

# FRANCHISE

## Netherlands



# Franchise

Consulting editors

**Mark Kirsch**

*Lathrop GPM*

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Quick reference guide enabling side-by-side comparison of local insights, including franchise market overview; key considerations when forming and operating a franchise; offer and sale of franchises; franchise contracts and the franchisor/franchisee relationship; and recent trends.

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## Contributors

### Netherlands



**Tessa de Mönnink**  
monnink@parkeradvocaten.nl  
*Parker Advocaten*



## MARKET OVERVIEW

### Franchising in the market

How widespread is franchising in your jurisdiction? In which sectors is franchising common? Are there any economic or regulatory issues in the market that are more or less hospitable to franchising or make it economically viable in your jurisdiction?

There are approximately 870 franchise formulas operating in the Netherlands, with over 34,200 franchise outlets. Franchise businesses employ over 375,000 people and annual sales are well over €55 billion. This makes the franchise sector considerably important to the Dutch economy. Franchising is found in many industries, with focal points in retail (both food and non-food), services (for instance, medical services) and care, and comes in many forms. These vary from soft franchising, where the franchisee has a lot of freedom within the franchise to structure its activities (eg, by making its own selection from a wide range of products available to the franchise), to hard franchising, where the business operations are prescribed by the franchisor down to the smallest detail. In hard franchising, the franchisee is largely unburdened and in exchange, he or she relinquishes some of the freedom of movement in his or her entrepreneurship, as outlined in the explanatory note to the new Dutch Franchise Act, effective as of 1 January 2021.

*Law stated - 22 June 2021*

### Associations

Are there any national or local franchise associations? What is their role in franchising, including any impact on laws or regulations? Are there any rules of conduct or membership requirements?

The Dutch Franchise Association (NFV) represents the interests of its affiliated members (namely, franchise organisations). Its main objective is to promote the healthy and balanced development of franchising in the Netherlands. The NFV is a member of the European Franchise Federation, as are franchise associations in almost all European countries. The NFV is also a member of the World Franchise Council, which is a forum where supranational issues can be discussed.

*Law stated - 22 June 2021*

## BUSINESS OVERVIEW

### Types of vehicle

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

Franchises may come in the form of any business entity existing under Dutch law, in particular:

- private limited liability companies (BVs);
- public companies (NVs);
- sole proprietorships;
- general partnerships; and
- limited partnerships.

BVs and NVs are legal entities. General partnerships, limited partnerships and sole proprietorships are non-legal entities. The question of whether a business entity is a legal entity or not affects the franchisor's personal liability.

## Regulation of business formation

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

The formation of business entities is governed by Book 2 of the Dutch Civil Code for legal entities and Book 7A of the Dutch Civil Code. There are also several specific relevant laws for business entities, for example, the Works Councils Act. All business entities must be duly registered in the Commercial Register of the Dutch Chamber of Commerce .

Law stated - 22 June 2021

## Requirements for forming a business

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

The requirements for forming and maintaining a business entity depend on what form of business entity is incorporated. When a private limited liability is used by the franchisor, the following are required:

- a statement of no objection from the Dutch Ministry of Justice; and
- a notarial deed of incorporation, including the articles of association.

On 1 October 2012, an act for the simplification of private company law entered into force, making important changes to Dutch law applicable to BVs. From this date, the laws with respect to BVs became simpler and more flexible. As a result, it is now possible to deviate more from the statutory rules in the articles of association of the company and a minimum capital of €18,000 is no longer necessary. Furthermore, the mandatory bank and accountants' statements with a contribution in kind have been abolished. A notarial deed of incorporation is still required. The act entered into force with immediate effect and is applicable to all BVs. The act introduced several possibilities to deviate from the provisions of the law in the articles of association, which offered foreign investors more freedom to incorporate or structure their BV as they deem appropriate.

Law stated - 22 June 2021

## Restrictions on foreign investors

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

Business entities that are incorporated under foreign law but are active on the Dutch market rather than within their own country are subject to the Companies Formally Registered Abroad Act (CFRA Act). The CFRA Act does not apply to members of the European Union or to countries that are members of the European Economic Area Agreement. All other entities must comply with certain requirements, which also apply to Dutch entities (such as registration in the Commercial Register, statutory minimum capital and the filing of annual accounts with the Commercial Register where the business entity is registered).

Law stated - 22 June 2021

## Taxation

## What aspects of the tax system are relevant to franchisors? How are foreign businesses and individuals taxed?

In principle, taxable profits realised by corporate entities that are for tax purposes resident in the Netherlands – for example, Dutch limited liability companies (BVs and NVs) – are subject to the Dutch corporate income tax rate. Dividends received and capital gains derived from a shareholding to which the Dutch participation exemption applies are exempt from Dutch corporate income tax. Dividends distributed by a Dutch tax-resident company are generally subject to Dutch dividend withholding tax. A reduced rate or an exemption from Dutch dividend withholding tax may be available; for example, as a result of the application of a tax treaty or if the Dutch participation exemption applies. In principle, dividends distributed to an EU shareholder holding more than 5 per cent are also exempt from Dutch dividend withholding tax. In general, Dutch corporate taxpayers can credit dividend tax withheld against corporate income tax due.

Individual shareholders holding more than 5 per cent in the nominal share capital of a company (substantial interest) are generally subject to Dutch individual income tax in respect of dividends received and capital gains derived from such substantial interest. Individual shareholders holding less than 5 per cent in the nominal share capital of a company are generally subject to Dutch individual income tax.

Individuals performing franchise activities in the Netherlands, either in the form of tax transparent partnerships or as sole entrepreneurs, are generally subject to income tax at progressive rates. Dutch individual entrepreneurs may apply a number of beneficial tax facilities.

No taxes are levied upon establishing a business in the Netherlands. Dutch capital tax, which was due on the incorporation of a company with capital divided into shares, was abolished as of 1 January 2006. The acquisition of Dutch houses is currently subject to real estate transfer tax. For real estate business premises, a Dutch real estate transfer tax applies. In certain circumstances, the acquisition of more than 33.33 per cent of a Dutch real estate company is also subject to Dutch real estate transfer tax.

Wages paid by a Dutch employer are subject to Dutch wage withholding tax and Dutch social security premiums. Dutch wage withholding tax is creditable against the Dutch individual income tax liability in full. Attractive tax benefits are available for foreign employees if these employees have certain specific skills that are scarce in the Netherlands.

Dutch value added tax (VAT) currently amounts to 21 per cent. Reduced VAT rates of 6 per cent and zero per cent apply for certain supplies, such as the supply of agricultural products. Imports performed by Dutch entrepreneurs are generally subject to Dutch VAT. In principle, the importing entrepreneur may credit or refund the VAT paid on the imported supplies. Exports from the Netherlands are generally exempt from Dutch VAT.

*Law stated - 22 June 2021*

## Labour and employment

### Are there any relevant labour and employment considerations for typical franchisors?

In principle, franchisees are deemed independent entrepreneurs. Hence, no labour and employment considerations apply. However, franchisees may qualify as employees on the basis that the relationship between the franchisor and franchisee does not correspond with the franchise agreement as it is in fact an employment relationship. Case law shows that this is often the case with self-employed persons such as driving instructors and door-to-door salespeople. If the agreement is considered an employment agreement, the franchisee is, inter alia, entitled to holiday allowance and payment during illness. Also, laws regarding termination of the employment agreement apply.

According to tax law, the franchisor is required to withhold income tax and social security benefits in case the tax

authorities deem the relationship between parties a (fictitious) employment relationship. Each cooperation agreement, such as a franchise agreement, is considered on its own merits. The name and wording of the contract between the parties is not decisive. The courts look at the intention of the parties when entering into the franchise contract, as well as the way in which the parties have given substance to their relationship. If it is established that the franchisee is obliged to perform the agreed duties in person, that the franchisor pays the franchisee (directly or indirectly) for these duties and that a relationship of authority can be established that manifests itself in the right of the franchisor to give instructions that the franchisee must follow, an employment relationship can be assumed. Particularly in franchise relationships, the following criteria prove to be decisive: equivalence of the contracting parties, the ability of the franchisee to let someone else perform the duties (for example, third parties or employees of the franchisee), the franchisee bearing the business risk and economic independence of the franchisee. Provided that the franchisee is truly a franchisee, pursuant not only to the contract but also to its day-to-day activities, no employment relationship should be deemed to exist. Particularly if the franchisee is contracted via his or her Dutch limited liability company, the risk of an employment relationship is limited, at least from a civil law perspective. The tax authorities have a different view on this.

*Law stated - 22 June 2021*

## Intellectual property

### How are trademarks and other intellectual property and know-how protected?

Registered trademarks are protected by the Benelux Treaty for Intellectual Property. The registrant of a Benelux trademark has exclusive rights for specific classes of goods or services in Belgium, the Netherlands and Luxembourg if a trademark is registered in the public trademark registry of the Benelux Office for Intellectual Property. In addition, the registrant has exclusive rights for specific classes of goods or services in the European Union if a trademark is registered as a community trademark in the public trademark registry of the Office for Harmonisation of the Internal Market of the European Union.

In principle, know-how is not protected by any intellectual property right. However, know-how may be protected under the general provisions of Dutch unfair competition law (including civil tort). Know-how could be contractually protected by including confidentiality (non-disclosure) obligations in an agreement (eg, a franchise agreement).

*Law stated - 22 June 2021*

## Real estate

### What are the relevant aspects of the real estate market and real estate law? What is the practice of real estate ownership versus leasing?

In the Netherlands, there are no restrictions on the acquisition of real estate by foreigners. Therefore, foreign franchisors would not face difficulties should they wish to purchase real estate to lease to franchisees. However, franchisors must take the protection of lessees under the semi-mandatory Dutch lease law into account, even if the properties have been made available to the franchisees in the franchise agreement and no specific lease agreement has been drawn up.

There are two different tenancy regimes for the lease of commercial premises: the lease of retail space (including shops, restaurants and takeaways) and the lease of the other commercial premises (including travel agencies, cinemas, the ticket offices of lotteries and bank branches). Under the retail space regime, lessees are protected by various conditions of semi-mandatory lease law, including but not limited to:

- a minimum lease term of two to five years and limited grounds for termination by the lessor;
- termination or rescission can in principle only be effectuated judicially (also in the event of breach of contract); and
- the turnover rent may be affected by market rent review.

Under the regime of other commercial premises, the lessees only get protection of vacation. The lessees are entitled (within two months of the date of vacation) to request the court to extend the term of vacation. The court can be requested to approve a deviation from semi-mandatory law.

*Law stated - 22 June 2021*

## Competition law

What aspects of competition law are relevant to the typical franchisor in your jurisdiction? How is competition law enforced in the franchising sector?

Franchising agreements that do not meet the criteria set forth in Regulation (EU) No. 330/2010, and to which no de minimis thresholds apply, will be prohibited on the basis of article 6.1 of the Dutch Competition Act (DCA) or article 10 of the Treaty on the Functioning of the European Union (TFEU), unless the four criteria detailing the legal exception of article 6.3 of the DCA or article 101(3) TFEU apply. Competition laws in the Netherlands are enforced both administratively and by means of civil litigation (private enforcement). The Dutch Competition Authority can impose fines if a franchising agreement disregards what is set forth in Regulation (EU) No. 330/2010, in particular if the agreement contains any hardcore restrictions (eg, resale price maintenance). The maximum statutory fine is 10 per cent of the undertaking's worldwide turnover. A party to a franchising agreement claiming that the agreement infringes article 6.1 of the DCA or 101(1) TFEU can invoke the nullity of the agreement (in whole or in part) before a Dutch court. The court must then decide on the applicability of Regulation (EU) No. 330/2010 or the legal exception of article 6.1 of the DCA or article 101(1) TFEU. If it decides in the affirmative, it must subsequently determine whether this leads to nullity of only the infringing clauses or nullity of the agreement in its entirety. The latter will be the case if the court determines that without the infringing clause, the agreement would not (or would not on similar terms) have been concluded. In a few instances, the court has nullified a franchising agreement in its entirety, notably because the franchisor engaged in resale price maintenance.

The Authority for Consumers and the Market (ACM) supervises whether franchise and distribution agreements are disadvantageous to competition and consumers in the Netherlands, in which case the agreements may be prohibited. On 26 February 2019, the ACM published new guidelines for agreements between suppliers and buyers. Around this time, the ACM announced that, in future, it will be more vigilant regarding prohibited price agreements. This also seems to match the new line of the European Commission, which, until recently, did not prioritise this subject either.

*Law stated - 22 June 2021*

## OFFER AND SALE OF FRANCHISES

### Legal definition

What is the legal definition of a franchise?

In the new Franchise Act, effective from 1 January 2021, the term 'franchise' has not been explicitly defined, but both 'franchise agreement' and 'franchise formula' are defined terms.

A franchise agreement is defined as follows in article 911 (1) of the Franchise Act:

A franchise formula is defined as follows in article 911 (2) of the Franchise Act:

1. a trademark, model or trade name, house style or design; and
2. know-how: i.e. an entirety of practical information not protected by intellectual property rights, derived from franchisor's experience and from the investigations it has carried out, which information is secret, substantial, and identified[.]

*Law stated - 22 June 2021*

## Laws and agencies

### What laws and government agencies regulate the offer and sale of franchises?

There were numerous discussions about the need for a franchise law or franchise code in the Netherlands. At the beginning of 2015, the Ministry of Economic Affairs appointed a committee to prepare the Dutch Franchise Code, which was finalised in February 2016. The intention of the Ministry was that franchisors and franchisees in the Netherlands could voluntarily follow this code. However, a large majority of the franchisors were opposed to and rejected the Franchise Code, refusing to apply it to their franchise contracts.

At the end of 2016, the Ministry proposed a draft franchise bill that would declare the Franchise Code mandatory law. This draft franchise bill was rejected by many stakeholders during the consultation phase. The newly installed Dutch government indicated, in October 2017, that it wanted to introduce new legislation in the field of franchising to enforce the position of franchisees in the pre-competitive phase. On 12 December 2018, Mona Keijzer, the Under-Secretary of Economic Affairs and Climate, presented a new draft bill on franchises to the franchise sector for consultation. It has become an independent act that does not relate any more to the widely criticised Franchise Code. This new Franchise Act was adopted by the Dutch parliament and senate in mid-2020 and came into force on 1 January 2021.

*Law stated - 22 June 2021*

## Principal requirements

### What are the principal requirements governing the offer and sale of franchises under the relevant laws?

The Netherlands has moved from a country where franchising was not regulated to one of the most highly regulated countries in the world. Of all the requirements under the new Franchise Act, seeking consent from the majority of the franchisees to innovate and change the franchise formula but also to start with a derived formula may become the greatest challenge for franchise formulas. According to article 911 (2) of the Franchise Act, a derived formula is an operational, commercial and organisational formula that:

1. is decisive for a uniform identity and image of the enterprises in which this formula is applied;
2. corresponds to a franchise formula in one or more distinctive features that are recognisable to the public; and
3. is used directly or through third parties by a franchisor for the production or sale of goods, or the provision of services that are wholly or largely the same as the goods or services covered by the franchise formula within the meaning mentioned in (2).

A consequence of a derived formula could be that it competes with a franchisee's business operation.

Regarding the maintenance of the franchise relationship between franchisor and franchisee, the general obligation for them to behave 'as a good franchisor and a good franchisee' toward each other is stipulated in the Franchise Act. Furthermore, the provision of assistance and commercial and technical support by the franchisor to the franchisee is one of the core elements of a franchise relationship.

Other principal requirements are:

- providing prospective franchisees with financial information, either historically if available for the franchisee's location or for similar locations, wherein the franchisor must explain why it has decided that the locations are similar and where it may deviate (this could lead to prognosis claims later on when results at the franchisee's location are lower than projected);
- sharing financial information with franchisees during the co-operation, including how the fees contributed by the franchisees are being spent and arguably also kick-backs or bonuses provided by suppliers, but guidelines on this are not currently explicit;
- agreeing on a goodwill calculation in the franchise agreement; and
- complying with non-compete restrictions.

*Law stated - 22 June 2021*

### **Franchisor eligibility**

Must franchisors satisfy any eligibility requirements in order to offer franchises? Are there any related practical issues or guidelines that franchisors should consider before offering franchises?

There are no specific requirements that must be met before a franchisor may offer franchises.

*Law stated - 22 June 2021*

### **Franchisee and supplier selection**

Are there any legal restrictions or requirements relating to the manner in which a franchisor recruits franchisees or selects its or its franchisees' suppliers? What practical considerations are relevant when selecting franchisees and suppliers?

Good franchising practice suggests that the franchisor should employ a careful process for recruiting and selecting franchisees, as the franchisor and its other franchisees may be negatively impacted by the improper operation of that franchise formula by an incompetent franchisee. This can damage the image and strength of the franchise chain and is therefore not compatible with good franchising practice.

*Law stated - 22 June 2021*

### **Pre-contractual disclosure – procedures and formalities**

What procedures and formalities for pre-contractual disclosure are required or advised in your jurisdiction? How often must the disclosures be updated?

A franchisor has far-reaching disclosure obligations in the pre-contractual phase towards the prospective franchisee.

This includes any information that is or could reasonably be relevant and this information should enable the franchisee to make a well-considered decision to enter into a franchise agreement. The franchisee provides the franchisor with timely information about its financial position, insofar as it is reasonably relevant to enter into the franchise agreement. According to the explanatory memorandum accompanying the Franchise Act, the information should be clear, comprehensible, unambiguously formulated and tailored to the average franchisee. As an example, the explanatory memorandum suggests the addition of an explanatory note in the franchise agreement that explains the most important rights and obligations in the franchise agreement and their impact. This information should be provided at least four weeks prior to entering into the franchise agreement. During this standstill period, it is not possible to amend the draft franchise agreement, unless such amendment is to the benefit of the prospective franchisee. It is also not possible for the franchisor to request investments or other payments from the franchisee in view of the upcoming franchise relationship. The standstill period enables the prospective franchisee to fulfil its duty of investigation, to assess all the documents, to engage an expert, and to come to further questions or obtain further consultation about the content and the implementation of the franchise agreement. Since the franchise disclosure document contains the franchisor's confidential information, the prospective franchisee can be obliged to sign a non-disclosure agreement before receiving the franchise disclosure document.

*Law stated - 22 June 2021*

## **Pre-contractual disclosure – content**

### **What information is the disclosure document required or advised to contain?**

The prospective franchisee must provide the franchisor with timely information about his or her financial position if it is reasonably relevant to enter into the franchise agreement. Furthermore, the franchisor must provide the prospective franchisee, in a timely manner, with:

- the draft of the franchise agreement, including its appendices;
- a statement of the content and scope of rules regarding fees, surcharges, or other financial contributions to be paid by the franchisee or regarding the investments required from the franchisee; and
- information about:
  - the manner and frequency of any consultation between the franchisor and the franchisees and, if available, the contact details of the body representing the franchisees;
  - the extent to and the manner in which the franchisor can enter into competition with the franchisee, including whether this may be by means of a derived formula; and
  - the extent to, the frequency with and the manner in which the franchisee will have access to turnover-related data relating to the franchisee or relevant to the franchisee's business operations.

In addition, the franchisor must provide the prospective franchisee with the following information (if available to the franchisor, to a subsidiary or to a group company affiliated with the franchisor) in a timely manner if it is reasonably relevant to the conclusion of the franchise agreement:

- information about the franchisor's financial position; and
- financial data regarding the intended location of the franchise enterprise or, if such information is not available, financial data of one or more enterprises considered by the franchisor to be comparable, along with information from the franchisor making it clear the reasons why he or she considers them to be comparable.

Furthermore, the franchisor must provide the prospective franchisee with all other information that he or she knows, or

can reasonably assume, to be relevant for the conclusion of the franchise agreement.

*Law stated - 22 June 2021*

### **Pre-sale disclosure to sub-franchisees**

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 the Franchise Act and its explanatory memorandum, the situation of sub-franchising and the rights and obligations of the involved parties are not mentioned. Also, as there is currently no case law available on this subject, it is unclear how courts will address sub-franchising. However, it seems to be most logical that the party who concludes the franchise agreement with the sub-franchisees will be the party obliged to fulfil all disclosure requirements. This will generally be the sub-franchisor.

*Law stated - 22 June 2021*

### **Due diligence**

What due diligence should both the franchisor and the franchisee undertake before entering a franchise relationship?

Good franchising practice suggests that the franchisor must employ a careful process for recruiting and selecting franchisees. After all, the franchisor and other franchisees operating the franchise formula in question may be negatively impacted by improper operation of that franchise formula by an incompetent franchisee. This can damage the image and strength of the franchise chain and is therefore not compatible with good franchising practice.

Incidentally, the provision of information is not a one-way street. The prospective franchisee has an obligation to provide the franchisor with timely information about its financial position 'to the extent reasonably relevant to the conclusion of the franchise agreement', as stipulated in article 913 (3) of the Franchise Act. The franchisee also has a special duty of investigation. The franchisee is obliged, within the limits of reasonableness and fairness, to take necessary measures to avoid entering into a franchise agreement under the influence of incorrect assumptions. This is intended to prevent the franchisee from relying solely on communications from the franchisor. In doing so, the franchisee may be expected to maintain a critical attitude. In certain circumstances, this may involve the franchisee seeking external advice from trade associations or other experts.

*Law stated - 22 June 2021*

### **Failure to disclose – enforcement and remedies**

What actions may franchisees or any relevant government agencies take in response to a franchisor's failure to make required disclosures? What legal remedies are available? What penalties may apply?

The Franchise Act is mandatory law. Deviating from the main provisions in a franchise agreement to the disadvantage of a franchisee operating in the Netherlands is not permitted. Such deviating clauses are invalid. If the franchise agreement contains deviating clauses, they cannot be invoked. When the franchisor does not provide the franchisee with the required information, either before the conclusion of the franchise agreement or thereafter, this could render

the franchisor liable for any decisions that the franchisee makes without knowledge of such information when afterwards the franchisee claims that, with the required information, it would have decided otherwise or maybe would not even have concluded the franchise agreement. Consequently, the franchise agreement itself could be annulled and the franchisor may be compelled to compensate the franchisee for all fees paid, investments and costs made in the execution of the franchise agreement. The franchisee usually has three years to nullify all or part of the franchise agreement, which would require undoing the services rendered back and forth (including all payments, investments and costs made).

Another risk arises when a franchisor does not request the consent of its franchisees for certain changes (for instance, changes to the franchise formula, required investments, additional costs, or changes that may impact the revenue of the franchisees or the development and implementation of a derived formula) and the franchisees are of the opinion that those changes will have a negative financial impact. In these cases, the franchisees (either individually or with other franchisees) may claim damages or costs as a result of the decision made by the franchisor. The franchisees may also try to stop the franchisor from implementing new elements, decisions or a derived formula by requesting court intervention, for example a preliminary injunction, with the argumentation that the franchisees had not given their consent for these changes. The court could rule that the franchisor is not at liberty to implement certain changes and could be subject to penalties.

*Law stated - 22 June 2021*

### **Failure to disclose – apportionment of liability**

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 the Franchise Act and its explanatory memorandum, the situation of sub-franchising and the rights and obligations of the involved parties are not mentioned. Also, as there is currently no case law available on this subject, it is unclear how courts will address sub-franchising. However, it seems to be most logical that the party who concludes the franchise agreement with the sub-franchisees will be the party obliged to fulfil all disclosure requirements. This will generally be the sub-franchisor.

Under Dutch law, private companies with limited liability and public companies limited by shares both have legal personality. In principle, therefore, liability rests with the business and not with individual officers, directors or employees. Individual officers or directors are only exposed to liability in the event of improper management on their part that amounts to personal culpability of the directors. The burden of proof rests on the franchisee.

*Law stated - 22 June 2021*

### **General legal principles and codes of conduct**

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

### **General civil law principles**

In addition to the Franchise Act, the general laws of contract apply as well as Dutch court decisions. Book 6 of the Dutch Civil Code sets out the requirements relating to the formation of contracts. These provisions must be read in conjunction with the more general rules regarding juridical acts; that is, acts intended to invoke legal consequences

provided in Book 3 of the Dutch Civil Code. In the legal literature and jurisprudence, certain rules of law in relation to franchises have been developed. It is important to be aware that all contracts concluded under Dutch law are subject to the general requirements of reasonableness and fairness.

## EU and Dutch competition laws

Besides the civil law aspects, in franchising (as well as distribution and all other vertical agreements) competition laws play an important role. The European Commission Guidelines to Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the applicability of article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices is very important, as well as the guidelines thereto. The Dutch Competition Authority ensures compliance with European and Dutch competition laws.

## Code of ethics

Franchisors that are members of the Dutch Franchise Association are bound by the rules in the European Code of Ethics for Franchising drawn up by the European Franchise Federation .

*Law stated - 22 June 2021*

## Fraudulent sale

What actions may franchisees take if a franchisor engages in fraudulent or deceptive practices in connection with the offer and sale of franchises?

Besides the options under the Franchise Act and general civil law, a franchisee could benefit from the Acquisition Fraud Act and its possible consequences for the franchise practice. This act provides that a person acting in the course of a profession or business is acting unlawfully towards another professional party if he or she makes statements to the other party that are misleading in one or more respect. Incidentally, it is not only misleading if untruths are told, but also if essential information is omitted, such as information that the other party needed precisely to make an informed decision about the transaction in question. This act dictates that the party that made the announcements must state and prove that the announcements were correct and complete. In contrast to the 'normal' law of evidence, the other party is not obliged to prove that these communications were incorrect or incomplete. This results in a significant easing of the burden of proof for the injured party.

If a franchisor engages in fraudulent or deceptive practices, the franchisee may base a claim for annulment of the contract against the franchisor due to deceit, error or misrepresentation. If the actions or omissions of the franchisor also qualify as a civil tort, which is always accepted in cases of deceit, the franchisor has an obligation to compensate all of the franchisee's damages.

*Law stated - 22 June 2021*

## FRANCHISE CONTRACTS AND THE FRANCHISOR/FRANCHISEE RELATIONSHIP

### Franchise relationship laws

What laws regulate the ongoing relationship between franchisor and franchisee after the franchise contract comes into effect?

The Franchise Act, which came into effect on 1 January 2021, also regulates how the parties should act towards each other during the course of the franchise agreement. Namely, the franchisor should provide the franchisee with

information during the relationship and both parties need to act as a 'good franchisor' and a 'good franchisee' respectively. This last concept is very comparable with a principle that already existed in Dutch civil law that parties need to act reasonably and fairly towards each other, and take into account the other parties' interests.

*Law stated - 22 June 2021*

### **Operational compliance**

**What mechanisms are commonly incorporated in agreements to ensure operational consistency and adherence to brand standards?**

This depends highly on the situation in question and the applicable franchise agreement. Some franchise agreements have been in place for many years and generally the control mechanisms in those agreements are limited. However, most franchise agreements contain reporting and information obligations at minimum. Inspection and audit rights are less common, but can still be found, especially in franchise agreements that have been prepared following the implementation of the Franchise Act.

*Law stated - 22 June 2021*

### **Amendment of operational terms**

**May the franchisor unilaterally change operational terms and standards during the franchise relationship?**

If the franchisor intends to alter the franchise formula using a provision contained in the franchise agreement or intends to have a derived formula (operated directly or through third parties) without amending the franchise agreement, and the franchisor requires from the franchisee an investment, fee, surcharge or other financial contribution or can reasonably foresee that the implementation will lead to costs or loss of turnover, the following applies.

If the required monetary contribution exceeds a certain financial threshold set out in the franchise agreement, the franchisor requires prior consent to implement the plan in question from:

- a majority of the franchisees established in the Netherlands with whom the franchisor has concluded a franchise agreement concerning the franchise formula; or
- each of the franchisees established in the Netherlands that are affected by the intended plan.

Examples of an alteration of the franchise formula are the introduction of new product groups or new services (or disposal thereof), focusing the franchise formula on new target groups and exploring new marketing channels. Loss of turnover will likely occur if the franchisor intends to exploit a derived formula within the exclusive territory of the franchisee. In that event, the franchisor competes with its franchisees by using a derived formula directly operated by the franchisor or through third parties. It is advisable to add a financial threshold to the franchise agreement to determine the discretion of the franchisor regarding the alteration of the franchise formula or the use of a derived formula. This amount can be tailored to the type of franchise, the relevant sector and supply chain, and the size of the franchise enterprise. However, the proposed financial threshold requires the consent of the franchisee. If the financial threshold is not specified in the franchise agreement, prior consent will always be required from franchisees, regardless of the extent of the required investment, financial contribution, or costs or loss of turnover. The franchisor can benefit from the presence of a representative body of franchisees to obtain the necessary consent from the majority (that is, at least 50 per cent) of the franchisees. This could be less time-consuming than obtaining consent from the individual franchisees concerned.

**Policy affecting franchise relations****Do other government or trade association policies affect the franchise relationship?**

The European Franchise Code (EFC) implemented by the Dutch Franchise Association (NFV) may affect the franchise relationship when the franchisor is a member of the NFV. For example, the EFC stipulates that the franchisor must provide the franchisee with initial training and continuing commercial and technical assistance during the entire term of the agreement.

Law stated - 22 June 2021

**Termination by franchisor****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?**

Either party may have cause to terminate the franchise agreement in the case of a serious breach of obligations by the other party. The criteria for what constitutes a serious breach should be carefully considered before actually terminating, because Dutch courts have the discretion to decide that a certain circumstance does not qualify as a sufficiently serious breach, notwithstanding the fact that this may have been agreed by the parties in the franchise agreement.

In the case of termination of the franchise agreement by the franchisor without cause, a legal distinction should be made between contracts concluded for a definite and an indefinite duration. Contracts of definite duration can generally not be terminated before the end of the contract term unless the possibility to terminate early – without cause – has been specifically agreed upon. Early termination, in most situations, results in liability of the terminating party. If a franchisor terminates a contract for a definite term prematurely without cause, the franchisee can claim continued performance or damages. The damages could consist of lost profits calculated over the remaining term of the contract, and costs and investments that the franchisee was not able to redeem owing to the premature termination.

In the case of a contract for an indefinite duration, the leading view recently affirmed by the Dutch High Court is that the contract may in principle be terminated by either party. However, under certain circumstances, a franchisor may be obliged to present a good reason to terminate the agreement. Besides this, the franchisor must respect a reasonable notice period, the length of which depends on the circumstances of the matter. While until recently it was quite usual that courts granted termination periods of up to a maximum of six to 12 months, currently there are a couple of higher court decisions in which notice periods of two to three years have been granted, even when contractually the parties agreed to a shorter notice period. Furthermore, the franchisor may be obliged to compensate the franchisee upon termination for investments or costs that the franchisee may not be able to earn back as a result of the termination, as well as for over-stock (eg, taking back stock against a reasonable purchase price). So far, no high court has granted a franchisee payment of a goodwill or customer compensation, even though this has sometimes been suggested in literature. If the franchisor terminates a contract without cause or does not respect a reasonable notice period, the franchisee could claim continued performance during the period that should have been respected by the franchisor, or instead claim a financial compensation for damages.

Law stated - 22 June 2021

## Termination by franchisee

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

Either party may have cause to terminate the franchise agreement in the case of a serious breach of obligations by the other party. The criteria for what constitutes a serious breach should be carefully considered before actually terminating, because Dutch courts have the discretion to decide that a certain circumstance does not qualify as a sufficiently serious breach, notwithstanding the fact that this may have been agreed by the parties in the franchise agreement.

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*Law stated - 22 June 2021*

## Renewal

### How are renewals of franchise agreements usually effected? Do formal or substantive requirements apply?

In practice, franchise agreements are often continued without the conclusion of a new formal agreement. Under Dutch law, no formal or substantive requirements apply.

*Law stated - 22 June 2021*

## Refusal to renew

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

Whether a franchisor may refuse to renew the franchise agreement with a franchisee depends primarily on the content of the agreement. Often, the possibilities and conditions for renewal are specified in the agreement. When there is no contractually agreed renewal mechanism, a franchisor may be able to terminate the relationship by not renewing the franchise agreement if it complies with a reasonable notice term. The franchisor may sometimes be required to compensate costs and investments of the franchisee and, in exceptional circumstances, a 'good reason' will be required. Furthermore, where the franchisor can prove that the franchisee is in breach of its material obligations, the franchisor may refuse to renew the agreement on the basis of breach of contract. In certain circumstances, the franchisor will be obliged to compensate the franchisee upon termination; for example, if the franchisor or a new

franchisee takes over the franchise business, based on the Franchise Act the franchisor would be required to pay the franchisee a goodwill compensation. The calculation of the goodwill compensation should be specified in the franchise agreement.

*Law stated - 22 June 2021*

### **Transfer restrictions**

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

A general provision regarding contract transfers is set out in the Dutch Civil Code. A contracting party may, only with the consent of the other party, transfer its rights and obligations under the contract to a third party. Therefore, a franchisee may only transfer the franchise with the franchisor's consent. A franchisor will not normally refuse such a transfer where the third party meets the selection criteria. It can be contractually arranged that the franchisee should first offer the business to the franchisor on the same terms as those that the franchisee would offer to the third party. Based on the Franchise Act, the franchisor must pay the franchisee a goodwill compensation in the event that it takes over the franchise business.

*Law stated - 22 June 2021*

### **Fees**

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

Franchising fees are not regulated by law. In practice, however, different types of fee can be distinguished. First, an entrance fee, which is a one-off payment that the franchisee pays to the franchisor. It represents a contribution towards the costs that the franchisor has incurred in the expansion of its chain and establishment of goodwill. Second, a continuing franchising fee, which is a regular fee for the use of the franchise system. This is usually a percentage of profits that the franchisee has realised within a given term. A specific fee may also be due as a contribution towards advertising, promotional activity or technology costs.

*Law stated - 22 June 2021*

### **Usury**

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

Under freedom of contract between professional parties, in principle the parties are free to agree on the interest rates to be applied. If the parties did not agree on any interest rate, Dutch statutory trade interest applies automatically in the event of late payment. If no payment term has been agreed, then it is set automatically at 30 days after having received the invoice. On 16 March 2013, a new act entered into force, implementing Directive 2011/7/EU to prevent payment delays in commercial agreements. This act gives creditors more opportunities to recover their claims. Even though professional parties can agree upon payment terms, the act dictates that only in exceptional circumstances can a payment term longer than 60 days be agreed upon. When acting with governmental agencies, the maximum payment term should be 30 days and only in exceptional circumstances can it be longer than this, but it may never exceed 60 days. Based on this act, a creditor can claim a minimum compensation of €40 for the costs of recovery. Under this act, the statutory trade interest is increased by 1 per cent. This act does not apply to transactions with private consumers. The Dutch legal interest rate in commercial matters as of 1 January 2021 amounts to an annual percentage of 8 per cent. For transactions with consumers, a lower annual interest rate of 2 per cent applies.

**Foreign exchange controls**

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

No, there are no laws or regulations restricting this ability.

Law stated - 22 June 2021

**Confidentiality covenant enforceability**

Are confidentiality covenants in franchise agreements enforceable?

Confidentiality covenants in franchise agreements are, in principle, enforceable. The franchisee typically commits itself for the duration of the contract (and following its termination) to keeping all details of the franchisor's business operations confidential. This typically extends to non-patented know-how materials. The franchisee is legally obliged to treat certain information received from the franchisor as confidential, according to the law on the protection of business secrets that has been in force since 17 October 2018. This law is based on the Directive 2016/943/EU on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. Although there may be a legal obligation to keep certain information confidential, it is still recommended to include a clear confidentiality clause in the franchise agreement, including a penalty clause in the event of confidentiality breaches. The courts have the right to mitigate such penalties and this right cannot be contractually excluded.

Law stated - 22 June 2021

**Good-faith obligation**

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

In the Netherlands, general civil law is governed by the principles of reasonableness and fairness. In the Franchise Act, this is made specific with the introduction of the obligation that the franchisor must act as a 'good franchisor' and the franchisee must act as a 'good franchisee'. Those principles may not only supplement the existing contract and relationship, but may also derogate from the contract that the parties agreed upon at an earlier stage, in the event that such provision is, in the given circumstances according to the principle of reasonableness and fairness, unacceptable. The standard required to derogate from an agreed provision is high. Franchisors in particular should be aware that a provision in an existing contract that is very one-sided (eg, a provision that the franchise relationship may be terminated by the franchisor at any given moment, respecting a notice term of only 30 days), could be set aside by the principle of reasonableness and fairness, if such provision is unacceptable in the given circumstances.

It is not possible to predict what kind of provisions may be set aside, if any, as the court considers all relevant circumstances, including:

- the economic power of each party;
- the dependency of the parties from each other;
- the duration of the contract;
- the investments made by either party;

- what each party could reasonably expect from the other party; and
- all other relevant circumstances.

As a general rule, Dutch courts generally tend to protect weaker or smaller parties at the expense of economically stronger or larger parties. However, this certainly does not mean that, simply by being a weaker party, certain clauses will be set aside. This depends on all the circumstances of the matter.

*Law stated - 22 June 2021*

### **Franchisees as consumers**

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

When dealing with a very small franchisee, there is a possibility that general conditions –even potentially including a standard franchise agreement, or a part thereof – may be annulled because of reflex action of articles 6:236–238 of the Dutch Civil Code. Those articles deal with the ‘black’ and ‘grey’ lists, which set out prohibited clauses in general conditions for consumers.

*Law stated - 22 June 2021*

### **Language of the agreement**

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

The parties may agree to draw up contracts in whichever language they choose. However, based on the Franchise Act, it is arguable that disclosure documents, the franchised agreement and any related documentation should be made available in a language that the franchisee understands.

*Law stated - 22 June 2021*

### **Restrictions on franchisees**

What types of restrictions are commonly placed on the franchisees in franchise contracts?

Some provisions (such as exclusive territories, restrictions on sources from whom a franchisee may purchase or lease goods or services, prohibitions on franchisees soliciting the franchisor’s or other franchisees’ employees, non-competition, governing law, dispute resolution, etc) are commonly placed on the franchisees in a franchise agreement. However, based on EU and Dutch competition laws, certain provisions would be void, for example restrictions on customers the franchisee may serve and the prices franchisees charges to its customers.

*Law stated - 22 June 2021*

### **Courts and dispute resolution**

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

Franchise agreements generally contain a dispute resolution clause, in which a competent court or a form of arbitration

is explicitly chosen. Arbitration through the Netherlands Arbitration Institute (NAI) is well regarded and is generally less expensive than the more internationally well-known International Chamber of Commerce (ICC) arbitration.

In cases where there is no valid arbitration provision, the sub-district court is competent in smaller claims (ie, for amounts less than €25,000) and for particular issues, such as employment and rent-related disputes. Larger claims may be brought before the civil judge of the district court.

The NFV can assist with mediation for parties seeking out-of-court remedies.

The Netherlands Commercial Court (NCC) was created on 1 January 2019. It is a chamber in the Amsterdam District Court, where parties may litigate before the Dutch court in the English language. A matter may be submitted to the NCC where:

- the Amsterdam District Court or Amsterdam Court of Appeal has jurisdiction;
- the parties have expressly agreed in writing that proceedings will be in English before the NCC;
- the action is a civil or commercial matter within the parties' autonomy; or
- the matter concerns an international dispute.

*Law stated - 22 June 2021*

### **Governing law**

Are there any restrictions on designating a foreign governing law in franchise contracts in your jurisdiction? How does the governing law affect the contract's enforceability?

Franchisors cannot derogate from the Franchise Act in a franchise agreement, even if foreign law has been agreed upon, when franchisees are operating in the Netherlands. If Dutch law is applicable but a franchisee is located outside the Netherlands, the franchisor may deviate from the franchise agreement to the detriment of a franchisee.

*Law stated - 22 June 2021*

### **Arbitration – advantages for franchisors**

What are the principal advantages and disadvantages of arbitration for foreign franchisors considering doing business in your jurisdiction? Are any other alternative dispute resolution (ADR) procedures particularly favoured or disfavoured in your jurisdiction?

The principal advantages of arbitration are as follows.

- Arbitration offers a choice regarding the language of proceeding; the regular courts in the Netherlands only accept the Dutch language (with the exception of the Netherlands Commercial Court).
- It is possible to agree on the country and area where the proceedings will be conducted.
- It is possible to choose the number of arbitrators and the time limitations.
- Arbitration is, generally speaking, finalised more quickly than regular court procedures.
- Arbitration may be dealt with by appointed experts instead of or in addition to lawyers.
- Involved parties can agree to observe secrecy in arbitration, whereas regular court proceedings are public.

The principal disadvantages of arbitration are that, in general, arbitration is much more expensive than regular court

proceedings, regular court proceedings offer the possibility of appeal whereas arbitration does not and the quality of arbitration may not always be ensured. This depends on the arbitration forum, although NAI and ICC arbitration in general is of good quality.

*Law stated - 22 June 2021*

### **National treatment**

In what respects, if at all, are foreign franchisors treated differently (legally, or as a practical matter) from domestic franchisors?

In principle, there is no difference in the treatment of foreign and domestic franchisors. However, the Franchise Act states that franchisors with franchisees operating outside the Netherlands should be able to deviate from the binding provisions in the Franchise Act, even when Dutch law is applicable to the franchise agreement. Franchisors with franchisees operating in the Netherlands are not able to deviate from the binding provisions in the Franchise Act, even when another (foreign) law system is applicable to the franchise agreement.

*Law stated - 22 June 2021*

### **UPDATE AND TRENDS**

#### **Legal and other current developments**

Are there any proposals for new legislation or regulation, or to revise existing legislation and regulation? Are there other current developments or trends to note?

The new Franchise Act has been in effect since 1 January 2021. From this date, new franchise agreements concluded with franchisees operating in the Netherlands or renewals of franchise agreements with existing franchisees must comply with the mandatory provisions of the Franchise Act. Existing franchise agreements with a longer duration than two years from 1 January 2021 are subject to a transitional period of two years with regard to specific provisions, such as the rights of consent, non-compete and goodwill. As of 1 January 2023, all franchise agreements, including already existing agreements made prior to 1 January 2021, must fully comply with the Franchise Act.

*Law stated - 15 June 2022*

## Jurisdictions

	<b>Australia</b>	Norton Rose Fulbright
	<b>Canada</b>	Lapointe Rosenstein Marchand Melançon LLP
	<b>China</b>	Jones & Co
	<b>Finland</b>	ADVOCARE Law Office
	<b>France</b>	Bersay
	<b>Germany</b>	Taylor Wessing
	<b>India</b>	G&W Legal
	<b>Israel</b>	Gilat Bareket & Co, Reinhold Cohn Group
	<b>Italy</b>	Rödl & Partner
	<b>Japan</b>	Anderson Mōri & Tomotsune
	<b>Malaysia</b>	Wong Jin Nee & Teo
	<b>Mexico</b>	Gonzalez Calvillo SC
	<b>Netherlands</b>	Parker Advocaten
	<b>New Zealand</b>	Stewart Germann Law Office
	<b>Norway</b>	CLP
	<b>South Africa</b>	Spoor & Fisher
	<b>South Korea</b>	Lee & Ko
	<b>Switzerland</b>	Kellerhals Carrard
	<b>Turkey</b>	Özdağistanli Ekici Attorney Partnership
	<b>United Kingdom</b>	Ashtons Legal
	<b>USA</b>	Lathrop GPM