
THE FRANCHISE LAW REVIEW

THIRD EDITION

EDITOR
MARK ABELL

LAW BUSINESS RESEARCH

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For further information please email
Nick.Barette@lbresearch.com

THE FRANCHISE LAW REVIEW

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Editor
MARK ABELL

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Gideon Robertson

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Nick Barette

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EDITOR'S PREFACE

Since the publication of the second edition of *The Franchise Law Review*, there have been major economic and geopolitical developments that have had a significant impact on world trade. The price of oil has plunged relentlessly downwards; China's manufacturing sector is suffering significant setbacks while its capital markets have taken a tumble; Europe faces a range of challenges, from Schengen and 'Brexit' to VW's disgrace over emissions; Iran and Saudi Arabia are exacerbating the problems in the Middle East and the Russian economy continues to float in the doldrums. Through all this, however, the apparently inexorable march towards the globalisation of commerce has continued unabated.

Despite the slow emergence of a few economic bright spots, the economy of what was once called the 'developed' world continues for the most part to struggle, while even Brazil – one of the much-vaunted BRICS nations – has fallen into recession. As a consequence, businesses are often presented with little choice but to look to more vibrant markets in Asia, the Middle East and Africa for their future growth.

At the same time, South–South trade is on the increase, perhaps at the expense of its North–South counterpart. All of this, coupled with the unstable wider geopolitical landscape, presents business with only one near certainty: there will be continued deleveraging of businesses in the coming years and, thus, growing barriers to international growth for many of them. All but the most substantial and well-structured of such businesses may find themselves facing not only significant difficulties because of their reduced access to funding to invest in their foreign ventures, but also challenges arising from their lack of managerial experience and bandwidth.

Franchising, in its various forms, continues to present businesses with one way of achieving profitable and successful international growth without the need for either substantial capital investment or a broad managerial infrastructure. In sectors as diverse as food and beverages, retail, hospitality, education, health care and financial services, it continues to be a popular catalyst for international commerce and makes a strong and effective contribution to world trade. We are even seeing governments turning to it as an effective strategy for the future of the welfare state as social franchising gains still more traction as a way of achieving key social objectives.

Given the positive role that franchising can make in the world economy it is important that legal practitioners have an appropriate understanding of how it is regulated around the globe. This book provides an introduction to the basic elements of international franchising and an overview of the way that it is regulated in 36 jurisdictions.

As will be apparent from the chapters of this book, there continues to be no homogenous approach to the regulation of franchising around the world. Some countries specifically regulate particular aspects of the franchising relationship. Of these, a number try to ensure an appropriate level of pre-contractual hygiene, while others focus instead on imposing mandatory terms upon the franchise relationship. Some do both. In certain countries there is a requirement to register certain documents in a public register. Others restrict the manner in which third parties can be involved in helping franchisors to meet potential franchisees. No two countries regulate franchising in the same way. Even those countries that have a well-developed regulatory environment seem unable to resist the temptation to continually develop and change their approaches to regulation – as is well illustrated by the recent changes to the Australian regulations. The inexorable march towards franchise regulation continues as countries such as Argentina, which has previously not specifically regulated franchising, have adopted franchise specific laws over the last 12 months.

Many countries do not have franchise-specific regulation, but nevertheless strictly regulate certain aspects of the franchise relationship through the complex interplay of more general legal concepts such as antitrust law, intellectual property rights and the doctrine of good faith. This heterogeneous approach to the regulation of franchising presents yet another barrier to the use of franchising as a catalyst for international growth.

This book certainly does not present readers with a full answer to all the questions they may have about franchising in all the countries covered – that would require far more pages than it is possible to include in this one volume. It does, however, try to provide the reader with a high-level understanding of the challenges involved in international franchising in the first section and then, in the second section, explain how these basic themes are reflected in the regulatory environment within each of the countries covered.

I should extend my thanks to all of those who have helped with the preparation of this book, in particular Caroline Flambard and Nick Green, who have invested a great deal of time and effort in making it a work of which all those involved can be proud.

It is hoped that this publication will prove to be a useful and often-consulted guide to all those involved in international franchising, but needless to say it is not a substitute for taking expert advice from practitioners qualified in the relevant jurisdiction.

Mark Abell

Bird & Bird LLP

London

January 2016

Chapter 19

BELGIUM

*Olivier Clevenbergh, Jean-Pierre Fierens, Siegfried Omanukwue,
Marie Keup and Eric-Gérald Lang¹*

I INTRODUCTION

Franchising forms an integral part of the way goods and services are sold and rendered on the Belgian market, and it is constantly expanding.

Based on figures from the Belgian Franchise Federation, approximately 100 franchisors and 3,500 franchisees are currently active on the Belgian market, covering 30,000 franchised outlets and resulting in a total turnover of €2.4 billion. Most of the franchise networks are active in business sectors such as food retail, do-it-yourself (construction) and ready-to-wear.² International franchisors (mainly of French and US origin) represent about 47 per cent of the total franchise concepts in Belgium, whereas 53 per cent of the franchise concepts have a Belgian origin.³

The Belgian Franchise Federation has, since its establishment in 1992, supported the development of franchising in Belgium and has strong ties with the European Franchise Federation. Members of the Belgian Franchise Federation are mainly franchise networks (franchisors and franchisees), lawyers specialised in franchising and entities with a strong focus on franchising.⁴

No specific regulatory authorities are entrusted with regulating franchising in Belgium. However, the Belgian Ministry of Economy follows the development of franchising in Belgium. To evaluate the implementation of the legislation on

1 Olivier Clevenbergh and Jean-Pierre Fierens are partners and Siegfried Omanukwue, Marie Keup and Eric-Gérald Lang are senior associates at Strelia.

2 Source: www.fbf-bff.be/nl/over-franchise/franchising-in-belgie.html.

3 Source: survey of the Belgian Franchise Federation of 2012: www.fbf-bff.be/Fbf/enquête_franchise_NL.pdf.

4 Strelia is a member of the Belgian Franchise Federation.

pre-contractual obligations in commercial partnership agreements (including franchising), an Arbitration Commission was established in 2006. It makes (non-binding) recommendations on this legislation and any future amendments to it.

II MARKET ENTRY

i Restrictions

Belgian law does not restrict the development of a foreign franchisor's network on the Belgian market, including by way of master franchising.

Foreign franchisors do not face restrictions on participation or foreign investment in a Belgian business entity.

ii Foreign exchange and tax

There is no foreign exchange control in Belgium and there are no specific tax regulations dealing with cross-border franchising, neither inbound nor outbound. Cross-border franchising may give rise to tax residency, withholding tax (notably on royalties) or transfer pricing issues, which are to be dealt with through proper planning and documentation. Belgium offers a broad range of double tax treaties and domestic exemptions allowing the setting of tax-efficient franchising structures.

III INTELLECTUAL PROPERTY

i Brand search

The trademark register of the Benelux Office for Intellectual Property (BOIP) holds all deposited and registered brands that are valid in the Benelux (i.e., Belgium, the Netherlands and Luxembourg).⁵ To verify whether a trademark is registered at EU level, one should consult the database of the Office for Harmonization in the Internal Market (OHIM). The database of the World Intellectual Property Organization is also a useful tool as it records national and regional trademarks registered worldwide. Searches for registered brands can be conducted easily using these online trademark databases.

ii Brand protection

Trademarks must be registered to be protected (even though the rules of unfair competition provide some degree of legal protection for the use of certain unregistered signs). There are separate registration procedures for Benelux, EU and worldwide trademark registrations.⁶ If the franchisor licenses or sublicenses its trademark to the franchisee, the franchisee can (but is not obliged to) register the licence with the BOIP.

The registration process of a trademark involves the following steps: (1) filing of a trademark application and payment of a fee, (2) publication of the deposited application,

5 There is no 'Belgian trademark'.

6 A worldwide registration is a bundle of national and regional trademark registrations. There is no international trademark.

(3) examination of the application and any opposition by third parties, and (4) formal registration of the trademark (if no opposition has been made or if the objections were rejected and the application complies with the registration requirements).

The registration process takes about four months with the BOIP, and 26 weeks with the OHIM. A trademark registration with either the BOIP or the OHIM is valid for 10 years. Such a registration is renewable for periods of 10 years at a time without limitation. Once a trademark is registered it can still be cancelled.

iii Enforcement

Most franchise agreements expressly give the franchisee the right to use the franchisor's trademarks or distinctive signs, or both, for the performance of the franchise agreement. If a dispute arises between the parties relating to this right of use, either party may sue the other party, including initiating summary proceedings, to obtain provisional measures.

A franchisee that licenses a trademark from the franchisor is entitled to intervene in counterfeit proceedings initiated by the franchisor to claim damages for loss suffered because of the unauthorised use of the trademark by a third party. However, the franchisee may not initiate independent proceedings without the franchisor's authorisation to do so.

iv Data protection, cybercrime, social media and e-commerce

Belgian legislation on data protection applies to data controllers that are established in Belgium or (where the controller is established outside the European Union) that make use of equipment situated in Belgium for the purposes of processing personal data.⁷

Franchisors and franchisees must comply with the data protection laws, for example, when processing personal data of their customers (data subjects). The Belgian regulatory authority for matters relating to data protection is the Commission for the Protection of Privacy.

Failure to comply with the legal obligations on data protection can lead to sanctions by the Commission for the Protection for Privacy and the Belgian courts.

Cybercrime, social media and e-commerce are governed by specific laws. These topics do not give rise to particular difficulties or disputes in relation to franchising.

IV FRANCHISE LAW

i Legislation

There is no legislation in Belgium that specifically and exclusively governs franchise agreements.

The pre-contractual phase of franchise agreements is regulated by Book X, Section 2, of the Belgian Code of Economic Law (the Belgian Economic Code), which replaces the Law of 19 December 2005 on pre-contractual information regarding

⁷ Law of 8 December 1992 on privacy protection in relation to the processing of personal data (as modified by the Law of 11 December 1998 to implement the European Directive 95/46/EC).

commercial partnership agreements (the Disclosure Law). Further, franchise agreements are governed by general contract law (mainly under the Belgian Civil Code) and subject to mandatory rules, among others, on employment, consumer protection, data protection, and competition law.

There is debate in case law and among scholars on whether franchise agreements are governed by Book X, Section 3, of the Belgian Economic Code, which replaces the Law of 27 July 1961 on the termination of exclusive distribution agreements (the Distribution Law). The majority position is that a franchise agreement is a *sui generis* agreement that differs from exclusive distribution agreements, even if it contains an exclusivity clause.

Franchise agreements are generally not governed by Book X, Section 1, of the Belgium Economic Code, which replaces the Law of 13 April 1995 on commercial agency (the Agency Law). The franchisee generally sells products in its own name and on its own behalf, as opposed to an agent that acts ‘in name and on behalf of’ the franchisor. However, under specific circumstances, the courts could rule otherwise.

ii Pre-contractual disclosure

The Disclosure Law imposes mandatory pre-contractual disclosure obligations on the franchisor towards a prospective franchisee. On the occasion of incorporating the Disclosure Law into the Belgian Economic Code, the legislators tried to clarify certain provisions of the Law and take into account certain difficulties that arose in practice. The Disclosure Law has a broad scope and applies to all ‘commercial partnership agreements’, which are defined as:

agreements concluded between two parties, each acting on their own behalf and in their own name, pursuant to which one of the parties grants to the other, in consideration of a remuneration of any nature whatsoever, whether direct or indirect, the right to use, in the course of the sale of products or the provision of services, a business process, comprising one or several of the following features:

- *a common sign or brand;*
- *a common trade name;*
- *a transfer of know-how;*
- *commercial or technical assistance.*

Franchise agreements are an important category of commercial partnership agreements covered by the Disclosure Law. This is clear from the parliamentary documents of the Disclosure Law.

Under the Disclosure Law, at least one month before signing the franchise agreement, the franchisor must provide the prospective franchisee with (1) a draft of the franchise agreement, and (2) a ‘pre-contractual information document’ (PID), which is a separate document that contains the information referred to in Article X.28 of the Belgian Economic Code. The one-month period is a cooling-off period to give the prospective franchisee time to evaluate the prospective business. Other than confidentiality obligations, the franchisee may not enter into any obligation towards the franchisor during the one-month period.

The PID consists of two separate parts. The first part must set out the 'main contractual provisions' of the draft franchise agreement, such as the direct remuneration of the franchisor (royalties, etc.), consequences of the franchisee's breach of its obligations, duration and conditions of renewal of the agreement, non-compete and exclusivity clauses, etc. The franchisor must also disclose the method of calculating 'indirect remuneration', such as the amount the franchisor receives from third parties in relation to the franchise agreement (e.g., its margin on the products sold, or end-of-year bonuses paid by a supplier to the franchisor). The second part of the PID must provide information needed for the prospective franchisee to make a correct assessment of the commercial partnership. This should include information on the history, state and prospects of the market from a local and general point of view; the history, state and prospects of the market share of the franchise network; the annual accounts of the franchisor during the past three years; if applicable, the number of franchise agreements that were concluded and that were terminated at the initiative of the franchisor and at the initiative of the franchisee during the past three years; etc.

If the main contractual provisions are modified after providing the draft franchise agreement or PID to the franchisee (but before concluding the franchise agreement), the franchisor must provide the franchisee with the modified draft agreement and a simplified PID (which may be limited to the modified main contractual provisions) at least one month before concluding the contract. As an exception, this requirement does not apply if a modification is requested by the franchisee in writing. In practice, this means that the one-month cooling-off period can only start to run after the parties have agreed on the final text of the franchise agreement.

The Disclosure Law imposes additional disclosure obligations on the franchisor in the following situations: (1) renewal of a fixed-term franchise agreement, (2) conclusion of a new franchise agreement between the same parties, and (3) amendment of a franchise agreement that has been in force for at least two years. In these situations, the franchisor must provide a draft franchise agreement and a simplified PID at least one month before the renewal of the franchise agreement, conclusion of a new franchise agreement or amendment of the franchise agreement. The simplified PID must contain at least the changes to the first part of the PID (main contractual obligations) and changes to the second part of the PID (information for a correct assessment of the commercial partnership).

The franchisee may invoke the nullity of the entire agreement within a limitation period of two years starting from the date of signing the contract if: (1) the franchisor failed to provide any draft of the franchise agreement or any (simplified) PID, or (2) the franchisee incurred obligations towards the franchisor before the end of the one-month cooling-off period. If the franchisor only failed to provide the first part of the PID (main contractual obligations), the franchisee may invoke the nullity of the undisclosed provisions of the franchise agreement. Further, the franchisee may invoke the nullity of the franchise agreement or seek damages based on general contract law if: (1) the first part of the PID is incomplete or incorrect, or (2) the second part of the PID (information required to make a correct assessment) is missing, incomplete or incorrect. Under general contract law, the franchisee bears the burden to prove that its consent to enter into the agreement was impaired because of the incomplete or inaccurate information in the

first part of the PID or the missing, incomplete or inaccurate information in the second part of the PID. The limitation period for such claims based on general contract law is 10 years.

The franchisee can waive its right to invoke the nullity of (a provision of) the agreement on grounds of failure to comply with the Disclosure Law. However, this waiver is subject to two conditions: (1) the waiver can only be granted after a one-month period following the signing of the agreement, and (2) the franchisee must expressly specify the nullity grounds for which the waiver is granted (for example, because the franchisor did not provide a PID at least one month before the signing of the agreement).

On nullification of a franchise agreement, the court may order the parties to be restored to their position as if the agreement had never been concluded. In practice, this means that the parties will have to reimburse each other for the costs that each has incurred (such as investments, fees, costs related to concluding the agreement, etc.). However, some case law and doctrine consider that franchise agreements give rise to successive reciprocal obligations of the franchisor and the franchisee. Thus, the parties are deemed to compensate each other during the performance of the agreement and therefore are not bound by a specific restitution obligation. In addition, the parties can seek damages under general contract law. In that case, the amount of the damages will be calculated based on the actual expenses and lost profits. The franchisee must prove the existence and extent of its loss.

The Disclosure Law contains a rule of interpretation: if in doubt, the franchise agreement must always be interpreted in the way that is the most favourable to the franchisee.

iii Registration

Under Belgian law, no specific registration requirements apply to franchise agreements. Franchisors or franchisees may, however, be subject to certain regulatory provisions, depending on their business (e.g., specific permits are required for businesses in the food industry, travel industry, etc.).

iv Mandatory clauses

Belgian law does not impose mandatory clauses in franchise agreements. Franchisee agreements must be in writing as a result of the requirements of the Disclosure Law (since a draft of the agreement must be communicated in writing). For a contract to be characterised as a franchise agreement, it must have certain characteristics that have been laid down by case law. It must be a partnership between two independent parties, under which one party (the franchisee) distributes goods or services of the other party (the franchisor) in a network, using a common trademark and know-how that the franchisor transfers to the franchisee, and whereby the franchisor provides certain assistance to the franchisee possibly in return for remuneration. It is advisable to ensure that the franchise agreement includes clauses that reflect these characteristics.

v Guarantees and protection

There are several ways for a franchisor to secure payments that the franchisee owes. The most common is a personal guarantee by the franchisee (more specifically, a guarantee

from the individuals who manage or hold shares in the company of the franchisee) and a bank guarantee. Depending on the type of franchise, the franchisor can stipulate in the franchise agreement that it has a retention right over the goods that are delivered to the franchisee.

To ensure optimal protection against non-payment by the franchisee, it is advisable for a franchisor to ensure that the franchisee provides several guarantees and preferably a third-party guarantee on first demand (e.g., bank guarantee). Amendments to the Belgian law on securities will in future allow a franchisor to obtain a pledge over the business of the franchisee.⁸ This is currently a security reserved for the banks.⁹ It remains to be seen whether the franchisors will make use of this opportunity, since they will then often come into conflict with the bank that finances the business of the franchisee. Other contractual protections are also possible, such as granting the franchisor a call option on the business of the franchisee, combined with the right to set off the sums owed by the franchisor to the franchisee against the debts owed by the franchisee to the franchisor.

V TAX

i Franchisor tax liabilities

Belgian tax law does not contain specific provisions for franchising activities.

The franchisor, being a company, is subject to Belgian corporate tax at a rate of 33.99 per cent on its net profit, as determined in accordance with Belgian generally accepted accounting principles and the Belgian Income Tax Code. Reduced rates can apply to small and medium-sized enterprises. Furthermore, different tax incentives are available under certain conditions, notably the 'notional interest deduction' (i.e., a notional interest tax deduction calculated on the company's adjusted equity) and the 'patent income deduction' (i.e., an 80 per cent tax deduction on certain patent income).

A non-resident franchisor, being a company, is subject to Belgian non-resident corporate tax at the same rate and under similar rules and incentives. Subject to the relevant double tax treaty (DTT), only the profit derived through a local permanent establishment would prove taxable in Belgium.

Franchise fees derived from franchisors generally include royalty payments and, therefore, like dividend and interest payments are normally subject to the Belgian withholding tax at a rate of 25 per cent,¹⁰ unless a relief is available under applicable domestic or DTT provisions. Under Belgian tax law, this withholding tax is usually not creditable or refundable for non-resident franchisors.

Specific anti-abuse rules ensure that transactions are dealt at arm's length, with a focus on affiliated parties or parties enjoying a favourable tax regime.

8 See Act of Wet 11 July 2013 on modification of the Civil Code regarding securities on moveables, which is to enter into force at latest on 1 January 2017.

9 See Article 7 of the Act of 25 October 1919 on the pledge of a business.

10 In the context of the upcoming tax reform (the 'tax shift'), this standard withholding tax rate will normally be increased from 25 to 27 per cent for income paid or attributed as of 1 January 2016.

Franchisors will usually have to register and account for VAT on goods and services supplied to franchisees, in accordance with the Belgian VAT Code and the VAT Directive 2006/112/EC. Franchise agreements may include complex supplies that need to be segregated for this purpose. Other indirect taxes, such as excise or registration duties, can apply depending on the transactions.

ii Franchisee tax liabilities

The franchisee, being a company, will be subject to Belgian corporate tax at the same rate and under the same rules and incentives as for franchisors – as specified above. All costs borne under the franchise agreement are, as a rule, tax deductible, subject to anti-abuse provisions and limitations for certain kinds of expenses.

Belgian withholding tax might need to be retained on certain payments – as also specified above.

Unless franchisees are involved in VAT-exempt businesses, they will usually have to register and account for VAT on goods and services supplied to their clientele, in accordance with the same Belgian VAT Code and VAT Directive 2006/112/EC. Depending on the business, franchisees will be able to recover all or part of the VAT-incurred input. Other indirect taxes, such as excise or registration duties, can apply depending on the transactions.

iii Tax-efficient structures

Tax efficiency of franchising structures should be examined cautiously before implementation. Where tax optimisation involves parties and assets (especially IP rights) to be located in certain jurisdictions, this can typically trigger withholding tax and transfer pricing issues.

In this respect, Belgium has a broad range of DTTs, which vary to a large extent in scope and conditions, providing relief for the withholding tax on royalty payments. Full exemptions exist notably under DTTs with Germany, France, Luxembourg, Ireland, Netherlands, the United Kingdom, Russia and the United States. Full exemptions also exist for interest and royalty payments between qualifying EU associated companies (requiring a 25 per cent direct holding) based on the Interest and Royalty Directive 2003/49/EC). Subject to certain conditions, Belgium grants foreign tax relief, compensating the withholding tax (up to 15 per cent) incurred abroad on interest and royalty payments.

Advance tax rulings can be requested conveniently from the Belgian tax authorities as means of seeking full legal certainty on the tax consequences of contemplated transactions. The ruling procedure may be initiated on a no-name basis and usually lasts between three to six months. In the distribution or franchise sector, rulings are frequently requested to confirm efficient transfer pricing policies from a Belgian tax perspective (e.g., cost-plus markup).

Various tax and non-tax reasons make Belgium a recognised place to locate certain distribution or financial functions.

VI IMPACT OF GENERAL LAW

i Good faith and guarantees

The Belgian Civil Code's Article 1134 lays down a general obligation for parties to perform their contract in good faith. The principle of good faith has several consequences: it is used to interpret the contract, to fill in the gaps of the contract and to protect a party against the excessive behaviour of the other party. Belgian courts place the duty of good faith at the heart of the franchisor's obligations, and hold that the franchisor must make reasonable efforts for the franchisee's business to be successful. Thus, franchise agreements entail a reinforced duty of good faith. Courts regularly terminate franchise agreements on grounds of the franchisor's breach of its duty to perform the franchise agreement in good faith (e.g., failure to assist, failure to take prompt action when a franchisee does not comply with its obligations, and discriminatory treatment of franchisees in the same network). A concept related to the duty of good faith is the prohibition against the abuse of a right. This can preclude a party from exercising its right in certain circumstances, notably when the benefit of exercising the right is manifestly disproportionate to the damage caused to the other party. The abuse of right is regularly invoked by franchisees when a franchisor refuses to renew its contracts.

ii Agency distributor model

The Agency Law regulates commercial agency agreements, which are defined under Article I.11, 1° of the Belgian Economic Code as an agreement whereby one party (the principal) appoints another party (the agent) to independently, continuously and in return for a remuneration negotiate and possibly conclude business matters in the name and on behalf of the principal. Under the Agency Law, the agent is entitled to a notice period or (additional) indemnity if the principal terminates the agreement.

The Agency Law normally does not apply to most franchise agreements, given that a franchisee does not merely act as an intermediary to negotiate or conclude business 'in the name and on behalf of' the franchisor. However, the Agency Law may exceptionally apply to a franchise agreement if the franchisee sells products or provides services in the name and on behalf of the franchisor.

By contrast, the Distribution Law is more likely to apply to franchise agreements. In particular, this is the case where a franchise agreement entails an exclusive distributorship of goods and the franchisee fulfils the other criteria under the Distribution Law. In that case, the franchisee–distributor could be entitled to a reasonable notice period or an indemnity plus additional compensation.

iii Employment law

When a franchisor exercises close authority over a franchisee that is a physical person (e.g., by giving the franchisee detailed instructions and exercising strict control on the execution of orders), one cannot fully exclude the risk that the franchise agreement is recharacterised as an employment contract on the grounds of the finding that the franchisee lacks legal independence. This means that the mandatory laws on employment contracts become applicable. Laws governing employer–employee relationships provide

a lot of protection to the employee (e.g., regarding the notice periods and indemnity on termination of the employment contract) and impose various tax and social security obligations on the employer.

Belgian courts have occasionally recharacterised franchise agreements as employment contracts. Parties must therefore be careful when drafting and performing their franchise agreement. To limit the risks of recharacterisation, it is advisable for the franchisee to adopt the form of a legal entity (i.e., not as a physical person) and the franchisor should ensure that the franchisee has sufficient independence in its performance of the agreement. It is also advisable for the franchisor to ensure the presence of other typical elements of a franchise agreement, such as the transfer of know-how and the existence of a network. Such elements may justify the control exercised by the franchisor (e.g., to maintain the uniformity of the franchise network).

The franchisor is normally not responsible for the franchisee's compliance with its tax, social security and other obligations as an autonomous employer. However, in at least one instance, claims have been brought against a franchisor for non-compliance with the labour regulations by franchisees in its network.

iv Consumer protection

The Law of 6 April 2010 relating to market practices and consumer protection – which was replaced by Book VI of the Belgian Economic Code – regulates trade practices and the protection of consumers. Franchisees are not characterised as consumers, since they act with a for-profit purpose and conclude the franchise agreement in the framework of their business activities.

v Competition law

Franchise agreements are subject to competition law, both at EU and national level.

The Law of 15 September 2006 on the protection of economic competition (the Belgian Competition Law) – which was replaced by Book IV of the Belgian Economic Code – implements on the Belgian market a prohibition against anticompetitive agreements between undertakings and a prohibition against abuse of a dominant position (respectively Articles IV.1 and IV.2 of the Belgian Economic Code). Articles IV.1 and IV.2 are nearly identical to Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), which has direct effect in Belgium. Whereas Articles IV.1 and IV.2 of the Belgian Economic Code concern anticompetitive practices that affect trade within the Belgian market, Articles 101 and 102 TFEU relate to anticompetitive practices that may affect trade between EU Member States.

A franchise agreement (or one of its clauses) that entails a restriction of competition may benefit from the EU Vertical Block Exemption Regulation.¹¹

11 Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

Disputes concerning competition law can be brought before the Belgian Competition Authority or the Belgian courts. The Belgian Competition Authority mainly serves to protect the public interest, whereas parties may seek the award of damages before the Belgian courts.

Case law is divided on the sanction for franchise agreements that contain forbidden competition clauses. Some courts declare the nullity of the entire agreement, while others only declare the nullity of anticompetitive clauses and may award damages or order the restitution of goods or payments.

vi Restrictive covenants

Franchise agreements often contain non-compete clauses. Such clauses should be limited in time and place and be necessary, for example, to protect the transferred know-how and to maintain the identity of the franchise network. Non-compete obligations during the agreement must be limited to five years to benefit from the EU Vertical Block Exemption Regulation. Non-compete obligations after the end of the agreement should be limited to one year after expiration of the franchise agreement.

A franchisor is generally not allowed to, directly or indirectly, impose minimum or fixed resale prices on the franchisee. However, a franchisor can impose maximum and recommended resale prices.

Franchisors often seek to include in the agreement exclusivity of supply clauses, which require the franchisee to exclusively buy the products from the franchisor or its approved suppliers. Such clauses are widely accepted, given that it is often necessary to maintain a certain degree of uniformity in the franchise network.

vii Termination

The termination of franchise agreements is governed by the general principles of Belgian contract law.

Parties are free to conclude a franchise agreement for a fixed term or an open-ended term. In practice, franchise agreements are often concluded for a fixed term with a possibility of (automatic) renewal. As a rule, a fixed-term franchise agreement cannot be unilaterally terminated before expiry of the term, without breach of contract. By contrast, either party may terminate a franchise agreement with an open-ended term, provided that the terminating party gives a reasonable notice period to the other party and the termination is not abusive. In addition, either party may terminate a franchise agreement (whether with a fixed or open-ended term) if the other party commits a serious breach (e.g., failure to meet payment obligations under the agreement).

The provisions of the Agency Law or Distribution Law regarding the termination shall prevail, in cases where they apply to the franchise agreement (which is the case only in a minority of court decisions).

To maintain the integrity of the franchise network at the end of an agreement, some franchise agreements grant the franchisor a purchase option on the franchisee's business (often including goodwill, a lease agreement, equipment, stock, etc.) at a price (or method of calculation of the price) that is fixed in the agreement. A franchisee is

not entitled to any indemnification (e.g., for loss of clientele) at the end of the franchise agreement, unless the agreement contains clauses to that effect or if the agreement (exceptionally) falls under the scope of the Agency Law or Distribution Law.

viii Anti-corruption and anti-terrorism regulation

The Belgian Criminal Code contains anti-corruption and anti-terrorism provisions. This legislation is applicable to franchise agreements. We are not aware of case law in this area that addresses specific issues regarding franchising.

ix Dispute resolution

In cases of disputes regarding franchise agreements that have a connection with two or more EU Member States, the Brussels I Regulation 44/2001¹² and Rome I Regulation 593/2008¹³ govern the questions of which courts have jurisdiction and the applicable law. The general principle is that the parties are free to agree on which courts have jurisdiction and on the applicable law, subject to the application of mandatory national rules. The Disclosure Law provides that disputes regarding its application (among others to franchise agreements) are subject to the jurisdiction of Belgian courts and the application of Belgian law if the franchisee performs the activities referred to in the franchise agreement primarily in Belgium. EU law has priority in the event of conflicts with national laws.

In Belgium, the ordinary courts (often the commercial courts) usually have jurisdiction to decide on disputes regarding the interpretation, performance and termination of franchise agreements on the Belgian market. Following a judgment in first instance (by the Commercial Court), the parties can lodge an appeal before the competent Court of Appeal. On questions of law only, a further appeal is possible before the Belgian Supreme Court. Belgian courts can refer questions to the Court of Justice of the European Union concerning the interpretation of EU law.

The parties may include an arbitration clause in the franchise agreement, providing for national or international arbitration. Mediation can be used to resolve franchise disputes but is not mandatory.

Court proceedings usually take a lot of time in Belgium. Depending on the court where the case is pending, court proceedings at first instance tend to last approximately between one and two years. On appeal, court proceedings tend to last about two to five years. Parties may launch summary proceedings to obtain provisional measures (e.g., an injunction to prohibit a former franchisee from continuing its activities with the franchisor's trademark), whether or not proceedings on the merits of the case are pending. To obtain such a provisional measure, the claimant must prove that there is a situation of urgency (i.e., an imminent threat of serious irreparable damage).

12 Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

13 Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations.

The costs for launching civil proceedings in Belgium are lower than in most other jurisdictions since the proceedings are mainly in writing (it is exceptional to have live witness depositions, etc.). In court proceedings, the prevailing party is entitled to an indemnity to cover the costs of the proceedings. This indemnity is capped and determined based on the amount of the claims. The higher the amount of the claims, the higher the indemnity will be.

VII CURRENT DEVELOPMENTS

Current debates on franchising often relate to the pre-contractual obligations of the franchisor, its obligation to perform the franchise agreement in good faith and competition law matters. The parliament's decision in 2005 to legislate only on the pre-contractual phase of commercial partnership agreements (including franchise agreements) was the result of a compromise. Some stakeholders wanted a law that fully and specifically regulates franchise agreements, in particular with respect to their termination (as is the case for commercial agency and exclusive distribution agreements). There are still many supporters of such a specific regulation.

Although the Disclosure Law was adapted and clarified on the occasion of its incorporation into the Belgian Economic Code, several important questions raised by practitioners remain unanswered (e.g., there is still lack of clarity on the mandatory content of the simplified format of the disclosure document, when required by the Disclosure Law, and the actual sanctions in the event of non-compliance).

The recent economic crisis (and slow recovery) had an important impact, among others, on the behaviour of franchisors on consumer markets and in their relationship with franchisees. The competition to attract and retain customers is fiercer than ever, and the franchisors try to manage their networks as well as they can to increase their market share. This often leads to discussions on price clauses, whereby the franchisors want to impose lower resale prices on their franchisees. This is generally to the benefit of consumers and unlikely to violate competition rules. However, the relevant clauses should be drafted adequately to avoid infringements. As a policy priority for 2015, the Belgian Competition Authority announced its intention to take action in the large (food) retail sector. Franchisors also compete against each other to develop their network and, in certain sectors such as retail or food, to obtain the best locations and to retain their franchisees. Another effect of the economic crisis is the increasing number of franchisee bankruptcies. This leads the franchisors to seek better protection and, as a result, gives rise to disputes concerning which party is to blame for the business's failure.

Appendix 1

ABOUT THE AUTHORS

OLIVIER CLEVENBERGH

Strelia

Olivier Clevenbergh has specific expertise in the field of retail and distribution law and is an acknowledged specialist in franchising. He advises pre-eminent clients in this sector. He is also active in the field of corporate law. He combines his transactional practice with a contentious practice covering the same areas.

Mr Clevenbergh was admitted to the Brussels Bar in 1989 and was admitted as a solicitor of England and Wales in 1995.

Before being one of the founding partners of Strelia in 2013, Mr Clevenbergh was a partner at Stibbe, from 2000 and, in addition to his client activities, was managing partner of Stibbe Brussels from 1 January 2005 until 30 June 2011.

Mr Clevenbergh is listed as a 'leading lawyer' in the main international directories for dispute resolution and corporate law.

JEAN-PIERRE FIERENS

Strelia

Jean-Pierre Fierens specialises in distribution law and corporate law. Over the past 10 years he has been appointed numerous times as sole arbitrator, co-arbitrator or chairman of an arbitral tribunal. He also acts as counsel in arbitration matters. He is an Accredited Mediator at the Centre for Effective Dispute Resolution.

Mr Fierens was president of the Dutch-speaking Bar Council of Brussels from 1998 until 2000. He was admitted to the Brussels Bar in 1973 and holds a Master of Laws degree from Columbia University (1980).

Before being one of the founding partners of Strelia in 2013, Mr Fierens was, from 1986, a partner in the Brussels office of Stibbe. He chaired the board of Stibbe and was the head of the litigation department at Stibbe Brussels.

SIEGFRIED OMANUKWUE

Strelia

Siegfried Omanukwue obtained a law degree from the Katholieke Universiteit Leuven (KU Leuven) in 2007, a Master of Laws degree from the London School of Economics and Political Science in 2008 and a postgraduate diploma in EU competition law from King's College London in 2011. He started his career as a lawyer in 2008 and focuses on litigation, contracts and EU law matters.

MARIE KEUP

Strelia

Marie Keup obtained a law degree from the University of Paris X-Nanterre in 2010 and is completing a Master of Laws degree in intellectual property rights and ICT at the Katholieke Universiteit Leuven (KU Leuven). She started her career in 2012 and focuses on contract law, liability law, intellectual property law, commercial law in general and insolvency proceedings.

ERIC-GÉRALD LANG

Strelia

Eric-Gérald Lang obtained a law degree from the Université libre de Bruxelles (ULB) in 2005 and a tax degree (Diplôme d'étude spécialisées – DES) from the ULB in 2006. He started his career as a lawyer in 2006 and handles tax law matters, with a focus on indirect taxes and VAT.

STRELIA

Royal Plaza
rue Royale 145
1000 Brussels
Belgium
Tel: +32 2 627 00 90
Fax: +32 2 627 01 09
olivier.clevenbergh@strelia.com
jean-pierre.fierens@strelia.com
siegfried.omanukwue@strelia.com
marie.keup@strelia.com
eric-gerald.lang@strelia.com
www.strelia.com