

To the Minister of Economic Affairs
Mr. H.G.J. Kamp
P.O. Box 20 001
2500 EA The Hague

Amsterdam, 24 May 2017

Your Excellency,

The American Chamber of Commerce in the Netherlands (AmCham) would hereby like to call your attention to the proposed draft bill self-regulation franchise published by the Ministry of Public Affairs on 12 April 2017. AmCham recognizes the importance of franchise. The franchise sector is international in the sense that many franchisors active in the Netherlands are foreign, many American, and that Dutch franchisors also expand their networks abroad, into North American and other regions of the world.

The Netherlands has a good reputation with foreign investors and the Dutch legal system is generally regarded as transparent and efficient. In this context, AmCham would like to share some concerns regarding the proposed draft bill and the underlying self-regulation, the Dutch Franchise Code ('NFC').

It is of concern that proper representation and transparency in the drafting process of the NFC may have been lacking (in particular on franchisor side), which led to an unbalanced outcome in favour of franchisees. There was little to no participation in the process of international (e.g. non Dutch) franchisors whose interests are not properly reflected. For a long time no translation was available. The requirement that contracts should be in Dutch is in our experience and understanding not reflective of industry practice, it is unnecessary and costly. AmCham understands and presumes that, given that international franchisors were not at the table in negotiations, the outcome in the form of the NFC will not apply to them, nor to expansions of Dutch franchisors abroad. In any case it affects the democratic legitimacy of the draft bill if the underlying NFC is not supported by the market.

Comparing to other countries in the world, with specific franchise laws, AmCham is surprised that the draft bill and DFC entitles franchisees to have significant influence on what in the franchise sector generally is regarded as the prerogative of the franchisor: to develop and own the brand, the franchise concept and the franchise network, to make decisions on the selection of franchise partners and locations where they operate, on the termination or assignment of a franchised business. If the franchisor cannot unreasonably withhold his consent on these topics and if he cannot unilaterally revise the contract on topics such as trademark guidelines and consumer data, this places a burden on the franchisor to explain his actions. The starting point should be freedom of contract so that the franchisor can carry out in his own discretion and without delay his responsibility to protect the reputation and success of the network.

Even more unusual and impracticable in an international context is the obligation to have a franchise association and that the association should consent to any major change that has a significant impact on the operation of the collective network of franchisees.

The Code emphasizes dispute resolution through consultation, mediation and advice by a special franchise committee, but even though the text seems clear that this leaves open the possibility to have disputes decided by regular courts or arbitration, some respondents in this consultation process seem to think otherwise. If so, creating access barriers to the Dutch (and foreign) courts and arbitration would adversely affect the investment climate and attractiveness of the Dutch market for foreign franchisors.

International business is served by transparent and balanced regulatory frameworks. Even though there may be good reasons to implement a franchise law in the Netherlands, AmCham does not think the current structure is sufficiently transparent and logical for international investors. The set up with a draft bill, consisting of only three articles (the first of which aims to replace definitions in the NFC, the second a 'delegation clause', the third stating a transition period), followed by a general administrative rule, that then appoints the NFC as the applicable self-regulation is already overly complex.

Furthermore, the NFC is based on 'comply or explain' but with the sanction stated in the draft bill that the franchisee can nullify the contract if deviations from the NFC are not properly explained. AmCham envisages a lack of transparency and predictability. The lack of a predictable outcome regarding the enforceability of franchisors' franchise agreements may well lead foreign franchisors to shy away from investing. Or contracts may become even much longer than at present with many annexes explaining deviations from the code and draft bill. Or franchisors will select foreign laws and forum in their contracts (for example English law and courts), thus creating inequality between franchisees of Dutch and of foreign franchisors. This may lead to unfair competition between networks of foreign and domestic franchisors, since foreign franchise businesses can act more swiftly and uniformly as directly by the franchisor, with less (time consuming) influence and debate with the franchisees.

AmCham has a concern also with the text of the NFC that may affect foreign investors. There is lack of consistency with standing case law. There are uncertainties resulting from obligations to be stated in the explanatory notes and explanations to be included in the text of the Code itself. This is relevant because only the text of the Franchise Code and not the explanatory notes will be appointed in the general administrative rule and thus receive a statutory basis.

Another example is related to the scope of the draft bill. The draft bill only applies to franchise agreements where the franchisee pays a monetary remuneration. Considering the importance of transparency and predictability for the investment climate, it is important for foreign franchisors to know without a doubt if the draft bill and NFC apply to their agreements or not. Even though some respondents in this consultation may have suggested otherwise, it is important to keep the distinction between franchise concepts for which the franchisee pays a monetary compensation (e.g. franchise fees) and when this is not the case, in which situation the bar for what we should expect from the franchisor should indeed be set lower than envisaged in the draft bill and NFC.



In conclusion, clearly, there is an inherent contradiction between the essence of soft law ('comply or explain'), and the option for the franchisee to nullify if the explanation to the deviation is missing or flawed. It creates a burden and cost on the franchisor to include explanations to the deviations in the contract or a contract annex and he can never be sure the explanation is sufficient.

Even though the draft bill also contains some non-controversial topics and it may overall be a good idea to develop franchise laws in the Netherlands, the proposed draft bill and NFC do in our view not strengthen the investment climate or development of a balanced and prosperous franchise sector in the Netherlands. Ultimately, this draft bill is not in the interest of the Dutch economy. AmCham therefore recommends to withdraw the currently proposed draft bill.

Yours sincerely,

Elke Roelant
Program Director
American Chamber of Commerce in the Netherlands