

DFA FRANCHISE CODE OF CONDUCT
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With many thanks to the Working Group on the Alternative Franchise Code of Conduct of the Association of Distribution, Franchise and Agency

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COMMENT ON DFA FRANCHISE CODE OF CONDUCT

INTRODUCTION

The Dutch Association for Distribution, Franchise and Agency (the “**DFA Association**”) has about 165 members consisting of legal advisers, company lawyers, and attorneys, specializing *inter alia* in franchise.

The DFA Association saw the sector struggling with the consultation version of the Dutch Franchise Code (“**NFC**”). It finds that there is no sufficient support for this current NFC among franchisors. Evidently, a successful franchise code of conduct requires that it is supported by all the parties involved. Furthermore the DFA Association believes that the current NFC is too extensive, unbalanced and too prejudicial to the freedom of contract of the parties. Within this context the DFA Association believed, seeing that one of the purposes in its articles of association is to enhance the quality of legal practice *inter alia* in the field of franchising at a national and international level, to ask a delegation of it to develop an alternative franchise code which meets said objections.

BASIC PRINCIPLES of DFA FRANCHISE CODE OF CONDUCT

When drawing up this “alternative franchise code of conduct” the DFA Association tried to make the code of conduct:

- (A) simple, well-balanced and practically workable;
- (B) applicable to all forms of franchise, i.e. regardless whether of the size of franchisors, type of market, products or services etc.; and
- (C) instead of a straightjacket which interferes too much with the freedom of contract of the parties, a code which does specify how the parties, franchisee and franchisor, should behave towards each other.

Upon drawing up this code of conduct, the DFA Association took into account the European Code of Honor of 1972, Belgian legislation on franchise, the consultation version of the NFC and the laws and regulations (including competition law) applicable in the Netherlands.

DISPUTE SETTLEMENT

Minister Kamp considers the following in his letter of 20 October 2014 in respect of the approach of the problems in the franchise sector as far as regards dispute settlement:

“Dispute settlement through the court often is not an option for the parties. It does not really match the reality of franchise, whereat by reason of a multiannual contract, the parties cannot or only at prohibitive costs, distance themselves from each other. The legal

rules as applied by the court aim at compensation of damage and not at preservation of the mutual relationship, so court cases are often not held but once the franchise relationship has already been broken off. That is why jurisdiction is not the best means to enhance the constructive and mutually advantageous cooperation which practice needs."

By reason thereof the Minister is of the opinion that an alternative form of dispute settlement is preferable over going to court.

The DFA Association is of the opinion that the available instruments for alternative dispute settlement in the form of mediation, binding advice or arbitration sufficiently provide for the option of alternative dispute settlement. The DFA Association is of the opinion that a binding advice or mediation cannot be imposed imperatively, because the parties must have the freedom to present a dispute to the court by reason of: (i) the skills of judges; and (ii) the major (financial) interests which may be involved. The DFA Association further believes that current jurisdiction in civil matters is adequate as to expediency and expertise. A brief empirical study of case law of the last years did not provide any further insights.

With due account of the above, the DFA Association does not see any need for creating a new institute aiming at the settlement and solution of disputes in the field of franchise relationships.

DFA FRANCHISE CODE OF CONDUCT

1. APPLICABILITY OF CODE OF CONDUCT

1.1 Franchisors who adhere to the present code of conduct can declare this integrally applicable to the franchise agreements which they enter into with their franchisees as general terms or conditions associated with the franchise agreement. If a franchisor does so, he is allowed to use a specific “certification”.

2. DEFINITIONS

2.1 The following definitions apply to the present code of conduct save provided otherwise in the applicable franchise agreement:

(a) **franchise formula:** the operational, commercial and organizational manner developed by the franchisor, under a specific name, or not, in which products and/or services are sold or granted by franchisees, which is decisive to the uniform identity, reputation and image of the franchise chain and which is franchised;

(b) **franchise agreement:** the agreement mutually concluded by the franchisor and franchisee regarding the use of the franchise formula by the franchisee under the terms and conditions included in it, including the associated annexes;

(c) **manual:** the written record of the procedural, financial and/or operational instructions of the franchisor to the franchisee(s) regarding the operation of the franchise chain; and

(d) **written** includes digitally as well.

3. INFORMATION DUTIES AND NEGOTIATION STAGE

Selection of Franchisees

3.1 The parties mutually provide all relevant information which they know or should know to be important to the other party when assessing any cooperation.

3.2 The franchisor shall exclusively select franchisees who seem to have, in reasonableness, the skills, personal qualities and – if applicable – the required training and/or permit(s) to operate an enterprise in conformity with the franchise formula.

3.3 Franchisor shall inform a candidate franchisee about the option of being assisted by an advisor.

Mutual information Duties

3.4 The information which the parties give to each other shall be clear, correct and not misleading.

3.5 The franchisor shall provide to the candidate franchisee within a reasonable term before entering into the franchise agreement, in writing:

- (a) the present code of conduct;
- (b) the draft franchise agreement as also the associated annexes;
- (c) the manual as far as available, possibly only for perusal if confidentiality requires so;
- (d) an overview of the financial (franchise) fees which the franchisee will have to pay, in such manner that this will be sufficiently understandable to the franchisee;
- (e) general information about the franchise formula, such as how long the franchise formula has been operational, an overview of the franchisees, their franchised stores, the franchised stores of the franchisor himself and the associated store addresses;
- (f) at the request of the franchisee, information about the financial position of the franchisor, consisting of the annual accounts deposited with the Chamber of Trade and Industry or a similar body, as far as existing, or any other financial reporting which the financial position of the franchisor duly appears from;
- (g) information about the existence or non-existence of an association or consultative body of franchisees and contact data of the members of the board or representatives;
- (h) information about the existence or non-existence of other sales channels of the products or services of the franchisor which are part of the franchise formula, or not, including e-commerce, agents, distributors, multi-brand sale etc. and which may have a direct impact on the conduct of business of the franchisee; and
- (i) name of any branch association and/or franchise association which the franchisor is a member of.

3.6. If these last five years there was a previous franchised store at the address in question or within the relevant surroundings, the franchisor will inform the candidate franchisee about this.

3.7. If the franchisor provides a financial prognosis of the store to be operated and/or the study results on which the prognosis has been founded, for instance a business location investigation, this shall be founded on sound basic principles.

3.8. If no financial prognosis is provided, the franchisor will give, at the request of the franchisee, as far as available, anonymized financial data about existing, and if possible similar (franchised) store(s).

3.9. The franchisee has his own responsibility to investigate feasibility of the operation of his enterprise. The franchisee shall audit (or order an audit of) the information of the franchisor

and the principles and assumptions used in this to verify (financial) correctness and feasibility with due account of Section 4.3.

4. GENERAL PRINCIPLES

- 4.1 Both the franchisor and franchisee are independent enterprises which act at their own account and risk.
- 4.2 The parties will act with reasonableness and fairness towards each other, during the negotiations, during the agreement as well as upon its termination.
- 4.3 The parties will handle the information -including the know-how – which they obtain from each other with due care and with confidentiality. The franchisor may use commercial and financial data of the franchisees to preserve, develop and improve the franchise formula with due account of the laws and regulations such as in the field of privacy.
- 4.4 The parties acknowledge the importance of uniform application of the formula and the need to constantly develop it. The parties are aware that this can mean that both the franchisor and the franchisee will have to make investments in this respect during the franchise agreement.
- 4.5 The parties acknowledge the collective interest in preserving, developing and improving the franchise formula and are aware that the collective interest prevails over the individual interest of the franchisee, save this is unacceptable under criteria of reasonableness and fairness.
- 4.6 The parties shall endeavor to solve any complaints and disputes, in mutual consultation – if so desired, through mediation - with due account of reasonableness and fairness.

5. DUTIES AND LIABILITIES OF THE FRANCHISOR

5.1 the franchisor shall:

- (a) be the right owner or be entitled to use the intellectual property rights which are characteristic of the franchise formula and should be entitled to grant franchisees the right to use them;
- (b) endeavor to preserve, develop and improve the franchise formula;
- (c) give the commercial, operational and/or logistic support as specified in the franchise agreement and/or the associated manual or, failing which, the commercial, operational and/or logistic support which can be expected in reasonableness from the franchisor in the light of the specific franchise formula;

- (d) monitor the uniform identity, reputation and image of the franchise formula;
- (e) assist the franchisee in the operation of the franchise enterprise, at the latter's request, and in reasonableness, in word and deed;
- (f) provide, upon request of the franchisee before entering into the agreement, an adequate Dutch translation of the franchise agreement to the franchisee; and
- (g) provide, upon request of the franchisee, a copy to the franchisee of the signed franchise agreement.

6. DUTIES AND LIABILITIES OF THE FRANCHISEE

6.1 The franchisee shall:

- (a) endeavor as independent entrepreneur to develop his franchise enterprise in a financially sound manner;
- (b) endeavor to preserve the uniform identity, reputation and image of the franchise formula, both in his franchise enterprise and outside of it;
- (c) not communicate any know-how provided by the franchisor to third parties during the life of the franchise agreement or after this;
- (d) cooperate in reasonableness in any review of the franchise formula desired by the franchisor; and
- (e) provide, at request, verifiable relevant company data to the franchisor which allow to assess the development of – the operation by the franchisee of his franchise enterprise and financial reporting.

7. FRANCHISE AGREEMENT

7.1 The franchise agreement shall state clearly and understandably the rights, duties and liabilities of the franchisee.

7.2 The franchise agreement shall comprise in any case the following items:

- (a) a description of the franchise formula;
- (b) arrangements on the use of the intellectual property rights of the franchise formula, such as trademarks, tradenames, logos, domain names etc.;

- (c) a description of the (franchise) fees to be paid by the franchisee;
- (d) a description of the products and/or services which are part of the franchise formula;
- (e) the right of the franchisor to adapt the franchise formula to any new or amended methods or (market) conditions;
- (f) the term of the agreement whereat account shall be taken of the investments required from the franchisee as also clauses on any renewal and on termination of the agreement; and
- (g) as far as relevant, arrangements regarding:
 - (i) the existence of an exclusive contract territory and its extent;
 - (ii) non-competition clauses;
 - (iii) the conditions on which the franchisee is allowed to sell or transfer his franchise enterprise and any preferential rights of the franchisor in this respect;
 - (iv) the sale of products or services through the internet and social media;
 - (v) the management and use of customer data or consumer data with due account of the laws and regulations in the field of personal data protection;
 - (vi) (exclusive) purchase obligations;
 - (vii) the system of conditions used;
 - (viii) the nature and extent of any penalty clauses;
 - (ix) the consultation structure for the defense of collective interests of the franchisees; and
 - (x) (sub)lease of the business space from which the franchisee runs his franchise enterprise (whether or not in a separate (sub)lease agreement).
