Franchise 2018

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Overview

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

When setting up a business in Denmark, the franchisor may choose from a wide variety of corporate forms and forms of business entities, ranging from business enterprises with personal liability to corporate forms with limited liability. A franchisor will typically set up business as a private limited company or a public limited company. Both types of company are business entities with limited liability on the part of all participants.

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

Private limited companies and public limited companies are governed by the Danish Companies Act and both types of company must file for registration with the Danish Business Authority to achieve legal capacity and to be formally established. The legal requirements are largely the same for both company forms, but the capital requirements differ, and, in general, private limited companies have to meet fewer requirements (for instance, in relation to management structure).

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

In contrast with many other jurisdictions, the formation of a company in Denmark does not require attestation by a public notary, legalisation or separate governmental approval.

When setting up a private limited liability company or a public limited company, the following requirements should be borne in mind:

- Share capital has to be paid. Private limited companies must have a minimum share capital corresponding to 30,000 kroner and public limited companies must have a minimum share capital of 500,000 kroner.
- The franchisor (the promoter) must sign a memorandum of association, which includes the articles of association of the company. The company’s articles of association must include information about the company’s name, the company’s objectives, the amount of the share capital, the rights attaching to the shares, the company’s governing bodies, notices of general meetings and the company’s financial year.
- The registration of the company is made online in the Danish Business Authority’s Webreg platform when the share capital has been paid and no later than two weeks after the signing of the memorandum of association.
- The Danish Business Authority charges a fee of 670 kroner to carry out the registration of the company.
- A private or public limited company does not achieve legal capacity until registration has taken place.
- At least once a year a general meeting has to be held in the company.
- An annual report has to be made each year.
- The actual owners of the company need to be registered within the Danish Business Authority. The actual owners are the physical owners who ultimately own or control the company. Public limited companies which are listed on a stock exchange are not comprised by these rules.

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

Foreign enterprises in Denmark are not subject to any restrictions. Denmark is a member state of the EU and must observe the fundamental principles of non-discrimination and free movement of goods, capital, persons and workers. Enterprises and persons from outside the EU are not subject to any restrictions either.

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

As a general rule companies and individuals that are tax resident in Denmark are subject to a full tax liability and are liable to pay taxes on their worldwide income.

Companies and individuals that are not tax resident in Denmark may be subject to a limited tax liability with respect to certain income and gains derived from sources in Denmark.

Taxation of foreign franchisors

A foreign franchisor that is not tax resident in Denmark may be liable to taxation in Denmark if it is deemed to have a permanent establishment in Denmark. A permanent establishment is generally defined as a fixed place of business, such as an office, factory or workshop, through which the business of an enterprise is wholly or partly carried on. Generally, activities such as cross-border sales from a foreign franchisor to a Danish franchisee or other purchaser, purchases of stocks of goods and merchandise, collection of information, advertising and research and development do not constitute a permanent establishment. Also, selling through a Danish independent agent or distributor does not create a permanent establishment in Denmark when the agent or distributor is acting in the ordinary course of its business. On the other hand, if an employee or other representative of a foreign franchisor, including a franchisee, is authorised to conclude contracts in the name of the franchisor, the foreign franchisor may be regarded as having a permanent establishment in Denmark.

If a foreign franchisor has a permanent establishment in Denmark, it is subject to limited tax liability with respect to any income and gains derived from the permanent establishment. The taxable income is generally determined as if the franchisor were subject to full tax liability and taxed at the tax rates applying to Danish tax residents (see below). Foreign franchisors may also be subject to a limited tax liability in Denmark with respect to other income, including, for example, income from real property situated in Denmark and dividend, royalties or interest deriving from sources in Denmark. Denmark imposes withholding taxes on dividends (27 per cent), interest, and royalties (both 22 per cent).

Exemptions from withholding tax and relief from double taxation may be available under Danish law, under tax treaties concluded by Denmark or under applicable EU directives such as the Parent-Subsidiary Directive (Council Directive 2011/96/EU, as amended) or the Interest and Royalty Directive (Council Directive 2003/49/EC, as amended).
Taxation of Danish entities

In the event a foreign franchisor decides to establish a limited liability company in Denmark, this company will generally be subject to a full tax liability and be liable to pay taxes on its worldwide income except for income from permanent establishments and real property located abroad.

A company is considered to be tax resident in Denmark if the company is registered with the Danish Business Authority or if the company has its seat of management in Denmark.

Danish companies and Danish permanent establishments belonging to the same group are subject to mandatory joint taxation. It is also possible to opt for international tax consolidation.

Operating costs, depreciations and losses may generally be offset against taxable income and gains. Tax losses may be carried forward indefinitely. However, certain limitations apply in the utilisation of tax losses and deduction of interest expenses.

Under Danish law, there is no limited tax liability with respect to capital gains on shares. Thus a foreign franchisor that sets up a subsidiary company in Denmark is not subject to Danish tax on capital gains realised on the transfer of shares in the Danish subsidiary.

Certain entities such as partnerships and limited partnerships are transparent for Danish tax purposes, meaning that taxes are levied on the partners in proportion to their shares of the partnership. Depending on the nature of the business carried on by the partnership, a permanent establishment may be held to exist in Denmark (see above).

Taxes and tax rates

Danish companies are taxed at a flat rate of 22 per cent (2017). Individuals are taxed at progressive tax rates of up to 56.4 per cent (2017), including labour-market contribution. Social contributions in Denmark are relatively minor.

In addition to income taxes, franchisors operating in Denmark should pay attention to the applicable rules concerning value added tax, customs duties, excise duties, land and property taxes and payroll taxes. The Danish VAT rate is 25 per cent.

As a general rule, no capital duties, stamp duties or transfer taxes are levied in Denmark.

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?

As a general rule, there is no risk that the franchisee or the employees of a franchisee could be deemed employees of the franchisor.

It is, however, important that the franchisor be aware that its level of control cannot reach too far. Thus, if the franchisor is able to unilaterally decide the opening hours of the business, the employees' employment contracts or the franchisee's ability to conduct other businesses, this might establish a legal subordination relationship between the franchisor and the franchisee.

7 How are trademarks and know-how protected?

Trademarks

Pursuant to the Danish Trademark Act, a trademark can be obtained either by registration or through continuous use of a particular mark in the course of trade.

It is possible to file an application with the Danish Patent and Trademark Office (PTO) for a Danish trademark or, alternatively, the European Union Intellectual Property Office (EUIPO) for a European Union trademark, which will have effect in Denmark and all other EU member states.

The protection period for a registered trademark is 10 years from the date of registration, with the possibility of renewal. The owner of a trademark must, however, use the trademark to keep the registration valid and retain the exclusive right in the trademark, as a registered trademark is vulnerable to non-use cancellations after it has been registered for five years.

A trademark right obtained through use will remain in force until the owner seizes use of the trademark.

A trademark right, either obtained through registration or use, grants the holder an exclusive right to use the trademark or similar trademarks for the goods and services, as well as similar goods and services, for which the trademark is registered or used.

Know-how

Know-how is acknowledged by Danish law although it is not defined by statute. Therefore, know-how should first and foremost be protected by creating safeguards within a business organisation, including necessary contractual provisions and sanctions in agreements with franchisees and other business partners.

The Danish Marketing Practices Act grants protection of trade secrets and technical drawings. Furthermore, this Act includes a standard provision prohibiting acts that are not in accordance with ‘good marketing practices’. This standard provision may generally be invoked as a protection of unauthorised use of business know-how along with the protection on trade secrets and technical drawings.

The recently adopted EU directive on the protection of trade secrets of 8 June 2016 (2016/943) includes protection of undisclosed know-how. The directive will be implemented into Danish law by means of a new, separate act on protection of trade secrets, which will occur no later than 8 June 2018. The draft act is not yet published but, based on the text of the directive, the new Danish act will undoubtedly result in changes in the legal position in terms of know-how protection.

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

The acquisition of real estate in Denmark is limited for foreign buyers, since ownership is exclusively reserved to persons and companies with a current permanent residence in Denmark and persons and companies resident in Denmark for at least five years. This restriction does not apply, however, if a foreign person or company enjoys the rights of free movement found in EU law. The restriction may also be exempted by official decision of the Ministry of Justice, but practice shows that such exemptions are rare. Any company with a domicile outside the European Union cannot acquire property without the permission of the Ministry of Justice.

If the franchisor owns the property in which the franchisee wishes to run its business, the character and terms of the franchise contract may decide whether the contract is regulated by the Danish Business Lease Act, including its mandatory provisions. Consequently, an examination must be carried out to classify whether the franchisor’s core responsibility is as the franchise contract or the lessor of the premises. If the main part of the franchisee’s payment results from usage of the franchise (name, brand, products, etc), the contract will not be regulated by the Business Lease Act. The act generally applies, however, if the main proportion of the payment results from the lease of premises. If the act does apply, it may restrict the franchisor’s ability to terminate the contract with the franchisee.

If the franchisor has leased the premises in which the franchisee is going to run its business, the contract between the franchisor and the landlord must include a provision of right to sublease. If the franchisor wishes to assign the lease to the franchisee then it has a right to do so unless the lease contract between the franchisor and the landlord states otherwise; however, a lease contract often will contain provisions regarding the right to assign the lease.

Laws and agencies that regulate the offer and sale of franchises

9 What is the legal definition of a franchise?

There is no statutory definition of a franchise in Denmark. In Denmark a franchise is understood traditionally as a form of business organisation in which a firm that already has a successful product or service (the franchisee) operates under the franchisor’s trade name and trademarks, including by use of the franchisor’s know-how and trade secrets, and usually with the franchisor’s guidance, in exchange for a royalty fee or a start-up fee, or both.

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

No specific laws regulate the offer and sale of franchises, but the Contracts Act, the Sale of Goods Act and Act on Employees’ Rights in the event of Transfers of Undertakings include relevant provisions that franchisees should be aware of.
11 Describe the relevant requirements of these laws and agencies.

If the seller of a franchise fraudulently fails to disclose substantive information on the business (if the principle of good faith or duty of loyalty is set aside by the seller), the sale may either be declared invalid or the acquisition deemed defective, meaning that the buyer may be entitled to a proportionate reduction of the price or compensation, or – in very rare cases – the buyer may rescind the purchase agreement.

A potential buyer of a franchise’s business should be aware of the Act on Employees’ Rights in the event of Transfers of Undertakings, as the individual salaries and employment conditions of the employees of the franchisee must, as a general rule, not be changed. Furthermore, a reasonable reason must exist to lay off employees in relation to a transfer of business – the transfer of the business itself is not such a reason.

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

Not applicable.

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

No.

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.

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

There is no compliance procedure in Denmark, but if a franchisor does not provide a franchisee with, for example, relevant financial information on the franchise or actual claims on the franchisor’s rights to the trademarks of the franchise, or if the franchisor sets aside its duty of loyalty, the franchise agreement may be held invalid in full or in part.

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?

There is no formal pre-sale disclosure obligation under Danish law; however, the franchise agreement may be held invalid if the sub-franchisor (or any party entering into the franchise agreement with the sub-franchisee) fails to inform the sub-franchisee of substantive commercial information such as financial information or information regarding the franchise system, including information on current litigation and claims that may affect the sub-franchisee’s right to utilise essential parts of the franchise concept.

17 What information must the disclosure document contain?

Not applicable. No disclosure document is required under Danish law.

18 Is there any obligation for continuing disclosure?

No.

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

Not applicable.

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?

Not applicable.

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?

Liability would only be imposed on a party acting fraudulently or setting aside its duty of loyalty. Individual officers, directors and employees of the franchisor or the sub-franchisor are not exposed to liability, unless they fraudulently misrepresented facts or did not provide relevant substantive information to the franchisee.

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?

The principle of culpa in contrahendo and an obligation of good faith make pre-sale disclosure advisable. It is advisable to disclose information to potential franchisees about profitability or material litigation, such as pending lawsuits with an impact on the potential franchisee’s business or the current status of trademark applications or registrations. Also, the European Code of Ethics for Franchising, as adopted by the European Franchise Federation, provides for written disclosure of all information material to the franchise relationship, but such code of ethics is by nature not legally binding. It is still, however, advisable for franchisors to follow the content of the code in relation to disclosure.

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?

See questions 11 and 15. There are no statutory rules on pre-disclosure, but the principles of law of good faith, culpa in contrahendo and a duty of loyalty, including a seller’s duty to disclose material facts, also apply to franchisors.

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?

Franchisees may initiate legal proceedings claiming reimbursement or damages calculated as loss of profit if the franchisor has acted fraudulently or contrary to the principle of good faith.

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?

There is no specific franchise law. The franchise agreement, as well as the business transactions between franchisors and franchisees, are governed by a number of laws dependent on the type of business, such as the Contracts Act, the Competition Act, the Marketing Practices Act, Business Lease Act and Product Liability Act.

26 Do other laws affect the franchise relationship?

See question 25.

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?

Termination will usually be regulated in the agreement, and whether for cause or without cause may take place as provided for in the agreement. Disregarding the agreement, termination for cause may be served upon material breach, in which case termination may take effect...
immediately under Danish law. If the agreement is silent on the issue of termination without cause, but does not explicitly state the agreement to be non-terminable, under Danish law termination can take place but will require appropriate notice. This period of notice will be decided in the specific circumstances, but based on case law appropriate notice would arguably be between six and 12 months. The level of start-up investment made by the other party may be taken into account when deciding on the length of notice.

29 In what circumstances may a franchisee terminate a franchise relationship?
See question 28.

30 May a franchisor refuse to renew the franchise agreement with a franchisee? If yes, in what circumstances may a franchisor refuse to renew?
Yes. There is no legislation or regulation compelling any franchisor to renew a franchise agreement that expires. Upon expiry of a franchise agreement the franchisor may, at its sole discretion, decide whether to offer a renewal. Please note that automatic renewal mechanisms may be problematic in light of the European Commission’s Block Exemption Regulation on Vertical Agreements, as they may be interpreted to extend the duration of a non-compete clause. See question 40 for further information.

31 May a franchisor restrict a franchisee’s ability to transfer its franchise or restrict transfers of ownership interests in a franchisee entity?
Yes. It is common to impose change-of-control clauses enabling the franchisor to terminate the agreement if the beneficial owner of a franchisee entity transfers the share or voting power. Also, it is common to include the right for the franchisor to approve of or veto a new franchisee.

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?
There is no regulation restricting the amount of interest between two businesses provided that the interest amount and principle for calculation has been agreed upon by the parties in advance.

Previous case law has affirmed agreements on annual interest rates up to 25 per cent, but in extreme cases the court may hold an agreement between two businesses on interest calculation invalid. If the parties have not made an advance agreement on the calculation of interest and the interest rate this will be calculated in accordance with the Act on Interest, currently prescribing annual interest of 8.55 per cent.

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. The parties may agree on making payments in whatever currency they like. If, however, the parties have not made any prior agreement and the payment is to be made in Denmark, the creditor may require payment to be made in the local currency (Danish kroner).

35 Are confidentiality covenants in franchise agreements enforceable?
Yes. Confidentiality covenants are generally enforceable in Denmark and such covenants in franchise agreements are treated similarly to any other agreements.

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. Good faith is important both in negotiating the franchise agreement and in cooperation afterwards. Both franchisor and franchisee are obligated to work for the benefit of the franchise chain.

37 Does any law treat franchisees as consumers for the purposes of consumer protection or other legislation?
No. Franchisees are treated as professionals.

38 Must disclosure documents and franchise agreements be in the language of your country?
No. Documents in the English language will also be accepted (but in no other languages).

39 What restrictions are there on provisions in franchise contracts?
The overriding principle in Danish contract law is freedom of agreement between businesses. Therefore, there are generally no restrictions on provisions in franchise contracts. A notable exception, however, is competition law, which may hold provisions invalid if they are found to be anticompetitive. See question 40 for further information.

40 Describe the aspects of competition law in your country that are relevant to the typical franchisor. How are they enforced?
The Danish Competition Act regulates competition matters in Denmark. The act applies to all agreements, including franchise agreements. The competition rules in the Danish Act are almost identical to the EU competition rules in all relevant matters. Furthermore, the EU competition rules are directly applicable in Denmark when there is an effect on trade between member states. The two sets of rules are often applied simultaneously.

The European Commission’s Block Exemption Regulation on Vertical Agreements is incorporated into the Danish Competition Act. If particular conditions are met, the Block Exemption exempts agreements that otherwise might be unlawful according to competition law. The general conditions for the applicability of the Block Exemption Regulation are that:

- the market share held by the buyer does not exceed 30 per cent of the relevant market on which the supplier sells the contract goods or services; and
- the market share held by the buyer does not exceed 30 per cent of the relevant market in which the buyer purchases the contract goods or services.

Pursuant to article 5 of the Block Exemption Regulation, non-competitive obligations can legally be enforced for up to five years, provided that the Block Exemption Regulation applies. Upon expiry of that period the non-competitive obligation may be renewed. A non-competitive obligation can, however, be enforced throughout the full duration of the contract and for another year after termination of the agreement if certain cumulative conditions are met. The conditions for the prolonged time period are that:

- the obligation concerns competing goods or services;
- the obligation is limited to the premises and land from which the buyer has operated during the contract period; and
- the obligation is indispensable to protect know-how transferred by the supplier to the buyer.

The third condition relates particularly to franchise agreements, thus creating the possibility of the extension of clauses containing non-competitive obligations.

Furthermore, it has been established by the Court of Justice of the European Union that franchise agreements differ in nature from regular distribution agreements, and some obligations levied upon the franchisor fall outside the scope of the competition rules. If a franchise agreement contains obligations that do not exceed what is necessary to protect the transferred know-how, identity or reputation, the conditions will not fall within the scope of competition law. Therefore, if the aforementioned conditions are met, the parties may agree on clauses or provisions that would otherwise be anticompetitive.

**Enforcement of competition law in Denmark**
The Danish Competition and Consumer Authority adopts all relevant decisions concerning illegal agreements infringing the Danish Competition Act. If a case is of fundamental importance, the Danish Competition Council will decide the outcome. These decisions can be brought before the Danish Competition Appeals Tribunal. After this, the case can be brought before the regular courts.
Simultaneously, a case may be referred to the public prosecutor with the aim of imposing fines on either undertaking or their managing employees. Such fines are imposed by the courts.

Unlike the European Commission or the European courts, the Danish competition authorities focus a great deal on competition infringements in vertical agreements, in particular cases regarding resale price maintenance. In a recent case a franchisor and four franchisees were found to have infringed the competition rules by sharing markets and coordinating prices. The parties ultimately accepted fines. Consequently, it is very important to be aware of the relevant competition rules when drafting a franchise agreement in Denmark.

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

The Danish courts are mainly composed of the Supreme Court, two high courts, the Maritime and Commercial High Court, and 24 district courts.

If a party wishes to take legal action against another party a writ has to be filed, generally, with one of the 24 district courts (first tier). If the subject matter of the case falls within the scope of the Danish Marketing Practices Act or the Danish Trademark Act, the writ has to be filed with the Danish Maritime and Commercial High Court. The counterparty is given an opportunity to submit a statement of defence. Hereafter, additional pleadings may be exchanged between the parties before the main hearing commences. A judgment is issued and this is, as a rule, subject to appeal to one of the high courts (second tier). Further appeal is only possible if the appellant files a petition for leave to appeal to the Supreme Court and this petition is granted (third-tier grant).

There are no compulsory dispute resolution procedures in Denmark. The Danish courts (except the Supreme Court) can offer parties court-based mediation after a writ has been filed with the court. Participation in court-based mediation is voluntary and both parties must agree, but refusal to participate in court-based mediation will not adversely affect a party’s case. If the parties choose court mediation a mediator helps the parties to come to a solution on their dispute. The mediator cannot render any sort of judgment – he or she can only guide and help the parties to come to an agreement.

Furthermore, there are different voluntary facilities in place for settling disputes outside the ordinary court system, which include mediation not facilitated by the courts and arbitration, often favoured in large commercial disputes. Both of these are subject to agreement between the parties.

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

The principal advantage of arbitration is that it has a long tradition in Denmark. For many years well-established arbitration institutions, supported by close cooperation with the ordinary courts, have created a solid basis for arbitration proceedings in Denmark. Furthermore, the Danish Arbitration Act is largely framed in accordance with the 1985 Model Law on International Commercial Arbitration adopted by UNCITRAL and therefore has an international element that entails limited procedural surprises for a foreign franchisor. Moreover, Denmark is a party to the New York Convention, which means that it will be easy for a foreign franchisor to enforce an arbitral award in another state that is party to the New York Convention. There are no restrictions on the nationality or qualifications of legal counsel. Hence, a foreign franchisor that has a local counsel with special knowledge within franchising is able to participate in Danish arbitration proceedings. Finally, the obvious advantages such as privacy and confidentiality, flexibility, influence on appointment, and a speedy and efficient process also apply to Danish arbitration.

The disadvantages are, as for arbitration in most other jurisdictions, the potential increased level of cost and lack of possibility of appeal, but there are no specific disadvantages for foreign franchisors conducting arbitration in Denmark.

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

There is no legislation treating foreign franchisors differently as such. The fact that the franchise is of foreign origin will have no effect at all. If, however, the legal entity operating as franchisor is a foreign legal entity or individual, certain restrictions in Danish law should be noted. For example, the acquisition of real estate in Denmark by a foreign legal entity or individual is subject to permission from the Danish Ministry of Justice (see question 8).