

LEGAL UPDATE

The Franchise Act enters into force on 1 January 2021

Date: 7 December 2020

Last Friday, 3 December 2020, it was announced that the Franchise Act (*Wet Franchise*) will enter into force on 1 January 2021. The decision can be read [here](#). This date had been mentioned before but it remained uncertain whether it would be the definitive date. There was even talk of entry into force on 1 July 2021, due to the requisite amendments to agreements and the required consultations between franchisors and franchisees. This option was rejected, however.

More than that, the legislature even deviated from the policy on the minimum introduction period which entails that there must be at least two months between the publication date and the entry into force.

This deviation was, however, deemed justified because 1 January 2021 had repeatedly been mentioned as the envisaged date of entry into force during the parliamentary debate and this date had therefore long been known to the parties falling under the scope of the Franchise Act. It is clear from the fact that the parties concerned had themselves had mentioned 1 January 2021 as the date of entry into force in their own communication lines on the Franchise Act, that these parties did in fact consider that date as the date of entry into force. In view of this and in view of the fact that the Franchise Act had already been published in the Dutch Bulletin of Acts and Decrees (*Staatsblad*) on 15 July 2020, it had for some months been clear to the parties concerned which rights and obligations ensued from the Franchise Act and on which date it would enter into force.

What does this mean?

On 1 January 2021, franchisors and franchisees must conform to the Franchise Act. Moreover, from this date franchise agreements must comply with the new Act since the provisions in the new title 16 of Book 7 of the Dutch Civil Code are mandatory provisions.

A transitional period applies to some specific provisions for franchise agreements dating from before the entry into force. These are provisions relating to goodwill, the non-competition clause and the consent requirement for amendments to the franchise formula. A transitional period of 2 years, within which the existing franchise agreement must be aligned with the new Act, applies to these provisions. New agreements must comply directly and in full with the new Act, including in terms of goodwill, non-competition and the consent requirement.

The pre-contractual phase

Once the Act has entered into force, the franchisor must, in good time, provide the franchisee with certain information specified in the Act, during their negotiations on a new franchise agreement. Entirely in line with the established case law on this point, the Explanatory Memorandum confirms that the franchisor is under no obligation to provide an exploitation forecast. All the information prescribed by the Act must be provided at least four weeks before the new franchise agreement is concluded. This four-week period is regarded as a stand-still period.

The terms of the franchise agreement

The Franchise Act contains certain requirements which the terms of franchise agreement must in any event meet. They relate to the following topics:

1. *goodwill fee*: the agreement must stipulate how to determine whether the company contains goodwill and, if so, how much;

2. *post-contractual non-competition clause*: the period stipulated in such clause must be limited to one year after the end of the agreement and the field covered by such clause must be limited to the field within which the franchise is exploited;
3. *interim amendment of the franchise agreement or formula (consent requirement)*: franchise agreements must contain a specific threshold for amendments. Henceforth, the consent of a majority of the franchisees based in the Netherlands, or of each of the franchisees based in the Netherlands affected by the amendment, will be required in some cases (e.g. investments, financial contributions, costs or loss of turnover by the franchisee) for the implementation of changes in the franchise agreement or formula, or if the franchisee intends to exploit a derivative formula without amending the franchise agreement to that effect.

Obligations during the collaboration

In future, the franchisor will have to supply the franchisees with information regarding the use of various fees on a yearly basis. For example, information needs to be supplied on how the various fees are used. These are, for the most part, the usual fees such as a marketing fee or automation fee. The idea is that obliging the franchisor to share information on this will allow for consultations on the optimal use of the fees by the franchise organisation. What is more, the franchisee must be informed in good time of a number of other matters specified in the new Act.

Foreign franchisees

The provisions of the Franchise Act are mandatory for franchisees based in the Netherlands. Deviations are permitted if the franchisor is based in the Netherlands, but the franchisee is based abroad, even if Dutch law has been declared applicable to the franchise agreement.

In a nutshell

Given that it is now certain that the Franchise Act will enter into force on 1 January 2021, very little time remains. There is much to do in the franchise sector, specifically for franchisors:

- align new agreements with the Franchise Act before it enters into force;
- already start considering aligning existing agreements with the Franchise Act before the end of the transitional period as regards goodwill, non-competition and consent to interim amendments. What a reasonable and feasible threshold is for those amendments, needs to be examined;
- remember to review the other documents too (e.g. the handbook) and the processes that need to be completed;
- examine whether and how the recruitment and selection of franchisees needs to be modified. Verify whether all the requisite information for potential franchisees is available and is made available;
- next, consider whether to draw up a Pre-contractual Information Document (PID) like they do in Belgium;
- finally, consider a way in which to check how certain fees are used and how to inform the franchisee about this, *and* about the other matters specified in the new Act.

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