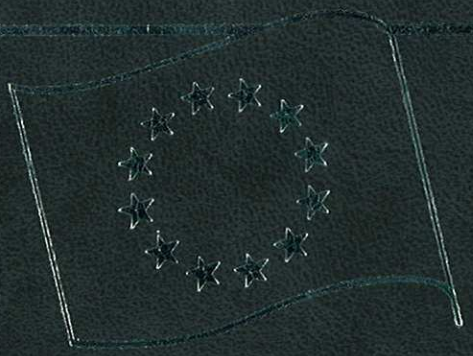
European Franchising



Law & Practice in the European Community

MARK ABELL

EUROPEAN FRANCHISING

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Volume 2

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By MAITRE OLIVIER GAST, Advocate at the Paris Bar

3.1 INTRODUCTION

Franchising has undergone considerable expansion in France. It accounts for over 800 franchisors, 40,000 franchisees and a turnover which represents almost 10% of French retail trading. This growth has been favoured by:

- A training school, the Institute for the Promotion of Franchising, in Colmar;
- A journal, *Franchise Magazine*;
- An annual salon, Le Salon International de la Franchise, the first in the world, a valuable meeting place for franchisors and franchisees and which this year received more than 35,000 visitors; and
- A trade association, La Fédération Française de la Franchise, devoted to developing, promoting and defending franchising, a notable achievement of which has been to work out a code of technical terms.

France is thus the uncontested leader in franchising in Europe with 50% of European franchises.

3.2 GOVERNMENT STRUCTURE

France is a democracy. The present constitution dates from 1958. It consists of a parliamentary system but one in which the great majority of legal instruments emanate from the executive. Laws are usually proposed by the government and then adopted by Parliament. However, some laws make reference to a ministerial order for detailed application. In such cases, before the law can be enforced, an order must be made by the relevant ministry. This is the case for the Loi Doubin.

The Socialist Party is the largest in France, followed by the more conservative parties, the RPR and the UDF. At present a strong resurgence of the extreme right, represented by the National Front, and a net decline in the Communist Party can be discerned. The ruling Socialist Party is exercising a liberal policy favouring the emergence and development of small businesses, and also of franchising. Thus the government has introduced the Law of 31 December 1989 (the Loi Doubin), of which article 1 imposes on the franchisor the obligation of providing information to enable the profession to be cleaned up and to attract new recruits to franchising.

3.3 FOREIGN INVESTMENT

3.3.1 Establishment of businesses

In general, the government is not unfavourably disposed to the management or ownership of businesses in France by foreigners.

Management of businesses in France by foreigners requires the issue of a foreign businessman's permit for persons not coming from a member state of the Common Market and for those not holding a residence permit.

Ownership of businesses situated in France by foreigners is controlled by the rules for direct investment in France.

The participation of foreign businesses in French enterprises is the subject of specific control when it is considered as direct foreign investment in France.

Decree No. 90/58 of 15 January 1990, modifying and extending decree No. 89/938 of 29 December 1989, as well as a circular of 15 January 1990 relax the rules on foreign investment in France, facilitating the participation of foreign businesses in France.

By 'direct investment' is to be understood:

- the purchase, creation or extension of commercial funds, branches or entire enterprises of a personal character; and
- any other operation having the effect of permitting one or more persons to take or accumulate effective control of a company engaged in industrial, agricultural, commercial, financial or property activities of whatever type, or of effecting the enlargement of such a company already under their control.

Participation by a foreign enterprise is considered direct foreign investment and thus subject to control, when it exceeds 20% of the capital of a French company on the stock exchange, or when it exceeds 33.3% of the capital of an unquoted company.

These thresholds of participation are not absolute and the Administration can fix a different threshold to take account of the reality of the control exercised, and notably of other elements than the mere percentage of capital or voting rights held.

Thus a French company can be considered as under foreign control even when foreign participation in its capital is very low if this participation is accompanied (for example) by exercise of patent rights, of licences, of commercial agreements or of technical assistance putting the company in which the investment has taken place in a situation of dependence on the investor.

If any doubt exists over the effectiveness of control which the taking of a stake can entail, the interested parties ought to consult in writing the relevant administration to find out whether or not the operation ought to be considered as a case of direct investment.

Once direct investment has been identified, then the system differs according to whether the foreign investor is of Community origin or not.

In fact there is a dispensation from prior administrative authorisation for all direct investment in France by European

investors with an annual turnover of over 1,000 million francs which have been in business for 3 years. An obligation of prior disclosure is put on other investors of Community origin, but the administration is only allowed a period of 15 days in which to check the nature of their Community connection. However, operations connected with public order, public health and public security remain subject to authorisation.

Investments from outside the Community totalling over 10 million francs are subject to prior authorisation by the Administration. Such authorisation can be assumed after a delay of 1 month, except that the Minister of the Economy, Finance and Budget has a right of adjournment in cases affecting the national interest.

France offers investment incentives to foreign companies which wish to undertake commercial activities, notably by exempting these companies from control over foreign investment in France.

Thus the following are specifically exempt from disclosure and prior authorisation:

- creation of branches or new businesses;
- extension of activity by an existing business; and
- direct investment operations limited to a total of 10 million francs in craft enterprises, hotels, retailing or various commercial services.

Creation of businesses in France is encouraged in a more general manner. This notably translates into tax advantages and regional assistance in the form of grants by local authorities. Secured loans can be given to small businesses to finance their investments and notably to shopkeepers and providers of services to enable them to join a franchise network.

In order to achieve flexibility the state can vary the various forms of aid during the course of the year and it is necessary to confirm with the relevant organisations or with the Internal Commerce Directorate the exact form these aids take at any given moment.

Transfer of business profits is no longer subject to any particular conditions as the result of the abolition of exchange controls on them (see 2.2).

As part of its 1992 programme, France plans to pursue its policy of encouraging foreign investments in France.

In fact, keen competition is developing among the countries of the twelve in Europe to attract extra-Community investment. France's concern is that businesses should locate their activities in France rather than in another European country. This is why the policy of welcoming foreign investment will be reinforced.

In relation to nationalisation, the government's present policy is to privatise industries. The risk of a foreign business in France being nationalised is very small.

3.3.2 Exchange control

The last restrictions relating to exchange controls on business enterprises and banks are being lifted. The only obligations that remain are:

- A statistical declaration to the Banque de France to help determine the balance of payments;
- A customs declaration on the import into or removal from France of cash, bonds or securities worth over 50,000 francs; and
- Specific requirements on direct foreign investment in France.

Current operations involving transfer of funds abroad are covered by a blanket authorisation, transfers being made by virtue of powers delegated to authorised intermediaries. No special permission is required but transactions depend on submission of the correct documents to the banks or the Post Office. This particularly concerns the following operations: transactions relating to imported goods, interest and dividends, compensation payments, patent and copyright royalties, the cost of registering patents and trade marks abroad, and transfers and profits. For example, in order to prove that a trade mark has been registered abroad, it will be sufficient to provide an invoice from the administrative body in charge of such registration. In respect of payment for imported goods, it is sufficient to produce an invoice.

Transfers by residents to foreign destinations or in France to the account of non-residents can be made as follows:

- By payment in francs or in foreign currency made by an authorised intermediary, the Post Office or official of the Treasury; or
- By franc or foreign currency cheque. Cheques can be sent to foreign suppliers by post.

Accordingly, the decree of 9 March 1989 permits authorised intermediaries (banks) and the Post Office to transfer sums of any amount on production of documents justifying the payment. These new regulations allow on the one hand for transactions for goods and services between France and abroad and on the other for private transactions such as gifts, loans and insurance payments. However, this facility cannot be used as a means of circumventing foreign controls.

The exchange control authorities have no power at law to revise or require modifications to royalties or licence agreements. It follows that there is no requirement to obtain their approval.

Nor do the exchange control authorities have any particular policy in regard to payments on royalties or other costs. However the tax authorities can in some circumstances question the deductibility of these payments by the debtor business if they belive that these payments constitute an indirect transfer of profits abroad (see section on taxation).

The procedure to be followed for investing capital in France has been described at 2.1. Only when they take the form of a consolidation or abandonment of properly constituted obligations must payments between residents and non-residents relative to direct investment be made in the prescribed form.

Before proceeding to make payments for which they have been instructed, intermediaries (authorised by article 2 of decree No. 89/938) must obtain the necessary documentation

as well as the information they require to make or check the accounts which they are obliged to submit at specified intervals to the administration.

In summary, exchange control has been virtually abandoned except for the few formalities described above.

3.4 BUSINESS STRUCTURE

It is possible to carry on business in France by different means – by setting up a branch or subsidiary in the territory, or by a joint venture agreement with one or more French companies.

Setting up a subsidiary presupposes the creation of a company, either limited by guarantee or limited by shares, the latter option being generally chosen. After drawing up the articles of association, issuing the shares and registering the company at the Commercial and Company Registry, it is necessary to issue various documents for the information of third parties.

Setting up a branch or joint venture agreement requires no particular formalities. When this is done by a foreign business, it will be subject to the rules on direct foreign investment (see 2.1). The two principal types of company limited by shares are the *société anonyme* (SA – public limited company) and the *société à responsabilité limitée* (Sarl – private company).

There are no *a priori* obstacles to a foreign franchisor dealing directly with French franchisees. No registration is required.

When a foreign company sets up a branch in France, the company bears unlimited liability for the latter's acts. In the case of a subsidiary, the existence of a distinct legal personality imposes a barrier to the liability of the parent company being engaged unless it can be proved that the latter is inextricably enmeshed in the management of its subsidiary.

3.5 SUBSTANTIVE LAW

3.5.1 Competition Law

Article 1 of the Law of 31 December 1989 imposes on the franchisor the obligation to provide the franchisee with certain pre-contract information. The exact form which this will take will be laid down in a statutory instrument which has not yet been published.

The ordinance of 1 December 1986 is designed to encourage free trade. It guarantees, on the one hand, freedom to fix prices and on the other, it prohibits restrictive practices such as those that reduce competition. These last are of two types and consist largely of the incorporation of articles 85 and 86 of the Treaty of Rome into national legislation.

Exclusive territory clauses are only prohibited when their anti-competitive effect is excessive. Such clauses ought not to have the effect of obliging a party to refuse a sale, which is prohibited. Thus an exclusive agreement may forbid a distributor from pursuing an actively competitive policy outside his territory but it cannot prevent him from selling to consumers outside his territory when they order from him.

Exclusive distribution agreements are not expressly forbidden by the statutes. However, they condemn 'concerted actions, conventions, express or tacit agreements or coalitions ... when they tend to limit free access to the market or the free exercise of competition by other business'. Anti-competitive practices can nonetheless be justified when they result from following the requirements of a law or regulation, or when it can be shown that they will ensure economic progress and that they allow customers a reasonable share of the resulting profits, without giving the businesses concerned the opportunity of eliminating competition for a substantial part of the products concerned. Restrictions can only be imposed on competition insofar as they are essential for attaining that objective of progress.

Certain categories of agreements, notably those aimed at improving the management of small and medium-sized enterprises, can be recognised as satisfying these conditions by decree issued after seeking the advice of the Competition Council.

The Competition Council was created by a Parliamentary Order dated 21 December 1986. Parliament enabled its creation by allowing the government to adopt a text in the form of a law; this is in other respects a Parliamentary Order.

The Competitions Council is comprised of sixteen members as follows:

Seven senior Magistrates who select four individuals with particular expertise in economics and competition. There are also five further members drawn from various other areas of expertise.

The Council advises upon all questions of competition at the request of the Government or other organisations. It is obligatory to consult the Council in respect of all draft laws which may have the effect of submitting the exercise of a profession or access to a market to quantitative restrictions, establishing exclusive rights in respect of certain areas, or imposing uniform practices in respect of prices or conditions of sale.

Horizontal agreements are only allowed under the same conditions as vertical ones (see text immediately above).

Imposing agreed prices or margins, directly or indirectly, constitutes a criminal offence. The supplier can only impose a maximum price or publish a range of recommended prices; clauses prescribing this last type of arrangement are studied very closely by the administration and the courts.

Refusal to supply is unlawful under French law unless the seller can establish that the demand is abnormal because of the quantities ordered, the method of delivery demanded by the purchaser, the purchaser's status (particularly the absence of any recognised trade qualifications), or his financial standing. The second exception to the illegality of a refusal to sell comes into play when the purchaser is acting in bad faith.

Article 36-1 of the ordinance of 1 December 1986 prohibits the exercise of any discrimination as regards an economic partner if this creates for the partner any competitive advantage or disadvantage. Such discriminatory practices

could consist of variations in prices, delayed payment terms, or discriminatory conditions or means of sale not justified by prevailing circumstances, such as the importance of the quantities sold or the services performed by clients or suppliers.

Agreements not to compete are prohibited by article 7 of the 1986 ordinance, which forbids understandings having the effect or object of preventing, restraining or distorting the free flow of competition in a market, particularly when they tend to:

- Limit access to the market or the free exercise of competition by other businesses;
- Create obstacles to the fixing of prices by market forces by artificially encouraging their rise or fall;
- Limit or control production, release, investment or technical progress; or
- Allocate markets or sources of supply.

Exclusive supply agreements are allowed but they must not leave the determination of goods or supplies to the judgment of the supplier. Also, by judicial interpretation of article 1129 of the Civil Code it has been decided that prices of articles or merchandise must be determined or determinable in an objective manner, independently of the unilateral act of either party.

Sales with surcharges, tied sales which impose on the purchaser the obligation to buy a certain quantity or a product or service other than that originally chosen and sales at a loss are all forbidden.

By article 12 of the ordinance of 1986, the Competition Council can, after hearing the parties to the case and the government commissioner, take certain preventative measures requested by the minister in charge of the economy against a range of organisations and businesses. These measures can only be taken if the practices complained of constitute a grave and immediate risk to the economy in general, to a particular part of it, to the interests of consumers or to the complainant business. They can consist of a suspension of the practice concerned or an injunction requiring parties to return to the previous state of affairs. They must be strictly limited to whatever is necessary to rectify the situation urgently.

The Competition Council can also order interested parties to put a stop to anti-competitive practices within a given time limit or impose special conditions. It can impose a financial penalty, either at once or in case of failure to comply with an injunction. The maximum penalties which the Competition Council can inflict are limited to 5% of pre-tax turnover during the last financial year and 10 million francs in an individual case.

Criminal prosecutions in a personal capacity of those who have taken a significant part in a case of abuse of dominant position or an illicit agreement can only be undertaken by the Public Prosecutor's Department before the Cour Correctionelle. The penalty is a fine of between 5,000 and 500,000 francs. Those found guilty can also be required to compensate third parties for any damage they have suffered. A private individual or a company can sue through the civil courts.

When injunctions imposed by the Competition Council consist of financial sanctions conditional on future conduct, they do not have to be confirmed by a judge. Recourse to the Court of Appeal in Paris only lies for suspension of an order and only then when it can be shown that obeying the injunction would result in manifestly excessive consequences, or when new facts of exceptional importance have come to light since its imposition. The Competition Council can also decide if its judgment or a summary of it is to be published. Only the civil courts have the right to declare an instrument or clause void and to award damages.

Once a prosecution has been undertaken, abandonment of any civil case need have no effect on the Public Prosecutor, although he is free to shelve the case. A civil case can be settled between the parties at any time. It is of course possible that no court will be asked to rule on a practice examined by the Competition Council.

Compensation for damage suffered (with costs) can be obtained from the courts, which however construe strictly such claims for damage, which must be direct and certain. Advocates' fees tend to be reduced on taxation.

French law on competition is founded in the Treaty of Rome. In all cases, international conventions are recognised as taking precedence over national legislation and as being of direct effect.

So far as is known, no reform of French competition law is contemplated.

3.5.2 Law on franchising

There is no law specifically applying to franchisors, apart from article 1 of the Law of 31 December 1989 (see below).

By virtue of the interpretation they have placed on the Decree of 23 December 1958, by a process of judicial precedent which seems at variance with the actual text, the courts give commercial agents working under an indeterminate contract the right to an indemnity against clients' claims payable by the principal on signature of the contract; but this right would not seem to apply to franchisees, who are independent businessmen.

The present government, which has a liberal economic policy, favours the creation and development of small and medium-sized businesses and thus of franchising in general. The government supervises the development of channels of distribution through the Directorate-General of Competition, Consumer Affairs and Prevention of Fraud (DGCCRF). The influence of the DGCCRF is considerable, since it can run a policy of either assistance or prevention according to the circumstances.

There are no registration or prior licensing requirements relating to the creation of distribution channels.

A contract can be either for a fixed term or indeterminate. Refusal to renew a fixed-term contract can be regarded as an abuse when it cannot be justified by proper motives. An indeterminate contract can be terminated at any time, subject to case law on abuse of legal powers. This case law also requires that transfer of know-how be formalised in an operations manual which should be supplied no later than the

commencement of trading. Know-how must also be specific, secret, substantial and identifiable.

As a general rule, total licence fees are fixed each month at from 3 to 7% of turnover of the franchisee, who ought also to participate in the franchisor's publicity expenses up to a limit of 2 to 4% of his own turnover.

Normally, improvements in know-how are not the object of a specific payment. But when the initial term of the contract expires, the franchisor will negotiate a new grant of rights unless there is a contrary provision in the initial contract which will have to be tightly drawn.

In order to ensure the quality of his products, the franchisor will often impose on franchisees a requirement to buy exclusively from him or from agreed suppliers. It is always possible for a franchisee to obtain supplies from other franchisees.

Exclusive territory clauses are found in most franchising contracts to protect the interests of the franchisee, although according to judicial decision their absence does not render the contract void (as is sometimes alleged).

Arbitration clauses may nominate a foreign arbitrator if desired.

In international contracts, it is legitimate to specify that they will be interpreted in accordance with a foreign system of law or that they will be subject to a foreign jurisdiction.

It has been established by case law that know-how is a recognised property right of the franchisor and he can protect it through secrecy and non-competitive activity clauses, but the latter can only survive termination of the contract if limited in scope, in place of operation and in time. One can stipulate that the former extends to the franchisee's employees.

Grounds for, and conditions of, cancellation must be expressly stated.

A clause requiring a franchisee to reach a minimum turnover figure is permitted, although in the absence of such a clause, the courts will not imply one.

A contract signed by a French citizen and whose place of execution is in France must be written in French (Law of 31 December 1975).

Under article 34 of the parliamentary order of 1 December 1986, it is forbidden to impose minimum prices, but maximum prices and guide prices are permissible.

Contracts are usually signed by a sole franchisee individually.

It is possible to stipulate that sale of his business by the franchisee be subject to the agreement of the franchisor. But the franchisee is never allowed to become a prisoner of his franchise. If the franchisor rejects all new franchisees, he must acquire the business himself on conditions (failing agreement) determined by an arbitrator or an expert appointed by the court. Sale of parts of the franchise can be made subject to the same conditions.

Generally speaking, the franchisor will organise national publicity with a predetermined contribution by the franchisee, who will be responsible for local publicity subject to approval by the franchisor of how it is carried out.

The franchisee is usually required to furnish a monetary guarantee on behalf of his company.

Franchising contracts obey the principle of freedom on contract and there is no specific legislation determining their content.

The consequences of a refusal to renew or of a rejection of a contract are determinable according to the good faith (or otherwise) of their author. It is not possible to enforce performance of a contract but it is possible to award damages to the other party in case of abuse.

If the contract is for a fixed term, it usually expressly includes or excludes its tacit continuance. Even if it is excluded, the contract will often provide that the party wishing to terminate must notify his intention to the other party at least six months before the date of expiry. There is no set form. Termination of an indeterminate contract should be in writing with reasonable notice in the absence of a specific provision in the contract.

If the break is made in good faith and under normal conditions, there will be no right to an indemnity. If the breach is judged an abuse, the amount of any damages will be calculated by the court, which will take account of the resulting loss and the lack of opportunity for profits. Damage must be direct and certain; the position is summed up in the adage 'All the damage and nothing but the damage'.

In accordance with the law of 14 October 1943, contracts for exclusive supply are limited in their duration and cannot last for more than 10 years. One must also bear in mind any EEC regulations which are of direct effect in France.

The Law of 31 December 1989 (the Loi Doubin)

Under article 1 of the Loi Doubin of 31 December 1989, a document containing specified information must be sent to the franchisee 20 days before signature of the contract or 20 days before payment of any sums of money. Contents of this document are laid down in an enabling Decree of 4 April 1991 (see Volume 1, Appendix 17). The franchisor will have to describe his business, his experience, his supply network and his methods of operation. Certain essential clauses in the contract will have to be divulged, such as the conditions for termination. Finally, the franchisor's future plans will have to be stated.

The new disclosure requirements flowing from the Loi Doubin reflect a new approach to contract law depending as much on legal theory and precedent as on the wording of the Law. Under this approach, protection of the weaker party is effected by a descriptive and preventative requirement.

Article 1 of the Loi Doubin expresses clearly this new equitable approach. There is no need to paralyse relations between the parties by detailed regulation. Freedom of choice in contract is preserved, but this choice must be an informed one. Thus the Law imposes on the supposedly stronger partner the obligation of giving his future contract partner certain specified information which will allow the latter to sign the contract in full possession of the facts.

A wide field of application

Although often described in the press as no more than a law on franchising, the field of application of the Law is in fact much wider. Many other types of contract are covered

provided they satisfy the conditions in Article 1(1) of the Law, that is to say if they impose a requirement of exclusivity or quasi-exclusivity on the exercise of the activity concerned. This would cover, for example, contracts for concessions, partnership, various uses of trade marks on an exclusive or quasi-exclusive basis and certain co-operatives, and a good number of contracts of a similar type.

Every contract made under French law which fulfills the conditions below must be preceded by disclosure. Where a contract is made under foreign law but executed in France, prudence dictates that the disclosure requirements should be followed.

(a) *Permission to use identifying signs*

The text mentions 'every person', which must include artificial persons (corporations) as well as natural persons, business people and non-business people.

The identifying signs listed by the Law are 'a business name, a mark or an insignia'. This list would seem to cover every situation in which a consumer approaches a business by reason of the latter's distinctive trading sign. Logos are specifically covered, since the legal definition of a logo is of a figurative mark.

(b) *An obligation of exclusivity or quasi-exclusivity*

For an obligation of prior disclosure to apply, there must be an undertaking of exclusivity or quasi-exclusivity in favour of the person who is to be allowed to use the mark or insignia concerned. It is apparent from the text as well as from the parliamentary debates that the exclusivity foreseen is essentially one of supply.

The notion of quasi-exclusivity is more complex. When can one say that quasi-exclusive supply begins?

Despite a certain amount of case-law surrounding interpretation of Article L.781–1 of the Employment Code which could provide a partial answer to this question, it is preferable for operators potentially liable for pre-contractual disclosure to avoid the problem by supplying the relevant information document.

The burden of disclosure

(a) *Obligations on the discloser*

In considering the information to be disclosed, it is necessary to keep constantly in mind the spirit of the provisions of Article 1(1) of the Law. The information given must be 'sincere' and permit the other party to 'contract in full knowledge of the facts'. Combination of the two requirements places a heavy burden on the discloser, because false information can be 'sincere' if the error was made in good faith, but it would not permit a contract to be made 'in full knowledge of the facts'.

What should the discloser understand by the word 'sincere'? The vague nature of the terms employed by the legislators introduces an element of uncertainty which can only be reduced by giving as much information as possible.

Thus we recommend preparation of a document founded on the principle of full disclosure. Even the text of the implementing Decree only provides a guide to the information to be provided. One must constantly bear in mind the need to provide information on all subjects necessary to ensure that the contract is entered into in full knowledge of the facts.

(b) *Provision of certain information*

Provision of some information presents no problem for the discloser, but other items can be more difficult.

For example, take the requirement to present information on 'the general (and local) state of the market for the products or services which are the subject of the contract, and the prospects for development of this market.' Does this mean that the discloser must provide every disclosee with confidential business information which he would wish to conceal from competitiors? Must he inform these same disclosees of the company's future business strategy? This was certainly not the draftsman's intention.

Two pieces of information are required to be provided by Article 1(2) of the Law: the state of the market; and the prospects for its development. What do these notions mean?

The Decree defines the market as that for the goods or services which are the subject of the contract. Thus a presentation of the general state of the market implies a general description of the market in which both the discloser and his competitors are operating. It follows that the description of the general state of the market cannot be confined to the discloser's business.

There is no doubt but that one must communicate to the disclosee the 'state of the places', a national snapshot indicating the state of the competition existing in the market as well as the present position of the market – is it in decline, in expansion . . . ? To get this information one must go to a competent specialist body such as INSEE.

As with the description of the general (and local) state of the market, the 'prospects for the development of this market' only concern information available to all and established by specialist bodies such as that mentioned above. In no case would it involve running the risk of informing potential competitors of confidential internal information about the business.

The question remains: what is the market about which one must describe the 'prospects for development'? Does it mean only the general state of the market, or the local state as well? A systematic presentation of the prospects for development of each zone of activity seems difficult to conceive, if only because of the practical problems which it would involve. Thus it must mean a presentation of the prospects for development of the market as a whole, without specific adaptation, except in the case where special circumstances, such as administrative measures, would make this necessary, because they would impose distortions on the prospects for development between the national and local levels.

Heavy penalties

(a) *Criminal sanctions*

Article 2 of the implementing Decree imposes a penalty in Class 5 for failure to provide the required information (currently a fine of between FF3,000 and 6,000 and/or between ten days' and one month's imprisonment). Article

2(2) prescribes the enhanced penalties in Class 5 for a second or subsequent offence (in this case a fine of between FF 6,000 and 12,000). (See Article R.25 of the Criminal Code.)

Two observations need to be made.

(1) The obligation is one of strict liability. It makes no difference that the discloser was acting in good faith: once he has signed a firm contract without having supplied the required information document no less than 20 days before signature, he is liable.

(2) The rule on non-cumulation of penalties does not apply. This means that the defendant can be condemned to pay the fine mentioned above for each contravention of the requirement to provide prior information.

Thus one cannot advise too strongly persons under the information requirement to make sure they provide all the information required by the implementing Decree.

Another type of contravention, this time intentional, could flow from failing to follow the disclosure requirement placed on franchisors, grantors and other partners, and that is providing an information document that is not only inaccurate but deliberately misleading. In this case one could fall foul of fraud offences such as those covered by Article 405 of the Criminal Code. It is possible to conceive that the information document sent to the prospective franchisee constitutes the use of fraudulent measures if the provider of the information has knowingly uttered an inaccurate document.

It is thus essential to be very careful in preparing the information document.

(b) *Civil sanctions*

There can be no doubt that the provisions of Article 1 of the Law of 31 December 1989 concern public order (and thus cannot be excluded). In fact if they concern *public order of direction*, this would tend to the conclusion that the absence of disclosure would render the contract absolutely void. If however they concern *public order of protection* (as seems more likely, as the provisions of the Law of 31 December 1989 are designed to protect the presumed weaker party by providing him with an informed choice), nullity of a contract made in the absence of disclosure would only be relative. The essential difference between the two types of nullity is that the second can be cancelled by confirmation of the contract.

It remains to consider what happens when a document is furnished in good time but contains inaccurate information.

If the falsity is one on which it is likely the candidate has relied in agreeing to the contract, the contract would be cancelled on the ground of lack of true consent. If it concerns an error made in good faith, it could be cancelled for mistake, and if the error was made in bad faith, cancelled for deception. Clearly liability for the last two cases would differ.

If the document contains information which is partly false and it is not possible to conclude that the inaccuracy persuaded the candidate to contract, nullity of the contract could not, in our opinion, be invoked. Nevertheless the discloser could still be liable for damages for breach of contract.

Conclusion

Disclosure will increase the legal protection enjoyed by disclosees.

For reputable franchisors, the changes will not be all that great, since they would already have provided voluntarily much of the information prescribed by the Law. However, the changes will place on them the task of providing a document whose terms are both formal and sensitive, and whose preparation will need a great deal of care.

3.5.3 Protection of the franchisee

No law confers on the franchisee an automatic right to compensation in the event of the franchisor refusing to renew the contract. One must however take account of the case law under which the good faith of the parties will be examined. The law does not prescribe any period within which contractual requirements must be undertaken, but there again the courts will require a reasonable period. It is better to specify a period in the contract. Apart from the requirements of the criminal law which always apply in France, the contract can be subject to any legal system chosen by the parties.

The franchisee can agree to the exclusion of protective legislation so long as it does not concern public order. In this respect, it seems that the Law of 31 December 1989 falls into this category. It is thus necessary to distinguish between obligatory public order which applies in all circumstances, and protective public order which the beneficiary can agree to exclude *a posteriori*, that is to say after the commencement of contractual relationships, as is probably the case with the law requiring the provision of information for the franchisor.

The franchisee is an independent businessman and can only claim to be an employee in exceptional circumstances. For this to be the case, the franchisor must in effect be virtually the sole supplier, he must supply or control the franchisee's premises, and he must impose his conditions (and above all his prices) on the franchisee. However, we have already seen that the practice of prices being imposed by the franchisor is illegal. It is only when the franchisor treats his franchisees as subordinates, notably by controlling their management and accounting systems, that the courts will be able to reclassify the contract as a contract of employment.

The amount of indemnity due to the franchisees can be established either in the contract, by means of a penalty clause (which can always be revised by the courts), or directly by the courts, which will evaluate, as we have seen, 'All the damage, and nothing but the damage'. It is possible to install a new franchisee immediately after breach of contract by the franchisor. Here the courts cannot force the franchisor to perform the contract, but they can oblige him to pay heavy damages if they consider the breach to have been an abuse.

Any non-competition clause, to be valid, must be limited in effect, area and time. It can be enforced against the franchisee after termination of the franchising contract. However, if there has been a serious breach on the part of the franchisor, it is most unlikely that the franchisor will be able to rely on it. Here again, if EEC law is applicable, it takes precedence over national law.

(NB: To guarantee to the franchisee acquisition of specific, substantial and identifiable know-how, the franchisor is recommended to apply the so-called 'rule of 3/2'. This means that the franchisor must operate 3 outlets himself in the capital and 2 large provincial towns for at least 2 years.)

Where the franchisor terminates the contract without either justification or a legitimate excuse and the franchisee proves that the franchisor did so in an attempt to deliberately prejudice him, the franchisor will be liable.

The contract between the parties may be subject to foreign law. It appears however that the law dated 31 December 1989 which provides that the franchisor is under an obligation to provide the franchisee with an information document 20 days before the signature of the contract should be considered as a law of public order and as a result be deemed obligatory for any franchisor signing contracts in France, notwithstanding that the 'law of the contract' is for example English or Italian.

There are no laws requiring the resolution of disputes before a new franchisee can be appointed. However, if the franchisor installs a new franchisee within a territory which is the subject of litigation with another franchisee, he takes a serious risk. If the magistrates decide that the previous contract has been wrongly terminated by the franchisor, they may hold that the previous franchisee has suffered a loss equivalent to the profit made by the new franchisee.

EC laws of course take precedence over National laws by virtue of article 55 of the 1958 Constitution, subject to ratification by Parliament and reciprocity in their application.

3.5.4 Trade mark law

Protection of manufacturers', trade and service marks is controlled by the Law of 4 January 1991, replacing the Law of 31 December 1964. Under this Law, protection is available to anyone entitled to proprietary rights in the mark, which are established by a system of registration prescribed by the Law.

Registration (its effects are back-dated to the date of application) creates rights in the mark within the limits of the jurisdiction and the class of application: the symbol is protected as a trade mark throughout the whole of French territory, for the goods and services for which it has been registered, as well as for products and services considered similar. Protection is granted for 10 years without further formality or payment and can be renewed indefinitely on expiry.

France is a signatory to the Convention of the Union of Paris of 1883 and to the Arrangement of Madrid on 1891.

A foreign national can obtain registration of a mark in France. There is a registration fee of 580 francs plus 125 francs per usage class. It is not necessary to demonstrate prior use of the mark. The initial registration is valid for 10 years and can be renewed indefinitely every 10 years thereafter. The re-registration fee is 580 francs plus 225 francs per class.

A search of past trade mark registrations is not obligatory, but is highly advisable. The cost of a search is 145 francs for searches of the National Registry of Commerce and Companies, and 255 francs for searches at the National Trade Mark Register. However, it is also possible to have an agent carry out this procedure. The fees will obviously be increased to cover the agent's fees. It is impossible to say exactly how much such agent's fees will amount to as they vary considerably from one firm to another. The work involved amounts to between two and ten hours in respect of the preparation and application for registration of the Trade Mark.

If protection is sought in France by means of an international registration conforming to the terms of the Arrangement of Madrid, it will be necessary to show the existence of a valid 'base' registration in one of the contracting states.

The validity of a mark or of its registration can be put at risk:

- By express renunciation by its proprietor at the trade mark registry. Renunciation can be total or partial. (This usually occurs following an application for rectification by a third party).
- By failure to renew.
- By tacit abandonment. If the proprietor of a mark has tolerated its use by a third party for a fairly long period, he will lose his exclusive rights vis-à-vis that third party.
- If the mark has been subject to too general use. It is then liable to fall into the public domain. However case law has established that this loss of rights in the mark cannot be presumed and a mark falling into the public domain remains an exception.
- By failing to exploit the mark. Non-exploitation of the mark for five years can lead to a successful application for rectification.
- By amendment of the mark by judicial order (as part of the sanctions for an unsuccessful attack on another mark).
- By the mark being declared void by the courts if there has been a breach of the conditions for registration or if the mark itself does not meet the basic requirements for registration.

The same rules apply to service marks as to trade marks.

In the absence of statutory provision, it is possible for a licensee to grant sub-licences to third parties, provided the original licence agreement expressly permits this. However, the granting of sub-licences is not advisable because it can lead to disputes over the distinctive character of the mark as regards the origin of goods bearing the mark. It is much better to draw up a licence agreement direct between the proprietor and the sub-licensee or a three-sided contract between the proprietor, the licensee and the sub-licensee.

With certain exceptions only the proprietor of the mark is competent to sue for misuse or imitation of the mark. He can act on his own, but the licensee can also intervene in an action for misuse brought by the proprietor. However, the rule contains some exceptions. It is not a rule of public order and the licence agreement can contain an express provision

granting the licensee the right to sue for misuse. Also, case law has constantly recognised the right of a licensee to take legal action against unfair competition on the basis of any harm which he has personally suffered.

The proprietor of a mark wishing to stop infringements can take action by:

- Making an informal complaint leading eventually to an out-of-court settlement;
- Negotiation and compromise (or arbitration); or
- Legal action, which can be taken at the plaintiff's discretion either before the Cour de Grande Instance as a civil claim, or by invoking criminal sanctions, which can be more severe (damages can be accompanied by a fine and even by the penalty of imprisonment).

The French usage classes correspond to the international classification of products and services.

Registration procedure begins with deposit of the application for registration, which consists of sending to the Institut Nationale de la Propriété Industrielle (INPI) or to the Greffier of the Commercial Court a model of the mark with a list of the products or services to which it applies and an indication of the relevant usage classes. Deposit can be effected in person or by use of an agent. Deposit is followed by examination of the application by the administration. The examiners scrutinise whether it satisfies the conditions for validity (apart from the availability of the mark). The examination may lead to a decision to reject the application, the reason for which must be specified and notified to the applicant, so that he can (if necessary) consider an appeal.

If the application is not rejected, the mark will be registered, which takes the form of a decision by the Director of the INPI to inscribe the mark in the National Register of Trade Marks and publish it in the *Bulletin Officiel de la Propriété Industrielle*.

The cost of registration will include the cost of search for any prior registration (carried out by the INPI, about 250 francs), the registration fee (580 francs plus 125 francs per usage class) and the fee for effecting the registration, which will vary from one firm to another (the formalities of preparation and deposit involve some two to ten hours work).

The Law of 4 January 1991 on Trade Marks replaces the Law of 31 December 1964 with effect from 28 December 1991.

This Law puts French legislation in conformity with EC Council Directive 89/104 of 21 December 1988 and also introduces a number of innovations, notably by introducing an opposition procedure during the registration period, by limiting the powers of the administration to an examination of the formal correctness of an application for renewal, and by clarifying the position on certification marks which can be used by anyone who fulfills the conditions laid down by the owner of the registration. Ownership of a registered mark is backdated to the day the application for registration was deposited with the INPI.

Writing is no longer a condition of validity of a trade mark licence contract. It is still advisable to insert a clause in the franchise contract expressly covering the marks and insignia and to indicate to the franchisee that registration of this clause with the INPI will entitle him to take legal action to enforce his rights against third parties. Nevertheless the licensee can still take action under three conditions: (1) it must be an exclusive licence; (2) the licence agreement must not contain any clause prohibiting enforcement action; and (3) the licensee must have tried (and failed) to get the proprietor of the mark to take action himself.

3.5.5 Other intellectual property rights

Other relevant intellectual property rights are patents on the one hand, and protection of designs and models on the other. The are considered below.

Patents

A patent is a title granted by the INPI which confers a temporary (20 year) monopoly upon the exploitation of an invention to the person who reveals the invention and provides a sufficient and complete description and makes an application requesting such a monopoly.

This protection and its enforcement are covered by the Law No. 68.1 of 2 January 1968 as amended by Law No. 78.742 of 13 July 1978.

Designs and models

Next to inventions which can be categorised as creations with a technical character which are protectable by patent, there are also creations of an ornamental character of which the object is purely aesthetic. These are known as designs or models.

A design in this context may be defined as the use of lines or colours resulting in a decorative effect of a two-dimensional nature.

A model is a three dimensional figure and may be made in a wide range of materials (wax, porcelain, etc.).

The protection and enforcement of the above is provided by a law dated 14 July 1989 ('the law relating to Designs and Models') and by a law dated 11 March 1957 ('the law relating to Literary and Artistic Property'). These two laws may apply cumulatively in respect of the same object.

Copyright

Copyright exists in respect of all creations, whatever their character. Copyright also exists in respect of designs and models (see the preceding paragraphs), as well as in respect of other creations which do not have the ornamental qualities of designs and models.

The protection and regulation of copyright is provided for in a law dated 11 March 1957. Article 1 of this law provides protection for the author in respect of such creations without the need for a formal application.

3.5.6 Product liability

Responsibility for defective products is controlled by numerous legislative provisions.

Article 1641 of the Civil Code provides for compensation for hidden defects provided that the victim acts within a brief period of discovering the defect, which must pre-date the time of purchase. A product can also be considered defective if it fails to meet the requirements of a contract; the right to sue on it lasts for 30 years. Liability for hidden defects cannot be excluded in contracts with consumers or with professionals from another speciality. An estimatory action allows the plaintiff to sue for a reduction in price and a rehibitory one for cancellation of the sale. A seller in bad faith is also liable for all loss suffered by the purchaser. A seller in the course of business is almost always assumed to know of any defects in his merchandise and thus to be acting in bad faith.

It is also possible to take action against the seller or against the manufacturer for failing to meet his contractual obligations by relying on articles 1137 or 1147 of the Civil Code (depending on whether it concerns an obligation of means or of result). Provision of correct and safe goods is, generally speaking, an obligation of result.

The EEC Directive of 25 July 1985 has not yet been integrated into French law. In this connection one can detect some hesitation in deciding whether it would be preferable to rewrite totally national law on responsibility for defective goods or simply integrate the Directive into existing law. The latter solution appears the more probable.

A manufacturer or seller who has supplied a franchisee with defective products must be prepared to accept responsibility to the final consumer. Implementation of the Directive in member states will have the effect of making producers in member states directly responsible to consumers. Where producers from non-member states are concerned, the responsibility will have to be taken up by the franchisee, and he will have to compensate the consumer victim.

Guarantees which go beyond the legal guarantee on hidden defects should be expressly agreed.

Any penalty clause which prescribes the amount of damages payable by one party to the other in case of failure is a matter for mutual agreement, but it should be remembered that the courts can modify this sum when it is found to be manifestly insufficient or excessive.

3.5.7 Real estate

Foreigners and foreign companies can own land and property in France without any restriction. Nor are there any restrictions on foreigners or foreign companies taking leases.

Foreigners (apart from those from the EEC and holders of a residence permit) who wish to carry on a business in France must possess a foreign businessman's permit. A company is considered French if its registered office is situated in France.

Sub-letting of commercial premises is forbidden unless the head lease permits it or the landlord gives his permission. It also seems possible to let commercial premises under a management contract; which permits the franchisor to retain a commercial interest in the premises.

The Ministerial Order dated 30 September 1953 grants the owner of a business the commercial property rights, a concept which should be distinguished from the rights to the property (building) from which the business is exercised.

The grantee of the commercial property rights has a right to the renewal of the lease of the property (building) which is transferable. The value of business in France is extremely important and it has become very onerous for the proprietor of the building to recover possession.

It is possible in certain circumstances for the franchisor to acquire the business and grant a management licence of the commercial property rights under the terms of the law dated 20 March 1956. The grantee then exploits the business at his or her own risk for the period of the licence.

As a rule, in order to grant a business under a management licence, it is necessary for the grantee to have been a businessman for seven years and to have run the business for two years. There are however, legal exceptions; in particular where the management licence has the object of ensuring, without an exclusivity contract, the distribution to individuals of products manufactured or distributed by the grantor himself, or in cases where the court grants a special dispensation.

The management licensee, in contrast to the owner of the commercial property rights does not benefit from a right of renewal of the lease of the property (building).

Planning laws do not concern commercial premises, since they are not considered the same as the building from which the business is conducted. However it is necessary to obtain planning permission for alterations when they affect the external façade. Permission must be obtained for erection of a sign. Renovation of premises is allowed, but it is not permissible to undertake unauthorised alterations under the guise of renovation. Also, in theory, change of use is forbidden by the terms of the lease; however this can be subject to exception in certain circumstances and in exceptional cases sometimes even imposed on the landlord.

3.5.8 Employment law

According to the Employment Code, a franchisee can be considered as an employee of the franchisor when his work consists essentially either of selling goods or services of any kind, or coupons, tickets, books or publications of any description supplied exclusively by a single industrial or commercial business, or in taking orders or receiving objects for repair, processing or transport for the account of a sole industrial or commercial business, when that person carries on his trade in premises supplied or approved by that business and under conditions and at prices imposed by that business. In theory this provision should never be held to apply, since a franchisor is not allowed to impose prices on his franchisees.

Since franchisors and franchisees are independent businessmen, in theory employment law should not be applicable.

The franchisor may be considered to be the employer of the individuals working for its franchisees where the latter is neither a company nor an individual. (For example, a branch office).

Further, the franchisor is obliged, whether he merges with the franchisee or acquires the business, to also take over any contracts of employment still in force subject to the same conditions. (Article L122-12 of the Code du Travail).

Similarly, where the franchisor has granted the business to the franchisee under a management licence and where the licence is subsequently revoked, he is obliged to maintain the contracts of employment which are still in force.

A contract of employment should always be written in French if executed in France. Contracts of employment always begin with a trial period which lasts between two and three months during which either party may freely terminate the contract. Essentially, the obligations of the employer are: payment of salary, payment of the employee's social security, acting in accordance with any agreements made between the trade unions or governing professional body where appropriate (these are contracts that are agreed between the employer and employees in respect of a particular profession), the provision for the employees of a safe and hygienic place of work, the provision of paid holidays, and the adherence to working hours. French law provides for the continuation of contracts of employment in force at the time of a change of employer, and it is advisable for the franchisee to indemnify the franchisor for any financial consequences that this provision might involve.

Security of employment of workers is important. Any dismissal not justified by a real and serious reason will lead to an award of damages. The procedure to be followed for the dismissal of an employee is as follows:

- The first obligatory phase is one of conciliation. The employer must invite the employee to a meeting before notifying him of the termination of the contract. During this meeting, the employer should explain the reasons for dismissal and seek explanations from the employee. Thereafter, if the conciliation is unsuccessful the employer must notify the employee of the dismissal by (receipted) registered post detailing the reasons for the dismissal. The procedure may vary in certain circumstances where the redundancies are for economic reasons.
- Irregular or abusive dismissal is subject to severe sanctions.

The dismissal must be justified by real and serious causes which particularly may be through the fault of the employee, or as a result of economic necessity. In the absence of the cause being real and serious, the dismissal will be deemed to be 'abusive'. Advance notification prior to dismissal is obligatory unless the employee waives it. The minimum period of notice is two months during which time the employee may work for the employer while at the same time being allowed free time in order to search for alternative employment while his salary remains unchanged.

The penalties for unfair dismissal depend upon the size of the company and the period of time for which the employee has been employed there.

Even where the dismissal is reasonable and justified by real and serious cause, the employer may be required to pay a maximum indemnity of one month's salary as damages to the employee where the latter requests the same.

Whilst trade unions do not extend to franchisees who are individual businessmen, the impact of trade unions must be considered where the franchisor's business or the franchisees employ staff. Any business employing eleven or more employees must elect personnel representatives. Where the company employs fifty or more employees, the existence of a trade union committee is obligatory. The company may not oppose the election of trade union representatives. In France, trade unions are an important social force and they help employees in litigation against employers. There is a right of freedom of association. It should be noted that the manager of the company is obliged to allow personnel representatives sufficient free time to carry out their trade union duties. Any opposition to the election of personnel representatives or to the exercise of their duties is punishable under criminal law.

It should be noted that an employment law is of a public order nature. It binds all businesses in France, whether they are French or foreign.

3.5.9 Import and export restrictions

The customs union between the 10 earlier members of the EEC has resulted in abolition of customs duties on import of goods from member states. The duties levied on trade between the ten and Spain and Portugal will be progressively eliminated over a transitional period.

A common external tariff and trading policy has been established for trade with non-member states. However, as a result of the numerous agreements made between the EEC and other countries, only a score of countries are still subject to the common external tariff, among them the USA, Australia, Japan and New Zealand.

In fact no tariff is so high as to seriously prejudice the import of goods into France. Customs duties vary between 0 and 17% of the value of the goods (for example, 14% for textiles) and the average is 7%.

Establishment of a common commercial policy has resulted in the transfer to the Community of responsibility for essential contingency measures. For example, certain products are subject to quantitative restrictions and require an import licence: knives, umbrellas, radios, clocks and watches, toys, ceramics (essentially porcelain), electronic components and electronic measuring instruments.

The necessary formalities are not particularly onerous. Consumer goods coming directly from abroad can be imported either:

- without an import permit;
- on presentation of an import licence; or
- on presentation of a customs declaration with or without prior administrative authorisation, according to the circumstances.

The list of the products concerned is to be found in the annexes to the customs tariff or in the microfiche tariff. Changes are notified to traders by means of notices to importers published in the Official Journal.

Export of products is not, in general, subject to any control. However, there are certain exceptions. The export of some products is prohibited and they cannot leave France without the presentation of a permit. Other products are simply subject to surveillance, and the customs exercise control over the final destination of high technology products.

A system of drawback applies to all goods whatever their origin. This permits repayment of customs duties if the goods are re-exported outside the EEC in the form of compensatory products, subject to the following conditions:

- that they are not subject to quantitative restrictions on import;
- that they do not qualify on import for a preferential tariff;
- that they are not subject to an agricultural levy or other duty under the terms of the Common Agricultural Policy at the time of import; and
- that the compensatory products do not benefit from any export subsidy.

At the end of the period under the drawback scheme, repayment of duties can only be made provided there has not been any change in the meantime leading to withdrawal of entitlement.

3.5.10 Securities

In France, a franchise is not considered as a chose in action but as a contract and thus there can be no guarantee attaching to it. If follows that there can be no sale of a franchise in France; there is only the conclusion of a franchising contract.

3.5.11 Miscellaneous

Foreign workers

Recruitment of foreign workers to work in France is entrusted to international migrant agencies. Besides the fee payable for such recruitment of the order of 150 francs per permanent immigrant worker from the EEC and 885 francs for a permanent worker from elsewhere, the employer must pay a contribution in the form of a deposit of 3,650 francs per worker, rising to 7,300 francs when the gross monthly salary exceeds 10,000 francs.

A foreigner coming to France to engage in salaried employment must attach to his first request for a work permit a so-called 'introduction' contract of employment which he must obtain before his entry into France. The employer should lodge his application for the 'introduction' at the employment exchange for his area of residence.

In respect of working in France, nationals of member states of the EEC benefit from a privileged status which grants them equal rights in all member states.

In order to employ a foreign worker in France, the company must first of all submit a copy of the worker's contract to the Minister in charge of Immigrant Workers to obtain a visa. The visa is generally refused in respect of unskilled workers. Where the visa is granted, the employer must lodge a request with his local employment agency.

This written request must be accompanied by three copies of the Contract of Employment, an undertaking to pay fees to the Office of International Immigration (150 francs for an immigrant from a member state of the EEC and 885 francs in respect of workers from other countries). A special questionnaire must be filled out along with a questionnaire in relation to accommodation together with two photographs.

The exception to this procedure is where the foreigner is already permanently resident in France. Such a foreigner will be authorised to work there without the need for these lengthy procedural steps.

Only local authorities are allowed to grant subsidies to foreign investors in order to create jobs in their region. The town council and the departmental or regional authority will, under such circumstances, be allowed to help the foreign investor to find a site for its business. The best advice to investors is to contact the local Chamber of Commerce who will be able to advise fully in this regard.

Professional people doing work requiring special skills and seasonal workers can usually obtain an 'introduction' contract (which is generally refused) much more easily if armed with a visa from the section of the ministry concerned with immigrant workers before entering France to submit their request for a work permit.

Advertising in France

Advertising in France is subject to broad restrictions. The law is drawn from:

- A law dated 29 December 1979 in relation to trade marks and unregistered trade marks modified by a law dated 18 July 1985.
- A law dated 27 December 1973 (The Loi Royer) in relation to misleading advertising.

These laws regulate professional organisations, advertising contracts, sponsoring etc. and in particular cover certain specific aspects of advertising divided into the advertising medium used; (audio visual publicity, publicity in the press, publicity by means of posters and bill boards etc.); or divided into the products or services being advertised (alcoholic beverages, tobacco, pharmaceutical products, services etc.).

There are severe criminal and civil penalties for misleading advertising and a blanket ban upon comparative advertising.

Finally, it is important to note the existence of a regulatory body called the BVP which is charged with 'taking action in the public interest to ensure the advertising is clean, truthful and fair'.

The organisation, the Board of Directors of which is composed of representatives from various professional organisations such as the National Consumers Institute and the National Commercial Council, is inspired by the International Code of Fair Practices in respect of publicity for the International Chamber of Commerce.

The BVP has therefore become advertising's main self regulatory body.

Action is taken at two levels:

(1) Before the appearance of the publicity: the BVP provides recommendations appealing for discipline among advertisers.

(2) After the appearance of the advertising: the BVP is charged with taking all necessary action to cover loop-holes in the regulations or professional rules.

Action may be taken upon its own initiatives or following referrals by the Consumers Association, the National Institute of Consumers or victims of the advertising.

Data Protection

A Law dated 6 January 1978 relating to freedom of computer information establishes the principle that 'data should be at the service of all citizens' but may not be used in violation of human identity, civil rights, individual rights of privacy or public liberties.

Therefore, no administrative or judicial decision involving an assessment of human conduct may be based upon data processing giving the name of the person or persons involved.

In this respect, a National Committee for Data and Liberty (the CNIL) is charged with ensuring compliance with the law.

Further, any data processing carried out on behalf of persons other than the state, public authorities or administrative bodies must be declared to the CNIL in advance.

Such declaration must include an undertaking to adhere to the provisions of the law.

The CNIL is an independent administrative body composed of 17 members who remain in office for five years.

A law dated 3 July 1985 has been passed to oversee rights of property and the use of 'logicels'.

Finally, a law dated 5 January 1988 relating to computer fraud has created four new criminal offences:

- Fraudulent access;
- Interference affecting the proper functioning of computer systems;
- Alteration of the substances or falsification of data;
- Use of incorrect data.

3.6 JUDICIAL SYSTEM

The French system is divided into administrative jurisdictions, which control legal relations between the state, public officers and private individuals, and judicial jurisdictions, which control relations solely between private individuals. Suits between businesses are heard by Commercial Courts, while the Civil Courts have jurisdiction over matters which only concern individuals. When the case is between a business and an individual, the private individual can sue in either the civil or commercial courts, while the business must always sue in the civil courts.

The cost of proceedings is relatively insignificant in relation to the costs to be paid by the losing party. The cost of starting proceedings is approximately 500 francs. The most expensive aspect of the proceedings are the lawyers fees. A losing party may be obliged by the court to pay the legal fees of the winning party in full. However, the magistrates usually exercise this power with great care.

Where a decision is appealed, the costs may be tripled and it will also be necessary to pay the expenses of the witnesses for each party. In the case of an appeal, the process will usually last eighteen months longer. An accelerated appeal procedure does exist in cases of urgency where this is agreed between the parties. Such an appeal will usually result in a judgment decision within a month.

The Appeal Courts are divided into Civil, Social, Commercial and Criminal divisions.

A special court, the 'Conseil de Prud'hommes' has jurisdiction over all disputes linked to employment law.

In employment law, the highest Court in France is the Cour de Cassation which is only empowered to overturn a decision of a lesser court on the basis of law and never on the basis of fact.

The party claiming loss must issue process against the other party in the court with the appropriate territorial and subject jurisdiction. He must communicate his statement of claim himself. The other party will respond by means of written counter-claims. Exchange of missives will continue, interspersed with procedural hearings, for a period averaging 18 months in a case where there is no appeal lodged or other distinguishing feature, before judgment or final settlement.

Summary judgment

It is possible to reduce drastically the time taken for litigation when there is no serious contest. No need for urgency is required to take advantage of this procedure. The case will be heard and receive a decision (which is always provisional) from the President of the relevant court or one of his assessors.