

# BELGIAN RETAIL NEWSLETTER

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## European Parliament wants harmonized franchising legislation

In September 2017, the European Parliament passed a resolution on the functioning of franchising in the European retail sector.<sup>1</sup>

This resolution has a *non*-legislative and *non*-binding nature, but is important since it could pave the way for harmonized franchising legislation across the European Union.

### KEY HIGHLIGHTS FROM THE RESOLUTION

The resolution begins by pointing out the lack of a common European definition of franchising.

According to the resolution, one key feature of a franchising relationship is that it is a contractual relationship, concluded on a voluntary basis, between natural or legal persons that are legally and financially independent of each other. Under the contractual relationship, the franchisor grants to the franchisee the right to operate the franchisor's franchising formula, name and trademarks. Also, the franchisor shares know-how with the franchisee.

The European Parliament considers franchising an attractive business model, but sees among others the following flaws in the current practice and framework of franchising:

- Franchising currently is **under-performing** in the EU, representing only 1.89 percent of gross domestic product, as opposed to 5.95 percent in the U.S. and 10.83 percent in Australia, with 83.5 percent of franchising's turnover concentrated in only seven EU Member States;
- The **fragmented and non-harmonized** nature of the franchising legislation in the EU Member States – and hence the lack of harmonized European legal standards – creates barriers and may discourage both franchisors and franchisees from expanding their activities across national borders; and
- Existing, national legislation often focuses on the franchisor's disclosure obligations in the **pre-contractual** stage, while the legislator's focus should be broader and encompass various other issues (e.g., online sales, non-competition clauses).

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<sup>1</sup> The resolution is titled "European Parliament resolution of 12 September 2017 on the functioning of franchising in the retail sector (2016/2244(INI))" and can be consulted on the following website: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2017-0322&language=EN&ring=A8-2017-0199>

In order to realize the full potential of this business model, the European Parliament believes, amongst others, the following actions are needed, particularly in view of protecting the (prospective) franchisee.

- Legislation is needed to balance the rights and obligations of the franchisor and the franchisee including: (i) clear, correct and comprehensive **pre-contractual disclosure obligations** on the franchisor; (ii) the introduction of a **cooling-off period** after signing the franchise agreement; and (iii) the inclusion of clearly formulated and reasonable **clauses regarding e-commerce/online sales, non-compete commitments, confidentiality, etc.** in the franchise agreement, etc.
- The EU Commission should open a public consultation to obtain information as to the real situation on franchising. Also, the EU Commission should draft **non-legislative guidelines reflecting best practices** on the functioning of franchising in the retail sector, in particular in relation to the latest technological and market developments, such as Internet sales. The European Parliament wants to receive such guidelines by January 2018.
- The EU Commission also should draw up a non-exhaustive **list of unfair trading practices** that is published and made available to all interested parties.<sup>2</sup>

## "BELGIAN" FRANCHISING AGREEMENTS

While Belgium has no specific "franchise act", franchising agreements applicable in the Belgian territory could fall under certain mandatory Belgian legal provisions or criteria established by case law. By way of example:

- The **pre-contractual/contract formation phase** of Belgian franchise agreements is specifically regulated by Book X, Section 2, of the Belgian Code of Economic Law. Under these mandatory provisions, at least one month before signing the franchise agreement, the franchisor must provide the prospective franchisee with a draft of the agreement and a pre-contractual information document listing important contractual provisions and other data. During the one-month cooling-off period *prior* to signing the franchise agreement, the franchisee may not enter into any obligation toward the franchisor other than confidentiality obligations;
- Certain franchise agreements could fall within the scope of Book X, Section 3 of the Belgian Code of Economic Law. This section contains mandatory provisions on the **termination** of exclusive distribution agreements of indefinite duration. The franchisor can only terminate such agreements for convenience subject to a reasonable notice or a compensation in lieu of notice, and as the case also may be subject to an additional equitable/just compensation (mainly covering goodwill created by the franchisee); and
- In light of certain criteria established by Belgian case law, the franchisee's **non-compete obligation** should be limited to the franchisee's (former) franchising activities and franchising territory. Also, a non-compete clause should be limited in time. In practice, it could be difficult to enforce non-compete obligations exceeding one year after the termination of the franchise agreement.

## CONCLUSION

It remains to be seen whether the European Parliament's resolution will effectively lead to a harmonization of the EU Member States' franchise legislation. In the resolution, the European Parliament hints at a *regulation* or a *directive* as a legislative tool to achieve this goal.

At the Belgian level, the resolution is a useful reminder of **already-existing** mandatory, statutory obligations applicable to the contracting process and/or applicable to the substance of the franchise relationship.

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<sup>2</sup> The resolution gives, as an example of a potentially unfair trade practice, the fact that franchisors sometimes require franchisees to purchase products and services that are not related to the franchise formula (see resolution, point 23).