

Franchise

Contributing editor
Philip F Zeidman



2017

GETTING THE
DEAL THROUGH 

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Franchise 2017

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Belgium

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DBB

Overview

1 What forms of business entities are relevant to the typical franchisor?

Limited liability companies (SA and NV) with a minimum capital of €61,500 are relevant to typical franchisors in Belgium.

2 What laws and agencies govern the formation of business entities?

The Belgian Companies Code governs the formation of business entities.

3 Provide an overview of the requirements for forming and maintaining a business entity.

The formation of a business entity requires the preparation of the company statutes and a three-year financial plan in collaboration with an attorney's office and accounting expert, and having the statutes authenticated by a notary public. The statutes will be published in the Belgian Official Journal and will be registered on the appropriate commercial register for the area where the business has its registered office. Accounts are to be deposited annually with the National Bank.

4 What restrictions apply to foreign business entities and foreign investment?

There are no restrictions on foreign business entities' participation or foreign investment in a Belgian SA or NV.

5 Briefly describe the aspects of the tax system relevant to franchisors. How are foreign businesses and individuals taxed?

Franchises will be subject to the ordinary corporation tax on commercial companies. The nominal corporate tax rate is 33.99 per cent. A lower tax rate may apply (progressively) to the revenues of companies that are more than 50 per cent owned by individuals. (For small and medium-sized enterprises with a taxable profit not exceeding €322,500, the tax rate may drop to 24.25 per cent.)

The applicable (progressive) corporate tax rates (see www.belgium.be/fr/impots/impot_sur_les_revenus/societes/declaration/imposition/ (consulted 20 June 2016)) are as follows:

| Taxable revenue | Rate |
|------------------|--------|
| €1–€25,000 | 24.25% |
| €25,000–€95,000 | 31.00% |
| €95,000–€322,500 | 34.50% |
| Over €322,500 | 33.99% |

These tax rates may be reduced by a notional interest deduction mechanism. The notional interest deduction is computed on the companies' adjusted equity capital (including retained earnings). The percentage for the calculation of the deduction is fixed each year by reference to the long-term interest rates on Belgian bonds (with a ceiling of 6.5 per cent). At the time of writing indications were that the NID rate for tax year 2017 would be 1.631 per cent for SMEs however, this NID rate had not yet been published in the Official Gazette or on the website of the Belgian tax authorities. Additional information in English can be found at http://finance.belgium.be/en/binaries/NID_2014_0027_ENG_tcm340-240797.pdf; see also 'Notional Interest

Deduction: an innovative Belgian tax incentive' at: http://finance.belgium.be/en/ondernemingen/vennootschapsbelasting/belastingvoordelen/notionele_interestaftrek.

Note also that, as regards indirect taxation, in general goods and services provided by a business for commercial gain on an independent and regular basis (as specified under the Belgian VAT Code) are liable to VAT. VAT is a consumption tax that is borne by the end-user. VAT is paid in successive stages, namely, for each transaction in the manufacturing and distribution process. The standard VAT rate is 21 per cent, but lower rates of 6 per cent and 12 per cent apply to certain categories of goods and services.

6 Are there any relevant labour and employment considerations for typical franchisors? What is the risk that a franchisee or employees of a franchisee could be deemed employees of the franchisor? What can be done to reduce this risk?

Franchise contracts should be drafted and reviewed with the assistance of a lawyer to ensure that they are not assessed either as labour contracts for a salary, as agency contracts or as a distribution or concession contract (all of which are subject to specific legal rules under Belgian law). Unless the contract provisions clearly identify the franchise relationship and independent status of the franchisee there is a risk that the status of the contract may be judicially qualified as falling within one of the other categories of commercial contract.

7 How are trademarks and know-how protected?

Trademarks must be registered in order to be protected. Separate registration procedures are available for national, Benelux (Belgium, Luxembourg and the Netherlands) and EU trademark registrations. The franchisor's needs should be reviewed to decide which level of protection is most appropriate to its particular case. The franchise know-how can only be protected as such through the franchise contract itself. However, in November 2013, the EU Commission proposed a draft directive that would align existing laws against the misappropriation of trade secrets across the EU (Proposal for a Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure). On 14 March 2016 the European Parliament adopted its report on the Commission's proposal. On 27 May 2016 the Council approved the Commission's proposal as amended by the European Parliament on 14 March. The Directive was therefore deemed adopted. It was published in Official Journal L157 of 15 June 2016 as Directive (EU) 2016/943; member states are required to bring into force the laws, regulations and administrative provisions necessary to comply with this new Directive by 9 June 2018.

8 What are the relevant aspects of the real estate market and real estate law?

Commercial leases and business premises are subject to specific rules. The laws in question apply to all business enterprises, irrespective of their form, and independently of whether they have adopted a franchise format. Estate agents and certain specialised consultants can assist the franchisor with such questions.

Laws and agencies that regulate the offer and sale of franchises

9 What is the legal definition of a franchise?

There is no definition of a franchise in Belgian statute law. According to jurisprudence, a franchise involves the distribution of goods and services in any network using a common trademark, together with know-how transmitted to the franchisees while foreseeing that certain (technical) assistance will be given by the franchisor for the benefit of all the franchisees.

10 Which laws and government agencies regulate the offer and sale of franchises?

The most important statutes are the Law of 6 April 2010 Relating to Market Practices and Consumer Protection, and the Law on the Protection of Economic Competition consolidated on 15 September 2006 and modified by the provisions of the Law of 6 May 2009 making general amendments. These laws transpose into Belgian statute the applicable EU legislation. The Law on Pre-Contractual Information regarding Agreements to Form a Commercial Business Relationship (the Law of 19 December 2005) introduced the requirement for every franchisor in Belgium to communicate a pre-contractual information document to candidate franchisees at least one month before the signature of the contract. The law of 19 December 2005 was replaced as from 31 May 2014 by provisions now found in Book X, Title 2, of the new Belgian Code on Economic Law (see question 13).

11 Describe the relevant requirements of these laws and agencies.

The laws mentioned above seek to provide consumer protection, to guarantee fair dealing in commercial matters between competing companies and to ensure that the conditions of competition are effective and will not be compromised by unfair practices such as retail price maintenance or agreements between companies whose object or effect is to restrict competition.

12 What are the exemptions and exclusions from any franchise laws and regulations?

There is no specific law on franchising as such. The (national and EU) rules on competition law must be respected.

13 Does any law or regulation create a requirement that must be met before a franchisor may offer franchises?

The Law on Pre-Contractual Information regarding Agreements to Form a Commercial Business Relationship (the Law of 19 December 2005) regulated the pre-contractual information that must be provided by all franchisors to candidate franchisees at least one month before the signature of the contract. The 2005 Law was replaced and the provisions (certain of which have been amended and clarified) were inserted into Book X, Title 2 (articles X.26-X.34) of the new Belgian Code on Economic Law (BECL), by the Law of 2 April 2014, which applies as of 31 May 2014 (see 'Update and trends'). Except as otherwise stated, references in this contribution are to the relevant provisions of the BECL.

During the one-month 'cooling-off' period, except for commitments made under a confidentiality agreement, no other contractual commitments may be made, no remuneration, fee or deposit may be requested nor paid (BECL, article X.27).

The Law requires that a draft contract and a pre-contractual information document must be provided setting out certain information in accordance with a mandatory list. Failure to respect the requirements of the Law will entitle the franchisee to invoke nullity of the contract for a period of two years starting from the date of signature of the contract. There are no particular requirements concerning the franchisor company's own experience, either as regards a minimum number of company-owned operations or a minimum period for establishment of franchisor company-owned operations. There is no requirement for the franchisor company to have been operating in Belgium via its own outlets for a minimum period of time.

14 Are there any laws, regulations or government policies that restrict the manner in which a franchisor recruits franchisees or selects its or its franchisees' suppliers?

No such restrictions are provided for by laws, regulations or government policies. On the other hand information about market share, number of franchises, number of agreements signed and number of agreements terminated or not renewed shall be provided by the franchisor as part of the mandatory pre-contractual information. Further, an administrative

authorisation must be obtained when a retail business has sales area greater than 400m². The authorisation rules differ depending on the surface area of the commercial establishment. Note that there is no longer a national (Belgian) standard requirement in this respect. The former federal-level regulation was replaced in 2015 by requirements established by the regional authorities (in Wallonia, Flanders and Brussels). These administrative authorisation requirements must be combined with planning and environmental permits that must be obtained for any new construction or alteration of a building. When planning to open a new outlet, the requirements that will apply must be checked with the municipal administration responsible for the location of the new outlet.

15 What is the compliance procedure for making pre-contractual disclosure in your country? How often must the disclosures be updated?

See question 13. The Law of 2 April 2014 sets out the information that must be given to the franchisee at least one month before the signature of the contract. This information is given in a pre-contractual information document prepared by the franchisor, which is valid for the duration of the contract. New disclosures must be made, in the required form, at least one month before the signature of any renewal of the contract. However, BECL article X.29 does foresee that, in the case of a modification or renewal of a franchise that has been in existence for at least two years, the draft contract and a simplified pre-contractual information document may be provided.

16 In the case of a sub-franchising structure, who must make pre-sale disclosures to sub-franchisees? If the sub-franchisor must provide disclosure, what must be disclosed concerning the franchisor and the contractual or other relationship between the franchisor and the sub-franchisor?

In accordance with the Law of 2 April 2014, certain mandatory pre-contractual information must be given by the sub-franchisor to all proposed sub-franchisees. The franchisor does not assume responsibilities with regard to the sub-franchisees. These responsibilities are assumed by the sub-franchisor alone. Nevertheless, if the franchisor has committed an actionable fault with respect to the sub-franchisee, the latter may bring an action directly against the franchisor.

17 What information must the disclosure document contain?

As well as the draft franchise contract itself, a separate document has to be provided that is divided into two sections as follows:

- the important contractual provisions, insofar as they are to be included in the commercial relationship:
 - whether the franchise agreement is concluded *intuitu personae* (ie, in consideration of the active participation of a particular natural person or persons);
 - the obligations (ie, the significant contractual terms);
 - the consequences of a breach of the contractual terms (eg, failure to achieve a contractual commercial target);
 - what direct compensation is to be paid by the person who receives the (commercial) rights to the person granting those rights and how the indirect remuneration of the person granting the commercial rights will be calculated and, where applicable, how such remuneration may be revised during the contract and upon renewal;
 - any non-compete clauses, their duration and conditions;
 - the length of the franchise agreement and the conditions for its renewal;
 - the conditions of notice and of termination of the franchise agreement, notably in relation to expenses incurred and investments made;
 - the right of pre-emption or the purchase option of the party granting the franchise, and the rules for determining the value of the business at the time that this right or option is exercised; and
 - the exclusive rights reserved by the franchisor; and
- facts contributing to the correct understanding of the franchise agreement:
 - the name or correct designation of the party conceding the franchise as well as its contact references;
 - if the contract rights are being granted by a corporate person, the identity and the status of the physical person acting on its behalf;
 - the nature of the activities of the party conceding the franchise;
 - the intellectual property rights the use of which is being granted;

- where available, the annual accounts of the last three accounting years of the party granting the franchise;
- the franchisor's experience of operating the franchise, and its experience of operating the commercial formula independently of any franchise agreement;
- the history, current status and future prospects of the relevant commercial market on which the activities are exercised, both from a general and local point of view;
- the history, current status and future prospects of the franchise network's market share, both from a general and local point of view;
- for each of the last three years, as the case may be, the number of franchises belonging to the Belgian and international network, as well as the expansion prospects for the network;
- for each of the last three years, as the case may be, the number of franchise agreements signed, the number of agreements terminated at the initiative of the franchisor, the number of agreements ended by franchisees, as well as the number of agreements that were not renewed at the end of their term; and
- the expenses that the franchisee agrees to incur and investments it agrees to make at the beginning and during the course of the agreement, detailing their amount, purpose and their depreciation term, the investment timetable and how these amounts will be treated at the end of the contract.

18 Is there any obligation for continuing disclosure?

No. Concerning simplified disclosure requirements in respect of modifications and renewals see question 15.

19 How do the relevant government agencies enforce the disclosure requirements?

Respect for the legal requirements is ensured by the courts having regard to the litigation that is brought before them. There are no other controls.

20 What actions can franchisees take to obtain relief for violations of disclosure requirements? What are the legal remedies for such violations? How are damages calculated? If the franchisee can cancel or rescind the franchise contract, is the franchisee also entitled to reimbursement or damages?

Franchisees may apply to the courts for an order in respect of any failure to respect the mandatory pre-contractual legal requirements. If such an order is made within two years of the signature of the contract, the court must annul the contract if the franchisee so requests. The court will require the franchisor to repay to the franchisee all royalties received as well as paying damages in respect of any loss and damage suffered by the franchisee. The franchisee has to prove the existence of such loss and damage. The calculation of the amount of damages may be based on any appropriate legally admissible evidence, notably on the basis of accounting reports.

In addition, if particular data contributing to the correct understanding of the franchise agreement are missing, incomplete or inaccurate, or if any of the information about the important contractual provisions is missing or inaccurate the franchisee may invoke its customary law rights in respect of lack of consent or quasi-delict (negligent act or omission) without prejudice to its right to require annulment of the contract (BECL article X.30).

21 In the case of sub-franchising, how is liability for disclosure violations shared between franchisor and sub-franchisor? Are individual officers, directors and employees of the franchisor or the sub-franchisor exposed to liability? If so, what liability?

In principle, the responsibility of the franchisor cannot be invoked except if the franchisor has itself committed some breach with regard to a sub-franchisee. The officers, directors and employees are not liable except in the case of serious misconduct such as would render them liable for their actions through the application of the law generally applicable to companies.

22 In addition to any laws or government agencies that specifically regulate offering and selling franchises, what are the general principles of law that affect the offer and sale of franchises? What other regulations or government agencies or industry codes of conduct may affect the offer and sale of franchises?

Book X, Title 2 of the BECL (see question 13) is of mandatory application (BECL article X.26). It formalises the requirement of good faith that applies to the pre-contractual phase. The obligation to correct and sincere pre-contractual information exists generally in application of the principle of loyalty and good faith that governs the formation of contracts (articles 1109, 1116, 1134, 1213 and 1382 of the Belgian Civil Code).

Apart from Book X, Title 2 of the BECL, the most important statutes are the Law of 6 April 2010 Relating to Market Practices and Consumer Protection and the Law on the Protection of Economic Competition consolidated on 15 September 2006 and modified by the provisions of the Law of 6 May 2009 making general amendments. These laws transpose into Belgian statute the applicable EU legislation.

These laws seek not only to protect consumers but also to guarantee honest conduct in commercial matters between competing companies and to ensure that conditions of free and effective competition are not compromised by prohibited practices such as retail price maintenance or agreements between companies that have as their object or effect the restriction of free competition.

23 Other than franchise-specific rules on what disclosures a franchisor should make to a potential franchisee or a franchisee should make to a sub-franchisee regarding predecessors, litigation, trademarks, fees etc, are there any general rules on pre-sale disclosure that might apply to such transactions?

No.

24 What actions may franchisees take if a franchisor engages in fraudulent or deceptive practices in connection with the offer and sale of franchises? How does this protection differ from the protection provided under franchise sales disclosure laws?

Independently of the protection offered by the Law of 2 April 2014, customary law will apply to the franchisor; as such, the franchisee can require, as any citizen may, that such law be respected.

Legal restrictions on the terms of franchise contracts and the relationship between parties in a franchise relationship

25 Are there specific laws regulating the ongoing relationship between franchisor and franchisee after the franchise contract comes into effect?

No.

26 Do other laws affect the franchise relationship?

The Belgian Civil Code, the new Code on Economic Law, together with the customary law of contract (what might be referred to as the 'common law') are the foundation of the relationship between the franchisor and franchisee after the franchise contract comes into effect.

27 Do other government or trade association policies affect the franchise relationship?

No.

28 In what circumstances may a franchisor terminate a franchise relationship? What are the specific legal restrictions on a franchisor's ability to terminate a franchise relationship?

As the parties are free to decide on the terms of their contract, it is necessary to respect what the contract says. If the contract is silent on a particular point, the Civil Code will be the point of reference (for example, as regards annulment of contracts for failure to comply with commercial terms, provision of reasonable notice).

29 In what circumstances may a franchisee terminate a franchise relationship?

For a fixed-term contract, a franchise relationship may be terminated at the end of the term in accordance with the contract provisions. For a contract without a fixed term, a franchise relationship may be terminated at

Legislative amendments

The Belgian Law of 19 December 2005 introduced an obligation on every franchisor to provide a pre-contractual information document (PID) at least one month before the conclusion of a franchise agreement. By imposing such a requirement, Belgium followed the example of equivalent laws in France, Spain and Italy that aim to balance the relationship between the franchisor and a candidate franchisee.

While recognising that the candidate franchisee is often inexperienced and in a weaker economic position than the franchisor, the Belgian legislator nevertheless chose to regulate the pre-contractual phase alone and not the contract itself. In practice it would have been very difficult to regulate franchise agreements as such because the scope of the 2005 law extended to a wider range of 'commercial partnership' contracts.

At its meeting of 20 February 2014, the House of Representatives voted in favour of amendments to the 2005 Law (made on the basis of proposals from the Review Board established by article 10 of the 2005 Act) by an overwhelming majority (114 votes in favour, zero votes against and 20 abstentions).

As noted above (question 13), the 2005 law was replaced and the provisions (certain of which have been revised) were inserted into Book X, Title 2, of the new Belgian Code on Economic Law by the Law of 2 April 2014 (BECL). The law as replaced applies as of 31 May 2014.

Clarifications adopted in the new legislation

The scope of the law has been clarified by removing the qualification that the parties to the commercial contract each 'act in their own name and for their own account'. (This requirement had proved controversial). The new law removes these words but adds that agency contracts of banks and insurers are excluded from its scope as these are activities that are already specifically regulated. The concept of 'remuneration' has been deleted from the definition of a commercial partnership agreement. The 2005 Law referred to direct or indirect compensation paid by the franchisee to the franchisor. This had caused difficulties of interpretation as regards what was meant by 'indirect' remuneration. (BECL article 1.11, 2° and article X.26.)

Nevertheless both direct and (where applicable) indirect remuneration payable to the franchisor are significant contractual provisions and have to be clearly indicated as such in the first part of the PID (although it is sufficient to show the method of calculation for certain indirect payments, such as rebates, rather than actual amounts).

Simplified PID

The concept of a simplified PID is introduced. This removes the requirement to provide a complete PID when, for example, renewing a contract – where the franchisee already knows the franchisor and already has the information about its rights and obligations. The same applies where the franchise agreement is modified during its term. The simplified PID needs only to contain the data that have been changed. Note, however, that in this case, the simplified PID can only be used where the contract that is being amended has already been implemented for at least two years. (This is to avoid abuse of the provision providing for nullity during a two-year period after signature where the franchisor fails to provide the draft contract and a full PID one month before signature.) (BECL article X.29.)

The removal of the requirement to provide a PID in certain cases

A franchisee may request modification of a franchise contract which has already been signed (a change in the duration of the contract in order to make additional investments, for example). In such a case, it is apparent that the requirement to communicate even a simplified PID is unnecessary. However, to avoid abuse, the derogation will be narrowly interpreted and will only apply if the change to the contract is requested in writing by the franchisee (BECL article X.29).

Sanction for the provision of inaccurate or incomplete information in the PID

The new law states that when the franchisor gives inaccurate or incomplete information to the franchisee, in addition to the right to request the nullity of the contract in the first two years after signature, the question of the nullity of the contract shall be considered having regard to the principles of lack of consent or quasi-delict (negligent act or omission). In case of a dispute, it is up to the court to decide whether the inaccuracy or absence of certain information in the PID resulted in a lack of consent on the part of the franchisee, which could lead to the invalidity of the affected provision or indeed of the entire contract. (BECL article X.30.)

The waiver by the franchisee of its legal protection: formalities to be respected

The law also raises the issue of waiver of its legal protection by the franchisee. Such a waiver may be made after signature of the contract: but, to prevent waivers becoming an automatic mechanism used by unscrupulous franchisors, the new law provides that any waiver must be made in a stipulated manner. A waiver may not be made until one month has expired following the conclusion of the contract. It must be explicit and must state the reasons for nullity in respect of which the franchisee waives its rights. (BECL article X.30 last sub-paragraph.)

Confidentiality agreement and obligations of the franchisee to the franchisor during the one month 'cooling-off' period

The law authorises the conclusion of a confidentiality agreement during the negotiation of a contract that is subject to financial obligations (such as damages for non-compliance). It also provides that the prohibition against a franchisee contracting an obligation towards the franchisor or paying the franchisor a sum of money is not applicable in the case of existing contracts where the negotiation concerns a renewal or amendment (BECL article X.27 last sub-paragraph and article X.29 last sub-paragraph).

Contracts in progress and the new law

Transitional measures mean that the old law will remain applicable to existing contracts until the date of their expiry. Note however that on renewal or modification an existing contract will be treated as a new contract and will be subject to the new 2014 Law.

Judicial interpretation

In a May 2009 judgment, under the 2005 Law, the Liège Tribunal of Commerce confirmed that a franchisor, who merely provides a copy of the proposed contract, before it is signed, does not comply with the legal obligations arising from the PID. Moreover, the court held that the fact that certain obligations of the franchisee were not mentioned (in this case: commissions and delivery costs) in the draft agreement, was a failure which made the signed agreement void, since the information requirements of the PID are mandatory.

The case appears to indicate that a breach of one of the mandatory information obligations will be enough to mean that the agreement was concluded contrary to the requirements of the PID and is void.

In an October 2011 judgment, under the 2005 law, the Charleroi Tribunal of Commerce found, in the case of an affiliation contract with a supermarket chain, that failure to provide the required pre-contractual information rendered the contract void.

In the tribunal's view, the fact that there had been performance of the contract for a seven-month period before the affiliate raised problems about prices and profitability did not prevent it from relying on the mandatory provisions of the law.

Work of the Review Board

The 2005 Law established a Review Board (RB) whose role is to meet regularly and provide advice on the application of the Law on Pre-Contractual Information. The establishment of the RB is now set out in BECL article X.34. Since its inception the RB has issued 15 opinions on various issues. These can be found at: http://economie.fgov.be/fr/entreprises/reglementation_de_marche/Pratiques_commerce/Franchise/avis_commission_arbitrage/#.UkhWPRZbsjM.

In addition, the RB issues an annual report. At the time of writing the most recent report available is that for 2015. The report shows that the RB met six times at regular intervals in 2015. It also contains a copy of a letter to Minister for the Economy, of 27 October 2015, setting out what the RB considers to be the limits of its role. The context was a request from the minister to analyse certain clauses of brewery contracts and to identify whether they might contain certain one-sided obligations detrimental to the food and beverage industry. The RB referred to its advice 2014/15 regarding the conditions under which brewery contracts might fall within the scope of the Law on Pre-Contractual Information but considered that its role (as defined by Royal Decree) was to provide advice on the interpretation and application of that law – so an analysis of the brewery contracts would fall outside its remit. The RB did, however, suggest, in its reply to the minister, that establishing a voluntary industry code of conduct, which could be inspired by the legal provisions on pre-contractual information, might help resolve any issues that were identified in the brewery contracts in question.

any time provided that reasonable notice is given or in accordance with the notice provisions in the contract. In either case, a franchise relationship may be terminated at any time if the franchisor fails to respect the terms of the contract.

30 May a franchisor refuse to renew the franchise agreement with a franchisee? If yes, in what circumstances may a franchisor refuse to renew?

The franchisor can refuse to renew a contract without giving reasons, unless the contract provides to the contrary.

31 May a franchisor restrict a franchisee's ability to transfer its franchise or restrict transfers of ownership interests in a franchisee entity?

Yes, because the contract is normally one that has a personal character (*intuitu personae*); but it is always prudent to make express provision for this in the contract terms.

32 Are there laws or regulations affecting the nature, amount or payment of fees?

No.

33 Are there restrictions on the amount of interest that can be charged on overdue payments?

No, provided that the interest clause is not abusive. In such a case, the courts may reduce any interest for late payment that is considered excessive.

34 Are there laws or regulations restricting a franchisee's ability to make payments to a foreign franchisor in the franchisor's domestic currency?

No.

35 Are confidentiality covenants in franchise agreements enforceable?

Yes.

36 Is there a general legal obligation on parties to deal with each other in good faith? If so, how does it affect franchise relationships?

Yes. Failure to respect the requirements of good faith may lead to the annulment of the contract against the offending party. See article 1134 of the Belgian Civil Code.

37 Does any law treat franchisees as consumers for the purposes of consumer protection or other legislation?

No.

38 Must disclosure documents and franchise agreements be in the language of your country?

No, but prudence would suggest that one of the official languages of the country should be used so that the franchisee cannot argue that it failed to understand the documents. Use of another language in commercial relations is not a basis for nullity, but it may permit the courts a margin of appreciation to decide whether a franchisee had properly understood the contract documents. In the case of litigation, the court can require a translation of the documents to be produced.

39 What restrictions are there on provisions in franchise contracts?

There are no restrictions except as regards:

- prices – it is not possible to impose resale prices for products or services that the franchisee shall charge to its customers;
- non-compete clauses – such clauses must be of limited temporal and geographical application, directed to the franchise business and intended to protect the franchisor's know-how;
- application of Belgian law – the pre-contractual phase of the franchise contract is a matter of Belgian law and is subject to the jurisdiction of the Belgian courts, provided that the franchisee carries out the activities that are the subject of a franchise contract principally in Belgium (article X.33 of the Law of 2 April 2014); and
- the application of Belgian and European competition law.

Legislation of 3 April 2013, amending Belgian competition law, entered into force on 6 September 2013. Belgian competition law will apply to agreements the geographic scope of which is limited to Belgium. The Act replaces the former Competition Council and Directorate General for Competition with a single body called the Belgian Competition Authority. This law has been incorporated into Book IV of the BCEL.

40 Describe the aspects of competition law in your country that are relevant to the typical franchisor. How are they enforced?

Prices

It is not possible to impose resale prices for products or services that the franchisee shall charge to its customers.

Non-compete clauses

Non-compete clauses must be of limited temporal and geographical application and directed to the franchise business and intended to protect the franchisor's know-how. The courts will verify compliance with these requirements in the case of litigation. Failure to comply may result in nullity of the contract.

The transfer of substantial know-how usually justifies an in-term non-compete obligation for the whole duration of the supply agreement in the context of franchising (EU Commission Guidelines on Vertical Restraints para. 148). A post-term non-compete clause of up to one year's duration may fall within the express permitted exceptions for terms that restrict competition under article 5(3) of the Verticals Block Exemption Regulation (Commission Regulation 330/2010 of 20 April 2010 (OJ L 102, 23 April 2010,

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p1, Block Exemption Regulation on Vertical Agreements)). This is without prejudice to the possibility of imposing a restriction that is unlimited in time on the use and disclosure of know-how that has not entered the public domain. In practice, in Belgium a non-compete clause applying for more than one year outside the geographical area initially licensed to the franchisee will generally be considered to be invalid.

41 Describe the court system. What types of dispute resolution procedures are available relative to franchising?

The Commercial Tribunal will have jurisdiction over disputes with the possibility of an appeal to the Court of Appeal and, on certain occasions, further appeal to the court of final jurisdiction – the Cassation Court. In some litigation, questions may be referred by the Belgian courts to the Court of Justice of the European Union (for authoritative interpretation of EU law).

If there is an arbitration clause in the franchise contract, and if one of the parties so requests, the litigation will be submitted to either one arbitrator or three arbitrators. In the case of dispute, the decision of the arbitrators may be declared enforceable (in whole or in part) by the courts.

42 Describe the principal advantages and disadvantages of arbitration for foreign franchisors considering doing business in your jurisdiction.

The advantage of arbitration lies in the special knowledge of the arbitrators – provided they are well chosen – and in the greater rapidity of the procedure. However, these are not guaranteed benefits. The disadvantages lie in the expense (arbitrators have to be paid, whereas the courts are free (with the exception of certain taxes, which are relatively minor)) and in the possibility to contest an arbitral decision before the courts if an error of procedure or of interpretation of the law has been made.

43 In what respects, if at all, are foreign franchisors treated differently from domestic franchisors?

There is no difference.

Getting the Deal Through

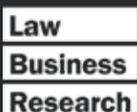
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