Franchise 2018

Contributing editor
Philip F Zeidman
DLA Piper LLP (US)
<table>
<thead>
<tr>
<th>Country</th>
<th>Name</th>
<th>Firm/Office</th>
</tr>
</thead>
<tbody>
<tr>
<td>Italy</td>
<td>Roberto Pera and Irene Morgillo</td>
<td>Rödl &amp; Partner</td>
</tr>
<tr>
<td>Japan</td>
<td>Etsuko Hara</td>
<td>Anderson Mōri &amp; Tomotsune</td>
</tr>
<tr>
<td>Korea</td>
<td>Sun Chang and Terry Kim</td>
<td>Lee &amp; Ko</td>
</tr>
<tr>
<td>Brazil</td>
<td>Paulo Shiguero Yamaguchi, Marco Mello Cunha and Victor Goulart Lazarini</td>
<td>Tess Advogados</td>
</tr>
<tr>
<td>Canada</td>
<td>Bruno Floriani and Marissa Carnevale</td>
<td>Lapointe Rosenstein Marchand Melançon LLP</td>
</tr>
<tr>
<td>Chile</td>
<td>Cristóbal Porzio</td>
<td>Porzio Rios Garcia</td>
</tr>
<tr>
<td>China</td>
<td>Claudio d’Agostino</td>
<td>DLA Piper UK LLP (Shanghai)</td>
</tr>
<tr>
<td></td>
<td>Paula Cao</td>
<td>DLA Piper UK LLP (Beijing)</td>
</tr>
<tr>
<td>Denmark</td>
<td>Mikkel Friis Rossa and Dan Bjerg Geary</td>
<td>Bech-Bruun</td>
</tr>
<tr>
<td>Finland</td>
<td>Patrick Lindgren</td>
<td>Advocare Law Office</td>
</tr>
<tr>
<td>France</td>
<td>Emmanuel Schulte</td>
<td>Bersay &amp; Associés</td>
</tr>
<tr>
<td>Germany</td>
<td>Karsten Metzlauff and Tom Billing</td>
<td>Noerr LLP</td>
</tr>
<tr>
<td>India</td>
<td>Sharanya G Ranga, Laxmi Joshi and Aditi Rani</td>
<td>Advaya Legal</td>
</tr>
<tr>
<td>Indonesia</td>
<td>Norma Mutalib, Richard Cornwallis and Reagan Roy Teguh</td>
<td>Makarim &amp; Taira S</td>
</tr>
</tbody>
</table>
Overview

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

A franchisor could consider several relevant business entities from partnerships or companies with personal liability to public or private entities with limited liability. The most commonly chosen corporate form is a private or public limited liability company. Both options provide a limitation of the potential liability assumed as a shareholder. The private form of a limited liability company is more commonly chosen by franchisors than the publicly listed alternative, as it has less extensive compliance requirements.

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

The establishment of a private limited liability company is governed by the Limited Liability Companies Act, while the establishment of a public limited liability company is governed by the Public Limited Liability Companies Act. Both acts set out similar rules and procedures for establishing a company, with the requirements for the memorandum of association and the minimum share capital, and both corporate forms must be registered with the Norwegian Register of Business Enterprises within three months from signing the memorandum of association.

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

The incorporation of a NewCo can be done within a short time frame and is done by signing a memorandum of incorporation, which among other things includes the company’s articles of association and an opening balance of the company. The opening balance must at least correspond with the minimum requirement for share capital. For a private limited company the limit is currently 30,000 Norwegian kroner. It has been proposed to reduce the minimum requirement for share capital to 1 krone, and it is expected to be finally decided during 2017 whether this change will be adopted. For a public limited company, the minimum share capital requirement is 1 million kroner. For both forms of entities, the share capital may be used freely by the NewCo once paid up (ie, to pay the costs of incorporation).

The articles of association may be very simple, and the minimum requirement for both forms of entities is that they include the name of the NewCo, the municipality of the NewCo’s registered office, the NewCo’s business, the amount of share capital and the nominal value of the shares. For public companies, the following must also be included: the number of shares, the number or the minimum and maximum number of directors, that the company shall be a public limited liability company, provisions regarding general managers and the matters to be dealt with by the ordinary general meeting.

The NewCo needs to be registered in the Norwegian Register of Business Enterprises within three months of the date of its incorporation. There is no requirement of attestation by a public notary. Before the NewCo can be registered, payment for the subscribed shares of the company must have been made in full to a designated bank account in the name of the company.

Registration of a NewCo generally takes one to two weeks, but may be more swift if done electronically. This is, however, complicated by the fact that all non-Norwegian directors need a D-number, which is the equivalent of a Norwegian social security number for foreigners. The D-number application process generally takes two to three weeks and must be made in conjunction with the application for registration of the NewCo. Together with a signed application form, each applicant must enclose a copy of valid proof of identity certified by accepted authorities such as a Norwegian public authority, a Norwegian lawyer, certified accountant, state authorised auditor or a foreign entity with notary powers.

Prior to registration, a private or public limited company can as a starting point only take on rights or obligations towards third parties to the extent such rights or obligations are specified in the memorandum of incorporation or follow from applicable law. The NewCo will, however, be able to enter into agreements and take on other rights and obligations already from incorporation (ie, prior to registration) without personal liability for the person acting for it if this is agreed with the counterparty.

Both forms of entity must hold an ordinary general meeting within six months from the end of each financial year, inter alia, to approve the annual financial statement and the annual report of the company.

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

Foreign business entities are not subject to specific restrictions and may establish business in Norway pursuant to the generally applicable laws and regulations. Foreign investments, either to be made by a foreign business entity or a foreign person, are neither subject to specific restrictions based solely on the investor being foreign.

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

Companies and individuals who are tax-resident in Norway are taxed on their worldwide income. Partnerships are transparent for Norwegian tax purposes.

Companies and individuals who are not tax-resident in Norway but derive income from sources in Norway, may have limited tax liability to Norway on such income. This mainly applies to income from business activities conducted in Norway, dividends from companies residing in Norway, income from real or moveable property situated in Norway, and income from employment undertaken in Norway.

Income from business activities

With respect to income from business activities in Norway, it follows from most tax treaties that the business activities must be conducted through a permanent establishment in order to be taxable in Norway. A permanent establishment is generally defined as a fixed place of business through which the business of an enterprise is wholly or partly carried on, such as a place of management, a branch, an office, a factory or a workshop. An independent agent who acts on behalf of an enterprise and who has, and habitually exercises, authority to conclude contracts on behalf of the enterprise, may be deemed a permanent establishment.

It should be noted that with the implementation of OECD BEPS and the new permanent establishment definition, agents will be more prone to be considered permanent establishments, as the new definition is more focused on activities resulting in contracts rather than the authority to conclude contracts.
A non-resident company with business activities in Norway is liable for Norwegian tax on all net income attributable to the business activities and taxed at the same rate as companies resident in Norway (the normal corporate tax rate for 2017 is 24 per cent). A non-resident individual with business activities in Norway is taxed as self-employed for income attributable to business activities (progressive tax rates of up to 49.9 per cent including national insurance contribution). A non-resident company or individual participating in business activities through a partnership is taxed at a maximum of 46.6 per cent for its part of the net income.

Income from resident companies

Dividends from resident companies to non-resident shareholders are subject to 25 per cent withholding tax, unless a lower rate is set in the applicable tax treaty. Exemptions may also follow from the Norwegian participation exemption model, which to a large degree exempts companies residing within the EEA or EU from paying tax on dividends from companies residing in Norway.

With respect to capital gain on shares, Norwegian legislation does not impose limited tax liability on non-residents. Neither does Norway have withholding tax on royalties or interests paid to non-resident recipients. Norway does, however, have limitations on deductions for intra-group interests.

Income from property

Net income and gain from real or moveable property situated in Norway is taxed as capital income at a rate of 24 per cent, when the property is not part of or itself constitutes a business. Real property in Norway is also largely subject to municipal property tax and stamp duty.

Income from employment

When it comes to income from employment exercised in Norway, non-resident individuals may be taxable to Norway on such income if the remuneration is paid by, or on behalf of, an employer who is liable to tax in Norway (either by tax residency or limited tax liability). Most tax treaties additionally require that the employee’s presence in Norway exceeds 183 days in a 12-month period (which, according to Norwegian domestic legislation, would qualify the employee as a Norwegian tax resident). In the case of hire-out labour, however, the source of the payment or the length of the stay is of no importance – in this case it is sufficient for Norwegian taxability that the employee is at the disposal of others within Norway. Income from employment is taxed at a progressive tax rate of up to 46.7 per cent including national insurance contribution.

Value added tax

Norway has a VAT system that is similar to the systems of other European countries. Foreign companies and individuals with business activities in Norway need to register for VAT when the sum of supplies and withdrawals covered by the Norwegian VAT Act exceeds 50,000 kroner during a 12-month period. The general VAT rate is 24 per cent.

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?

A franchisor cannot impose terms in the agreement with its franchisees that are contrary to or in breach of the mandatory provisions of the Working Environment Act or the Holiday Act, for example, in relation to opening hours and working hours.

Generally, the franchisor exercises power and influence over the franchisee without being considered the employer of the franchisee or employees of a franchisee. However, if the franchisor one-sidedly controls, instructs and supervises the terms of the franchisee's business, for example, the extent and timing of orders of goods, opening hours and terms of the employees of the franchisee, or the franchisee has no responsibility for the financial risk, there is a risk that the franchisor be deemed an employer of the franchisee or the employees of a franchisee.

7 How are trademarks and know-how protected?

Trademarks

Pursuant to the Norwegian Trademark Act, a trademark can be obtained either by registration with the Norwegian Industrial Property Office (NIPO), or through such continuous use of a particular mark in the course of trade that the target group considers the trademark well known.

An application can be filed with either NIPO for a Norwegian trademark, or with the European Union Intellectual Property Office for a European Union trademark, which will have effect in Norway and all EU member states.

A registered trademark remains protected for 10 years from the date of application, with the possibility of renewal. However, this presupposes that the owner of the trademark without reasonable cause has ceased to use the mark for a continuous period of five years.

A trademark right obtained through use remains in force until the owner seizes use of the trademark as described above.

A trademark right obtained through use or registration entails that the owner holds an exclusive right to use the trademark or similar trademarks for the goods and services set forth in the registration or for which the trademark is used, as well as similar goods and services.

Know-how

The term ‘know-how’ is not defined in Norwegian law. Nevertheless, it can constitute a business secret pursuant to the Marketing Practices Act, provided that the information in question is secret, specific to the business, essential to the competition strength of the business and subject to a sufficient amount of protective measures. The act prohibits any unauthorised use of such business secrets.

This act also includes a standard provision prohibiting actions contrary to ‘good marketing practice’. This provision can be invoked in connection with unauthorised use of know-how, even if the above-mentioned conditions are not met.

Additionally, the new EU directive on the protection of trade secrets is expected to be implemented into Norwegian law in 2018. The directive aims to harmonise European law on trade secrets, as well as providing a strengthened sanctioning regime.

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

Most commonly, the franchisor will lease the premises and sublet the premises to the franchisee pursuant to a sublease agreement. The Tenancy Act applies to commercial leases, but the parties are to a large extent free deviate from the Tenancy Act. In Norway, there are unofficial templates for commercial lease agreements that are generally accepted as market practice and the basis for further negotiations. However, owing to the nature of franchising, the franchisor should make sure to adjust the templates to meet the needs of a franchisor either in the position as a lessee or a sub-lessee. For example, if the franchisor is the lessee, the franchisor should include a clause in the franchise agreement stating that said agreement terminates if the lease agreement terminates, no matter the cause of such termination. If the franchisee leases the premises directly from the lessor, the franchisor should include a clause in the franchise agreement granting the franchisor a right to take over the lease that applies in the event of the termination of the franchise agreement or a material breach of the lease agreement by the lessee. Correspondingly, the franchisor should make sure to get this right included in the lease agreement between the lessor and the franchisee as lessee, in order to have an enforceable right to the transfer.

The direct purchase of real estate in Norway is regulated by the Sale of Real Estate Act. If none of the parties is a consumer, as is generally the case in sales of commercial real estate, the parties are free to deviate from the provisions of the Sale of Real Estate Act. Unofficial templates for direct sale of commercial real estate are commonly accepted as market practice and are widely used in the Norwegian commercial real estate market. To obtain legal protection of the acquisition and to be registered as the title holder of a property in the official entries recorded in the Register of Land and Land Charges, a signed deed must be submitted to and registered with the Land Registry. Stamp duty of 2.5 per cent of the property’s market value will apply to the transfer of title.
Domestic and foreign franchisors are not treated differently in the Norwegian real estate market or pursuant to the relevant laws and regulations.

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 Norwegian law. Traditionally and unofficially the definition of franchise is:

*Franchise is an operating model based on a collaboration between two independent parties (franchisor and franchisee). Against direct or indirect financial remuneration, the right to establish and operate the franchisee's business concept is distributed. The terms of operation of the franchisee's business as well as the cooperation between the parties are determined in a legal agreement.*

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

There are no laws or government agencies specifically regulating the offer and sale of franchises. Relevant laws to be taken into consideration are, inter alia: the Contracts Act, the Norwegian Sale of Goods Act, the Competition Act, the Working Environment Act, the Holiday Act, the Personal Data Act, the Norwegian Marketing Practices Act, the Tenancy Act and the Act Relating to Product Liability.

11 Describe the relevant requirements of these laws and agencies.

Regarding transfer of undertakings, the provisions in the Working Environment Act should be taken into consideration, as the rights and obligations of the former employer ensuing from the contract of employment in force at the date of transfer shall be transferred to the new employer. And while the employee may object to the transfer of the employment relationship to the new employer, the transfer of an undertaking to another employer is not in itself grounds for dismissal with notice or summary dismissal from a former or new employer.

In addition to legislative requirements, the general contractual principles are widely accepted in case law and apply to parties in contractual relations. The most important principles are the non-statutory principles of culpa in contrahendo, the duty of loyalty and a duty of good faith, as well as the general principle of good business practice set out in the Norwegian Marketing Practices Act. A failure to comply with these principles, for example, by not disclosing information material to a franchisee considering to enter into a franchise relationship with the franchisor, may lead to the contract being considered partially or wholly invalid by the courts, with a subsequent entitlement to compensation or price reduction for the franchisee.

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?

There are no such requirements.

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?

There are no such restrictions.

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

There is no specific legislative compliance procedure for pre-contractual disclosure in Norway, and it is up to the parties to agree on a due diligence process and the terms for such due diligence. However, further to question 11, the parties are bound by the general contractual principles requiring each party to provide the counterparty with relevant and necessary information before entering into a contractual relationship such as franchising. If a party fails to comply with these principles (eg, by not disclosing matters of a major importance to the counterparty such as financial risks, profitability, pending litigation or the current status of trademark registrations), the agreement may be wholly or partially invalid and the party in breach of its obligations may be held liable for losses incurred by the other party due to the non-fulfilment of the principles.

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?

The sub-franchisor is responsible for pre-sale disclosure, and bound by the same principles as described in questions 11 and 15.

17 What information must the disclosure document contain?

See question 15.

18 Is there any obligation for continuing disclosure?

No such legislative obligation, but as the general principles described in question 11 and 15 are continuous in nature, the parties have to make further disclosure as relevant throughout the franchise relationship.

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

No government agency enforces the disclosure requirements, and it is up to the parties to ensure their right to disclosure is met by the other party, that is, by entering into legal proceedings if necessary to resolve a question as to whether a party has acted in accordance with the general principles of loyalty and good faith.

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?

The franchisee has to initiate legal proceedings to obtain relief, and must specify the basis for the claim and a calculation of the economic loss incurred due to the franchisor’s breach of the principles. Depending on the requirements in the franchise agreement, the legal proceedings will be subject to the process of the ordinary courts or arbitration.

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 is based on each party’s breach of its disclosure obligations, and three basic conditions must be fulfilled to impose liability: there must be a liability for damages, an economic loss and the causal link between a concrete act or omission and the actual claim. Liability may be based on negligent, intentional or fraudulent behaviour. A potential division of liability between a franchisor and a sub-franchisor must be based on and assessed on a case-by-case basis.

Employees of the franchisor will generally not be held personally liable, as their actions or omissions are usually covered by the employer’s liability for its employees pursuant to the Act Relating to Compensation in Certain Circumstances.

Both the Limited Liability Company Act and the Public Limited Liability Act set out the legal basis for personal liability for officers or directors of the company acting negligent or intentional. The general manager and members of the board of directors may be held liable for any damage they, in their capacity as general manager or board member, have intentionally or negligently caused the company, a shareholder or others.

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?

See questions 11 and 15.
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, 15 and 22.

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?

See question 20.

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

There is no legislation specific to franchise in Norway. Depending on each franchise relationship, there may be a number of relevant laws, regulations and guidelines; see question 10.

26 Do other laws affect the franchise relationship?

The relevant laws are included in 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?

The terms for the franchisor’s right to terminate with or without cause will usually be stated specifically in the franchise agreement, alongside a specification as to whether either basis for termination gives the right to immediate termination or the termination subject to a notice period, which is usually between six and 12 months.

If the franchise agreement does not include a clause regarding termination rights, the franchisor may terminate the agreement with immediate effect upon a material breach of the contract by the franchisee.

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

The same circumstances as described in question 28 apply for the franchisee’s right to terminate the franchise relationship.

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

There is no legislation or regulation limiting the franchisor’s right to refuse the franchise renewal of the franchise agreement. The fundamental principle of Norwegian contract law is contractual freedom, hence the franchise agreement will set out the limitations, if any. For example, the franchisee may have an option to renew for a certain number of years or periods of years. If there are no such provisions in the franchise agreement, the franchisor may decide to deny or offer the franchisee a renewal at its sole discretion.

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

It is common to include a clause in the franchise agreement granting a right for the franchisor to freely approve or veto a transfer of the franchise to a new franchisee. Similarly, change-of-control clauses are common in franchise agreements, usually requiring the consent of the franchisor or granting the franchisor the right to terminate the franchise agreement upon transfer of the voting power in the franchisee.

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

No, the parties enjoy full contractual freedom in this regard. Note, however, that the duty of loyalty and good faith, as well as the regulations in the Contract Act regarding revision or invalidity of contracts owing to unreasonable terms or fraud, may affect the terms and amounts of the fees and payment obligations.

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

There are no legislative restrictions on the amount of interest that can be agreed on overdue payments between professionals. However, the parties must agree on the rate and the principles for calculating the interest rate, if they want to use a higher percentage or a calculation principle deviating from the prescribed interest level in the Act relating to Interest on Overdue Payments, currently at 8.5 per cent. If the agreed interest is unreasonably high, the basis for calculating the interest is very unfavourable to one party, the court may deem the rate invalid and edit the agreement accordingly. Very rarely will the court deem an agreement as a whole invalid owing to one clause being found unreasonable and void.

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

The parties are free to agree on other currencies than the local one, but unless the parties have made such agreement and the payments are carried out in Norway, the creditor is entitled to demand payment in the local currency, Norwegian kroner.

35 Are confidentiality covenants in franchise agreements enforceable?

Generally, yes. Note, however, that in the event of civil proceedings, a contractual confidentiality clause in a franchise agreement in itself is not sufficient to exempt the franchise agreement as evidence, unless the documents may be exempted pursuant to legal authority. Hence the parties will have to submit relevant documents they have available and offer witnesses to the court to fulfil their duty of disclosure pursuant to the Dispute Act, irrespective of confidentiality clauses.

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, the general principle of good faith and loyalty applies to all contractual relationships in Norway, including franchise relationships. The principle applies during negotiations and during the whole period of the franchise agreement.

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

Franchisees are not considered consumers pursuant to Norwegian law. If a relevant act distinguishes between consumers and professionals, a franchisee is considered a professional. Further, there is generally a presumption that the franchisee is a professional and has the capacity to take on the responsibility of a professional party.

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

It is preferable to conduct franchise agreements in Norwegian, but it is not a legislative requirement, and pursuant to the principle of contractual freedom, the parties may agree to use English as their
contractual language. Franchise agreements in English will usually be supplemented with a presentation of the terms or an office translation in Norwegian stating that the English version shall take precedence.

Any disclosure documents to the public authorities should be in Norwegian (e.g., corporate documents to be registered in the Register of Business Enterprises must be in Norwegian), but an additional office translation to English is usually accepted.

Acquisitions, mergers and joint ventures may be notifiable to the Norwegian Competition Authorities (see question 41). Concentrations that are unlikely to affect competition in the affected market may be submitted through a ‘simplified notification’, in which case the notification can be written in English. If the conditions for the simplified procedure are not met, the notification must be written in Norwegian.

39 What restrictions are there on provisions in franchise contracts?

The fundamental principle of Norwegian contract law is contractual freedom. Consequently there are no notable restrictions on specific provisions in relation to franchise contracts. However, competition law may hold anticompetitive provisions invalid, as further explained in question 40.

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

Agreements, including franchising agreements, are regulated by the Norwegian Competition Act. Norway is a part of the European Economic Area (EEA) through its membership in EFTA. The regulations in the EEA, which mirror those of the EU, have been implemented into Norwegian legislation through special acts and regulations. Consequently, the Norwegian Competition Act is partly harmonised with EU competition rules, and in practice the material rules are identical to the rules in the EU.

The European Commission’s Block Exemption Regulation on Vertical Agreements is incorporated into the Norwegian Regulation on application of the Competition Act Section 10(3) on vertical agreements and concerted practices, and is particularly relevant to franchise agreements. If the franchise agreement falls under the Block Exemption Regulation, the application of competition law is precluded. The applicability of the Block Exemption Regulation presupposes that: the market share held by the supplier does not exceed 50 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.

Article 5 of the Block Exemption Regulation sets out that a non-compete obligation can only be legally enforced for up to five years. If certain conditions are met, however, it can be enforced for the entire term of the contract and for another year after termination of the agreement. In order for the extended time period to apply, the obligation must concern competing goods or services, be limited to the geographic area from which the buyer has operated during the contract term, and be indispensable to protect know-how transferred by the supplier to the buyer.

Nevertheless, the Commission generally considers exclusivity clauses in franchising agreements justified if the franchise entails a significant transfer of know-how from the franchisor to the franchisee, and the non-compete obligation is necessary to protect said transfer of know-how.

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

The judiciary in Norway is hierarchical, with district courts at first instance, courts of appeal at second instance and the Supreme Court as the ultimate court of appeal. The local conciliation boards hear certain types of civil cases, based on the value of the dispute and whether both parties have engaged legal counsel. These ordinary courts will hear all cases relevant to franchising, unless the parties have agreed otherwise or a special authority is the competent instance, that is, the Norwegian Competition Authority, as described in question 40. As a general rule, all court decisions on civil matters, including commercial matters, are publicly available.

The ordinary courts (except the Supreme Court) will offer and advocate mediation, either out-of-court mediation or judicial mediation. However, mediation is not compulsory for matters relevant to franchising. If the parties agree to mediation, the mediator holds no authority to settle the dispute.

Further, the parties may agree to solve potential disputes by arbitration, which may be chosen for commercial disputes as the parties can agree that the solution shall be subject to confidentiality.

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

The advantages of arbitration are in general the same for foreign and domestic franchisors: the possibility of agreeing on privacy and confidentiality, flexibility for the parties involved, influence on appointment
of arbitrator and the efficiency of the process. Furthermore, when the parties agree to settle a dispute through arbitration, they avoid ordinary court proceedings, although the arbitration decision still has effect as a legally enforceable judgment that can be enforced by means of the general legal enforcement procedure in Norway.

The Arbitration Act of 2004 sets out the applicable provisions for Norwegian arbitration and has a special provision stating that foreign arbitration awards can be recognised and enforced in Norway. In many aspects it is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration.

Norway is a party to the UN Convention of 10 June 1958 on the recognition and enforcement of foreign arbitration decisions (the New York Convention). The convention is acceded to by about 125 countries, including the countries Norway has the most trade with. This implies that foreign arbitration decisions can be enforced in Norway without instituting special legal proceedings in the Norwegian courts.

There are no disadvantages specific to foreign franchisors compared with domestic ones. As for arbitration in general, the cost is considerably higher than legal proceeding in the ordinary courts, but most important are the restrictions on appealing against the judgement. An arbitration award may only be brought before the ordinary courts based on annulment actions.

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

Pursuant to Norwegian law, there is no legal distinction as to whether a franchisor is domestic or foreign.

* The authors would like to thank Stian Meyer-Larsen at RSM Advokatfirmaet AS for providing the answer to question 5.