

To the Minister of Economic Affairs & Climate
H.E. Mrs. drs. M.C.G. Keijzer
P.O. Box 2040 I
2500 EK The Hague

Amsterdam, January 30, 2019

Your Excellency,

The American Chamber of Commerce in the Netherlands (AmCham) would like to make use of the opportunity to present its views on the proposed draft bill Franchise of 6 December 2018.

AmCham is an independent association of mainly American companies. AmCham's mission is to ensure that the Netherlands is a competitive environment for companies to invest in. Furthermore, AmCham is the voice for United States business in the Netherlands and all companies involved in transatlantic trade.

Franchise is an important legal model used cross borders. American and other foreign franchisors are active in the Netherlands and Dutch franchisors are also operating internationally. AmCham considers franchise an important aspect of cross border trade. The Dutch legal system is generally regarded as transparent and well balanced and the Dutch courts as reliable and efficient. AmCham studies the draft franchise bill and explanatory notes and would like to submit its views as follows.

Key points:

- a) First of all, this draft bill and the explanatory notes seem to assume that franchisors are very powerful and financially secure while franchisees are dependent, lack sufficient information and are financially insecure. Based on national and international experience, we think this is an oversimplified view of reality. We understand that no empirical and objective market studies have been done.¹ There are of course large and economically powerful franchisors, but also small, start-up franchisors. Some franchise relationships are new, others have been ongoing for decades. And there is a relevant difference between *hard franchise* and *soft franchise* formats in the level of entrepreneurial freedom the franchisee has and the level of responsibility the franchisor has.

¹ Martine de Koning, 'Het wetsvoorstel Franchise: Bezint eer ge begint', in: *Nederlands Juristenblad* 2019/4, p 262-264.

- b) The overview of foreign legal systems in the explanatory notes makes clear that while disclosure obligations are present in several legal systems in Europe, this does not hold true for obligations regarding the performance and termination of the agreement. Without further research of the facts, it is surprising and unnecessarily burdensome for the sector that regulations other than just disclosure have been introduced without any proper justification or substantiated analysis of the likely positive and negative effects.
- c) Dutch contract law as set forth in the Dutch civil code provides for a nuanced framework that entails a careful evaluation of the nature of the relationship and the facts and circumstances at hand (principle of reasonableness and fairness and the tenet of error). The draft franchise bill does not provide such flexibility. The rules and sanctions are mandatory and the same for all parties on the market. We wonder why the draft bill does not make a distinction between the following elements: whether a franchisor or franchisee is a small or large company, whether it considers hard or soft franchise, and the sector or industry it operates in. AmCham questions if current law, with all its flexibility, does not provide a more fair and adequate solution for unfair practices within a franchise system.
- d) The draft bill entitles franchisees to have significant influence on the franchise concept and network. Changes with (potentially) significant consequences for the franchisees or that include a revision of the franchise agreement, require their prior consent (or the approval of 2/3 of the franchise association, if any). This is surprising as in the franchise sector it is generally regarded as a prerogative of the franchisor to freely make decisions in relation to the trademark usage, the franchise format and development of the network. This restricts a franchisor considerably in its entrepreneurial freedom in a context where already responsibility and liability for the success of the unit franchisees business has been shifted to the franchisor (goodwill compensation, disclosure etc).
- e) In international trade, clarity and legal certainty are key elements to foster trust and economic prosperity. It is important for foreign franchisors to know without a doubt if their agreement is within the scope of the bill or not. The definitions are therefore of key importance. It is helpful and based on a clear rationale that the draft bill only applies to franchise agreements where the franchisor provides the license for a 'monetary

compensation' (e.g. franchise fees), in which situation the bar of what the franchisee can expect from the franchisor indeed should be set higher.

- f) On other points, the draft franchise bill lacks transparency, balance and logicity. The many open standards in the draft bill also lead to legal uncertainty, in particular because the law is mandatory in its entirety. For instance, the draft bill introduces certain (pre contractual) information requirements that have to be met. Failure to meet these requirements is punished with the power for franchisee to claim nullification for a period of three (3) years. However, the bill does not specify precisely these information requirements. For example the Explanatory Memorandum seems to imply that the franchisor is obliged to provide financial information. The Supreme Court has repeatedly indicated (*StreetOne*², *Albert Heijn*³) that there in principle is no such obligation to provide financial forecasts. Does the bill intend to deviate from this established legal doctrine? If so, why do the explanatory notes not explain why this choice has been made? Also, why is the franchisor required to exchange his franchise handbook with confidential know how prior to any agreement being signed. There is a risk that this draft bill will bring more problems and conflicts than solutions.
- g) The bill introduces an obligation to write down in the franchise agreement how a goodwill compensation will be calculated to the franchisee at the end of the relationship. Parties are free to determine the method for calculating such goodwill. The Explanatory Memorandum does not explain the necessity of this provision regarding the compensation of goodwill in relation to current law. The obligations create more uncertainty and will surely raise rather than resolve the amount of legal conflicts in the sector. Pursuant to current law the franchisee is (in some case) given compensation for investments that it has not been able to recover (*Mattel/Borka*⁴). Has the double counting of such compensation and the goodwill compensation been given sufficient thought? And given the already relatively long notice periods in termination for convenience and the legal (competition law and other) limitations to non-compete clauses, the question arises whether sufficient entrepreneurial incentives remain with the franchisee. If not, franchise as a model loses its success rate and therewith

² HR 24 februari 2017, NJ 2018/12 (*Street One*)

³ HR 21 september 2018, NJ 2018/398.

⁴ HR 21 juni 1991, NJ 1991/742 (*Mattel/Borka*).

its popularity. It would have been good if the functioning of the current legal system would have been studied and evaluated before concluding that drastic changes are necessary.

- h) The bill is of mandatory law. This is surprising and raises questions since no other set of rules is entirely mandatory under Dutch commercial law, not even the rules applicable to commercial agency or consumer transactions. As the possibility for a franchisee to annul the agreement for not meeting disclosure obligations is a heavy remedy, such remedy requires proper substantiation. The draft bill sets out a lot of open norms without making concrete what parties have to do to meet such norm. Open norms and mandatory law simply do not match. If mandatory law is necessary, it has to be clear how the imposed obligations can be met.
- i) Foreign franchisors often work with master franchisees situated in the Netherlands. As the explanatory notes also point out, in its relation towards its franchisees, a Dutch master franchisee of a foreign franchisor cannot deviate from the rules in the draft bill by opting for a different law and forum in his franchise agreements with Dutch franchisees, while the franchisor in his agreement with the master franchisee has this freedom. This entails a serious risk for the master franchisee that he will be bound by obligations that he cannot back-to-back enforce on his franchisees. This example makes clear that the draft bill is unsuitable for use in an international franchise network.
- j) This draft bill is likely to affect the willingness of foreign franchisors to engage in business in the Netherlands. It will become attractive for foreign franchisors to no longer appoint master franchisees in the Netherlands and instead to either avoid the Dutch market altogether or to appoint unit franchisees in the Netherlands directly from a legal entity abroad (without opening a Dutch subsidiary as a franchisor) under a different chosen law and forum. This is not in the interest of the Dutch economy or the development of franchise as a successful cross border business model.
- k) The bill introduces the possibility that further rules will be set through general administrative order. This means that further mandatory law can be provided without the involvement and prior approval of the parliament. This structure of a bill and administrative order is complex. Please refer to the response AmCham submitted regarding the previous draft franchise bill

and to academic literature where this risk was pointed out.⁵

- l) Considering that some of the changes are quite drastic and that Dutch parties have no choice than to comply, we think that the transitory rules are of key importance so that companies can do impact studies prior to submitting their response in this consultation. It is unfortunate that the period for transition has not been published prior to this consultation.

In conclusion, AmCham underlines its concerns that adoption of the draft bill will not be in the interest of franchise as a sector or the Dutch economy. The draft bill not only lacks clarity and therewith legal certainty, it also seems to lay too many financial burdens upon a franchisor or master franchisee while taking away autonomy over the franchise system. This may hamper innovation and continuity in an increasingly competitive and digital economy. In our view, the draft bill does not strengthen the investment climate or development of a balanced and prosperous franchise sector in the Netherlands.

AmCham recommends to withdraw the currently proposed draft bill. Alternatively, we recommend to limit the draft bill to disclosure obligations only, and to shorten the period for nullification in case of lack of disclosure to one (1) year.

Yours sincerely,



Elke Roelant
American Chamber of Commerce in the Netherlands

⁵ See also: M. de Koning, 'Het 'wettelijk haakje' van de Nederlandse Franchise Code', *NJB* 2017, p. 1254 e.v