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KOSINOVA D. S.
PhD Candidate of Yaroslav Mudryi National Law University

PARTICULARITIES OF LEGAL REGULATION OF FRANCHISING RELATIONS UNDER THE USA LEGISLATION (PROBLEM STATEMENT)

The article is devoted to studying the peculiarities of legal regulation of franchising relations under the legislation of the United States of America (hereinafter referred to as – the USA). In particular, the author analyzed several regulatory acts of such states as Delaware, California, Texas, carried out their comparative analysis with legislative acts of the federal level and made the corresponding conclusions.

Keywords: franchising, franchising relations, franchisee, USA legislation.

Problem statement. The United States was one of the first countries in which franchise relations emerged. The presence of a large territory, the stability of the economic system, the development of entrepreneurship and other factors contribute to the active further development of this type of entrepreneurial activity. Such interest in franchising relations creates the need to regulate these relations in order to determine the legal nature of franchising relations and create certain legal guarantees for the parties in case of violation of their rights or interests.

Recent research analysis. Foreign and domestic researchers have devoted their work to the development of legal regulation of franchising relations in the world: H. Androshchuk, I. Boychuk, Zh. Delt, Dzh.Roberts, L. Cabral, N. Kovalchuk, O. Korolchuk, N. Kosar, A. Kostyuk, O. Kuzmina, F. Kotler, M. Porter, F. Ross, O. Wiliamson and others. However, unfortunately, a thorough study of the particularities of the legal regulation of franchising relations under the USA legislation has not been conducted.

The purpose of the article is to investigate the particularities of the legal regulation of franchising relations under the federal legislation of the USA and legislation of individual states and carry out their comparative analysis.

Statement of basic materials. The USA belongs to such states where there are special regulatory acts aimed at regulating franchising relations. Given the fact that this country is a federation, regulation is carried out at two levels - federal and state.

An important role in the regulation of franchising relations at the federal level is played by the Federal Trade Commission, which was created on the basis of the Federal Trade Commission Act. This authority adopted acts important for streamlining the aforementioned relations, such as Disclosure Requirements and Prohibitions Concerning Franchising, in 1979 (as amended, which came into force in 2008). As the name implies, its primary purpose is to prevent misrepresentation of potential franchisees from the franchisor, to allow the franchisee to look at all the risks and benefits before acquiring the franchisee by obliging the franchisor to provide information about the franchise that it offers. [1]

According to Disclosure Requirements and Prohibitions Concerning Franchising, Franchising - any long-term commercial relationship or arrangement that specifies the terms of the offer or contract, or the franchise seller promises or presents verbally or in writing that:

– the franchisee has the right to operate a business that identifies or associated with the franchisor's trademark, or to offer, sell or distribute goods or services that are identified or associated with the franchisor's trademark;

– the franchisor exercises or has the authority to exercise a significant degree of control over the franchisee's operation or to provide significant assistance in the franchisee's operation;

– as a condition of receiving or starting a franchise, franchisees make the required payment or undertake to make the required payment to the franchisor or its affiliates. [2]

It can be seen from the above that this act considers franchising in a broad sense - as a relationship, and not just as a contract - and has the following features:

1) duration (however, specific dates are not defined in the legislation);

2) the transfer by the franchisor of the rights to use its trademark in the franchisee's business activities;

3) the franchisee's business activities may consist in conducting of business, selling goods and/or providing services (that is, there are 3 types of franchising in the

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definition: franchising of a business format, product and service, respectively);

4) control and assistance to the franchisee by the franchisor in conducting business activities on franchising terms;

5) payment (the franchisee pays a fee to obtain the right to use the franchisor's trademark).

In the Disclosure Requirements and Prohibitions Concerning Franchising, detailed regulation of deadlines, methods of providing the franchisee with a document on disclosure of the information is carried out and a clear list of items that should be included in such a document is regulated.

Thus, the franchisor undertakes to provide information about his business activities related to the use of intellectual property rights that constitute the subject of the franchise, not later than 14 calendar days before signing the franchising agreement.

Paragraph 436.5 of the Disclosure Requirements and Prohibitions Concerning Franchising provides an exhaustive list of items that should be included in the document with the information provided to the franchisee:

1) franchisor and affiliates. This section provides general information about the right holder, namely: the name of the franchisor, the type of organization and the country (region) where it is established; the franchisor's previous activities and his experience in doing business in this field, etc.

2) business experience. Here it is necessary to provide details regarding the persons who work with the franchisor and who will participate and be responsible for the management related to the sale or operation of the proposed franchises (directors, general partners, employees, etc.).

3) litigation (indicates whether the franchisor or other persons who are responsible for the sale of the franchise are in litigation).

4) bankruptcy (whether the franchisor or related persons have existed for the last 10 years prior to the filing of the bankruptcy disclosure document, whether his company has been released from debt in accordance with the Bankruptcy Code, or whether such persons were general partners of the company in respect of which initiated bankruptcy proceedings).

5) initial contributions (all fees and charges or obligations to pay for services or goods received from the franchisor or any branch before the opening of the franchisee's business, which is paid on a one-time or installment basis;

6) dedicated to the payments and individual investments that a franchisee must make in order to start his own business under the franchisor's trademark.

The following paragraphs are about the obligations of the parties. So, concerning the franchisee, all the nuances are written regarding the use of certain equipment, software, choice of premises, sale of a certain type of goods and/or provision of services, the possibility of expanding the assortment, and the like. The responsibilities of the franchisor, in turn, are primarily related to assisting the franchisee, certain consultations with doing business, organizing trainings, an advertising campaign, etc. An important point is to provide information about the territory in which the potential franchisee will develop the business under a franchise agreement.

In addition to providing the data listed in the act under investigation, the franchisor must add a franchise agreement to the disclosure document. [3]

From the analysis of the above provisions, it follows that this act introduced a unified approach to disclosure of information about their activities in the prescribed format to franchisors in the USA. This act duly takes into account the interests of the franchisee, because such requirements for data put forward lead to the need to provide information on almost all aspects of the franchisor. In this case, the franchisee will be able to be aware of real circumstances, evaluate all the positive and negative aspects, and foresee potential difficulties in further cooperation on the basis of franchising. However, with this concretization of the activities of the enterprise - franchisor, the question arises of protecting the data that is transferred to the franchisee. In other words, the franchisor transmits to a potential franchisee who intends to enter into franchising relations and acquire a franchise in the future, the information which containing potentially weak moments of the franchisor's activity, information about his partners and persons involved in the development of franchising activities, without any guarantee that such information does not will be distributed to achieve an unlawful goal (for example, disclosing it to competitors, borrowing certain ideas, etc.). In our opinion, in order to maintain a balance of interests and ensure the protection of the rights of the parties, it is important to establish the obligation of the potential franchisee not to disclose obtained information as a result of the franchisor providing a document on disclosure of information. The establishment of such a debt and liability for its violation will positively affect the protection of the interests of the franchisor and the development of franchising in general, since by providing information the franchisor is in an unprotected position, because the parties are not yet endowed with mutual rights and obligations, but are only at the pre-contractual stage.

In Delaware, franchising is governed by Delaware Franchise Security Law (1970). The chapter, which was added to the Delaware Corporate, aims to protect the rights and interests of the franchisee because, as defined in the act:

– the relationship between the franchisor and the franchisee is characterized by economic dependence of the latter ;

– suppliers and licensees terminate franchises to franchisees in a short time without good reason and threaten and continue to threaten such termination;

– such unjustified terminations unfairly deprive franchised distributors of their capital and the fruits of their labor after they have created a favorable market for goods, trademarks and trade names of their suppliers and licensors;

– such termination of relations leads to the elimination of jobs and negatively affects the economic stability of the state.

Franchising is defined in this act as a contract or other agreement that governs a business relationship in that country between a franchised distributor and a franchisor, when the franchised distributor is required to pay more than 100 US dollars to enter into that contract or other agreement.

From the above definition, it is seen that in this act, franchising is considered in the narrow sense, only as a contract that mediates franchising relations. It should be noted that in this document franchising is defined as "other agreement", but no explanation of the interpretation of this concept in this act is given. From the point of view of domestic legal doctrine, an approach is established in which a treaty is a mutual obligation, a written or oral agreement on the rights and obligations between states, institutions, enterprises and individuals. [4] With regard to the above, the relationship between the subjects of the franchising to be regulated not only the franchising contract, but other agreement that may create some problems during ascertain the legal nature of the agreement and the legislation will apply to such agreements.

Paragraph 2551 of Delaware Franchise Security Law contains the term used for the name of the franchisee – franchised distributor – an individual, partnership, corporation or association with a place of business in the State engaged in the business of:

– the acquisition or taking of products on a consignment basis, which has the trademark or trade name of the manufacturer or publisher for the main purpose of selling such products at retail outlets;

– selling goods to or through points of sale, that have a trademark or trade name of no more than three manufacturers, publishers, licensees of trademarks or licensors of trade names

- the acquisition or taking of books, magazines, newspapers and/or other publications on a consignment basis for the primary purpose of selling such publications at retail outlets.

By "products" in this act we mean any material objects that are offered for sale regardless of their nature, including all types of publications. [5]

From the analysis of the above provisions, it follows that the scope of the investigated act extends to the following types of entrepreneurial activity, such as the acquisition, taking for sale or sale of certain products using the manufacturer's trademark. This means that the scope of the specified legal act is limited only to commodity franchising, while service and manufacturing franchising are ignored. It should also be noted that the use of the term "franchised distributors", which is identical in terms of characteristics to "franchisee", is contained in the legislation and legal doctrines of most countries of the world, and the use of different terminology in terms of content can cause certain problems when concluding franchising agreements with the subjects of these relations outside this state. Quite doubtful is also the definition of a franchised distributor specifically as an individual, because in any case, such an entity carries out an entrepreneurial activity, assuming its registration as a participant in entrepreneurial activity.

The pre-contractual relations of franchising in this act are regulated in detail, which means the need to apply federal regulatory legal acts, namely: the franchisor's obligation and the procedure for providing information to the potential franchisee about the franchise will be subject to Disclosure Requirements and Prohibitions Concerning Franchising.

Franchise relations in the State of California are governed by Franchise Investment Law, which is an integral part of Corporate Code. In accordance with Article 31005 franchising means a contract or agreement, expressed or collateral, oral or written, between two or more persons, through which:

– the franchisee has the right to engage in the business of offering, selling goods or services in accordance with the marketing plan or system provided by the franchisor;

– the activities of the franchisee enterprise in accordance with such a plan or system are largely associated with the trademark, service mark, trade name, logo, advertisement or other commercial symbols of the franchisor, indicating the franchisor or its branch;

– franchisees are required to pay franchise fees, directly or indirectly. [6].

As well as legislation of Delaware state, franchising is seen as a contract, not a relationship. However, the state of California uses the usual terminology regarding the parties to the contract – "franchisor" and "franchisee". As follows from this definition, the indications of franchising are fairly standard:

– franchising relations mediated by the conclusion of a franchising agreement;

– the franchisee receives the right to use the trademark, logo and name of the franchisor for use in their entrepreneurial activity;

– the contract is of a payment nature.

In this act, a lot of attention is paid to the need for the franchisor to register a proposal for the acquisition of the franchise to the franchisee. So, in accordance with Article 31110 of Franchise Investment Law dated April 15, 1971, the actions of any person to offer or sell any franchise are considered illegal if the franchise offer was not registered under this law or if the provisions on the need to register a franchisor offers do not apply to cases established by this act. In contrast to this act, in the legislation of Delaware and federal law, registration of a franchise offer is not required. This Law also establishes exhaustive cases when the implementation of registration actions is not required. In our opinion, such a requirement put forward to the franchisor aimed at protecting the franchisee regarding the fact that the information, which is submitted by the franchisor, is recorded by the authorized bodies and the falsity of the information provided entails the prosecution of the franchisor. However, on the other hand, the need for such registration can be considered by the parties as an additional obstacle, which can reduce the interest in the parties joining franchised relations within this state. In our opinion, it would be more appropriate in this case to establish the possibility of registering a franchise offer, that is, transform this norm into a discretionary one and provide the parties with the possibility of negotiating joint arrangements to resolve this issue through negotiations.

In some USA states such as, for example, Texas, there are no special laws or regulations aimed at directly regulating franchising relations. Thus, the legislation of the state of Texas, namely, the Texas Business Opportunity Act, contain only mention of franchising in the context of the fact that this type of relationship does not fall under the definition of "business opportunity", which is the subject of regulation of this document. So, "business opportunity" means selling or leasing for an initial payment of more than 500 US dollar for products, equipment, goods or services that the buyer will use to start a business in which the seller acknowledges that:

– the buyer is likely to make a profit in excess of the amount of the down payment that he paid;

– the seller:

1. will assist the buyer in choosing a location or in finding a place to use or operate products, equipment, supplies or services in premises that are not owned by law or are not on lease by the buyer or seller;

2. will provide a sales, production or marketing program;

3. will redeem the goods, equipment or resources purchased or manufactured, grown by the buyer, using all or part of the goods, equipment, supplies or services, the seller first sold or leased, or offered for sale to the buyer.

Thus, in the state of Texas, to regulate franchising relations applies acts adopted at the federal level.

Conclusions. Summing up, it can be noted that in the United States there are currently two levels of regulation of franchising relations - federal and state level. In general, in accordance with national legal doctrine USA, the primacy of federal law is presumed over regulatory acts that are adopted at the state level. From the analysis of the legal provisions of individual USA states on the regulation of franchising relations, it appears that they generally specify the provisions of Disclosure Requirements and Prohibitions Concerning Franchising, namely: 1) franchise disclosure; 2) the need for the franchisee to provide such information; 3) the need to register an offer to sell a franchise or submit such information to special authorities without registering (detailing occurs at the state level).

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КОСИНОВА Д.С.

аспирант Национального юридического университета им. Ярослава Мудрого

ОСОБЕННОСТИ ПРАВОВОГО РЕГУЛИРОВАНИЯ ФРАНЧАЙЗИНГОВЫХ ОТНОШЕНИЙ ПО ЗАКОНОДАТЕЛЬСТВУ США (ПОСТАНОВКА ПРОБЛЕМЫ)

Статья посвящена изучению особенностей правового регулирования франчайзинговых отношений в соответствии с законодательством Соединенных Штатов Америки (далее – США). В частности, автор проанализировал несколько нормативных актов таких штатов, как Делавэр, Калифорния, Техас, провел их сравнительный анализ с законодательными актами федерального уровня и сделал соответствующие выводы.

Ключевые слова: франчайзинг, франчайзинговые отношения, франчайзи, законодательство США.

КОСІНОВА Д. С.

аспірант Національного юридичного університету ім. Ярослава Мудрого

ОСОБЛИВОСТІ ПРАВОВОГО РЕГУЛЮВАННЯ ФРАНЧАЙЗИНГОВИХ ВІДНОСИН ЗА ЗАКОНОДАВСТВОМ США (ПОСТАНОВКА ПРОБЛЕМИ)

Постановка проблеми. США стала однією з перших країн, де виникли франчайзингові відносини. Наявність великої території, стабільність економічної системи, розвиток підприємництва та інші чинники сприяють активному подальшому розвитку такого способу ведення підприємницької діяльності. Такий інтерес до франчайзингу створює потребу у регулюванні цих відносин задля забезпечення визначення правової природи франчайзингових відносин та створення певних правових гарантій для сторін у разі порушення їх прав чи інтересів.

Аналіз останніх досліджень. Питанням розвитку правового регулювання франчайзингових відносин у світі свої праці присвятили таки зарубіжні та вітчизняні дослідники: Г. Андрощук, І. Бойчук, Ж. Дельт, Дж.Робертс, Л. Кабраль, Н. Ковальчук, О. Корольчук, Н.Косар, А.Костюк, О. Кузьміна, Ф. Котлер, М. Портер, Ф. Росс, О Вільямсон та інших. Однак, на жаль, ґрунтовного дослідження особливостей правового регулювання франчайзингових відносин за законодавством Сполучених Штатів Америки проведено не було.

Метою статті є дослідження особливостей правового регулювання франчайзингових відносин за федеральним законодавством США та за законодавством окремих штатів та здійснити їх порівняльний аналіз.

Виклад основного матеріалу. Автором у статті здійснено ґрунтовний аналіз низки нормативно-правових актів штатів Делавер, Каліфоннія, Техас з питань правового регулювання франчайзингових відносин з детальним дослідженням особливостей договірного регулювання зазначених відносин, характеристикою прав та обов’язків суб’єктів цих відносин.

Окремо автором здійснено порівняльний аналіз законодавчих актів федерального рівня та нормативно-правових актів, що регулюють дане питання, які прийнято на рівні штатів.

Висновки. Підсумовуючи, можна зазначити, що у США на даний час наявні два рівні регулювання франчайзингових відносин – федеративний та рівень штатів. В цілому, відповідно до положень національної правової доктрини США презюмується примат федеративного законодавства над нормативно-правовими актами, що прийняті на рівні штатів. З аналізу законодавчих положень окремих штатів США з питань правового регулювання франчайзингових відносин, вбачається, що вони в цілому конкретизують положення Disclosure Requirements and Prohibitions Concerning Franchising, а саме: 1) розкриття інформації про франшизу; 2) необхідності надання франчайзі такої інформації; 3) необхідності реєстрації пропозиції щодо продажу франшизи або подання такої інформації до спеціальних органі

Ключові слова: франчайзинг, франчайзингові відносини, франчайзі, законодавство США.