THE FRANCHISE LAW REVIEW

Fifth Edition

Editor
Mark Abell

THE LAWREVIEWS

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This article was first published in February 2018
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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-912228-11-9

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ARAMIS

ATIEH ASSOCIATES LAW FIRM

BASHAM, RINGE Y CORREA, SC

BECCAR VARELA

BIRD & BIRD

CHANCERY CHAMBERS

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PREFACE

Since the publication of the first edition of *The Franchise Law Review*, there have been some significant economic and geopolitical developments that have had a significant impact on world trade. However, the apparently inexorable march towards the globalisation of commerce has again continued unabated despite, or perhaps even because of, these changes.

Brexit, the elections of Donald Trump and Emmanuel Macron, the installation of Xi Jinping into the pantheon of Chinese Communist Party gods and the potential fall of Chancellor Merkel in Germany well illustrate the depth and importance of the political changes buffeting the global economy.

Talk of the BRICs is a thing of the past and businesses are often presented with little choice other than to look to more vibrant markets in Asia, the Middle East and Africa for their future growth.

At the same time, trade in the South is on the increase, perhaps at the expense of its North–South counterpart. All of this and the unstable wider geopolitical landscape present business with only one near certainty: there will be continued deleveraging of businesses in the coming years and therefore growing barriers to international growth for many of them. All but the most substantial and well-structured of businesses may find themselves facing not only significant difficulties because of reduced access to funding to invest in foreign ventures, but also challenges arising from 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 beverage, retail, hospitality, education, healthcare 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 franchising 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 play 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 a large number of jurisdictions.

As will be apparent from the chapters of this book, there continues to be no globally homogenous approach to the regulation of franchising. 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 instead focus on imposing mandatory terms upon the franchise relationship. Some do both. In certain countries, there is a requirement to register certain documents on a public register. Others restrict the manner

in which third parties can be involved in helping franchisors 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 approach to regulation – as is well illustrated by the new changes to the Australian regulations.

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 its use as a catalyst for international growth.

This book certainly does not present the reader with exhaustive answers to all the questions he or she may have about franchising in all the countries covered – that would require far more pages than it is possible to include in a single 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.

It is hoped that this fifth edition 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 2018

Chapter 25

DENMARK

Jacob Ørskov Rasmussen[1]

I INTRODUCTION

Most of the franchise systems in Denmark are found in the retail sector, but there are also franchise systems in the restaurant and hotel sector, as well as in the car rental and service sector, and the education sector.

Franchising has experienced a rapid growth in Denmark over the recent decade, which is attributable to both foreign franchise systems establishing in Denmark and Danish companies expanding through the use of franchise systems.

Among the biggest foreign franchise brands in Denmark are McDonald's, Burger King, Domino's Pizza, Subway, 7-Eleven, Avis Rent a Car and Sixt Rent a Car. Some of the latest newcomers are Dunkin' Donuts, Starbucks, Carl's Jr and Pizza Hut.

Several of the domestic franchise brands are small or medium-sized companies that have chosen franchising as a way to expand their business in Denmark. Some of the domestic franchise brands have also expanded their business internationally, such as Bang & Olufsen, Jysk, Vero Moda, Jack & Jones, Bianco and BoConcept.

Dansk Franchise Forening (DFF) is an interest group for Danish companies involved in franchising. It was established in 1984, at a time when franchising was almost unknown in Denmark. DFF has issued a code of ethics, which is based on the European Code of Ethics for Franchising adopted by the European Franchise Federation (EFF). The code of ethics is binding for the members of DFF.

There are no current governmental activities or other official campaigns focusing on franchising as a business model in Denmark.

II MARKET ENTRY

i Restrictions

As a member of the European Union, Denmark is committed to observe the principle of free movement of goods, persons, services and capital, and the general prohibition against discrimination on grounds of nationality. Consequently, there are no market entry restrictions or other approval requirements that apply to foreign franchisors in Denmark. This also applies to foreign franchisors from outside the EU.

1 Jacob Ørskov Rasmussen is a partner at Plesner Law Firm.

However, persons who are not residents of Denmark and who have not previously been resident in Denmark for a total period of five years may only acquire title to real property in Denmark after having obtained permission from the Ministry of Justice. This also applies to companies that do not have their registered office in Denmark, such as foreign franchisors.

EU or EEA nationals may acquire an all-year dwelling in Denmark without obtaining permission from the Ministry of Justice on certain conditions. The same applies to companies established in accordance with the law of an EU or EEA Member State that have established branches or agencies in Denmark or intend to do so or plan to deliver services in Denmark. It is a requirement that the property will serve as a necessary all-year dwelling for the acquirer or that the acquisition is a precondition for engaging in self-employed activities or providing services.

ii Foreign exchange and tax

Payments to and from Denmark are fully liberalised. This means that there are no restrictions on taking banknotes and coins out of or into Denmark, nor are there restrictions on other external transactions, including loans from and deposits with foreign banks, or portfolio investments and direct investments. However, anyone who enters or leaves the Danish customs area carrying money, etc. exceeding €10,000 in value shall on their own initiative go through a customs check and shall declare all money, etc. to the customs and tax authorities.

There is no tax regulation that relates specifically to franchising in Denmark (see Section V.i).

III INTELLECTUAL PROPERTY

i Brand search

To a large extent the Danish Trademarks Act[2] has been harmonised with the EU Trademark Directive, but there are still differences. The most notable difference is that a Danish trademark can be acquired through use. Further, the Danish Trademarks Act is to some extent supplemented by the Danish Marketing Practices Act,[3] which is a statutory law of unfair competition.

Protected registered trademarks can be searched on https://euipo.europa.eu/eSearch/#advanced (EU trademarks) and www.dkpto.dk (Danish trademarks). These websites can also be used for searching EU- and Danish-registered design rights. Unregistered Danish trademarks would have to be found through general knowledge of the market and internet searches.

Copyrighted works, image rights and business processes are not registered, and a search for these would therefore have to be conducted using the internet and through general knowledge of the market.

The process for ascertaining whether there is a conflict follows the normal process of determining whether there is an intellectual property infringement.

2 Consolidated Act No. 223/2017 on Trademarks.

3 Consolidated Act No. 426/2017 on Marketing Practices.

ii Brand protection

There are four ways in which a trademark can be obtained in Denmark:

a registration with the Danish Patent and Trademark Office (DKPTO);
b use in Denmark;
c international World Intellectual Property Organization registration designating Denmark; and
d EU trademark registration with the European Union Intellectual Property Office.

The Danish relative and absolute grounds for refusal are similar to those for EU trademarks. The DKPTO will provide a search report of its findings. An application for trademark registration will not be refused based on relative grounds for refusal.

The Danish Trademarks Act contains a rule about 'trademark theft'. It follows from this provision that registration cannot be obtained for trademarks that are identical or very similar to trademarks that are being used in a foreign country for the same goods or services, if the applicant knew or should have known of this older, foreign mark.

Design rights may also be registered via DKPTO. To be registered a design has to be new and have individual character.

iii Enforcement

A trademark proprietor is entitled to start proceedings based on its trademark rights. A franchisee can be a licensee, and a licensee is also entitled to start proceedings in relation to infringements of the trademark right, unless otherwise agreed upon between the licensee and the trademark proprietor. This will, however, change once the new Trademark Directive comes into force, no later than 2019. The licensee shall duly notify the trademark proprietor of such proceedings.

In general the remedies are the following:

a imposition of a court injunction, including a preliminary injunction, on the defendant (i.e., an order to refrain from any – continued – trademark infringement in the future);
b the securing of evidence (similar to an *Anton Piller* order);
c receiving compensation, in cash or in another form;
d imposition of a court order on the defendant (i.e., an order to do something so as to prevent any threatening – continued – trademark infringement);
e on conviction, having the defendant publish the judgment in whole or in part;
f imposition of a fine on the defendant; and
g surrender of the profit enjoyed as a result of the infringement.

The remedies apply regardless of whether the trademark right has been granted by registration or has been obtained by use.

The enforcement of design rights and copyright also follows the enforcement procedures listed in the EU Enforcement Directive.

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

The Danish Data Protection Act[4] applies to the processing of personal data. The purpose of the act is to enable companies, etc. to process personal data within the EU and EEA

4 Consolidated Act No. 429/2000 on the Processing of Personal Data.

while ensuring adherence to certain data processing principles and the preservation of the rights of the data subject. It is, *inter alia*, a requirement that personal data, whether related to employees or customers, is protected by special safeguards when said data is transferred outside the EU and EEA, for instance, from a franchisee to the franchisor. The act also requires the responsible entities, 'data controllers', to register and obtain prior approval from the Danish Data Protection Agency when processing certain types of personal data and also for some data transfers outside the EU and EEA. The new EU Data Protection Regulation[5] will be effective in Denmark as of 25 May 2018. The new regulation will increase existing obligations and constitute new obligations for data controllers, and the requirement for registration and approval from the Danish Data Protection Agency when processing certain types of personal data is likely to cease. However, the new Regulation will not result in any other material changes to the above-mentioned principles and requirements.

So far, special rules regarding cybercrime and notification of government authorities in relation to data breaches have only been adopted for the telecommunications sector.

The Danish E-Commerce Act[6] contains certain requirements in relation to identification of the trader and a duty to provide information on relevant aspects when purchasing goods or services online, for instance the name of the trader, its physical address and business registration number. In relation to distance sales, a trader must also provide a consumer with a right of cancellation according to the Consumer Contracts Act.[7]

Finally and more generally, a trader, whether a franchisor or a franchisee or other, must comply with the Danish Marketing Practices Act when performing marketing directed towards the Danish market. The Act requires adherence to the principles of good marketing practices, no use of misleading or undue indications or omission of material information if this is designed to significantly distort consumers' or other traders' economic market behaviour. The Act also applies to advertisements on social media such as the internet if directed towards the Danish market. Furthermore, with respect to advertisements on social media such as the internet, a main principle of the Danish E-Commerce Act stipulates that traders within the EU or EEA offering information society services – meaning commercial services delivered online – are subject to domestic control, thus a trader in a country within the EU or EEA has to comply with the requirements regarding digital marketing in said country, even though the marketing is targeted at other countries within the EU or EEA.

IV FRANCHISE LAW

i Legislation

There is no legislation that makes express provisions for franchising in Denmark. This means that every aspect of franchising is regulated by the general rules of law.

The Danish Contracts Act[8] and general principles of contract law apply to franchise agreements. The overall principle in Danish contract law is the principle of freedom of contract (i.e., the parties are free to decide the contents of their agreement). However, the drafting

5 Regulation 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

6 Consolidated Act No. 227/2002 on Services in the Information Society, etc.

7 Consolidated Act No. 1457/2013 on Certain Consumer Contracts.

8 Consolidated Act No. 193/2016 on Contracts and other Juristic Acts pertaining to Property.

(or carrying out) of a franchise agreement may be regulated by various mandatory rules. In particular, certain statutory rules such as the Danish Competition Act,[9] the Marketing Practices Act,[10] the Business Lease Act,[11] the Product Liability Act[12] and the Interest on Overdue Payments Act[13] may restrict the parties' room for manoeuvre.

Among the rules to be considered in the Danish Contracts Act when drafting (or carrying out) a franchise agreement, the general clause in Section 36 is of particular relevance. Section 36 stipulates: 'An agreement may be amended or set aside, in whole or in part, if its enforcement would be unreasonable or contrary to principles of fair conduct. The same applies to other legal transactions.'

Danish courts are reluctant to apply Section 36 on commercial agreements, but it may be applied where there is an evident discrepancy between the parties' bargaining positions.

Where the franchise agreement is silent, the parties' relationship may be regulated by general principles applicable to commercial relationships. Such principles may be found in the Danish Sale of Goods Act[14] as well as in the Commission Act[15] and the Commercial Agents Act.[16] However, the principle regarding payment of compensation for goodwill at termination in the Commercial Agents Act will only apply by analogy in very exceptional cases (see also Section VI.ii).

Case law is also a relevant source of law in relation to franchises, especially where an earlier decision has been made in the superior courts. Possible precedents may be found primarily in various law reports. However, not many precedents relating to franchises have been published. This may be because many franchise agreements refer disputes to be settled by arbitration and not by the ordinary courts.

ii Pre-contractual disclosure

There are no specific pre-contractual disclosure requirements in Danish law. Consequently, there are no legal requirements to disclose certain information relating to the franchise prior to entering into the franchise agreement. However, as a general principle, a duty of disclosure arises when reasonable commercial standards of fair dealing require that particular circumstances should be disclosed when entering into an agreement. A misrepresentation prior to entering into a franchise agreement may therefore give rise to an action for breach of the agreement. In a commercial relationship, the parties are also obliged to give information voluntarily if they know or ought to have known that the information is material to the other party.

The basis of liability for contractual damages on account of breach of an agreement is the concept of fault (*culpa*). In addition, liability requires that the non-breaching party has suffered a loss and that there is an adequate causal connection between the breach and the loss. Damages are computed on an expectation basis (i.e., the non-breaching party shall be put in the same position as if the agreement had been performed).

9 Consolidated Act No. 869/2015 on Competition.
10 Consolidated Act No. 426/2017 on Marketing Practices.
11 Consolidated Act No. 1714/2010 on Lease of Business Premises.
12 Consolidated Act No. 261/2007 on Product Liability.
13 Consolidated Act No. 459/2014 on Interest etc. on Overdue Payments.
14 Consolidated Act No. 140/2014 on Sale of Goods.
15 Consolidated Act No. 332/2014 on Commission.
16 Consolidated Act No. 272/1990 on Commercial Agents and Commercial Travellers.

Danish courts are reluctant to award damages for pre-contractual behaviour when no agreement has been entered into. However, the doctrine of *culpa in contrahendo* is recognised as a general principle but only as an exception. As a starting point, pre-contractual liability requires a clear breach of the law in the form of an unfair behaviour or a clear breach of the rules applicable to the contractual process.

Furthermore, the general conditions of liability in terms of loss and adequate causal connection must be fulfilled to impose a pre-contractual liability. Since no agreement has been entered into, damages will be computed based on reliance damages.

iii Registration

There are no registration requirements for franchises in Denmark.

iv Mandatory clauses

There are no mandatory clauses in franchise agreements according to Danish law.

v Guarantees and protection

There is no legislation relating to guarantees made by a franchisee under a franchise agreement, regardless of whether it is provided by a person or a company. A guarantee promise is subject to the rules in the Danish Contracts Act. A guarantee promise is thus binding on the promisor when it has been communicated to the promisee, and it does not require any acceptance from the promisee to be binding. The guarantee commitment as such is subject to the general rule of contractual freedom. Where the guarantee is silent, the reality of the guarantor's obligation must be determined by reference to case law and legal tradition.

Whether the guarantee is enforceable must be evaluated under the general rules on invalid declarations of intent in the Danish Contracts Act. In particular, the general clause in Section 36 may be of relevance (see Section IV.i).

V TAX

i Franchisor tax liabilities

The tax system in general

There is no Danish tax code applicable specifically to franchising structures. Hence, the taxation of a franchise in Denmark depends on whether the franchise is subject to personal or corporation tax.

Furthermore, the Danish tax system distinguishes between tax payers domiciled in Denmark and abroad.

Individuals and companies domiciled outside Denmark can be subject to a limited tax liability to Denmark regarding a number of specified income types.

Foreign persons and companies are, however, obviously often subject to tax liability in another jurisdiction as well. To avoid double taxation for limited liable taxpayers, Denmark has entered into a large number of double-taxation treaties. Further, Denmark has implemented various EU directives seeking to eliminate double taxation.

Corporation tax

A company is domiciled and subject to full tax liability in Denmark if the company is registered with the Danish Business Authority or if the management of the company has its principle place of business in Denmark.

Companies are subject to 22 per cent tax (2017) on income, capital gains, interests, etc.

Companies can deduct from taxable income expenses incurred when obtaining, ensuring or maintaining the taxable income, though with certain limitations. Additionally, companies can obtain a deduction from amortisation of assets. Finally – with some limitations – losses realised on tax relevant assets, such as debt and real estate, are deductible.

For non-domiciled companies withholding taxes on income from Denmark is particularly relevant. Most importantly Danish withholding taxes may apply to royalties, dividends and interests.

Royalties received from a Danish source are subject to limited tax liability. Thus, Denmark will withhold tax on royalty (e.g., from a Danish franchisee to a foreign franchisor). The withholding tax rate on royalties is 22 per cent (2017).

However, for royalties paid to recipients domiciled in a jurisdiction with which Denmark has entered into a double-taxation treaty, the state in which the beneficial owner of the royalty is domiciled has the exclusive right to tax the royalty payment. Additionally, Danish tax on royalties between group-related companies in the EU is normally waived pursuant to the EU Interest and Royalties Directive.

Non-domiciled companies are subject to limited tax liability on dividends at a 22 per cent tax rate (2017). The tax rate for non-domiciled companies was reduced from 27 per cent to 22 per cent on 1 July 2016, but the withholding rate for the Danish dividend-paying company remains at 27 per cent (equivalent to the rate applicable for domiciled companies). Subsequently, the foreign receiving entity can reclaim the excess withholding tax.

Dividends received by non-domiciled companies from Danish subsidiaries are tax exempt if the receiving company would not be taxable pursuant to the EU Parent–Subsidiary Directive or the tax should have been exempt pursuant to a double-taxation treaty.

Similarly, dividends received by non-domiciled companies from related Danish companies are exempt if the recipient is domiciled within the EU or EEA and would be tax exempt pursuant to the EU Parent–Subsidiary Directive or the tax should have been (fully or partially) exempt pursuant to a double-taxation agreement.

If the dividends are not exempt from withholding taxes, but the receiving entity is resident in a state with which Denmark has concluded a double-tax treaty that calls for a lower rate of withholding taxes, tax at the rate of 27 per cent (2017) must generally be withheld, and the receiving entity may subsequently reclaim the excess withholding tax.

Personal tax

An individual is subject to personal tax on employment income. Furthermore, income derived from self-employment is subject to personal tax.

An individual is fully liable to tax in Denmark, if the individual is domiciled in Denmark or has been present in Denmark for a continuous period of at least six months (including short stays abroad in the form of vacations, etc.).

An individual is subject to tax on salary, profits from self-employment, capital gains, interests, dividends, pensions, etc.

For employed individuals the expenses qualifying for a deduction are very limited; hence, for example, certain work-related transport and interest expenses on debt are deductible.

A personal business tax regime is applicable to self-employed individuals to allow for a harmonised taxation of personal businesses and companies. The tax rate applicable to self-employment income under this regime is 22 per cent (2017). Operating costs, such as salary, rent, travel expenses, insurance, training, etc., are deductible from self-employment income (such deductions may also be obtained outside the tax regime for self-employed individuals).

When self-employment income is extracted from the franchise business by the franchisee for personal use it will be subject to ordinary salary tax with a progressive net tax rate of up to 56.4 per cent, including labour market contribution and optional church tax (2017). The tax already paid on the self-employment income will be credited in the personal tax for the individual.

ii Franchisee tax liabilities

See Section V.i.

iii Tax-efficient structures

The structuring of a franchise business in Denmark is generally not driven by tax considerations. Hence, there is no general best practice used specifically for franchises.

Instead the structuring – from a tax point of view – is typically dependent on the specific business drivers for the franchisee, such as the nature of the business, the place of residence, whether the franchise is conducted as an individual concern or partnership or in a corporate form, etc.

VI IMPACT OF GENERAL LAW

i Good faith and guarantees

Danish contract law recognises the principle of good faith. This means that the parties to an agreement are obliged to care for each other's interests and to give each other information that is necessary to mitigate losses, as well as to avoid acting contrary to previous behaviour and to avoid an abuse of rights.

The principle of good faith has not been expressed in any statutory provision, but its existence is presupposed in some statutes, for example in Section 36 of the Danish Contracts Act (see Section IV.i).

Unfair actions and omissions as well as actions and omissions carried out in bad faith by a contracting party may give rise to an action for breach of the agreement (see Section IV.ii).

ii Agency distributor model

According to Danish law, franchisees are normally treated as independent distributors purchasing and selling goods in their own name and for their own account, and the franchisors are thus acting as suppliers. There are no specific Danish rules on either distribution or franchise agreements.

It is possible to include in the franchise agreement provisions providing for the franchisee to act as a commission agent. It would also be possible to include provisions providing for the franchisee to act as a commercial agent. This would not modify the nature of the franchise agreement as such, but it would constitute an 'agreement within the agreement', which would be governed by the Danish Commission Act or the Commercial Agents Act, as the case may

be. It should be emphasised that the Commercial Agents Act is based on an EU Directive that embodies a number of mandatory provisions serving to safeguard the interests of the agent by ensuring certain minimum rights.

In particular, the provisions in the Commercial Agents Act relating to goodwill at termination and minimum notice of termination may not be deviated from to the detriment of the agent through an agreement stipulating that foreign law shall apply, if the legal relationship would otherwise be governed by the Act. Therefore, if the franchisee acting as an agent has its place of business in Denmark, these provisions will apply regardless of any choice of law clause contained in the franchise agreement (see Section VI.ix).

According to published Danish case law, a distributor is only entitled to compensation at termination under very special circumstances. This could be the case if the distributor or dealer, despite fixing its own resale prices and otherwise being responsible for the commercial risks, has not been duly compensated for its investments, etc. at termination; for example, if the duration of the agreement was very short, and if the distributor or dealer also actively transfers the customer records, etc. to the supplier at termination, provided that the identity of the customers is not generally known. In a case before the Danish Supreme Court on 25 April 2000, a terminated dealer was, under very special circumstances, awarded compensation in the amount of 200,000 Danish kroner. In the ruling the Danish Supreme Court clearly stated that under normal circumstances an independent distributor or dealer will not be entitled to any compensation upon termination of the distributorship or dealership. However, in this specific case the Danish Supreme Court awarded the terminated dealer the compensation mentioned with reference to the fact that the termination of the dealership had taken place with no reasonable explanation and without taking the dealer's interests into consideration (very disloyal behaviour towards the terminated dealer), and with reference to the fact that the terminating supplier in question had taken over the customer base built up by the dealer, thereby preventing the dealer from being duly compensated for its investments in marketing, etc.

iii Employment law

According to Danish law, a franchisee is generally considered as a separate and independent business partner to the franchisor. However, depending on the intensity of the parties' cooperation and provided that the franchisee is a natural person, the franchise relationship may be qualified as a camouflaged employment relationship governed by general principles of employment law, whereby the franchisee is considered similar to an employee, as the weaker party in need of protection. There is also a risk that mandatory rules such as the Danish Salaried Employees Act[17] will apply, as well as statutory tax law relating to employment relationships.

Whether the franchise relationship is to be considered as a camouflaged employment relationship depends on an overall assessment of the circumstances of the case, including the wording of the franchise agreement and the parties' execution thereof. Among the factors to be considered is the extent to which the franchisee may manage its own hours, the extent to which the franchisee is taking on a financial risk by paying for the business premises and any employees, whether the remuneration to the franchisee is determined by the franchisee's performance or the time spent, etc.

17 Consolidated Act No. 1002/2017 on the Legal Relationship between Employers and Salaried Employees.

iv Consumer protection

When entering into a franchise agreement, the franchisee is considered to act in the course of business, and the franchisee will therefore not be treated as a consumer in accordance with any of the Danish laws concerning consumer protection.

However, the parties' position of strength may be of relevance in relation to Section 36 in the Danish Contracts Act (see Section IV.i).

v Competition law

The Danish competition rules, which are found in the Danish Competition Act and executive orders issued on the basis of the Act, are in all relevant aspects identical to the EU competition rules. In particular, the European Commission's Block Exemption Regulation for vertical agreements has been incorporated into Danish law.

This means that issues of exclusivity, pricing, product ties, e-commerce and full-line forcing are treated in the same way under Danish law as under EU competition law.

vi Restrictive covenants

The Danish competition rules are in all relevant aspects identical to the EU competition rules, and non-compete obligations are therefore treated in the same way under Danish law as under EU competition law.

Accordingly, a non-compete obligation relating to the products or services purchased by a franchisee is permitted for the duration of the franchise agreement, provided that the obligation is necessary to maintain the common identity and reputation of the franchised network.

vii Termination

Danish law does not require a minimum period of notice for the parties to terminate a franchise agreement made for an indefinite term and the parties are free to agree the period of notice. If a short period of notice has been agreed, the courts may in rare circumstances establish a reasonable period of notice by applying Section 36 in the Danish Contracts Act (see Section IV.i).

If no period of notice has been agreed, a franchise agreement made for an indefinite term may be terminated with a reasonable period of notice taking all circumstances into consideration, including the duration of the franchise relationship. A period of notice of six months is normally considered reasonable, including in situations in which the parties' relationship has lasted for several years (also, according to case law, if it has lasted over 20 years).

It is the starting point under Danish law that a franchisee is not entitled to compensation for goodwill at termination following an adequate term of notice. However, Danish courts have in some cases allowed a distributor such compensation but only in cases offering very special circumstances (see Section VI.ii).

The Danish competition rules are in all relevant aspects identical to the EU competition rules, and post-term non-compete obligations are therefore treated in the same way under Danish law as under EU competition law. Accordingly, post-contractual non-compete obligations in franchise agreements related to products or services that compete with the products and services covered by the franchise agreement are permissible for a maximum period of one year after termination of the agreement, provided that the non-compete

obligation is indispensable to protect know-how transferred by the franchisor to the franchisee and is limited to the point of sale from which the franchisee has operated during the contract period.

The right for the franchisor to take over the franchisee's business upon termination should be regulated in the franchise agreement. If nothing has been agreed, Danish law predicts that neither party has a right or a duty to take over the other party's rights and obligations under the agreement.

viii Anti-corruption and anti-terrorism regulation

Fraud

The Danish Criminal Code[18] deals with different types of fraudulent behaviour and actions, including embezzlement, deceit, fraud against creditors, breach of fiduciary duties, breach of trust, including providing the authorities with false or misleading information concerning a company's accounts.

There is no strict liability under the Danish Criminal Code. As a general rule, criminal liability requires the intention to commit a criminal fraudulent act for the purpose of gain that causes a corresponding loss to the victim.

Furthermore, negligent and fraudulent accounting under the Danish Bookkeeping Act[19] and the Danish Annual Report Act[20] are punishable by a fine with no statutory limit. Wrongful bookkeeping made with fraudulent intent may also be covered by the provisions on fraud in the Danish Criminal Code.

Bribery

The Danish Criminal Code distinguishes between and prohibits public active bribery, public passive bribery and private bribery (both active and passive).

Public active bribery means any person who unduly gives, promises or offers to someone performing a public function or office with a Danish, foreign or international public organisation a gift or another benefit to make the relevant person perform or fail to perform that function or office.

Public passive bribery means any person who unduly receives, demands or agrees to receive a gift or another benefit in the exercise of a Danish, foreign or international public function or office. Facilitation payments are generally considered bribes falling within the scope of public active bribery and public passive bribery.

Private bribery means any person who receives, demands or agrees to receive another benefit for himself, herself or others in a manner contrary to his or her duty of managing the property entrusted to him or her by another person, and any person who grants, promises or offers such a gift or other benefit, including in the form of kickbacks.

Violations of the Danish Criminal Code's provisions on bribery may be sanctioned with criminal fines, imprisonment (only individuals) and forfeiture. Further, violations may be sanctioned with exclusion from public procurement contracts. Directors and employees of a company may under certain circumstances be found personally liable for acts on behalf of a company.

18 Consolidated Act No. 977/2017 on Criminal Law.

19 Consolidated Act No. 648/2006 on Bookkeeping.

20 Consolidated Act No. 1580/2015 on Annual Reports.

Money laundering

The Danish Act on Anti-Money Laundering[21] is based on the Fourth EU Anti-Money Laundering Directive,[22] which was transposed into Danish law on 26 June 2017. The Danish Act on Anti-Money Laundering is to a great extent aligned with the Fourth EU Anti-Money Laundering Directive, although there are a few deviations from the Directive.

Money laundering is defined as any of the following:

a unlawfully accepting or acquiring for oneself or others a share in economic profits or funds that are obtained by a punishable violation of the law;

b unlawfully concealing, keeping, transporting, assisting in the disposal of or in a similar manner subsequently serving to ensure profits or funds obtained by a punishable violation of the law; and

c attempting or participating in such actions.

A franchisor acting and contracting in its own name is responsible for complying with the Act on Anti-Money Laundering (assuming it carries out activities subjecting it to the Act). However, a company may under certain circumstances be found liable for acts committed by a third party, if that third party is in some way connected to or is representing the company. Consequently, although this risk is unlikely to materialise, a franchisor may be found liable for money laundering committed by a franchisee or the employees of the franchisee or for lack of compliance with the Act on Anti-Money Laundering by the franchisee.

For this reason it is recommended that the franchisee agrees to comply with the franchisor's internal guidelines, code of conduct, etc., subject to such adjustments as may be necessary to ensure compliance with the Danish Act on Anti-Money Laundering; such proper adequate procedures can be used as a defence for the franchisor against liability for acts committed by the franchisee or the employees of the franchisee.

ix Dispute resolution

With regard to issues relating to jurisdiction, the 1968 Brussels Convention, the 2007 Lugano Convention and Regulation 1215/2012 apply in Denmark. This means that when entering into an agreement the parties are free to agree on the choice of forum. Many franchise agreements refer disputes to be settled by arbitration and not by the ordinary courts. It is also possible to agree on mediation as a form of dispute resolution. With regard to jurisdiction outside the ambit of these rules, international jurisdiction of Danish courts is based on a number of provisions in the Danish Administration of Justice Act[23] and the starting point is that the defendant must have home court in Denmark.

Regarding choice of law, the 1980 Rome Convention applies in Denmark (not the Rome I Regulation (593/2008) because of Denmark's opt-out from the EU cooperation as regards justice and home affairs). Consequently, the parties are free to agree on the law that shall govern their agreement. To the extent that no valid choice of law has been made by the parties, the starting point is that the agreement shall be governed by the law of the country

21 Consolidated Act No. 651/2017 on Measures to Prevent Money Laundering and Financing of Terrorism.

22 Directive 2015/849/EU of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No. 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.

23 Consolidated Act No. 1101/2017 on Administration of Justice.

with which it is 'most closely connected'. According to the basic presumption, the closest connection is to be found in the country where the party who is to effect the performance that is 'characteristic of the agreement' has his or her habitual residence or, in the case of a company, its central administration.

It is generally considered in relation to franchise agreements that the franchisor is to effect the performance that is characteristic of the agreement, consisting of the franchise concept, the right to use the franchisor's business names, trademarks and know-how and in some cases also patent rights, which shall be provided to the franchisee against payment of remuneration. Nevertheless, there are many indications that the franchise agreement shall be considered to have its closest connection to the country in which the franchisee is to make use of these rights. There is, however, no relevant Danish case law dealing with these issues.

It is possible to obtain a court injunction, including a preliminary injunction, ordering a former franchisee to refrain from trading in breach of a non-compete provision, or from using the franchisor's trademarks or other intellectual property rights (see also Section III.iii).

As a starting point, damages for breach of contract (and misrepresentation) are calculated on an expectation basis (i.e., the non-breaching party shall be put in the same position as if the agreement had been performed).

The party 'losing' the case will normally be ordered to effect reimbursement to the other party of the costs incurred by the latter in connection with the case (court fees, legal fees, etc.). In principle, the fees of legal professionals are not regulated. However, the High Court has laid down publicly accessible guidance rates for some fees, which are usually followed by the court. The amount to be reimbursed by the losing party according to these guidance rates will normally not cover the actual legal fees for conducting the case.

Foreign judgments against Danish citizens may be enforced in accordance with the rules in the 1968 Brussels Convention and the Lugano Convention, as well as EU Regulation 44/2001. If neither of these rules is applicable, the starting point is that foreign judgments are not recognised and that they cannot be enforced in Denmark. With respect to arbitration awards, Denmark has acceded to the 1958 New York Convention and, according to the Danish Arbitration Act,[24] Danish courts recognise foreign arbitral awards, irrespective of the country in which they were made. Recognition and enforcement may, however, be rejected on grounds of public policy, etc.

24 Consolidated Act No. 553/2005 on Arbitration.

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Jacob Ørskov Rasmussen is head of Plesner's commercial contracts team and also of the franchise and automotive teams – and he has years of experience in advising Danish and international clients on contractual relationships, both nationally and internationally.

Jacob has acquired in-depth knowledge of and experience in a broad spectrum of commercial contract types, including sales and distribution agreements, agency agreements, franchise agreements, logistics and warehousing agreements, facility management agreements and supply agreements, as well as purchasing contracts.

Jacob has extensive experience in franchising, including comprehensive experience in the drafting and negotiation of franchise agreements, Danish and EU competition law related to franchising, and setting up franchise systems in Denmark. Jacob has, among others things, been involved in franchise matters concerning the following brands: Starbucks Coffee, Carl's Jr Restaurants, KellyDeli (Sushi Daily), Joe & The Juice and Gucci.

Jacob has been designated by the International Distribution Institute (idiproject.com) as country expert regarding franchising in Denmark. He is also an expert in relation to distribution and agency law and he has years of experience in advising national, international and multinational clients within this legal field.

Jacob furthermore provides legal advice on export control and trade sanctions, contract management, compliance and legal risk management.

The automotive industry is also one of Jacob's special areas of expertise and he has in-depth knowledge of this industry. Jacob's clients include car factories and factory-owned and private car importers, as well as banks and financing companies.

Jacob is listed by *The Legal 500 EMEA* 2017 as a 'recommended lawyer' in the commercial, corporate and M&A practice area.

In addition Jacob is listed by *Who's Who Legal: Franchise* 2017 as a 'leading franchise lawyer': 'Jacob Ørskov Rasmussen receives wide-ranging endorsements for his outstanding contractual practice and specialist experience in the retail sector.'

ISBN 978-1-912228-11-9