concerned standard terms are deemed to be excluded from the contract; the same applies to the so-called surprise terms (Article 8).

Moreover, the Act on standard terms provides a content control of the standard contract prohibiting those clauses which are against good faith (Article 15), by means of a list of dark clauses - i.e. clauses which are absolutely deemed null and void -, and a list of grey clauses - i.e. clauses the validity of which depends upon the relevant standard business framework (*quadro negocial padrozinado*). Amongst these, and concerning standard contracts between companies or professionals, there are standard clauses providing for penalty clauses which are not proportional to eligible damages, as well as clauses which allow one of the parties to, immediately or without sufficient notice and adequate compensation, terminate the contract, where this has required from the other party to make considerable investments or expenses (Article 19(c) and (f)).

Despite these are *grey clauses*, meaning that their conformity with good-faith has to be assessed in according with the standard business framework, they are nonetheless sensitive clauses concerning in particular franchising agreements. In order to find out the franchising standard business framework some soft law instruments may prove relevant, notably the European Code of Ethics.

8. The European Code of Ethics and the Unidroit Model Franchise Disclosure Law

Portuguese legislation has no specific regulation designed for franchising contracts, but the general principles of contract law, such as the principle to negotiate in good faith, as well the regulation of standard terms provide a normative basis for the obligation to provide pre-contractual information between negotiating parties.

In order to fulfill general concepts and indeterminate legal notions, soft law instruments may prove relevant. In particular, the *European Code of Ethics* for

*Franchising*²⁷ is effective in Portugal since 1991. Part 3 of this Code provides that,

3.1 Advertising for the recruitment of Individual Franchisees shall be free of ambiguity and misleading statements;

3.2 Any recruitment, advertising and publicity material, containing direct or indirect references to future possible results, figures or earnings to be expected by Individual Franchisees, shall be objective and shall not be misleading;

3.3 In order to allow prospective Individual Franchisees to enter into any binding document with full knowledge, they shall be given a copy of the present Code of Ethics as well as full and accurate written disclosure of all information material to the franchise relationship, within a reasonable time prior to the execution of these binding documents;

3.4 If a Franchisor imposes a Pre-contract on a candidate Individual Franchisee, the following principles should be respected:

- prior to the signing of any pre-contract, the candidate Individual Franchisee should be given written information on its purpose and on any consideration he may be required to pay to the Franchisor to cover the latter's actual expenses, incurred during and with respect to the pre-contract phase; if the agreement is executed, the said consideration should be reimbursed by the Franchisor or set off against a possible entry fee to be paid by the Individual Franchisee;

- the Pre-contract shall define its term and include a termination clause;

- the Franchisor can impose non-competition and/or secrecy clauses to protect its know-how and identity.

On the other hand, the International Institute for the Unification of Private Law (Unidroit), of which Portugal is a Member, issued on September 2002, an instrument regarding franchise, the *Model Franchise Disclosure Law*, containing

²⁷ European Franchise Federation - European Code of Ethics for Franchising, <http://www.eff-franchise.com/>

provisions regarding the *obligation of delivery, format and contents of the disclosure document*.²⁸

Despite it is not binding, the *Model Franchise Disclosure Law* can be followed, as a framework, regarding the obligation to provide pre-contractual information, in special concerning arbitration and equitable judgments.

9. Term to submit and minimum content of the pre-contractual information document

There is no legal term to submit the pre-contractual information document. However, pursuant to article 227(1) of the Civil Code and taking into account the European Code of Ethics for Franchising (3.3 – “within a reasonable time prior to the execution of”), in practice it is often given a reasonable period of time to the Franchisee to study and to decide whether it wants to sign or not the binding document. The reasonable period of time, which depends on the complexity and/or state of pre-contractual negotiations, is usually stipulated between 15 days to one month. Notwithstanding, the rules of Civil Code on offer and acceptance of proposals are to be observed (Articles 228 et seq.).

Moreover, there is no specific legal obligation detailing or listing the content of the information. However, pursuant to the principle of good faith, the franchisor should provide all the relevant and convenient information to allow the prospective franchisee to take a duly based decision on whether he should enter into the contract. The information to be provided varies in accordance with the circumstances of each case.

Concerning *soft law instruments*, § 3.3 of the European Code of Ethics provides that franchisees are entitled to receive “full and accurate written disclosure of all information material to the franchise relationship”. According to § 5.4 of this Code, the *essential minimum terms* of the agreement are:

- a) the rights granted to the Franchisor;
- b) the rights granted to the Individual Franchisee;

²⁸ <http://www.unidroit.org/english/modellaws/2002franchise/2002modellaw-e.pdf>

- c) the goods and/or services to be provided to the Individual Franchisee;
- d) the obligations of the Franchisor;
- e) the obligations of the Individual Franchisee;
- f) the terms of payment by the Individual Franchisee;
- g) the duration of the agreement which should be long enough to allow Individual Franchisees to amortize their initial investments specific to the franchise;
- h) the basis for any renewal of the agreement;
- i) the terms upon which the Individual Franchisee may sell or transfer the franchised business and the Franchisor's possible pre-emption rights in this respect;
- j) provisions relevant to the use by the Individual Franchisee of the Franchisor's distinctive signs, trade name, trademark, service mark, store sign, logo or other distinguishing identification;
- k) the Franchisor's right to adapt the franchise system to new or changed methods;
- l) provisions for termination of the agreement;
- m) provisions for surrendering promptly upon termination of the franchise agreement any tangible and intangible property belonging to the Franchisor or other owner thereof.

Comparative outlook and conclusion

There is no domestic regulation specific of franchising contracts in Portugal, but at the same time there is not a situation of legal vacuum concerning the obligation to provide pre-contractual information in the formation of the contract.

To begin with, parties are liable for *culpa in contrahendo* as they have the obligation to act in good faith in preliminary negotiations, i.e., to provide all the pre-contractual information that is convenient and justified so that the other party decides whether and how the contract should be entered into. The sensitive value of this obligation in the field of franchising contracts has already been pointed out by the Courts.

On the other hand, franchising agreements may qualify as standard terms. Portuguese legislation provides special duties of communication, information and clarification upon those who propose standard terms, which may prove rather relevant for franchising.

Furthermore, parties can refer to soft law instruments, such as the European Code of Ethics for Franchising and the Unidroit Model Franchise Disclosure Law.

Protection of the weaker party as a basic principle of contract law²⁹ as well as the principle of legal certainty, could justify the adoption of a special regulatory instrument concerning pre-contractual information based upon the Unidroit Model Franchise Disclosure Law. Other countries have already adopted special provision, notably the USA, France (*Loi Doubin* of 31 December 1989), and Italy (*Norme per la disciplina dell'affiliazione commerciale*, Legge 6 maggio 2004, n. 129), as well as some Portuguese speaking countries or regions.³⁰

In the US, the franchisor has the duty to provide a *Franchise Disclosure Document* (FDD) at least fourteen days before any payment is made or a franchise agreement is signed. The FDD shall in principle include audited financial statements from the franchisor in a particular format (1), data of franchisees in the licensed territory (names, addresses and telephone numbers) for consultation before taking the franchise (2), estimate of global franchise revenues and franchisor profitability (3).

In Europe, French *Loi Doubin* of 31 December 1989, later incorporated into the Code of Commerce (Article L 330-3 code de commerce), is the first European franchise disclosure law. The disclosure document, which is confidential, must be delivered at least 20 days before any payment or execution of the agreement takes place. The disclosure document shall include the date of the founding of the franchisor's enterprise and a summary of its business history and all information necessary to assess the business

²⁹ The application of the law of the country of establishment of the franchisee, as provided for under Rome I on the law applicable to franchising contracts, seems to be influenced by such principle. Article 1(4)(e) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16.

³⁰ Curiously, Angola has a specific Act on Distribution Contracts, including franchising (Law 18/03, of 12 August – agency, franchising, and commercial concession), but it does not provide a specific obligation to provide pre-contractual information in franchising contracts.

experience of the franchisor, including bankers (a), description of the local market for the goods or service (b), the franchisor's financial statements for the previous two years (c), a list of all other franchisees currently in the network (d), all franchisees who have left the network during the preceding year, whether by termination or non-renewal (e), the conditions for renewal, assignment, termination and the scope of exclusivity (f).

Concerning Portuguese speaking countries or regions, the Brazilian Franchise Law 8.955/1994 (“dispõe sobre o contrato de franquia empresarial (franchising) e dá outras providências”) provides a mandatory disclosure document before performance of the agreement, failure to disclose it voiding the agreement and leading to refunds and payments for damages (Article 3). On the other side of the planet, the Commercial Code of Macau, enacted by Decree-Law 40/99/M of 3 August 1999³¹, establishes a detailed obligation to provide *pre-contractual information* and clarification (Article 680). This information is aimed to allow the franchisee to form a balanced and informed assessment of the advantages and disadvantages of the contract. As examples of information that the franchiser must provide we can mention namely his identification and two last exercises annual accounts, the specifications as to the estimated sum of the initial investment needed for acquisition, installation and entry into functioning of the franchise, the composition of the franchise network, lists of franchisees, sub-franchisees and sub-franchisers of the network, as well as of those who have left the network in the last 12 months, and also, for example, any services that the franchiser obliges himself to render to the franchisee during the duration of the contract. In case this obligation is not complied with by the franchiser, the franchisee is entitled to demand annulment of the contract thereof.

³¹ The Commercial Code is based upon the tradition of European Civil Law countries, and represents an important legacy of Portuguese legal heritage to this Special Administrative Region of the P.R. China. In systematic terms, the Code is divided in 4 books. Book I concerns the exercise of commercial enterprise in general (e.g., obligations of merchants, protection and negotiation of enterprises). Book II regulates the exercise of a collective enterprise and the cooperation in the exercise of an enterprise (company law and related entities). Book III concerns the external activity of an enterprise (i.e., commercial contracts such as, for example, agency, franchise, leasing, and independent guarantees). Book IV concerns negotiable instruments (e.g., bills of exchange). On this Code see notably Jianhong Fan & Alexandre Dias Pereira, *Commercial and Economic Law in Macau*. 2.^a ed. The Hague, 2011.

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