

# The Economic Importance of Franchising in Portugal – (Re)Analysis of the Franchising Contract

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## Abstract

If we analyse the '2018/2019 Franchising Census' carried out by the APF – Portuguese Franchising Association, we see that in Portugal, and for the year 2018, Franchising generated a turnover of more than 8 billion euros, which corresponded to 3.96% of the national GDP. This turnover is the result of the 'Franchising Contracts' signed by the 528 active brands, distributed among Services, with 57.7% of the preference, followed by Commerce, with 29% and Restaurants, with 13.3%. When we look at the levels of initial investment by Franchisees, we see that this initial investment was up to €25,000.00 for 43.6% of Franchisees, €25,000.00 to €50,000.00 for 26.5%, €50,000.00 to €100,000.00 for 17.7%, €100,000.00 to €250,000.00 for 9.9% and, finally, with an investment of more than €250,000.00 for the remaining 2.2%. In other words, more than 70% of the initial investment by franchisees did not exceed €50,000.00. The relevance of these figures for the Portuguese economy is the basis for presenting a legal (re)analysis of the 'Franchising Contract' in the Portuguese legal system, using a logical-deductive methodology of the legal regime of this type of contract.

**Keywords:** franchising, franchising contract, franchisor, franchisee.

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## 1. Introduction

When we analyse what we described above in the 'Abstract', it's possible immediately conclude that there are a huge number of entrepreneurs who are using a way of expanding their companies without having to make new investments, by using the contractual figure of *franchising*, and managing through this contractual figure to expand their business to new places, both within their own country and internationally<sup>3</sup>.

By using this contractual figure of *franchising*, the entrepreneur, whether as an individual (rarely) or as a company, expands his company, i.e. his organisation of material and human business resources, whether for the production or distribution of goods, and/or services, to other places where other entrepreneurs who have contracted a business with him under a *franchising* system, make use of the name of an establishment with characteristic signs that are already well known in the market, namely the name of the establishment, the insignia and its distinctive brand that attracts customers, to start a business that already has the necessary capacity to attract customers and, in this way, ensure that their business is already geared for success.

For the original entrepreneur, this type of contract gives him the advantage of expanding his company to new places without having to invest in setting up another establishment, while the new entrepreneur, by using this *franchising* contract, is starting an activity that is already known in the

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<sup>3</sup> For a comparative view see Vanessa P.G. Bretas, Ilan Alon, „Franchising research on emerging markets: Bibliometric and content analyses”, *Journal of Business Research*, Volume 133, 2021, pp. 51-65. <https://doi.org/10.1016/j.jbusres.2021.04.067>; Caro-Vela, M.D., Ramírez-Hurtado, J.M. & Calderón-Monge, E., „Insights into the localisation of outlets: The franchising chains”. *International Entrepreneurship and Management Journal* 20, 2139–2167 (2024). <https://doi.org/10.1007/s11365-024-00961-x>.

market and therefore has high expectations of business success based on the reputation of the entrepreneur who has signed the *franchising* contract with him.

As we have analysed from the figures in the ‘*Abstract*’, the legal means used by the original owner of the company that contracts is the franchisor, and the entrepreneur who is going to develop the new business in a *franchising* system is the franchisee, while it is also possible to have a subcontracting system, in other words, *sub-franchising*.

The *franchising* contract is the result of the legal technique of contracts, i.e. the legal system of obligations, but the purpose of this contract is so complex that it implies the use of multiple legal instruments inherent in multiple branches of private law that *franchising* itself encompasses.

We mustn’t forget that in these business relationships between franchisor and franchisee, there are necessarily aspects that have to be regulated by contracts for the purchase and sale of goods, the provision of services, the use of industrial property rights, the use of *know-how* that is not patented, i.e. the franchising contract necessarily involves the interconnection between a heterogeneous multiplicity of necessary contracts between specific entrepreneurs – franchisor and franchisee – with a view to the operation and exploitation of a new company by the franchisee.<sup>4</sup>

Having arrived at this point, let’s revisit this type of contract by (re)analysing the franchising contract in the Portuguese legal system, subdividing this (re)analysis into three parts: ‘Concept’, ‘Characteristics’ and ‘Legal regime’.

In order to carry out this analysis, we used the logical-deductive methodology of the legal regime of this type of contract<sup>5</sup>.

## 2. Concept

We define the ‘*Franchising Contract*’ (‘*Franchise-Vertrag*’, ‘*Franchise*’, ‘*Franquicia*’) as the contract whereby an entrepreneur – known as the ‘franchisor’ – grants another entrepreneur – known as the ‘franchisee’ – the right to exploit and enjoy his business image and respective intangible assets, namely its trademark, within the scope of its distribution network integrated into the sphere of the ‘franchisor’ and in a stable manner for the ‘franchisee’, in return for a consideration by the franchisee to the franchisor.<sup>6</sup>

The technique of expanding companies through *franchising* contracts was born in the 19<sup>th</sup> century in the United States of America, and has become widespread in the world economy with well-known international companies such as ‘*Coca-Cola*’ and ‘*McDonalds*’<sup>7</sup>, among others, or as the author Walter Skaupy says about the expansion of companies through the use of franchising contracts, ‘everything is *franchisable*’.

We are thus faced with a contract which falls into the broad category of commercial distribution contracts and which assumes and represents the most important integration of the franchisee into the network created by the franchisor, in which through this franchise contract, the franchisor places on the market, in a more or less broad network created through the franchisees, and which are independent of it, a vast set of companies which are under its control, whether in the area of its services, or its goods or production, achieving through the *franchising* contracts it has signed that its services, products or goods are marketed in a constantly uniform manner and obey its rules and systemic organisational characteristics, in other words, giving the impression to all customers, both of the franchisor’s company and of the franchisees’ companies, that they are always dealing with

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<sup>4</sup> On the importance and nature of franchising for business expansion and as a means of starting out as an entrepreneur, as well as its importance as a framework contract, see Pita, Manuel António, *Curso Elementar de Direito Comercial*, 4.<sup>a</sup> Edição, 2018, Almedina, Coimbra, Portugal, pp. 347–349.

<sup>5</sup> Solis-Rodriguez, Vanesa and Manuel Gonzalez-Diaz. 2012. “How to Design Franchise Contracts: The Role of Contractual Hazards and Experience.” *Journal of Small Business Management* 50 (4): 652–77. doi:10.1111/j.1540-627X.2012.00370.x.

<sup>6</sup> On this type of contract see, among others, Engrácia Antunes, José A., *Direito dos Contratos Comerciais*, 2020, Almedina, Coimbra, Portugal, pp. 451–458.

<sup>7</sup> On the historical origins and economic importance of ‘*franchising*’, see Vasconcelos, L. Pestana, *O Contrato de Franquia (Franchising)*, pp. 11 e segs., Almedina, Coimbra, 2000.

the same franchisor's company.<sup>8</sup>

The franchising contract is therefore subdivided, as a general rule, into the distribution *franchising* contract, in which the franchisee sells products manufactured or marketed by the franchisor in the franchised company, the service franchise agreement, in which the franchisee provides services to third parties under the distinctive signs and control of the franchisor and, finally, the production franchise agreement, in which the franchisee manufacture products which he sells under the signs and control of the franchisor.<sup>9</sup>

It is clear that this type of contract – the *franchising* contract – in order to be fully implemented between the franchisor and the franchisee, and in view of its many subdivisions – distribution, services and production – implies in its actual consummation the use of various legal instruments specific to private law, namely the use between the parties of purchase and sale contracts, staff training and technical assistance contracts, contracts for the use of industrial property rights, In other words, the practical execution of the *franchising* contract, and in view of its complexity, brings together and incorporates in its practical effectiveness a vast set of contracts that are essential for the concrete operation of the company by the franchisee<sup>10</sup>, which imposes a multiplicity of business configurations, as the doctrine rightly points out.<sup>11</sup>

Regarding the conceptualisation of '*franchising*', the European Union has also defined its content and scope through Article 1(3) of Commission Regulation (EEC) No. 4087/88 of 30 November 1988 on the application of Article 85 (3) of the Treaty to categories of franchise agreements, which demonstrates the importance of this means of business expansion and the creation of new companies both at the level of the Member States and the European Union as a whole.<sup>12</sup>

Now that we've got there, let's take a look at its essential '*features*'.

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<sup>8</sup> About these characteristics see, among others, Engrácia Antunes, José A., *op. cit.*, pp. 451–458; Correia, Rui Tavares, *Contratos Comerciais*, 2019, Nova Causa, Edições Jurídicas, Braga, Portugal, pp. 63-78.

<sup>9</sup> On the various types of *franchising* contracts, see Correia, Rui Tavares, *op. cit.*, pp. 63–78 e Engrácia Antunes, José A., *op. cit.*, pp. 451–458.

<sup>10</sup> In this sense, see Pita, Manuel António, *op. cit.*, pp. 347-349.

<sup>11</sup> See Weber, Hansjörg, „Franchising — Ein Neuer Vertragstyp im Handelrecht”, in: 15 *Juristische Arbeitsblätter* (1983), pp. 347–353, as well as the multiplicity of notions in the doctrine, see Ribeiro, M. Fátima, *O Contrato de Franquia*, pp. 144 e segs., Almedina, Coimbra, 2001.

<sup>12</sup> Commission Regulation (EEC) No 4087/88 of 30 November 1988 on the application of Article 85 (3) of the Treaty to categories of franchise agreements. Article 1 – Number 3: 3. For the purposes of this Regulation: (a) 'franchise' means a package of industrial or intellectual property rights relating to trade marks, 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; (b) 'franchise agreement' means 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; it includes 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, - the communication by the franchisor to the franchisee of know-how, - the continuing provision by the franchisor to the franchisee of commercial or technical assistance during the life of the agreement; (c) 'master franchise agreement' means 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 franchisees; (d) 'franchisor's goods' means goods produced by the franchisor or according to its instructions, and/or bearing the franchisor's name or trade mark; (e) 'contract premises' means the premises used for the exploitation of the franchise or, when the franchise is exploited outside those premises, the base from which the franchisee operates the means of transport used for the exploitation of the franchise (contract means of transport); (f) 'know-how' means a package of non-patented practical information, resulting from experience and testing by the franchisor, which is secret, substantial and identified; (g) 'secret' means that the know-how, as a body or in the precise configuration and assembly of its components, is not generally known or easily accessible; it is not limited in the narrow sense that each individual component of the know-how should be totally unknown or unobtainable outside the franchisor's business; (h) 'substantial' means that the know-how includes information which is of importance for the sale of goods or the provision of services to end users, and in particular for the presentation of goods for sale, the processing of goods in connection which the provision of services, methods of dealing with customers, and administration and financial management; the know-how must be useful for the franchisee by being capable, at the date of conclusion of the agreement, of improving the competitive position of the franchisee, in particular by improving the franchisee's performance or helping it to enter a new market; (i) 'identified' means that the know-how must be described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality; the description of the know-how can either be set out in the franchise agreement or in a separate document or recorded in any other appropriate form. See Commission Regulation (EEC) No. 4087/88 of 30 November 1988 on the application of Article 85(3) of the Treaty to certain categories of franchise agreements. (1988). Official Journal, L 359, 46–52. ELI: <http://data.europa.eu/eli/reg/1988/4087/oj> [legislation]

### 3. Characteristics

We characterize the ‘franchise contract’ as an ‘*atypical contract*’, as it does not have its own discipline<sup>13</sup> in Portuguese private law and is therefore an ‘*unnamed contract*’ as it does not have a ‘*nomen iuris*’, but we consider it to be a socially clearly delimited contract<sup>14</sup>, and it is obviously a ‘*consensual contract*’<sup>15</sup> as, As a general rule, it does not require a specific form for its conclusion, but it should be borne in mind that in view of the possible elements included in it, for example licenses to exploit private industrial property rights, it may have to be done in a special way, for example in writing.

It is an ‘*intuitus personae contract*’<sup>16</sup>, insofar as it is extremely important for the franchisor to know who specifically is going to be part of its business network. It is also, of course, an ‘*onerous contract*’<sup>17</sup>, since the franchisor obviously wants to make a profit and, therefore, by entering into it, wants to obtain compensation paid by the franchisee, who, as a result of the contract, is obliged to pay money, which usually includes an initial payment – *front money*, *droit d’entrée* – followed by payments proportional to turnover – *royalties*, *redevances* – throughout the contractual term.

It is considered to be a ‘*framework contract*’<sup>18</sup>, since its effectiveness is based on the constant realization between the parties – franchisor and franchisee – of a set of rights and obligations that will materialize in future contracts, namely purchase and sale contracts, both between them and with third parties.

Finally, we would say that we are dealing with a ‘*lasting contract*’<sup>19</sup>, since its execution between the parties – franchisor and franchisee – lasts for the duration of their business activities.

Looking at this *franchising contract*, as an authentic ‘*framework contract*’ between parties<sup>20</sup>, it is clear that it contains the obligation to indicate the distinctive elements of the social type of *franchising* in question, such as the use by the franchisee of the ‘*business image of the franchisor*’, the transmission by the franchisor to the franchisee of its ‘*Know-how*’<sup>21</sup> and the necessary ‘*technical assistance*’, in addition, of course, to the subordination of the franchisee to the ‘*control and supervision*’ by the franchisor.<sup>22</sup>

In addition to this set of essential elements, this type of contract also incorporates a wide range of secondary elements in view of the specific *franchising* business undertaken by the parties, namely exclusivity clauses, minimum ‘*stocks*’ acquisition clauses, financial and accounting assistance clauses and non-competition clauses.<sup>23</sup>

Having analyzed its ‘*characteristics*’, we then move on to analyse the ‘*legal regime*’ applicable to it.

### 4. Legal regime

As we have already seen, the *franchising contract* does not have its own regime, so according

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<sup>13</sup> In this sense, see Engrácia Antunes, José A., *op. cit.*, pp. 451–458 e Rui Tavares, *Contratos Comerciais*, 2019, Nova Causa, Edições Jurídicas, Braga, Portugal, pp. 63–78. However, sustaining the legally typical nature, see Perfetti, Ubaldo, *La Tipicità del Contratto di Franchising*, in: 1 RDP (1991), pp. 29–59.

<sup>14</sup> In this sense, see Pita, Manuel António, *op. cit.*, pp. 347–349.

<sup>15</sup> *Idem*.

<sup>16</sup> In this sense, see Malaurie-Vignal, Marie, «*Intuitus Personae*» et *Liberté de Concurrence dans les Contrats de Distribution*, in: JCP-EE (1998), pp. 260–263.

<sup>17</sup> In this sense, see Correia, Rui Tavares, *op. cit.*, pp. 63–78.

<sup>18</sup> On the nature of franchising as a framework contract, see Vasconcelos, L. Pestana, *op. cit.*, pp. 49. Assimilating the franchise to a license agreement for the exploitation of the company, see Pereira, A. Dias, *Da Franquia de Empresa (‘Franchising’)*, in: LXXIII BFDUC (1997), pp. 251–278.

<sup>19</sup> In this sense, see Correia, Rui Tavares, *op. cit.*, pp. 63–78.

<sup>20</sup> On the nature of franchising as a framework contract, see Vasconcelos, L. Pestana, *op. cit.*, pp. 49 e seg. Assimilating the franchise to a license agreement for the exploitation of the company, see Pereira, A. Dias, *op. cit.*, pp. 251–278.

<sup>21</sup> On its contractual dimension, see Dias, G. Figueiredo, *A Assistência Técnica nos Contratos de Know-How*, pp. 35 e segs., Coimbra. Editora, Coimbra, 1995.

<sup>22</sup> On all these aspects that we have just mentioned, see Pita, Manuel António, *op. cit.*, p. 347–349.

<sup>23</sup> See, among others, Engrácia Antunes, José A., *op. cit.*, pp. 451–458.

to Article 405 of the Portuguese Civil Code, the parties are governed by ‘Freedom of Contract’. In other words, the contractual parties<sup>24</sup>, the franchisor and the franchisee, have complete freedom to establish in the *franchising* contract the clauses which should govern the contract between the contracting parties, which means that when there is a need to fill contractual gaps, the parties have to resort, through integration by ‘*analogia legis*’, to the rules necessary to legally solve the specific gap and which are contained in the ‘*agency contract*’ published by Decree-Law no. 178/86, on July 3, 1986<sup>25</sup>, as this type of contract is the closest to the object of the ‘*franchising contract*’.

According to the doctrine, the most common contractual gaps between the parties, which the parties therefore need to use the legal rules contained in the ‘*agency contract*’ to fill, are those relating to the cessation of the contract<sup>26</sup>, compensation for clients<sup>27</sup> and compensation for non-competition.<sup>28</sup>

In order to interpret and apply this contract, the parties must also take into account all the other legal rules necessary to regulate it, in particular the necessary general rules of Civil Law, especially those relating to the manifestation of the ‘Negotiating Declaration’, in particular article 217 et seq. of the Civil Code, the legal rules relating to adhesion contracts General Contractual Clauses Law – LCCG<sup>29, 30</sup>, as well as the rules governing trademark licenses or other private industrial property rights, in particular articles 31 and 262 et seq. of the Industrial Property Code – CPI.<sup>31, 32</sup>

As for the rules governing competition between the parties to this type of contract, see article 9 et seq. of the General Competition Law – LGC, approved by Law no. 19/2012, of May 8<sup>33</sup>, and whose control of compliance is the responsibility of the Competition Authority, as governed by the ‘statutes of the Competition Authority’ approved by Decree-Law no. 125/2014, of August 18<sup>34, 35</sup>, in addition to all the rules relating to jusinsolvencial discipline.

## 5. Conclusions

If we take into account the progressive increase in companies in the *franchising* system, both as franchisors and as franchisees, *franchising* has contributed to a significant increase in the business fabric in Portugal, in line with what is happening in the rest of the world. It is easy to conclude that there is a growing importance in the (re)analysis of this type of contract – the ‘*franchising contract*’ – which, despite not being a contract with its own discipline in the Portuguese legal system, draws on various sources of Portuguese law for the necessary legal discipline, especially the ‘agency contracts’, published by Decree-Law no. 178/86 on July 3, 1986, on the ‘agency contracts’, as this is the contract which most closely resembles the final return sought by the parties – franchisor and franchisee – in the ‘*franchising contract*’, with the parties thus resorting to the necessary integration via ‘*analogia legis*’ in order to eventually resolve the gaps they find in the contractual clauses they have inserted in each of the specific ‘*franchising contracts*’ entered into between them.

<sup>24</sup> Idem.

<sup>25</sup> Consultable em <https://diariodarepublica.pt/dr/analise-juridica/decreto-lei/178-1986-228268>, consulted on 1.05.2024.

<sup>26</sup> On termination of contract see Pita, Manuel António, *op. cit.*, pp. 347–349.

<sup>27</sup> On the specific issue of ‘client compensation’, see Correia, Rui Tavares, *op. cit.*, pp. 63–78.

<sup>28</sup> On the issue of indemnification of the franchisee’s clientele, see Sequeira, E. Vaz, *Contrato de Franquia e Indemnização de Clientela*, pp. 460 e segs., in: ‘*Estudos Dedicados ao Prof. Doutor M. J. Almeida Costa*’, pp. 439–485, UCP Editora, Lisboa, 2002.

<sup>29</sup> See the Decreto-Lei n.º 446/85, de 25 de October and Consultable in [https://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?nid=837&tabela=leis&so\\_miolo](https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=837&tabela=leis&so_miolo), consulted on 1.05.2024.

<sup>30</sup> For further developments, see Ekkenga, Jens, *Grundfragen der AGB-Kontrolle von Franchise-Verträgen*, in: 34 AG 1989, pp. 301–316.

<sup>31</sup> Consultable [https://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?ficha=201&artigo\\_id=&nid=2979&pagina=3&tabela=leis&nversao=&so\\_miolo=](https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?ficha=201&artigo_id=&nid=2979&pagina=3&tabela=leis&nversao=&so_miolo=), consulted on 1.05.2024.

<sup>32</sup> For more on this subject, see Burst, Jean-Jacques, *Droits de Propriété Industrielle et Franchise*, in: ‘*Mélanges Offerts à Albert Chavanne*’, pp. 203–211, Litec, Paris, 1990.

<sup>33</sup> Consultable em [https://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?nid=1705&tabela=leis](https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1705&tabela=leis), consulted on 1.05.2024.

<sup>34</sup> Consultable em [https://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?nid=2206&tabela=leis&so\\_miolo=](https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=2206&tabela=leis&so_miolo=), consulted on 1.05.2024.

<sup>35</sup> For more on this subject, see Cunha, M. Gorrão-Henriques, *Da Restrição da Concorrência na Comunidade Europeia: A Franquia de Distribuição*, especialmente 333 e segs., Almedina, Coimbra, 1998. Noutros quadrantes, Epp, Wolfgang, *Franchising und Kartellrecht*, C. Heymanns, Köln, 1994.

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