



EUROPEAN FRANCHISE FEDERATION

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Brussels, May 16, 2017

To: Honourable Minister of the Economy of the Netherlands, Mr. H.G.J. KAMP

From/co-signed by:

- EFF Chairman, **Mr. Michael EYRE**/UK/member of the Board of the BFA/ex-franchisee-turned founder/franchisor
- Franchisee: **Mr. Eric Azan**/France/member of the Boards of the EFF as well as the FFF/franchisee

Concerns: the Ministry's plan to make the Dutch Franchise Code - DFC mandatory by law and the EFF's concerns for the future development of franchising in the Netherlands in this respect

This is the third letter that the Chairman of the EFF has addressed to the Minister of the Economy of the Netherlands on the issue of the implementation of the Dutch Franchise Code. The preceding letters were addressed on 22 July 2015 by the preceding EFF Chairman, Guy Gras. Followed in January 2017 by my first letter. Copies of these letters are appended to this letter (pdf) and their substance remains of interest to the positions expressed in this letter.

In the meantime, the text of the DFC has evolved. It is positive to note that its latest version is heavily inspired by the text of the newly reviewed (2016) EFF's EUROPEAN CODE OF ETHICS FOR FRANCHISING as well as by the substance of our letters.

On the substance of the DFC, the EFF supports a substantial amount of provisions. This letter will explicit what it questions and what it does not agree with.

Substance is only part of the story. The nature of the tool to be implemented is just as important, and here the EFF also has its concerns.

a) legal status of the Dutch Franchise Code:

The DFC explicits in detail 5 Chapters, including General Principles & Obligations (Chap. 2) of the franchisor, the franchisee and of both mutually. These obligations relate to Communication & Consultation (2.6). Chapter 3 deals with Recruitment, Publicity and what the EFF calls "pre-contractual disclosure information (3.4-3.8).

It appears that the DFC has sought to be as inclusive as possible of the **spirit** of a Code of Ethics. It says explicitly at the outset that "The NFC is based *inter alia* on the EFF's EUROPEAN CODE OF ETHICS FOR FRANCHISING".

It also seeks to be inclusive of the **substance** of pre-contractual disclosure laws that already exist in a few EU Member States including France, Belgium, Spain and Italy.

The advantages of the existing pre-contractual disclosure laws are that they seek to create a balanced and transparent playing field, before the signature of the contract, between the seller of a branded formula (ie an franchise, but not exclusively franchising) and the future buyer by obliging the seller of a business formula to provide the seller with all of the relevant information, which after examination, will decide the buyer to buy or not. By buyer, these laws include franchisees but not exclusively. These laws are valid also for co-operators.

A franchise implies a b-to-b "vertical" relationship. A coop implies a b-to-b "horizontal" relationship.

The purpose of pre-contractual disclosure laws is to set the rules for full and relevant pre-contractual disclosure obligations in both types of business formulas.

Pre-contractual disclosure laws have proven their usefulness and effectiveness. The Belgian case in particular, with its in-built regular assessment process has brought franchisors, franchisees, SME-organisations and Ministerial officers into regular and constructive parley.

Pre-contractual disclosure laws are not franchise-specific as explained above. They include franchising. For franchising, the advantage is that such laws do not stigmatise franchising as opposed to the many approximate other b-to-b formulas. Only Spain has defined its pre-contractual law as being "franchise-specific", except that their "sensu largo" definition of franchising broadens the scope of application.....

For the purpose sought by these laws (balance, transparency, greater responsibility of both parties before signing a contract) the advantage of is that they cover all of the types of branded b-to-b networks of independent partners. It is not the "qualification" of a contract that determines if it is "caught or not" by the law. It is the nature of the relationship.

This approach is far better than the approach adopted for the "DFC", which is essentially "post-signature" as well as franchise-specific. This not only stigmatises franchising, but artificially cuts off from its application other business models which the DFC should apply to also.

The Code should open itself to a broader scope of business formulas for which pre-contractual disclosure is just as important but that would escape the DFC by virtue of its current restrictive appellation. If a law is adopted, its name should reflect broader application.

On another note, the EFF whilst being a staunch supporter of a Code of Ethics does not think that such a Code, by its very nature - ethics based on aspiration for good behaviour as well as values - fits well as a law. In codified law, the general principles of law (good faith, reasonableness, fairness) exist and can be invoked by any judge or mediator.

The EFF therefore believes that

- *Either* the DFC should remain a Self-Regulatory Code of Good Practice, and at the same time change its name to be clearly more encompassing of other business formulas,
- *Or* the Ministry should take from the existing DFC elements that can be built into a pre-contractual disclosure LAW, and keep the Code as a Self-Regulatory guiding framework as it

defines itself. The DFC in its current state is not clear enough about if and how soon before the signing of the contract all of the information needs to be provided to the potential buyer.

This lack of clarity stems from the DFC trying to be 2 things at the same time – a Code and what could become pre-contractual disclosure law.

The EFF believes that the Dutch Ministry of the Economy needs to re-think these 2 aspects of the equation. Having two distinct instruments (a Code and a pre-contractual disclosure law) would meet the Ministry's original purpose whilst not creating the conditions for threatening the continued development of franchising in the Netherlands.

The EFF would like to end by stating its alarm at the following specific elements in the DFC:

In section 2.3, Obligations of the Franchisor: some of the obligations have stretched too far and create unlimited and unforeseeable obligations on the franchisor. So much so, that if they were turned into law, business operators in the Netherlands would hesitate to choose franchising as a business option.

Examples:

2.3.f: *"written recommendations....so as to improve the situation"* puts too much onus on one of the independent parties in relation to the responsibilities of the other independent party, particularly if significant pre-contractual disclosure has already been provided. A franchisor cannot be obligated to quasi-run the business for the franchisee *"to improve the situation"*.

2.6 .b-h: Communication & Consultation

The EFF is opposed to the legal imposition on "franchisor and franchisees to set-up and maintain as single independent representative body of franchisees"

The powers of an in-house franchisee association such as described include negotiating and agreeing or disagreeing to the definition of the franchise contract.

Three comments:

i) the spirit of this article interferes and redefines the governance of a franchise, putting the franchisees in the driving seat next to the franchisor. This amounts to a transformed conception of franchising which could lead to the end of the franchise model in Holland. This view would undoubtedly scare-off international investors and franchisors from Holland

ii) Many franchises do have a franchisee association (an internal brand franchisee association) as a dialogue structure between both parties. No country imposes this by law. If the DFC were to become law with this provision, this would jeopardize the continued development of franchising in Holland. Indeed, the franchisee association cannot be institutionalised by law to co-manage the franchise contract with the franchisor.

iii) To make such a recommendation a legal obligation is an analogy to the obligation on companies of a certain size to allow employee representation. Franchisees are not employees. The logic described above must not be imposed on franchises to which are attracted potential business buyers who consider themselves, and are, independent entrepreneurs.

Therefore, to avoid the many problems that article 2.6 raises, the EFF recommends deleting it completely from the DFC.

The substance of this letter comes in addition to the comments made in our 2 previous letters.

The EFF is in favour of non-franchise-specific pre-contractual disclosure law as well as self-regulatory Codes of Ethics.

The DFC is a curious mix of both peppered with a "trade-unionist" vision of franchisees in a "stand-offish" position to franchisors and who need to be protected by the law as employees are.

The intention of the DFC is laudable as a Code and not a law. Its present ambiguities, if they were to become law, are alarming to the European Franchise Federation and to the franchise community in the EU.

We hope our comments will help in addressing these issues and amending them.

Sincerely,

M. Eyre

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- Franchisee: France/FFF and EFF Board member/ name of franchise brand & function in the franchise C°



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