



EUROPEAN FRANCHISE FEDERATION

“The Single Voice for the Franchise Industry & its Ethics in Europe”

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To: Ministry of the Economy and Culture of the Netherlands
https://www.internetconsultatie.nl/wet_franchise/reageren/1

Position Paper of the EUROPEAN FRANCHISE FEDERATION -EFF- relating to the Dutch government’s draft “Franchise Act”, planned to be integrated as **Title 16 – Franchise, in Book 7 of the Dutch Civil Code.**

The EFF WELCOMES the Dutch government’s initiative for a law on precontractual disclosure information for agreements of commercial partnerships¹ (of which franchising is a form) before the signing of such agreements between the seller of the commercial partnership and the independent buyer.

The EFF, however, asks why the Dutch government has limited the scope of application of this intended pre-disclosure Act specifically to franchise agreements.

Among those EU Member States that have a law on precontractual disclosure obligations, the majority except Spain, have sought to apply the benefits of precontractual disclosure to a larger set rather than a restricted set of commercial partnership agreements. The risk of restricting the law to franchising only is that certain companies that in effect operate what would be recognised as a franchise will, by virtue of this restricted scope, try to escape the application of this law arguing that theirs is not a franchise company.

However, if the Dutch government persists in this definitional choice, then the EFF has this to say about the proposed definition of franchising in the law: it strongly suggests to complete the definition of franchising by adding a third element to the terms of the definition, element which is entirely to the benefit of the franchisee:

A Franchise Formula is a uniform commercial formula for the production or sale of goods or the provision of services, which in any case includes:

- 1. a trademark, model, utility model or a trade name, corporate identity or drawing; **and***
- 2. know-how, consisting of a whole of practical information not protected by any intellectual or industrial property right, arising from the experience of the*

¹ All the precontractual disclosure laws exclude from their scope of application agency contracts and concession contracts

Franchisor and the examinations performed by him, which information is secret, essential and identified;

To be added:

“3. the continued provision of commercial and technical assistance² by the franchisor to the franchisee;”

The EFF will detail hereafter certain CONCERNS about the following articles in the draft law, **Title 16-Franchise, of Book 7 of the Dutch Civil Code:**

1. Art. 911, b) introduction of a new notion: “derived formula”:

The EFF presumes that the introduction of this new notion of “derived formula” aims at forestalling direct or indirect (through third parties) competition by the franchisor on his franchisee in the franchisee’s allocated territory, of the same goods or services.

The European Code of Ethics clearly states that an ethical franchisor-franchisee relationship is necessarily founded on “good faith & fair dealings, which translate as franchisor-franchisee relations based on fairness, transparency and loyalty each of which contribute to founding confidence in the relationship”³. The EFF’s own Precontractual Guidelines state *that a precontractual disclosure document should list the franchisor’s means of selling the same products or services under the brand, commercial name or trademark which are the object of the franchise contract within the customer-catchment area or exclusive territory allocated to the candidate franchisee.*

If the EFF’s presumption is correct about the objective of this notion of “derived formula”, it welcomes it.

2. Art. 915, 2, c) nature of documents to be divulged at the precontractual stage

The draft law expects the franchisor, during the precontractual period and prior to signing the proposed contract, to provide the potential franchisee with *“the draft of the Franchise Agreement, including all annexes, handbooks and similar documents”*.

EFF’s concerns:

a) firstly, the object of a precontractual disclosure document provided by the franchisor to the candidate franchisee is not to define what the contract could or should contain but to provide information from the contract that will help the prospect decide, in full knowledge and understanding, whether he wishes to invest or not in the proposition and what his obligations will be.

b) therefore, a precontractual law which would require at this stage to divulge the actual contract *“including all annexes, handbooks and similar documents”* is an unacceptable commercial risk for any franchisor to accept.

This risk would not be alleviated to any degree if the law were to foresee clauses of confidentiality or stipulate sanctions on the prospect who, in the end, would not sign the contract but would run away with the information. Major commercial harm would be done to the franchise. This would kill franchising in the Netherlands.

² Mentioned in the European Code of Ethics for Franchising (2016), Art. 1 – Definition of Franchising; & in EU OJ – C337/6 of 20.9.2018, The Functioning of Franchising in the Retail Sector, A & # 20;

³ European Code of Ethics for Franchising (2016), Preamble, 2

c) in conclusion, the phrase from the draft law quoted above must be withdrawn from the text of the law.

3. Art. 919, 1,a) goodwill attributable to the franchisee

“1, a) the franchise agreement shall stipulate the way in which it is determined what good will is present in the franchise”

“1.b) that and how goodwill reasonably attributable to the franchisee will be eligible for compensation to the franchisee in the event of termination of the agreement”

EFF's concerns:

a) firstly, for 1,a), will the law's Guidelines detail “the ways in which to determine goodwill”?

b) then for 1,b), the law does not say under what terms the termination takes place. Would it be conceivable that the notion of “compensation for goodwill” could only arise if it were the franchisor that unilaterally and without motive terminated the contract before term?

Would the logic of compensation in the law be the same if it were the franchisee that terminates, and in what circumstances?

In addition, there remains the issue of 1,a).

c) the EFF is concerned that this law which has chosen to be specific to franchising, is simply borrowing the notion of eventual compensation for goodwill that is so-called attributable to the franchisee upon termination of the agreement directly from the practice of Agency agreements.

All of the existing Precontractual laws in EU countries have avoided this confusion.

Indeed, a franchise contract/relationship is fundamentally different to an Agency contract.

A franchisee is a fully independent entrepreneur acting for himself and by himself whilst an agent acts for and in the name of a principal. A franchisor is not the franchisee's principle.

The imprecisions and ambiguities of 1,a) and 1,b) are an invitation for conflict at each termination, the costs of which will undermine each party's position.

4. Art. 919, 1, 2) “usual conditions in commerce”

“.....shall only be valid if the usual conditions in commerce apply to this purchasing obligation”

EFF's concern:

What does “usual conditions in commerce” mean? Will the draft law's accompanying “Guidelines” define this?

5. Art. 919,1,4) amendment to a contract & prior consent of the franchisee/franchisees Art. 920 non-contractual act by the franchisor impacting the franchise formula & prior consent of the franchisee/franchisees

EFF's Concerns:

a) Art. 919,1,4) - /franchisee: any amendment to a contract, franchise or other, during the term of the contract, must have the consent of both parties, franchisor and individual franchisee; upon renewal however, if the franchisor amends his contract, he has the obligation to inform the franchisee about any amendment along the terms of the precontractual disclosure law, eventually with a simplified precontractual obligation about the specific amendment(s).

- /franchisees: the European Code of Ethics for Franchise foresees that *"it is a franchisor's obligation to disclose information about communication and support structures in place with the franchisees of the network."*

b) Art. 920 "a non-contractual act by the franchisor impacting the franchise formula". What could this mean? We could venture that the object of this article is to defend the idea, for example, that a franchisor cannot act deliberately in a manner which would negatively impact the gross margins (in relative terms) of a franchisee or of any or all of the franchisees in the network.

The EFF would, in the case of this example, support what the law is intending but requests that the law to be more explicit in its text or in its guidelines.

May we suggest another amendment about Art. 920: to change "has or may have" to "has had" so that the article would read:

"Any act of the franchisor concerning the franchise formula that has had a substantial negative impact on the finances of the franchisee opens the right for the franchisee, ultimately and after discussions with the franchisor, to terminate the contract".

Regarding this article in general, the imprecision of the term "non-contractual act" must not penalise franchising by creating a rigid environment for its development. Franchising has proven so successful in so many sectors because it is a flexible and adaptable business model.

In conclusion, whilst welcoming the initiative for a precontractual law in the Netherlands, the EFF is concerned:

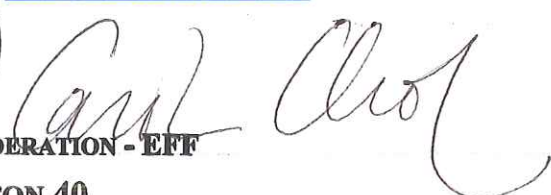
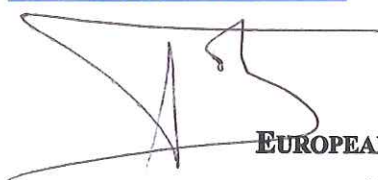
i) that restricting this law to franchising as opposed to "commercial partnerships" has the potential for paradoxical and unintended problems,

ii) that the imprecisions of certain articles, if not lifted, risk extensive misrepresentations leading to potential costly conflict,

iii) that this precontractual law is a useful prerequisite for future franchisee investors to make informed choices about the nature of the contract and of each party's respective obligations once the agreement is signed. Such a law – precontractual - should contribute to preserving the flexibility of franchise agreements.

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