



Franchise

in 30 jurisdictions worldwide

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Overview

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

In Sweden, there are essentially three types of legal entities through which a franchisor can perform its business: trading partnerships, limited partnerships and limited liability (by shares) companies. The typical franchisor would be a private limited liability company.

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

General provisions on trading partnerships and limited partnerships are provided by the Partnerships Act (1980:1102), and provisions on limited liability companies (private and public) are provided by the Swedish Companies Act (2005:551). Public limited liability companies are those companies that can offer ownership via shares on the open market (mainly listed companies). All other limited liability companies are referred to as private limited liability companies.

The above-mentioned business forms are to be registered with the Swedish Companies Registration Office, which is the authority responsible for the formation and registration of business entities.

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

A trading partnership

A trading partnership is incorporated when two or more partners have agreed to perform business and registered the company at the Swedish Companies Registration Office. A limited partnership is, according to the Partnership Act, a trading partnership in which one or more, but not all, of the partners have reserved their liability for the company's obligations.

The ongoing relationship between the partners in a trading partnership, as well as in a limited partnership, is governed by the partnership agreement. In the absence of provisions in the partnership agreement, the Partnership Act provides various terms. In order to change the nature of the partnership agreement, a unanimous decision between the partners is needed.

The company name, as well as the registered office, must be provided on letters, invoices, etc, in its full legal form and should be used exactly as it is registered.

Trading partnerships and limited partnerships are required to maintain the accounting records and to pay income taxes, for example, payroll tax and income tax on any profits. If one of the partners is a legal entity, the trading partnership or limited partnership has to file its annual report and auditor's report (if required) at the Swedish Companies Registration Office.

The registration of a trading partnership or limited partnership generally takes about four to six weeks.

A limited company

A limited company is formed when one or more founders resolve to form a limited liability company. A founder must be a natural person resident within the EEA, a Swedish legal entity or a legal entity with its registered office within the EEA.

To incorporate a limited liability company, the founders will have to draft a memorandum of association containing information regarding appointed directors and auditors, if required, subscribe for all the shares in the company and pay for the shares. Should none of the appointed directors be resident within Sweden, the board of directors has to appoint a person who is resident in Sweden and is authorised to receive service of process. The appointed auditor has to be an authorised or approved public accountant and must be resident in Sweden, namely, if the company is required to have an auditor.

The founders shall complete, date and sign the memorandum of association; thereafter, the appointed board of directors shall file for registration of the company at the Swedish Companies Registration Office.

Among other things, the board of directors is responsible for maintaining accounting records, keeping a register of the shareholders and filing the company's annual report and auditor's report to the Swedish Companies Registration Office for each financial year, irrespective of whether the company has been active or dormant. The annual report and the auditor's report (if required) are public documents that give the general public the opportunity of scrutiny.

The registration of a limited liability company generally takes two to four weeks. According to the Companies Act, the company name is to be stated on letters, invoices, etc, in its full legal form and should be used exactly as it is registered. A public limited company that does not have the word public in its company name shall place the designation '(publ)' after its company name.

Similar to the company name, the registration number and the place where the board of directors has its registered office are to be stated on letters, invoices, etc. The place where the registered office of the company is located means the municipality stated in the section of the articles of association on the registered office (and thus also in the Companies Register).

Other

All information regarding registered entities is publicly available. For further details visit the Swedish Companies Registration Office's website, www.bolagsverket.se.

Any company employing staff is required to be registered as an employer at the Swedish Tax Authority and to pay payroll taxes.

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

There are no restrictions on foreign ownership (direct or indirect) or investment in Sweden. The country's support of the principles of free trade and international remittance of capital has resulted in an open attitude towards foreign ownership and investment.

It is generally recognised that foreign investment has the advantage of introducing capital and employment opportunities as well as new technology and marketing techniques. Facilities and incentives available to local enterprises for the promotion of industrial development are available also to foreign entities that wish to set up business here; that is, there are no facilities or incentives aimed specifically at foreign investors. During the past three decades most restrictions affecting foreign investments have been lifted and foreign investments do not generally require permission. It should be mentioned that as Sweden is a member of the EU (since 1995), the principle of free movement of capital and trade and non-discrimination against entities and individuals of member states prevails.

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

In Sweden there are no provisions in tax law that specifically relate to franchising. This means that ordinary tax rules on business income apply.

Corporate tax

Foreign corporations operating a branch or otherwise from a permanent establishment in Sweden are subject to a 26.3 per cent corporate tax on the net income derived from the permanent establishment. No tax is imposed on the distribution of proceeds from a permanent establishment. Companies incorporated in Sweden also pay a corporate tax of 26.3 per cent on their net profit.

Participation exemption

Non-resident entities are not taxed in Sweden on capital gains from the disposal of shares. For corporations that are tax resident in Sweden, dividends and capital gains are exempted from tax when the shares are held for business purposes. Shares are considered to be held for business purposes if any of the following requirements are met: the shares are not listed; the holding corresponds to at least 10 per cent of the voting power; or the holding is otherwise related to a business performed by the holder or a company related to the holder.

Withholding tax

Dividends to a foreign corporate shareholder are exempt from withholding tax to the same extent that a dividend is exempt from tax if distributed to a Swedish resident shareholder. An additional requirement is that the receiving company is subject to a corporate tax comparable to the tax levied on a Swedish company. This means that withholding tax is normally imposed only on dividend distributions to tax haven companies. The statutory withholding tax rate on dividends is 30 per cent. Tax treaty provisions may apply in specific cases. There is no withholding tax on interest payments.

Royalty payments

Franchise fees are normally treated as 'royalties' for income tax purposes. There is no withholding tax in Sweden on royalty payments to a foreign entity. Instead Swedish-source royalties are taxed as a special form of income from a permanent establishment. This means that a foreign entity that receives royalties from Sweden should pay the 26.3 per cent corporate tax as if the royalties were income from a permanent establishment in Sweden. However, royalties are subject to tax treaty provisions that generally prescribe tax liability only in the state of residence of the receiving party. This means that royalties are normally exempted from tax in Sweden when the receiving party is resident in a treaty jurisdiction. Treaty provisions have to be checked in each individual case.

Special rules apply on royalty payments between related companies in EU jurisdictions. As a main rule, intra-group royalties within the EU are taxed only in the jurisdiction of the receiving party (EU Directive 2003/49/EC).

Payroll taxes

Statutory employer social security contributions amount to 31.42 per cent (as of 2011) of total salary and benefits paid to the employee. A reduced rate of 15.49 per cent or 10.21 per cent applies on salary payments to young and older employees (aged 18 to 24 and over 64). Preliminary tax has to be withheld on salary payments. Payroll taxes are normally due on a monthly basis.

Tax treaties

Sweden has an extensive network of tax treaties (currently 84 countries).

- 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?

There are no specific labour and employment considerations for typical franchisors. Provided that the franchisee is an independent entity acting on its own behalf and in its own name when paying salary and entering into employment contracts, there is hardly any risk that a franchisor will be regarded as an employer or joint employer based merely on the fact that the franchise agreement, for example, requires the franchisee to comply with the applicable employment laws or collective bargaining agreements, including any local minimum wage requirement. The same applies if the franchisor's prior acceptance is required with regard to employment of key personnel.

Moreover, there may be situations whereby the EC Transfer of Undertakings Directive (and Swedish local equivalent) applies: for example, if one franchisor or franchisee takes over the business of the other. In such a case, the relevant business' employees will transfer to the acquirer.

In other respects, it should be noted that the Swedish Discrimination Act (the Act) prohibits discrimination on various grounds, including sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation and age. The Act also prohibits orders or instructions to discriminate against someone. Hence, a franchisor may not instruct a franchisee to discriminate.

- 7 How are trademarks and know-how protected?

Trademarks are protected by registration under the Swedish Trademarks Act. Registration protects the use of the trademark in relation to a specific class of goods or services. Trademark protection can also be achieved provided it can be proven that the mark is established on the market, which is the situation when it has become well known to a significant portion of the consumers of the goods or services available under the mark. Certain protection may also be sought under the Swedish Marketing Act for passing off.

Know-how is usually protected by way of a confidentiality undertaking in the franchise agreement, which is enforceable in Sweden.

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

In Sweden it is possible to hold land either by freehold, site leasehold or leasehold. The only existing form of complete and absolute ownership in Sweden is by freehold. (Site leasehold is a form of leasehold of land owned by the state or a municipality, but the holder is, in principle, in the same legal position as the owner of a freehold.) Since acquiring freehold property usually requires a significant capital investment, leasehold is the most common form for franchises, in particular when starting up a franchise system or entering new markets and locations.

A lease of real property is governed by different regulations depending on in what manner the property is leased. Generally, if the object of a lease is a building or a part thereof, it is considered a

lease in accordance with the tenancy regulation that is incorporated in chapter 12 of the Swedish Land Code. Commercial leases are usually valid for a settled period of time and there are no limits regarding minimum terms.

A tenant has indirect (economic) legal protection of the lease, from which it follows that a right to compensation arises if the landlord does not have a legitimate reason for terminating the lease (the legitimate reasons being stipulated in the tenancy regulation). The minimum compensation corresponds to an amount equivalent to one year's rent. However, it is common that this matter is regulated in the lease agreement and that the tenant and the landlord sign a separate agreement excluding the right to compensation in accordance with chapter 12 section 57–60 of the Swedish Land Code. Such an agreement is generally valid if it is approved by the Rent Tribunal.

Proper location of the premises is always important for a franchise activity. It is therefore often important for the franchisor to have control over the premises. This is possible if the franchisor rents the premises from the landlord and subleases it to the franchisee or, if the franchisee rents the premises directly from the landlord, if there is a provision in the lease agreement stipulating that the lease agreement shall transfer to the franchisor if and when the franchise agreement is terminated. If the landlord refuses transfer without reasonable cause, the Rent Tribunal can permit the transfer.

If the franchisor concludes the lease agreement with the landlord, the franchisor should observe that the lease agreement needs to provide a right to sublease to the franchisee. The terms of the sublease agreement should reflect the terms of the lease agreement and the franchise agreement needs to take the terms of the lease agreement into account (synchronisation), particularly with respect to termination provisions, so that the franchisor can give vacant possession of the lease at the expiry of the lease agreement and avoid being stuck for a time without any franchisee.

If premises are not identified when the franchise agreement is negotiated, the franchisor should consider making the franchise agreement conditional upon the signing of a lease agreement of premises approved by the franchisor. The same applies if a planning approval or other kind of authority decision is required to furnish or change the proposed premises.

Laws and agencies that regulate the offer and sale of franchises

9 What is the legal definition of a franchise?

The closest one can get to a legal definition is the definition of a franchise agreement in the Swedish Franchise Disclosure Act. It was enacted in October 2006 and the definition of a franchise agreement reads in rough translation as follows:

In this law, franchise agreement is intended to mean an agreement by which an entrepreneur (the franchisor) agrees with someone else (the franchisee) that the latter, against compensation paid to the franchisor, shall use the special business idea of the franchisor for the marketing and sale of goods and services. Further conditions for an agreement, according to this law, are that the franchisee, under the agreement, shall use the distinctive trademark and other intellectual property rights of the franchisor and cooperate on the occasion of recurrent controls of the observance of the agreement.

It has been argued in the literature on the subject that the statutory disclosure obligation could be avoided entirely by not including a recurrent control system in the franchise agreement.

The Swedish Franchise Association (SFA) provides a similar definition in its ethical standards. These standards apply only to members (www.franchiseforeningen.se). However, when it comes to the statutory pre-contractual disclosure requirement, the definition in the disclosure regulation does of course apply.

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

Apart from the aforementioned Swedish disclosure regulation that is also elaborated on in questions 14 to 20, there are no laws or agencies that specifically regulate the offer and sale of franchises.

Competition law may have an impact on franchises, for example, by way of prohibiting certain restrictive terms of franchise agreements. The Swedish Competition Authority monitors the Swedish Competition Act. See question 39 for more information on competition law.

The SFA provides ethical standards that apply to members only (www.franchiseforeningen.se).

11 Describe the relevant requirements of these laws and agencies.

See questions 14 to 20 for information on pre-contractual disclosure and question 39 for further information on Swedish competition law.

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

There are no exemptions or exclusions, but as mentioned in question 9, it has been argued that the entire disclosure obligation may be set aside by not including a control system in the franchise agreement. See questions 14 to 20 for further information on pre-contractual disclosure and question 39 for information on Swedish competition law.

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

No such requirement exists by way of law. The ethical standards of the SFA require that the franchise system must have a track record and at least one franchisee before introduction of the system. The standards are only binding on members of the SFA.

14 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 disclosure regulation does not distinguish between different types of franchisors. Therefore, it is the sub-franchisor that shall provide the franchisee with the required information. As a further consequence, in a sub-franchising structure the master franchisor shall provide the sub-franchisor with the required information in ample time before conclusion of the agreement.

See question 16 with regard to what type of information should be disclosed. In a sub-franchising structure the sub-franchisor need not disclose information concerning the franchisor or the contractual or other relationship between the franchisor and the sub-franchisor if it is not necessary in order to correctly describe the franchise activities (minimum requirement number one); the total number of franchisees within the system, how big they are, where they are located and the contact details of those closest (minimum requirement two); the IP rights involved (minimum requirement four); or any sourcing requirements (minimum requirement five).

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

The Swedish regulation is a pure disclosure regulation and does not require filing, registration or authority notification of the disclosure

document. As to form and timing, it provides that pre-contractual disclosure should be made in ample time before the franchise agreement is concluded and that disclosure should be made in writing in understandable language. Ample time means approximately two weeks, but depending on the circumstances this could, in exceptional cases, be less.

16 What information must the disclosure document contain?

The Swedish disclosure regulation provides one general requirement and eight minimum requirements. The general requirement provides that the franchisor shall provide the franchisee information about the implication of the agreement and such other factors that are needed in consideration of the circumstances. The eight minimum requirements are:

- a description of the franchise activity that the franchisee is to engage in;
- information on the other franchisees with which the franchisor has concluded an agreement within the same franchise system, and the volume (scope) of their activity (this requirement probably entails accounting for the total number of franchisees within the system, how big they are, where they are located and the contact details of those closest, so that the potential franchisee can make contact and obtain further information);
- information on the compensation that the franchisee shall pay the franchisor and other economic conditions for the franchise activity;
- information on the intellectual property rights that will be granted;
- information on the goods or services that the franchisee is obliged to buy or rent;
- information on non-completion undertakings that shall apply during or after the termination of the franchise agreement;
- information about the term of the agreement, conditions for modification, prolongation and termination of the franchise agreement, as well as the economic consequences of termination; and
- information regarding how a dispute under the agreement shall be settled and the liability for costs of such a settlement.

There is no requirement that disclosure should be made in Swedish; only that it should be made in writing and in clear and understandable wording. If there is any doubt that the recipient of the information may not have a good knowledge of, for example, English, it is advisable to provide the information in Swedish.

17 Is there any obligation for continuing disclosure?

There is no requirement to update a disclosure made pursuant to the Swedish disclosure regulation. Material changes to a franchise may however trigger an obligation to re-disclose if the franchise agreement can, in reality, be regarded as a new agreement.

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

The Swedish Market Court is the enforcing body and proceedings may be brought before the court by a franchisee or an association having a justified interest in representing business people or entrepreneurs.

In the case of violation of the disclosure obligations, the Market Court may order the franchisor to disclose, in the specific case or for future offerings, the missing information. An administrative fine can be appended to the order.

19 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?

As mentioned, the Swedish disclosure regulation is a pure disclosure regulation, meaning that apart from the pre-contractual disclosure obligation, it does not regulate the relationship between the franchisor and the franchisee. Therefore, neither civil actions by franchisees nor criminal penalties are available on the basis of the disclosure regulation.

As in any other pre-contractual or contractual relationship, withholding, distorting or providing false information may lead to consequences in relation to a franchise, and consequently all remedies for pre-contractual and contractual wrongdoings, including damages and cancellation of the contract, may be available. In principle, the right to compensation for pre-contractual damages does not cover loss of profit. Also in principle, contractual damages are calculated on the basis that the economic position of the aggrieved party should be restored to what it would have been had the breach of contract or the wrongdoing not taken place, meaning that loss of profit may be included.

20 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?

The disclosure regulation does not distinguish between master franchisors and sub-franchisors. Therefore it is the sub-franchisor that is under obligation to provide the information to the franchisee. In relation to a franchisee, the sub-franchisor is therefore closest to liability, and possible remedies are accounted for in questions 18 and 19. As long as there is no criminal liability involved – for example, for fraud – officers and directors of franchisors will not personally be exposed to liability.

21 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 offering and selling of franchises is subject to Swedish contract law and general contractual principles.

The SFA requires its members to comply with its ethical standards, which are substantially based on the European Code of Ethics for Franchising. Membership is voluntary and therefore franchisors who are not members do not have to comply with these standards. The standards require franchisors to have undertaken a trial operation of the business before launching the franchise, to prove ownership of all intellectual property associated with the franchise and to provide initial and ongoing training to the franchisee.

22 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?

There are no statutory rules on seller's disclosure outside the mentioned disclosure regulation, but general principles of loyalty or fair trading and dealing may, depending on the circumstances in the specific case, provide that the seller shall not withhold information that the seller understands may be of decisive importance to the buyer.

- 23** What other 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 the franchise sales disclosure laws?

If a franchisor engages in fraudulent or deceptive practices, the franchisee may have a remedy for fraudulent misrepresentation. To bring an action, the franchisee must prove, on the balance of probabilities, that the franchisor made a false statement that he or she knew or believed to be false at the time it was made, and that the franchisee was induced into entering the agreement by it. If the franchisee is able to prove this, then it will be able to treat the contract as null and void and, potentially, claim damages.

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

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

There is no specific law regulating the ongoing relationship between a franchisor and franchisee after the franchise contract comes into effect. Swedish contract law and general principles of contract law apply.

Swedish contract law provides for contract modification under specific circumstances. Contract terms may be modified or set aside if deemed unfair (unconscionable) in view of the contents of the contract, the circumstances prevailing at the time the contract was entered into, subsequent circumstances or the circumstances in general. This follows from article 36 of the Swedish Contracts Act. When determining the applicability of the provision in question it is stated that special regard should be paid to the need to protect those who, in their capacity as consumers or otherwise, hold an inferior bargaining position. Although there is no legal obstacle preventing an application in commercial relationships with balanced bargaining position, the principle purpose of article 36 is to protect consumers and others, whether individuals or legal entities, who are in a consumer-like position from unfair contract terms. No Supreme Court precedent exists in which the provision has been applied to commercial relationships in which the inferior party was not a consumer or a typical small-scale enterprise (in a consumer-like position). However a recent arbitration award rendered by a panel in which one of the arbitrators was a Supreme Court judge suggests a change towards a more general application of article 36 in commercial relationships. Most franchisees would probably not fall into the consumer-like category but the smaller ones, such as the one-person shop, may do so. If this is the case, special consideration should be made when drafting contract provisions concerning, inter alia, limitation of liability termination, penalties and arbitration.

- 25** Do other laws affect the franchise relationship?

Laws such as the Sale of Goods Act and the International Sale of Goods Act (CISG) may apply, and principles such as the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract law (PECL and PELSC) and the Draft Common Frame of Reference (DCFR) may imply certain terms into contracts between the franchisor and the franchisee. The said principles may be applied when the contract or the law is silent or needs filling out or interpretation. This is clearly demonstrated by a recent precedent (NJA 2009, page 672) in which the Supreme Court filled out the termination provision of a distributor agreement by stipulating a reasonable notice period of three months. The ethical standards of the SFA may also affect the relationship, but only in relation to members of the SFA.

The Swedish Personal Data Act may affect the relationship insofar as where the personal integrity of customers and personnel of the franchise system is concerned. Implemented pursuant to the European Data Protection Directive, the act applies to controllers of personal data who are established in Sweden, or cases in which the controller of personal data is established in a third country (a state not included in the EU or EEA, for instance the US) but uses equipment situated in Sweden for the processing of personal data. It applies to all such processing of personal data that is wholly or partly automated. Personal data – for instance, information pertaining to customers, suppliers or employees – may be processed only if the registered person has given his or her consent to the processing or if the processing is necessary to fulfil certain purposes: for instance, to enable the performance of a contract or a purpose that concerns a legitimate interest of the controller of personal data if the interest is of greater weight than the interest of the registered person in protection against violation of personal integrity. If data about a person is collected, the controller of the data shall in conjunction voluntarily provide the registered person with information about the processing of the data.

In the main, it is prohibited to transfer personal data to a third country that is undergoing processing. This also applies to the transfer of personal data for processing in a third country unless the third country has an adequate level of protection for personal data. But if consent by the registered persons is not a viable route to take, contractual solutions (implementation of the standard contractual clauses adopted by the EU commission) or the Safe Harbor Principles (applicable to US entities only) may be used to comply with the Act and transfer personal data to entities in, for example, the US.

Furthermore, binding corporate rules (BCR) may be adopted. BCR are internal rules that establish consistent and compliant requirements for the use of personal data within a multinational company. BCR makes it possible for the local data protection agencies to authorise the transfer of personal data to third countries within the meaning of the act or directive. This is a flexible and efficient way of complying with the rules in the act or directive and transferring personal data to entities in third countries. For the company to adopt and use BCR, it must be able to guarantee adequate protection of personal data with regard to its transfer to a third country. The BCR must apply generally and throughout the corporate group, irrespective of the place of establishment of the members or the nationality of the data subjects whose personal data are being processed. BCR provides a uniform minimum standard for every entity within the group. If applicable local law provides a higher level of protection than that established by the standard, the requirements of local law will apply. The internal rules of a corporate group cannot replace the data protection obligations by which the members of the corporate group are bound by law but it forms a practicable tool for large multinationals who would otherwise perhaps need to incorporate a vast network of bilateral intragroup agreements in order to provide for international transfers of personal data within the group. DLA Nordic has successfully acted for a multinational group seeking exemption from the prohibition based on adopted BCR (the first application ever in the Nordic countries).

As to the relationship between a franchisee and its customers, various general laws (private and public) such as the Contracts Act, the Sale of Goods Act, the Consumer Sale of Goods Act, the Personal Data Act, various other consumer protection regulations, the Marketing Practices Act, the Competition Act and sector-specific related regulations, to name a few, will apply to the franchise activities in the same way that they apply to any other local business activity.

For information on competition law, please see question 39.

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

No, not in principle. However, the SFA imposes ethical standards applicable to its members. See question 21 for brief information on these standards.

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

As already mentioned, apart from the disclosure regulation, Sweden has no specific franchise relationship law, so it is up to the parties to agree on the conditions for termination. Due to the risk that even in a franchise relationship, specific regulations in existence applying to agents could be invoked, the parties should regulate whether or not rights on termination, severance or goodwill pay shall apply. As mentioned under question 25, the risk is clearly demonstrated by a recent precedent (NJA 2009, page 672) in which the Supreme Court filled out the termination provision of a distributor agreement by stipulating a reasonable notice period of three months. In view of this, and in particular when a long-lasting relationship that is silent as to the notice period is being terminated without cause, it is recommended that the franchisor observes a three- to six-month notice period.

A franchise agreement will typically contain terms allowing the franchisor to terminate for material breach of contract or insolvency of the franchisee. Swedish law imposes no specific requirement relating to the termination of franchise agreements. Swedish general contractual principles allow either party to terminate by virtue of a fundamental breach of contract by the other party. In addition to the right to terminate, damages are also available as a remedy.

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

Subject to the specific termination rights it may have under the franchise agreement, the general contractual principles stated under questions 25 and 27 will apply also to the franchisee.

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

Subject to any renewal provisions in the specific franchise agreement, there is no general legal obligation for a franchisor to renew. All the same, franchisees are usually given the right to renew for at least one further period, generally of the same length as the first. Renewal is not usually granted unless the franchisee has performed adequately. The right to renew can be made conditional upon, for example, the re-entering into of the current form of agreement, completion of refresher training or payment of legal costs.

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

A franchisor may restrict the franchisee's ability to transfer its franchise or restrict transfers of ownership interests in a franchisee entity. The franchise agreement usually stipulates that the franchisee has no right to transfer the franchise without the franchisor's consent.

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

There are no laws or regulations affecting the nature, amount or payment of fees. For principles on contract modification, please refer to question 24.

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

In principle, interest can be charged at the rate agreed between the parties. If no rate of interest is agreed, the Swedish Interest Act stipulates a per annum rate of 8 per cent over a specific official interest rate that is announced from time to time by the Central Bank of Sweden. For principles on contract modification, see question 24.

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

No such restrictions apply at present. Sweden abolished exchange controls a long time ago (and exchange controls are not allowed within the EU).

34 Are confidentiality covenants in franchise agreements enforceable?

Confidentiality covenants in franchise agreements are, in principle, enforceable if correctly drafted. In practice enforcement may be more difficult.

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

There is a general contractual principle (or theory) that the parties shall deal with each other in good faith. The principle is also reflected in the previously mentioned UNCITRAL, PECL and DCFR principles. The ethical standards of the SFA also impose on its members an obligation to deal fairly with one another.

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

No such specific law or regulation exists. Nevertheless, as mentioned under question 24, article 36 of the Swedish Contracts Act provides means for contract modification for the purpose of protecting primarily consumers. The provision may also be applied in favour of those in a consumer-like position and has on a few occasions been applied to typical small-scale enterprises and arbitration clauses, which clauses were set aside by the courts.

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

There is no requirement that disclosure should be made in Swedish; only that it should be made in writing and in clear and understandable wording. If there is any doubt that the reader of the information may not have a good knowledge of English, for example, it is advisable to provide the information in Swedish.

38 What restrictions are there on provisions in franchise contracts?

As mentioned, Swedish contract law provides for contract modification under specific circumstances. Contract terms may be modified or set aside if deemed unfair (unconscionable) in view of the contents of the contract, the circumstances prevailing at the time the contract was entered into or subsequent circumstances, or the circumstances in general. This follows from article 36 of the Swedish Contracts Act. Although there is no legal obstacle preventing an application in a commercial relationship with a balanced bargaining position, the principal purpose of article 36 is to protect consumers and others, whether individuals or legal entities, who are in a consumer-like position from unfair contract terms. No Supreme Court precedent exists in which the provision has been applied to commercial relationships in which the inferior party was not a consumer or a typical small-scale enterprise (in a consumer-like position).

Update and trends

There are no trends or hot topics but the precedent mentioned in answer to question 27 should be noted. It demonstrates the importance not to leave any gaps in the franchise agreement when, for example, it comes to notice period for termination, severance pay and or goodwill pay – as the courts may, if the franchisee's dependence on the franchisor resembles an agent/principal relation, fill such gaps using agency principles and those are generally regarded less favourable from a franchisor perspective.

Also, as mentioned under question 24, the change in application of article 36 of the Swedish Contracts Act (contract modification) towards usage in non consumer-like relations should be noted. In that case a limitation of liability clause was modified against the party relying on monetary limitation.

All the same, a recent arbitration award decision given by a panel in which one of the arbitrators was a Supreme Court judge suggests a change towards a more general application of article 36 in commercial relationships. Most franchisees would probably not fall into the consumer-like category but the smaller ones, such as the one-person shop, may do so. If this is the case, special consideration should be made when drafting contract provisions concerning, inter alia, limitation of liability, termination, penalties and arbitration.

Restrictions may also follow from competition law. For such restrictions, see question 39.

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

Sweden became an EU member in 1995. The Swedish Competition Act is, in principle, a blueprint of the EU competition regulation. In addition, the EU regulation is, in principle, directly applicable in the member states. Below is a brief account of the major features of a rather complex regulation.

Article 101 of the Treaty on the Functioning of the European Union (TFEU) (formerly article 81 of the EC Treaty) and the corresponding Swedish prohibition prohibits agreements, decisions or concerted practices that may affect trade between member states and that have as their object or effect the prevention, restriction or distortion of competition. The Swedish prohibition applies where agreements affect trade within Sweden; article 101 applies where they affect trade between member states. Franchise agreements may fall under either prohibition, subject to the exceptions and exemptions set out below.

An agreement will fall within the prohibition only if it has as its object or effect an appreciable prevention, restriction or distortion of competition within the aforementioned respective geographical areas. In determining whether an agreement has an appreciable effect on competition, the Swedish Competition Authority (KKV) will, under article 101, have to regard the European Commission's Notice on Agreements of Minor Importance. This states that a franchising agreement (which is a vertical agreement) will normally fall outside the prohibition if the market share of each party does not exceed 10 per cent if the agreement is concluded between actual or potential competitors, or 15 per cent if concluded between those who are not competitors. However, if the franchise agreement is de minimis but contains hard-core restrictions, it will be prohibited under article 101. Hard-core restrictions include price fixing, resale price maintenance and absolute territorial protection (division of markets) and will be dealt with further below.

By reference, the general thresholds in the European Commission's Notice on Agreements of Minor Importance are also applicable under the Swedish prohibition. However, there is one difference. According to the KKV Notice on Agreements of Minor Importance, parties to an agreement where neither firm reaches a turnover of

30 million kronas will not be considered to be effecting competition if their combined market share is below 15 per cent of the relevant market.

Vertical agreements are those between undertakings that operate at different levels of the production or supply chain, such as most franchise agreements. Many of the obligations contained in franchise agreements can be assessed as being necessary for the protection of intellectual property rights or to maintain the common identity and reputation of the franchised network. Therefore, by virtue of the EC Block Exemption for Vertical Agreements, which is by reference also applicable under the Swedish Competition Act, franchise agreements may fall outside the prohibitions. The block exemption will, however, not apply if the market share held by the supplier exceeds 30 per cent of the relevant market in which it sells the contract goods or services or, in the case of 'exclusive supply' obligations, if the buyer has more than a 30 per cent share of the relevant market in which it purchases the contract goods or services.

There are no provisions regarding the duration of a franchise agreement itself. But the block exemption will not cover any direct or indirect non-compete obligations contained in a franchise agreement that runs for an indefinite period or in excess of five years. Non-compete obligations (exclusive purchase agreements) that are renewable under the terms of a franchise agreement, so that they will in effect be in excess of five years' duration, are held to have been concluded indefinitely. A non-competition restriction that goes beyond the said limitations is, however, permitted when the obligation is necessary to maintain the common identity and reputation of the franchised network. Such a restriction will then fall outside article 101 TFEU, meaning that the benefit of the block exemption will not be needed. In these circumstances, the duration of the non-compete obligation is irrelevant as long as it does not exceed the duration of the franchise agreement.

There is also a block exemption for distribution systems within the motor industry.

If none of the above exemptions apply, a franchise agreement may meet the conditions for individual exemption under article 101(3) TFEU or section 2.2 of the Swedish Competition Act, respectively. To qualify for an individual exemption, the overall economic benefits of the agreement must outweigh the effect on competition. Where the supplier is dominant in the market, any restrictions must be objectively justifiable.

As mentioned, hard-core restrictions are always forbidden and thus disqualify application of a block exemption. Franchise agreements can be exclusive distribution agreements and are permitted provided they do not allow for absolute territorial protection. Other restrictions on territories or customers to which a distributor can make sales or provide services are considered hardcore restrictions. For example, a ban on passive (unsolicited) sales is a hard-core restriction. Direct or indirect price fixing (for example, agreeing a minimum sale price or level of discount) and resale price maintenance are hardcore restrictions (but a maximum sale price restriction may be imposed). The block exemption will not apply if a franchise agreement includes any of these restrictions.

European and Swedish competition law also prohibit the abuse of dominant market position. Since this applies in principle only to a business with a market share of 40 per cent or more of the relevant market, very few franchisors are considered dominant and therefore affected by the prohibition.

As to the enforcement of competition law, the enforcing authorities, KKV and the European Commission, may carry out an investigation into suspected competition law infringements. The Commission will only be involved if the suspected infringements could affect the trade between member states. The enforcing authorities have significant powers through which to investigate suspected anti-competitive behaviour, including entering and searching business premises (dawn raids) and imposing heavy fines. For more on Swedish competition law and on KKV visit www.kkv.se.

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

In civil cases, proceedings are commenced by the person who has the claim (the claimant). The claimant must try to prove the liability of the other party (the respondent) on the balance of probabilities. The choice of court depends on where the other party resides or has its place of business, but a number of other circumstances may also be decisive. Often, the parties agree on either arbitration (first and final instance) or a specific public court as an agreed forum of first instance. In commercial relations the most common way to settle disputes is arbitration, a sort of private court where party-chosen impartial arbitrators handle the dispute and render an award. An award may be enforced in any country that has signed the New York Convention. The procedures for arbitration may, depending on the choice of the parties, be subject to law or to a certain set of rules administered by an institute, such as the arbitration rules of the Arbitration Institute of the Stockholm Chamber of Commerce (www.sccinstitute.se). The Swedish court system for civil law disputes consists of three instances, the district court, the court of appeal and the supreme court. There are restrictions on appeals to the second and third instance.

As mentioned, the Swedish disclosure regulation requires disclosure on how a dispute under the agreement shall be settled and of the liability for the costs for such settlement.

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

The advantages of arbitration in Sweden include the fact that the legal community in Sweden is highly reputed for its knowledge and experience in arbitrating international commercial disputes; the swift and non-public arbitration procedure; and the access to easy and swift enforcement of an award.

Disadvantages include the fact that the costs are rather high in comparison with court proceedings in Sweden, although not necessarily in comparison with international arbitration in other European countries.

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

Foreign franchisors are not treated differently from domestic franchisors in any way.

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