



FRANCHISING®
Building local businesses,
one opportunity at a time.

May 23, 2017

Honorable Minister of the Economy of the Netherlands
Mr. Henk Kamp

Dear Mr. Kamp,

I am the President & CEO of the International Franchise Association (IFA), the world's oldest and largest organization representing franchising worldwide. Celebrating over 50 years of excellence, education and advocacy, IFA works to protect, enhance and promote franchising. IFA members in the United States and around the world include franchise companies in over 300 different business format categories, individual franchisees, and companies that support the industry in marketing, law and business development. Most of our members are already engaged in or are seriously considering engaging in international expansion. At least 40 of IFA's franchisor members are already active in the Netherlands and we know first-hand that your market is appealing to additional franchisors considering international growth.

As you know, in the Netherlands, as in much of the developed world, the franchise economy is a major contributor to employment and job creation. IFA has concerns that the legislation to make the Dutch National Franchise Code (NFC) obligatory could deter some franchisors from expanding into the Netherlands due to the increased cost of legal advice, preparing documentation, and translations needed to comply with the Code. This shift in the incentives of franchisors could produce a noticeable impact on economic growth and job creation.

Franchise businesses in the Netherlands already operate under statutory and case law, including on contracts, intellectual property, consumer protection and competition. Franchisor members of the Netherlands Franchise Association (NFV) also operate under the European Franchise Federation's Code of Ethics for Franchising. Franchise agreements, like any other contractual agreement, should set forth guidelines and expectations and each party should have an opportunity to review it, and understand and agree to the terms (or negotiate them) before mutually signing. These agreements and the standards under which franchise businesses operate are designed to help ensure a uniform and quality experience for customers. Both franchisees and franchisors have invested significant capital and resources in their businesses and pride themselves on delivering quality goods and services that their customers have come to expect. The proposed obligatory NFC intrudes on the freedom of contract rights of private companies in ways that can undermine or even void specific and long-standing contract terms. This shift will harm the ability of franchisors and franchisees to resolve their disputes effectively and economically.

Based on notions of "partnership" between franchisors and franchisees, the NFC creates standards dealing with virtually every aspect of a franchise relationship and imposes a duty of "reasonableness and fairness" on both franchisors and franchisees. As a moral standard, the concept of "reasonableness and fairness" is commendable. However, as a legal standard, virtually every action or inaction of a franchisor or a franchisee could be subject to second-guessing. Although the language of the NFC attempts to

place limits on how reasonableness and fairness would be interpreted, one could not know if the standard has been met until a judge or arbitrator has rendered his/her decision.

Unlike other franchise regulations throughout the world, the NFC permits a franchisor to avoid the duty to comply with most of the Code's prescriptions and proscriptions, if it sets out an explanation of each Code provision that it is waiving or modifying and attaches that explanation and justification for the waiver or modification to the franchise agreement. The legal cost of the analysis and explanations will undoubtedly be significant for all franchisors whether they are analyzing how the NFC will affect their business policies and practices, whether they are drafting modifications to their standard agreements, or whether they are preparing detailed explanations of how and why provisions of their agreements vary from the NFC standards and why the variations are justified.

Although many provisions of the code are waivable, it states, "Franchise agreements shall not contain any stipulations that could limit and/or exclude reliance on reasonableness and fairness" (Section 2.2). However, parties may agree to a limitation on compensation claims. This vague, underlying text undermines the efficacy of the waivers; it exposes franchisors and franchisees to nullification of mutually agreed waivers and creates uncertainty and risk rather than the intended relief and flexibility.

The NFC also imposes a presale franchise disclosure obligation on franchisors. Among the disclosures required is "a meticulous, transparently substantiated turnover and cost forecast, accompanied by a study of the place of business and/or available historical figures, and a comprehensibly substantiated, sound investment and operating budget." Historical information about the turnover of previous franchised outlets in a territory, including their turnover and earnings and the reason for terminating the franchises, must be disclosed. Foreign franchisors are generally unable to provide such forecasts because of their lack of operating experience in a new market.

Further, the disclosure obligations include "other information needed by the franchisee to reach a good, well-considered decision on whether to enter into the franchise agreement." This open-ended disclosure obligation exposes franchisors to unknowable claims.

The Code also requires disclosures of "preliminary agreements" executed by the parties. Any fee must be either refunded to the franchisee or credited to fees due under a final agreement. We are unaware of any other law that imposes such a requirement.

Finally, agreements (but not necessarily disclosures) must be written in the official language of the "country in which the franchisee's business is registered or translated by a sworn translator." This requirement imposes a considerable and unnecessary expense on franchisors when a prospective franchisee is fluent in English, Dutch or another language shared with the franchisor.

In sum, compliance with the NFC would be quite costly, especially for foreign franchisors. Given the compliance costs and uncertainty about the ultimate interpretation of provisions of the NFC, many foreign franchisors may forego franchising in the Netherlands and focus on other markets with fewer obstacles to conducting business.

As IFA represents primarily foreign brands, it is also worth observing the benefits to the Dutch economy and Dutch small business owners of franchising across borders. First, franchising allows Dutch small business owners to become stakeholders in, and operators of successful international brands. Second, the vast majority of the money the Dutch franchisee generates tends to stay in Dutch hands and in the

Netherlands. Conventionally, franchisees remit only 5 to 7% of their revenue to the franchisor in royalties. Third, international franchising allows for the growth of Dutch-born brands into foreign markets.

The objective of many franchise relationship bills is to establish grounds for franchisees to unilaterally change terms and conditions of franchise contracts in prescribed areas - such as product pricing, store hours, vendor purchases, operating standards, territories, renewals and transfers. While such proposals may appear favorable to franchisees, their enactment may lead to unintended consequences that weaken franchisees' equity in their businesses, damage brands, reduce product quality, limit franchisor assistance, increase incentives for litigation and jeopardize constitutionally guaranteed contract rights.

For franchisees, brand reputation is everything. The proposed one-size-fits-all regulation could damage the brand, hurt small franchise businesses, and cost Dutch jobs. It also could lower the value of small businesses and put the owner's hard earned equity at risk. These regulatory changes could put more small businesses at risk of shutting their doors and severely limit further brand expansion in the Netherlands.

We are grateful to you for this opportunity to express our concerns, and we would be grateful for the opportunity to further discuss this with you in whatever manner or venue is easiest for you.

Sincerely,

A handwritten signature in black ink that reads "Robert Cresanti". The signature is written in a cursive, flowing style with a prominent initial "R".

Robert C. Cresanti, CFE
President & CEO
International Franchise Association