



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT  
ECONOMIC AND SCIENTIFIC POLICY **A**



Relations between franchisors and franchisees: regulatory framework and current challenges

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# Relations between franchisors and franchisees: regulatory framework and current challenges

Study for the IMCO Committee





**DIRECTORATE GENERAL FOR INTERNAL POLICIES**  
**POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY**

# **Proceedings of the Workshop on Relations between franchisors and franchisees: regulatory framework and current challenges**

**Brussels, 12 July 2016**

## **Abstract**

The workshop organised by the Policy Department A for the IMCO Committee aimed at discussing problems in the area of franchising and the impact of the EU rules on functioning of the franchising contract. It allowed exchange of views on market conditions in the EU as well as corrective legislative and regulatory actions.

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## LIST OF ABBREVIATIONS

|               |   |
|---------------|---|
| <b>ADR</b>    | Alternative Dispute Resolution                                    |
| <b>B2B</b>    | Business-to-business  |
| <b>BER</b>    | Block Exemption Regulation  |
| <b>BFA</b>    | British Franchise Association                                     |
| <b>ECJ</b>    | European Court of Justice   |
| <b>EFF</b>    | European Franchising Federation                                   |
| <b>INI</b>    | International Network of Insurance                                |
| <b>NFC</b>    | Near Field Communication  |
| <b>SMEs</b>   | Small and medium-sized enterprises                                |
| <b>SOCR</b>   | Statistics Online Computational Resource                          |
| <b>UEAPME</b> | European Association of Craft, Small and Medium-sized Enterprises |
| <b>UTPs</b>   | Unfair Trading Practices  |

## 1. EXECUTIVE SUMMARY



Following comments presented by the European Parliament to the Retail Action Plan of the European Commission, where franchising was discussed, the Parliament commissioned a study on franchising. The aim of the study was to indicate the impact of EU rules on the functioning of franchising, to identify problems in the sector and to suggest further actions. The Study recommended, among other things, that, in order to commence a widespread and balanced discussion on franchising, it would be useful to organise a workshop at the Parliament to discuss the problems concerning franchising.

The workshop, chaired by Mr de Jong, was divided into three panels. The first panel presented the Study and the research behind it, together with the methodology, and the reasons why establishing the real situation on the franchising market is faced with practical challenges. Next, a Dutch project conducted by the Ministry of Economic Affairs was discussed. While the project resulted in adopting soft law for franchising in the Netherlands (the Dutch Franchise Code), the process that led to it was challenging due to the difficulties experienced while conducting a dialogue with the stakeholders.

The second panel focused on the franchising regulatory framework and the current challenges that the market players are confronted with. The opinion that abusive behaviours are present on the franchising market, and they are at least partly due to the contents of the Block Exemption Regulation, was presented alongside the opinion that franchisees are fully capable of taking care of their contractual situation, and that the Regulation properly reflects the reality and the needs of the market.

The third panel set out possible policy options for consideration. The presented preferable options varied considerably. Some of the participants pointed out the need for further legislative action and the revision of the Block Exemption Regulation, while on others advocated keeping the status quo and pursuing self-regulation efforts.

The presentations were followed by an extensive Q&A session that allowed representatives of the industry to express and exchange opinions.

One of the conclusions of the study was that there is a lack of balanced representation of the parties; efforts were made to ensure that both franchisors and franchisees had an equal opportunity to speak during the workshop. The participants included franchisors, franchisees, their organisations, practitioners as well as academics. The workshop confirmed that franchisors and franchisees present very different positions as to defining what constitutes a problem for franchising, what



the impact of the Block Exemption Regulation is on the functioning of franchising in the EU, and on the possible actions and remedies that could be undertaken. While franchisees are urging immediate action in the area (starting from adjusting the Guidance to the present Block Exemption Regulation), the franchisors would prefer to keep the status quo. In addition, the parties vary when it comes to the evaluation of self-regulation, which is appraised as effective by franchisors, but criticised as one-sided and illusory by the franchisees.

## 2. INTRODUCTION

Ms **Vicky Ford, the Chair of the Internal Market and Consumer Protection Committee**, opened the workshop by welcoming the initiative of Mr Dennis de Jong (MEP) to organise it. Ms Ford emphasised Mr De Jong's dedication and support for small businesses, and his efforts to attract people's attention to the subject of franchising. Ms Ford pointed out that the Study prepared for the IMCO Committee clearly demonstrates that some European countries' legislative models work significantly better than others, and that this may help indicate how to improve best practices at the EU level. Further, Ms Ford referred to the entire retail sector, and the Retail Action Plan led by her predecessor, Mr Malcolm Harbour, which aimed at promoting better trading practices and better relations between those involved in the supply chains. She thanked the experts for their participation and expressed her wish to make sure that the best practices will be shared within the single market, and that both large and small market actors will have an equal say on how market players work.

Next, Mr **De Jong (MEP)** stressed the importance of good law-making, and of legislation that is not purely symbolic. The speaker stated that SMEs will be the first subjects to give practical examples that no additional rules are needed, but rather practical solutions. Mr De Jong (MEP) welcomed the audience and underlined the importance of discussing the subject of franchising. Further, he explained the origin of the initiative, which came from his comments on the Retail Action Plan of the European Commission, where franchising was discussed, and which resulted in the policy department of the European Parliament commissioning the Study on Franchising. The Study is, in his opinion, not only very extensive, but also worth reading.

Mr De Jong (MEP) outlined the thematic content of individual sections of the workshop and expressed the general approach of the European Parliament to franchising. The Parliament strongly supports franchising as a method that allows working together in one formula, and as an enrichment for the European Single Market. That being said, the Parliament is interested in hearing about the existing problems in the context of franchising contracts, what can be done better, and how the current EU legislation interplays with franchising.



## 2.1. Presentation of the study

Dr **Aneta Wiewiórowska (Osnabrück University)** opened her presentation by presenting the questions formulated by the European Parliament that constituted the foundation for the research:

1. What is the effect of existing EU-legislation on the properly and improperly functioning contracts in the area of franchise?
2. Does EU Regulation No 330/2010 need adjustments and/or better enforcement?
3. Could possible European solutions be found through self-regulatory initiatives?
4. What are the current systems at EU level that deal with cross-border cooperation and exchange of best-practices in the area of franchising?
5. Would additional action, e.g. the introduction of a new EU instrument, be needed?

Dr Wiewiórowska explained that the legal landscape of the research was twofold. On the European level, it was EU Regulation No 330/2010, where the Parliament was particularly interested in whether there is a need to adjust long-term competition clauses, purchase options, multi-franchising and block-exemptions. The second level of the research concerned national laws, where it dealt with both: competition law and private law. At the European level, one can only find a regulation that applies to franchising in the competition law area. So, as Dr Wiewiórowska explained, while at the EU level only competition law applies to franchising contracts, Member States can and do introduce franchising rules in the area of private law. Of course, in such cases competition law exerts an impact on private law, though this is not of major concern at the European level.



Dr Wiewiórowska continued that the research focused on nine legal systems: Belgium, Estonia, France, Germany, Italy, the Netherlands, Poland, Romania and Spain. National reports were prepared by national experts on the basis of a questionnaire that focused on competition as well as private law aspects, case law, doctrine, etc.

Next, Dr Wiewiórowska explained that the initial assumptions concerning the research were verified by the market reality, i.e. the difficulties in finding sources. This resulted in the adjustment of the working method. As she said, there are numerous publications available on franchising, but they mostly focus on explaining what franchising is, how one should do it, and on the associated benefits and dangers. However, those publications do not explain what problems are actually happening on the market. This is due to the lack of market transparency. Franchising is a B2B contract that parties conclude in a peaceful and quiet environment of legal offices, which means that it is difficult to get hold of the source, i.e. the contracts. Also, it is difficult to find sources that would investigate and discuss the content of real franchising contracts concluded on the European market. In addition, while it differs from country to country, the number of court cases on franchising is not significant, making it difficult to draw conclusions only on the basis of cases decided



by national courts. To overcome this problem, the researchers entered discussions with the parties' representatives, in order to establish the market practice.

In the course of the research, numerous interviews were held with representatives of franchisees and franchisors (mostly phone conferences).

Dr Wiewiórska went on to reveal that one of the most important findings of the research was that franchising is a very specific contract as compared with other B2B contracts. The presenter explained that there are two layers of relations between the parties to a franchising contract that are potentially problematic. Generally speaking, franchisors are structurally stronger than franchisees normally, as it is the franchisor who has more power to negotiate and better access to information. This structural imbalance is combined with mutual vulnerability of the parties. It means that both franchising parties behave in an atypical way. On the one hand, the franchisor gives up his trade secrets, which are normally not disclosed to other parties, but must be shared in order to secure the success for the chain. On the other hand, a franchisee gives up part of his independence as an entrepreneur, and this is also atypical behaviour for a businessman, who should be free to do whatever he or she thinks is the best for his or her business. Dr Wiewiórska emphasised that this is a peculiarity of franchising that is not considered at the European level in the Block Exemption Regulation.

Dr Wiewiórska described the process that took place at the EU level, where the rules evolved from franchising specific into treating franchising as any other type of distribution contract. Initially, in the Pronuptia Case decided by the ECJ and a number of decision by the Commission that followed it, franchising was approached considering these peculiar relations between the parties. However, as the time went by and block exemption regulations were enacted, it disappeared as a consideration for legislative measures.

The speaker stressed that it is obvious that competition law has an impact on private law relations. The question is how this impact is manifested, why it happens, how deep the impact is and what are the consequences? Unfortunately, European law does not really consider these questions. The Block Exemption Regulation has a very specific meaning for private law regulations at the national level, but this is disregarded at the EU level. Competition law aims to allow better market development, and therefore supports the structurally stronger party to the franchising contract – i.e. the franchisor, which is fair because it is the franchisor who develops the chain. However, at the national level, Member States react (not only to EU legislation, but generally speaking to the situation on the franchising market) and introduce either law, soft law, or develop case law to support franchisees (in all the researched legal systems but Poland). There is a kind of chain reaction. While EU competition law tries to remove barriers to allow better market



development, Member States introduce national solutions to support the weaker party, which in turn creates barriers to the further development of the market.

Then Dr Wiewiórowska presented the conclusions of the research. The first one is that national franchising markets are highly differentiated. This is clearly visible in the old and new Member States, as in the old Member States franchising started to develop much earlier than in the new Member States. There is a 20-year gap between the new and the old Member States. In addition, when it comes to the content of franchising contracts, the interviews revealed that there are at least two types of franchising relations on the market, and the differences between them are not always taken into consideration.

Second, there clearly is a lack of balance in the self-representation of the parties: the franchisors are much better represented than the franchisees. The reasons are clearly understandable, as the franchisors have better access to resources, and the franchisees (normally SMEs) must basically deal with the business, so engaging in self-organisation is much more difficult for them.



Third, it is difficult to find convincing arguments to support the current competition law choices. That being said, Dr Wiewiórowska stressed that she does not claim that such arguments do not exist, but simply that they are not being presented.

The final conclusion is that one can clearly see that the content of vertical restraints, as allowed in the Block Exemption Regulation, sets the standards for private law. It works in the following way: if a specific provision is allowed by the Block Exemption Regulation, then this is seen as a standard that can be accepted without being verified at the national level, for example, through the unfairness control whenever it can be applied in B2B relations.

Concluding, Dr Wiewiórowska presented the recommendations of the Study. First, the Study suggests strengthening the self-organisation of franchisees in order to ensure more equal representation of the parties. Second, a verification of the market reality is recommended, as the methodology of the research did not allow for this. Therefore, the Study suggests opening anonymous contact points to establish what is happening on the market. This will help verify whether, and to what extent, the competition law assumptions are correct, and what is the impact of completion law

on private law regulations. On the basis of the gathered information, further-reaching actions might be considered.

## 2.2. The Dutch Project

Reporting on the origins of the Dutch Franchise Code, Ms **Jeannine de la Bursi-Franssen** stated that the **Ministry of Economic Affairs** first became aware of the problems in the franchise sector about two years ago, when Mr De Jong (MEP) approached the Dutch Minister of Economic Affairs. At the same time, there was quite a lot of media coverage relating to court proceedings between franchisors and franchisees. After carrying out studies on the subject, she said it appeared that the nature of these conflicts echoed the problems appearing with regards to payment delays and other unfair market practices. On the basis of the diagnosis, action was undertaken in two areas: self-regulation and out-of-court proceedings.

Ms de la Bursi-Franssen explained that, over the course of several months early in 2015, interviews were conducted with franchisors and franchisees, their representatives, service providers and legal service providers in the sector, in order to understand the ongoing conflicts and their origins. The research unveiled fraud where the franchise formula was used as a cover. There were people who abused the franchise business model by directing offers at unsuitable subjects, people who had lost their jobs or had received severance pay. Such business models merely aimed at mining severance payments or other assets. Ms de la Bursi-Franssen said, however, that this cannot be considered as an underlying problem with franchise, as it is simply fraud. The research also established that there are conflicts in the real franchise world between franchisor and franchisees, mostly resulting from the different goals and ambitions of the parties. The problems, as Ms de la Bursi-Franssen explained, have their origins mostly in the e-commerce solutions, and in the formulas where the power of the franchisor and the franchisees is very unbalanced. Ms de la Bursi-Franssen observed that sometimes difficulties were caused by the fact that franchisees had very different expectations when entering into contracts, as compared with the situation they had to face in reality.

The outcome of the survey, as Ms de la Bursi-Franssen highlighted, gave cause for concern regarding the large degree of distrust both between the two sides at the table, but also within the parties, in particular between the legal and the sectoral service providers. Because of the climate of distrust and the lack of good communication, a decision was made to organise a series of round tables. As it was necessary to get the parties to talk and cooperate again, a “thematic” strategy had been adopted. The first round table focused on the fraud. Ms de la Bursi-Franssen explained that this was the issue unanimously condemned by the entire sector which thus created a basis for cooperation. Here it was also necessary to attract the attention of the public prosecutor as the party entitled to initiate appropriate actions.

Ms de la Bursi-Franssen clarified the details of the second round table that took place in the Ministry of



Economic Affairs with participation of about 60 people (franchisors, franchisees, representatives and service providers). The discussion looked at where the sector should be in 2020, and how it would get there. The conclusion was that self-regulation in the form of a code should be drafted by the sector. In order to facilitate the process, the Ministry of Economic Affairs allocated a budget and two people to help with drafting. A Drafting Committee was established, with two representatives of the franchisors (nominated by the Dutch Franchise Association) and two representatives of the franchisees. Ms de la Bursi-Franssen emphasized that these four Committee members were volunteers and they spent their own time in a very intense drafting process.

The Committee established think-tanks on both sides in order to broaden the knowledge base. Ms de la Bursi-Franssen stressed that the think-tanks and the Drafting Committee operated in confidentiality when making the first draft of the code, to avoid little snippets of the code being discussed in public before an integral draft could be presented. It took almost seven months of work before the first draft of the Dutch Franchise Code was published for consultation. The Ministry received 150 comments on the draft, proportionally divided between the franchisors and the franchisees. While the franchisees' reactions were typically brief, expressing pleasure and pledging support to the Code in progress, the franchisors' reactions were more technical and more legal in depth. After the consultations, the Code was improved by the Committee accordingly and, in Ms Bursi-Franssen's opinion, a very balanced result was accomplished. Nevertheless, as Ms de la Bursi-Franssen observed, the Code was violently rejected by some franchisors. The speaker expressed an understanding of the fear of restrictions on the freedom to develop a business, and the fear of restrictions on making profits. Ms de la Bursi-Franssen continued that there were many franchisors whose attorneys have checked their franchise contracts to see whether they would comply with the Code and the results were very satisfactory. This stems from the fact that the Code was drafted by franchisors and franchisees, and so it takes the interests of both parties into consideration.

Ms de la Bursi-Franssen stressed that the Code, as an instrument of self-regulation, is very flexible. It gives guidelines on how to organize the franchise co-operation, but it leaves enough room to adapt it to various sectors, types of co-operation, involved group sizes, etc. The Code also deals with transparency requirements, which are very important in the pre-contractual phase. It outlines the elements that should be contained in a franchise contract, and gives a degree of guidance on how those requirements should be met. As Ms de la Bursi-Franssen underlined, the Code addresses the procedures for collective decision-making and contains guidelines for ending the franchise co-operation with respect to all the interests involved. Further, the Code encourages the parties to have a procedure in place for collective decision-making within the formula.

Finally, Ms de la Bursi-Franssen turned to the second output of the initial meeting that regarded out-of-court proceedings. The conclusion was that a system of out-of-court dispute resolution is needed, because court proceedings are not effective and often do not provide proper solutions. So far, a blueprint of alternative dispute resolution has been made. The next step is to task the sector with creating a platform of franchisors and franchisees that can serve as a home base for an ADR system. Ms de la Bursi-Franssen expressed hope of seeing the sector adopting the code, creating the platform and developing the dispute resolution system.

Ms de la Bursi-Franssen closed her presentation by stating that the Minister of Economic Affairs has made it perfectly clear that he is ready to go down the legislative path if insufficient progress is made with self-regulation.

### 3. REGULATORY FRAMEWORK AND CURRENT CHALLENGES

Mr **Luc Hendrickx** began his presentation by observing that franchising has become very popular and that, after thirty years of silence, finally there is a realisation in the European Parliament that there are problems in this area. Mr Hendrickx, speaking for **UEAPME**, emphasised that this organisation does not solely represent a limited number of franchisees, but is the association of SME employers of the European Union. It gathers 67 member organisations, consisting of national cross-sector associations and European trade federations. It stands for 12 million small and medium-sized enterprises not only in the retail sector, but from all kind of sectors, employing over 55 million people in 34 countries. UEAPME is also a recognised European Social Partner.

Mr Hendrickx stressed that UEAPME has a positive approach towards franchising. He emphasised that the retail sector is particularly affected by globalisation and increased competition. Small and medium-sized enterprises, with their limited resources, must cooperate more in order to remain competitive as self-employed entrepreneurs. Therefore, franchising can be a good solution for them.

Mr Hendrickx observed that good commercial cooperation depends on the effort of both parties. Franchising gained popularity in the retail in the 1980s. Unfortunately, right from the beginning, there was a tendency from franchisors to impose unacceptable unilateral provisions to contracts. Mr Hendrickx underlined that franchising is a contract between a self-employed person and the franchisor, and that the franchisees remain liable for the expansion of their selling points. Therefore, it is of a vital importance that the franchisee has enough room for personal engagement and the development of ideas. In the majority of contracts, however, there is no room to adapt the retail space to the local situation.

There are some typical and dated problems in the franchising sector that Mr Hendrickx has been aware of for over 30 years. One of them is the non-disclosure obligation, sometimes so far-reaching that it forbids franchisees from asking his organisation or a lawyer for any advice regarding the content of the contract. Mr Hendrickx said it is unacceptable that franchisors are putting entrepreneurs into the situation to sign a contract that would be binding for several years without any legal advice. Further, he turned his attention to the fear factor. Referring to the Study Mr Hendrickx stressed that, from the moment a franchisee raises his voice, he is at risk of not receiving deliveries or suffering other problems, including constant rhetoric from the franchisor stating that the franchisee is a bad entrepreneur, not respecting the contract, or not doing enough for the job. Mr Hendrickx also mentioned that the scarce jurisprudence is "biased" as it is mostly written by lawyers involved with franchisors and defending their positions. Another problem is constituted by unbalanced standard contracts, where franchisees are burdened with too many obligations as compared to the franchisors.

Mr Hendrickx stated that self-regulation is not the proper way to solve these problems, observing that the attempts of franchisors and franchisees to sit around



the table and to work them out together in the 1990s and in the 2000 have failed. Mr Hendrickx underlined the importance of national legislation, such as Belgian rules on the pre-contractual information obligation, which helps to inform future franchisees about the consequences of the contract. Apart from interventions at the national level, franchising did not receive any attention at a European level.

The main problems remain the same: the non-disclosure clause and the non-competition clause. Regarding non-competition clauses, the main problem is that in most cases there is no or very limited transfer of know-how. In addition, most SMEs, especially in food retail, already have enough know-how (e.g. already ran a small grocery) before becoming a franchisee. In addition, franchisees pay fees for the transfer of know-how. According to Mr Hendrickx, there is no substantial transfer of know-how from franchisor to franchisees who were already active in the relevant field of business.

Next Mr Hendrickx turned to pre-emptive rights. He claimed that there are no contracts fixing the value of the business at the beginning of the contract for the case of a later purchase that would take into account the added value created by the franchisee. In addition, there are many performance obligations that have to be maintained, extremely limited commercial freedoms or excessive prices the franchisee has to pay. Mr Hendrickx referred to situations where an individual entrepreneur would obtain better prices from producers than he would as a member of a franchising group with 30 or 40 companies. There is certainly something wrong with the franchising concept, when a small entrepreneur acting on his own account can obtain easily better advantages than in the framework of a franchise network. Mr Hendrickx also mentioned further problems, including direct inter-selling, i.e. competition between the franchisor and his franchisees, as well as digitalisation, which are not taken into account at the moment.

UEAPME sees the main problem as being Regulation 330/2010, with its rules on non-competition clauses. Mr Hendrickx stated that, although this Regulation was aimed at enhancing competition, in fact it has the opposite effect – it limits it. The definition of know-how in Regulation 330/2010 is vague and the protection of know-how does not justify the exclusion from the market, which is the consequence of the clause. The main request from franchisees and UEAPME is to limit the duration of the non-competition clause to the duration of the contract. so that franchisees, as self-employed individuals, will not have to close their businesses. Non-competition clauses are often used as means to prevent franchisees from switching to another brand.

Mr Hendrickx concluded his presentation by stating that neither self-regulation nor the European Codes of 1972 and 2016 can provide an answer to the main problems that franchisees encounter. The Codes of 1972 and 2016 attribute extreme importance to know-how and are formulated unilaterally, with no involvement from representatives of franchisees. Even contracts of adhering franchisors deviate from the code. Mr Hendrickx emphasised that losing time on starting new negotiations on new codes is certainly not an option for the SMEs. In addition, improving the reporting and complaint system will not work either, because complaints can be considered as a breach of the non-disclosure clause. Self-assessment tools are only helpful in so far as they can be used before concluding a contract, while at the same time it must be remembered that most contracts are standardised and there is no

space for negotiations. On the topic of better balance in the representation of franchisees, this role is taken up by UEAPME. Mr Hendrickx underlined that better enforcement is necessary, but it will not solve the problems of the franchisees (Art. 29(1) Regulation 1/2003). Regulation 330/2010 should be immediately updated: on the one hand in order to achieve a general solution, and on the other to adapt it to the digitalisation of trade.

Ms **Carol Chopra**, Executive Director of the **European Franchising Federation**, came to the Workshop with a delegation of nine people. The delegation included two franchisors (from the UK - the EFF's current chairman, Michael Eyre, and from Belgium - the EFF's Treasurer, Pierre Boseret) who have over 30 years' experience in franchising, including early years as franchisees, as well as three legal experts who, Ms Chopra declared, represented both franchisors and franchisees and two managing directors from the EFF's Member franchise associations (the Netherlands and Hungary).

Ms Chopra introduced the European Franchising Federation as the single representative of the franchise industry's interests in Europe. Its objective is to represent franchise systems and franchise independent entrepreneurs, both franchisors and franchisees. The EFF, the speaker said, exists to promote and defend franchise systems that meet the standards and ethics of the European Code of Ethics for Franchising. Ms Chopra stressed that the EFF speaks for franchise systems as a whole, including franchisors and franchisees, promoting franchising as a business strategy- not only in favour of one of the parties, i.e. the franchisors.

Ms Chopra emphasised that the EFF certainly does not consider the franchisee-franchisor relationship to be an adversarial one; it cannot be for such a model to be successful. The EFF defends self-regulation over regulation (national or EU), with the EFF European Code of Ethics for Franchising being the most appropriate means of regulating such a diverse and ever-growing business model. She welcomed the initiative in the Netherlands to introduce their own code of ethics, adding that some improvements are still necessary in this regard. The speaker went on to define a franchise relationship, as well as the essential elements that constitute a proper franchise. Franchising is as a B2B relational contract between two independent entities, whereby the franchisor sells a formatted business proposition to the buyer, who contracts to operate the system as it is defined. Apart from that, there must be other elements present, without which the EFF does not consider a contract to be a franchise. These are: brand, IPRs, know-how and continued assistance throughout the term of the contract. The IPRs are essential for protecting the elements of the business package, and give the franchisor the right to take measures to protect the identity and the reputation of the brand and of the network. Furthermore, a franchise does not exist if there is no know-how. The EFF takes the view that it is the franchisor's duty to make his franchise know-how evolve over the course of the contract. He must invest in developing it, as it is the know-how that gives a competitive edge to the brand on the market, and helps the franchisee to sell the services or products that are the object of the franchise.

Next, Ms **Nichola Broadhurst**, a **BFA affiliated** franchise lawyer, accentuated that franchising is a hugely successful strategy for business expansion. It generates a vast amount of turnover and a huge number of jobs in the EU Member States as elsewhere around the world. She pointed out that the franchise industry is extremely diverse, covering many market sectors, various types of industries and being



represented by a significant variety of franchise agreements, each tailored to the business model of a franchise brand. This reality speaks against any call to introduce a standardised “one-fit-for-all” type of franchise contract.

With this in mind, Ms Broadhurst found it comforting to hear Ms Bursi-Franssen saying that the Dutch Ministry of Economic Affairs was against prescribing the franchising contract, arguing that one model contract will not work for franchising in general, as it is far too diverse. She emphasised that franchisees and franchisors are independent entities. Franchisees are neither consumers nor in a situation of subordination to the franchisor, as an employee may be to an employer. Since franchisees are not consumers, they should not be extended the same level or type of support and protection by legislators as consumers are. As independent

investors, they are capable of taking their own advice, but also making sure that they receive proper legal advice, and of acting with due diligence and particular financial due diligence. She observed that there are certain instances where franchisors do not give the full picture to franchisees, but still it is the task of franchisee to do the due diligence. Further, franchise is a mutually dependent relationship and franchisors are dependent on the successes of their franchisees in order for their business to succeed in the long term. It is obvious then, that franchisors would not survive by abusing own franchisees in the long term.

Next, Ms Broadhurst presented the EFF’s position on vertical restraints. The speaker emphasised that they must conform to strict and clear criteria in order to be allowed without fully or partially annulling the agreement. The EU’s successive Block Exemption Regulations and their Guidelines have defined these rules. For these rules to apply under EU COMP Law, the trade agreement in question must (i) affect (seek to close or limit) cross-border trade (which is very rarely the case of franchise contracts in Europe – they are essentially country-specific), (ii) respect the market share thresholds, as well as the narrowly defined criteria for each of the restraints described in the Block Exemption Regulations.

Ms Broadhurst emphasised that the national courts have to interpret competition law and decide whether the vertical restraints have been abused. This must happen at a national level, rather than at a European level of competition law. Further, Ms Broadhurst explained that the vertical restraints are not equivalent to unfair trade practices, being not inherently invalid. It may turn out that the vertical restraints turn to be the UTPs, but the demarcation line was made very clear in the Regulation.

Referring specifically to the food retail sector (in which there are cases of abuse and/or of misinterpretation of how and when vertical restraints should be used), the speaker underlined that this cannot be used as evidence of widespread UTPs across the entire franchise sector. The unfair trade practices identified in the food sector are for national courts to resolve. The issues of “unfair” trading practices in franchise agreements in Holland are before the Dutch courts.

The EFF's position is, therefore, that amending the Block Exemption Regulation is not the solution to the perceived problems, and not the appropriate instrument to use. Moreover, Ms Broadhurst expressed the EFF's opinion that the Study does not seem to be a balanced representation of franchise practice across Europe, stressing that the very mature franchise market in the UK had not been taken into account.

She went on to illustrate the legitimacy in many franchise agreements of some of the vertical restraints being portrayed as intrinsically "unfair" irrespective of anything:

- post-termination non-compete clauses: the Block Exemption Regulation accepts non-compete clauses as pro-competitive, as long as they are used correctly. It is unacceptable to ask EU law to ban them completely;
- direct competition by the franchisor with the franchisees via internet selling. She admitted that it can turn out that some franchisors want to cut out their franchisees by selling on the internet, but this is very rare and not widespread. Most franchisors who conduct a good and sensible business system will have an internet sales policy that is inclusive of franchisee interests with a share of sales proceeds.
- linking mandatory turnover, based on the performance criteria requirements, to termination:
- performance requirements, when and where they exist in a franchise agreement, may be justified under the following circumstances: if an exclusive territory is given to a franchisee, the franchisor does not want to lock up that territory with a franchisee that might underperform in a territory with a certain potential. If the targets are realistic and achievable (based on demonstrable facts and hypothesis), then the restraint principle is not unfair as such.

To determine the unfairness of a restrictive clause in a contract, a great number of factors have to be properly understood and analysed, including the exact circumstances of each case.

Ms Broadhurst concluded her presentation by expressing the EFF's position on the Study again, considering it to be limited and based on a dangerous methodology, not representing all the franchise practices across Europe, and using unhelpful language that focuses on the fear factor.

Then Ms Chopra took over again, dedicating the second part of her presentation to the remedies offered by the Study. She stressed that the EFF does not see adjusting the Guidelines to Regulation 330/2010 or removing vertical restraints in the EU competition law as the right strategy. She emphasised that the vertical restraints have their place and need to be properly understood. The proposed remedy is inappropriate also because the Study did not do enough justice to all of the literature that explains the nature of the block exemption.

Ms Chopra expressed the strong opposition of the EFF against any specific instrument in the sense of EU franchise law as, in her opinion, national laws are perfectly adequate here, and do not depend on whether it is a contractual issue, a competitive issue or an issue that relates to fairness. The speaker emphasised that national competition authorities have been empowered by Regulation 1/2003 and European legal systems are extremely rich in tools, instruments and remedies to resolve commercial conflicts. Ms Chopra concluded by referring to the value and place for

self-regulation to help guide and thus prevent contractual abuses in B2B agreements. She offered the EFF's European Code of Ethics for Franchising.

Mr De Jong then asked Ms Chopra about the solution in the Dutch Franchise Code, to which the EFF disagrees. Ms Chopra answered that the EFF does not disagree with the code itself, but they would have liked it to have been amended in a spirit of better mutual understanding, trust, collaboration and cooperation going forward.

For the best part of the last 35 years Dr **Mark Abell** has been involved as a **legal practitioner** and as an academic in the franchising business, advising both franchisors and franchisees. Dr Abell began his presentation by stressing that, in his opinion, franchising in the EU is underperforming and is not achieving its full potential, as it does in other economies, for example in the United States or in Australia. This means that the European Union, as an economy, is not getting the best out of franchising. The underperformance is largely due to the way franchising is regulated in the EU. Namely, Member States have introduced various rules on franchising that amount to technical barriers for developing franchising.

To overcome this, Dr Abell suggested a radical reengineering of the EU regulatory framework, or, as he quoted Schumpeter, "creative destruction". He stressed that a very different approach needs to be taken. One should bear in mind that franchisees are not always small, innocent individuals. As he said, some of them are, but some are actually bigger than their franchisors and, as Dr Abell emphasised, this is not mere opinion but fact. Further, franchise is not a simple bilateral relationship, but it involves a very complex set of relations.

Dr Abell observed that, after spending five years analysing whether self-regulation works or not, he is very confident in saying that it does not work, and it does not provide the right answer for the problems that are encountered in the field. At the same time, he recognised the important role of the European Franchise Federation and national franchise associations in improving the functioning of the franchising market.

According to Dr Abell, there are three basic commercial imperatives that require attention. First, market confidence in franchising has to be maintained, and franchising must attract businesses. There is a need for regulation that does not only offer strict rules for franchisors on how not to perform; there must also be an exchange of benefits. The advantages for franchisors must be evident, because otherwise business will be discouraged from using the formula. The overregulation of franchising can persuade businesses to circumvent the rules by simply using another formulation to cover the franchising scheme. Dr Abell advocated promoting franchising among businesses by pointing to the obvious benefits of being a franchisor. He suggested several solutions that could increase market confidence, for example: franchisors should be allowed to require franchisees to make full pre-contractual disclosure in the same way as franchisors should. Dr Abell stressed that, in his experience, one of the most significant issues on which disputes are based are neither bad franchisors nor bad or lazy franchisees, but simply a mismatch of expectations. This occurs when the franchisor and the franchisee do not fully understand the relationship they are entering into, and this is the problem that has to be dealt with. Further, Dr Abell emphasised that, when regulating franchising, specific subjects such as small franchisees, fractional franchisees, sophisticated



investors, large investors, large franchisees and insiders, should be excluded from the regulation. The attention should be focused upon those issues that actually need rules. He further underlined that it is necessary to make sure that franchising chains can compete with large corporate businesses. According to Dr Abell, Article 101 TFEU and the block exemption, are advantageous to large corporations at the expense of SMEs, be they franchisors or franchisees. Dr Abell would welcome a new regulation where franchisors can impose pricing policy, in the same way as corporate chains, because that underpins branding. He also suggested a more efficient way of controlling digital platforms. Dr Abell expressed his disapproval for franchisors competing with their franchisees, or franchisees rioting by using the internet to do whatever they want with the franchisor's brand.

Second, Dr Abell focused on the pre-contractual hygiene that needs to be ensured. In his opinion, it is important that franchisees are required to take advice before they enter into a franchise contract. In addition, it is important that the franchisees do pay attention to such advice, which must come from lawyers and accountants that actually understand what the franchise proposal is. Dr Abell emphasised the important role of national franchise associations in this regard. Such associations would help to make sure that the lawyers who advise franchisees know about franchising. He suggested that, before signing, franchisees should present a certificate from a qualified lawyer with experience of advising on franchising, saying that they have taken advice. Dr Abell proposed further that franchisees should be required to take a basic course on what franchising expects of them. He considered the possibility of a partial funding of franchise associations by either the EU or national governments. This would allow franchise associations to explain and educate all those potentially involved in franchising on what is expected of them. A profound education of franchisees is important in the context of pre-contractual disclosure. Dr Abell observed that the franchisor can provide all the necessary information, but if the prospective franchisee does not read or understand it, then it has no effect. Dr Abell stressed the importance of the pre-contractual hygiene, which needs to be established at a pan-European level, as there are currently six different disclosure regimes in various Member States. They all vary, are all in conflict with each other and this amounts to a real barrier to franchisors expanding effectively and efficiently across the entire EU. Therefore, Dr Abell called for the creation of a pan-European code.

Third, Dr Abell emphasised the need to make very clear what is expected of both parties. He proposed that there should be a number of mandatory terms in all franchise agreements that make it clear what both parties of the agreement must deliver. Dr Abell stressed that he is aware of the fact that franchise agreements differ from business to business, but they do all have specific basic common elements. Dr Abell used the example of the intellectual property rights of a franchisor, which have to be respected, and stressed that franchisees should not be allowed to challenge these rights. Further, franchisors should deliver adequate training and should not be allowed to encroach upon their franchisees in order to take over customers. Dr Abell emphasised that, in his experience, the vast majority of franchisors today do not act in this way. At the same time, franchisees should not be allowed to use the franchise network as a springboard for their own businesses. Allowing franchisees to steal the franchisor's intellectual property and to use it to create their own business would be condoning theft. Dr Abell also underlined that franchisees must respect confidentiality. Further, the speaker commented that some franchisees pay more for certain things than independent traders, and he does not regard this as a problem

as long it is made very clear to the franchisees how the franchisor makes money, even if it is through tied products.

Dr Abell highlighted that, according to all research done in the EU, in Australia and in the US, the failure rate of small businesses that are not franchisees is by large much greater than that of franchisees. Franchising is not a guarantee for success, but rather a blueprint developed by the investment of the franchisor over a long period of time. Concluding, Dr Abell indicated again that the current way that franchising is regulated in the EU is wholly inappropriate. It creates internal technical barriers and prevents the EU from enjoying the true potential that franchising has to offer to franchisors, franchisees and consumers. Dr Abell stressed that there is an important role to play for national franchise associations. Finally, he recommended a directive approach and mentioned his draft in this regards.

## 4. POLICY OPTIONS

Ms **Christel Delberghe**, a spokesperson for **Eurocommerce**, introduced this organisation representing the European retail and wholesale sector in Europe. Its members include not only national associations (such as SOCR, The Czech Confederation of Commerce and Tourism, Svensk Handel and Confcommercio Federdistribuzione) and leading companies in food and non-food retail (30), but also specific associations such as Dutch and Swedish grocery retailers as well as ecommerce associations. Ms Delberghe delineated a map of the European retail and wholesale sector comprising 5.4 million companies (of which a large majority are micro businesses) employing 29 million Europeans and producing 10% of the EU Gross domestic product. Ms Delberghe- emphasised that small and medium enterprises (SME) are acting in a highly competitive and ever-changing environment. SMEs have to face digital transformation, administrative burdens, complex regulations and difficult access to finance, to name just a few obstacles.

Franchising, according to Ms Delberghe, is an important business model that involves 14 000 groups and half a million operations, engaging 3 million people across the EU. There are many advantages relating to franchising, as it is a convenient means to establish business through a shared investment of franchisor and franchisees. On the one hand, it grants the franchisee access to a well-known and established brand or formula, and on the other the franchisor can profit from the local knowledge of his franchisee, who opens up new markets. Franchise can be understood as a start-up aid making it easier for entrepreneurs to run their business, while at the same time being a means that enriches entrepreneurship in Europe and supports the competitiveness of SMEs. It also allows the transfer of know-how and innovation, which, under other circumstances, would remain concealed from individual entrepreneurs. Ms Delberghe observed that the franchise business contributes to the attractiveness of smaller cities and shopping areas.

Then Ms Delberghe defined franchising, calling it “a special type of agreement whereby one undertaking grants another the right to exploit a package of intellectual property rights for the purposes of producing and/or marketing specified goods and/or services, and this in exchange for direct or indirect financial consideration. In other words, it is a distribution contract with elements of Intellectual Property Rights and compensation for this.” She explained that a franchise agreement consists of three main issues. Firstly, the use of a common name (shop sign) and a uniform presentation of contract premises and/or means of transport. Secondly, there must be a transfer of know-how by the franchisor to the franchisee. Finally, the existence of continued commercial and technical assistance on the part of franchisor to the franchisee for the duration of the agreement. Ms Delberghe stressed that the success of the formula depends on both sides – the common efforts by the franchisor and the franchisee. Giving a vast number of examples (“furnishing, food, retail, car services, cleaning, hairdressers, other services to people, business services, training, fast foods, catering, hotels, travel agencies and real estate”), Ms Delberghe emphasised that, although widely used in retail, franchising as a business formula spans many more sectors. Because of the variety of forms and contracts adapted to the specific business relationship and sector, a unified approach to franchising is therefore not advisable. In addition, the relation and position between the franchisor and the franchisee may not always be the same. Cases can occur where the franchisor will not be the stronger party, mainly when entering a new national market.



Ms Delberghe underlined that Eurocommerce is aware of the difficulties arising out of bilateral relationships, such as the asymmetry of information. However, Eurocommerce encourages the European Parliament and the European Commission in the first instance to establish the facts, including the scale and impact on the market. The lack of evidence should not, however, be exploited as an argument for a further regulation. If a regulation is needed, it should not be linked to retail in particular, as franchising is not specific to any individual sector. Ms Delberghe underlined that a wide and generic approach should be maintained.

Ms Delberghe questioned the review of the block exemption regulation as a proper means to help franchisees in their relationships with franchisors. She stressed that the purpose of competition policy is to protect competition on the market and to benefit consumers through lower prices and better services. Referring to the study, Ms Delberghe observed that franchising relationships are mostly regulated by private law instruments at the national level. The national rules are best adapted to the particular national circumstances, legal environment and business culture, and therefore they seem to be the most appropriate platform to address problems arising



in the franchising area. Here, the failure to adopt the common sales law scheme at the EU level must be taken into account as evidence of the difficulty to establish further harmonisation in the field of contract law. Therefore, the private law enriched by codes of conduct (e.g. EFF's Code of Ethics for Franchising or the Dutch Franchise code), is the most appropriate mean for addressing franchising.

Ms **Patricia Hoogstraaten** (the general manager of **Vakcentrum**, also representing Koninklijke MKN Nederland and Buurtsuper.BE) began by saying that, apart from the EU competition law, there is no set of rules among Member States that would regulate franchising, which creates an imminent threat to the whole franchise system and encourages franchisors to use unbalanced standard contracts against their franchisees. The position of franchisees is weakening, as they are forced into malignant dependency relationships, enabling the franchisors to abuse them in the financial and economic sphere. She stressed the importance of independent entrepreneurship for the franchise formula: economy, health and consumers. She said, however, that the increasing pressure, the opportunistic behaviour of franchisors and the legal lacuna when it comes to the legislation, is endangering independent entrepreneurship.

Ms Hoogstraaten listed the main problems that franchisees are facing today. The terms are becoming more one-sided, there is no pre-contractual protection and no specific civil law solutions in the legal systems of the Member States. Last but not least, the European law contains elements that are harmful to franchisees, such as the prohibition on multi-franchising and the non-competition clauses. In addition, the lack of regulation on the digital economy is most unfortunate. These, taken together, create a climate where independent entrepreneurial activity is threatened.

Referring to the Study, Ms Hoogstraaten stated that the problems differ among sectors, as well as among formulas within one sector, but they are certainly not specific only to the Netherlands or Belgium. Ms Hoogstraaten emphasised the urgency for action in this regard. The discussion on the topic – the need to protect the franchisee – has already been going on for years, but still there are no workable solutions. Immediate and appropriate steps must be taken to safeguard the future of independent entrepreneurs.

Ms Hoogstraaten explained the necessary steps in six points. The first problem regards the content of Regulation 330/2010, which strengthens the position of the franchisors and does not meet the needs of the current market reality, such as digital developments like ecommerce and consumer data are not dealt with. The implementation of Regulation 330/2010 did not positively influence the economic position of franchisees, and the ban on multifranchising, the non-competition clauses and the interpretation of the purchase obligations given by the Guidelines are counted among the problematic issues. Ms Hoogstraaten emphasised that the regulation supports a solution where the franchisor, after refusing to cooperate in a further outlet on a franchise basis, can prohibit the franchisee from operating a similar business in any other outlet with a different formula, which she does not regard as proportional. Such restrictions in franchise agreements are in accordance with the Pronuptia- case (1986) only when they are necessary for the franchisor in order to protect his know-how, identity and the reputation of his network. However, the restrictions cannot be stretched beyond what is strictly necessary, given these interests.

Ms Hoogstraaten stressed that the Guidelines on vertical restraints are not in favour of the franchisees and protect the franchisors' interests. This happens because most of the obligations contained in franchise agreements can be assessed as being necessary to protect the intellectual property rights or to maintain the common identity, and that is why they fall outside of Article 101(1). The limitless application of the non-competition clause harms the franchisees in particular after the termination of the agreement. A franchisee can hardly prove that the know-how of a franchisor justifies the closure of the franchisee's business if the franchisor does not wish to continue the franchise agreement after the end of the contract. Ms Hoogstraaten mentioned an example from Belgium, where some franchisees had planned to change their formula after the termination of their contract because of the merger of their franchisor. The non-competition clause would not allow it, because when a franchisee decides to change formula, he has to stop his business for a period of one year. Ms Hoogstraaten pointed out that, in line with the Guidelines, the franchisors can contractually restrict their franchisees without any proof of necessity. In this way, the Guidelines open the door to a frequently misused justification to infringe the franchisees' interests, although there is no proper basis for this in the regulation. Theoretically, a franchisee could go to court claiming the infringement of Article 101(1) of the Treaty on the Functioning of the European Union. In practice, however, under the existing conditions and lacking legislation that would protect franchisees, they hardly ever do so, also considering the costs and the fear factor. Ms Hoogstraaten suggested a simple solution, which would be to forbid non-competition clauses after the termination, unless the franchisor can prove that there will be an abuse of his know-how. Ms Hoogstraaten also called for an intermediate adjustment of the Guidelines, before the amendment of Regulation 330/2010 in 2022.

The second step is setting up a low threshold review, as requested by the European Parliament in 2013 (paragraph 29 of the EP report on "the European Retail Action Plan for the benefit of all actors (2013/2093 (INI)))". The European Commission was asked to reconsider the current exemption threshold (a market share of less than 10%). This request remained unanswered.

Thirdly, new rules related to franchising and the digital economy should be introduced. Ms Hoogstraaten underlined that special attention should be paid to the outcome of the Study, which points out the lack of specific guidelines about (in)direct competition by the franchisor against his franchisees – both related and unrelated to e-commerce. Ms Hoogstraaten repeated that the digitalisation of the economy is largely ignored by Regulation 330/2010 and the accompanying directives. However, there are two issues that greatly affect the relationship between the franchisor and his franchisees – namely e-commerce and the use of data (especially consumer data). Entering the world of on-line sales – promoted by the European Commission – brings the franchisor and franchisees to a specific competition position, especially if it concerns the market area of the franchisee. There is a lack of transparency with regard to the distribution of costs and revenues. In addition, effort should be taken to set the quality requirements for internet sellers to prevent unfair competitive advantages. Ms Hoogstraaten stressed also that there is still no answer to the question of who might use consumer data and other data collected via franchisees. This question has two sides. On the one hand, the franchisees are willing to participate in collecting and exploiting the data, provided they can also use and benefit from it and from the information derived from the data. On the other hand, it is the franchisors who process the data to develop the formula. The franchisors

approach customers, not only their own, but also those of the primary franchisees, without the franchisees being aware of it. Ms Hoogstraaten emphasised that there is no regulation in this regard. The consumer data is generated by both parties within the formula. The valuation of the data should therefore be divided proportionally. In addition, sound agreements must be made on proceedings associated with the sale of data to third parties. Ms Hoogstraaten stressed that some franchisors consider both e-commerce and data management as issues that fall outside the franchise formula. Therefore, the digital components of the formula should also be regulated. Further Ms Hoogstraaten invited the European Parliament to request the European Commission to promote good cooperation between the Directorate-General for Competition and the Directorate-General for the Internal Market and Services, which are both very cooperative, but regarding the expressed concerns, they only point towards each other. In 2011, the Directorate-General for Competition stated that franchisors are abusing the lack of the level playing field. Ms Hoogstraaten was pleased by the positive reaction of Commissioner Bieńkowska, who supported the request of MEP Dennis de Jong to promote the discussion on franchise.



As a fourth issue, Ms Hoogstraaten dealt with the role of self-regulation. As a co-author of the Dutch Franchise Code (NFC), she fully supported such a solution. Ms Hoogstraaten stressed that, by introducing the NFC – a compromise that followed 18 months of negotiations – a healthier and more balanced playing field has been achieved within the franchise industry. According to Ms Hoogstraaten, the starting point of the code was to combine the interests and forces of franchisors and franchisees, to create a profitable business for both parties. In this spirit, the Code provides clear guidelines in the area of mutual rights and obligations during the entire franchise relationship (pre-contractual,

during the term of the franchise agreement and after ending the contract). A guarantee of transparency, integrity and consultation was created. Ms Hoogstraaten emphasised the importance of applying the Code. There is still no Dutch legislation that would oblige its application. One cannot forget the fact that the Dutch franchisors' organisations do not support the NFC, despite the fact that they nominated two franchisors to the negotiation team. Ms Hoogstraaten sees self-regulatory business-to-business codes as a good way to address tensions wherever unfair practices occur. She observed, however, that, despite the fact that the European Code of Ethics on Franchising (European Franchise Federation – further the EFF) is more than 40 years old, it has not been adopted as a strict set of rules, either by the franchising parties or by courts or banks in the Netherlands.

Ms Hoogstraaten stated that the EFF does not represent franchisees and pointed out two issues from the new European Franchise Code of 2016 that, in her eyes, makes

it a one-sided document set up by franchisors without consulting the counterpart (UEAPME was not even informed about the initiative). First, the new code transforms “franchisors’ obligations” (as it was in the old code) into “franchisors’ commitments”. Second, the requirement of a “written” franchise agreement (Art. 5.2 of the old code) is skipped. Ms Hoogstraaten observed that even in the Principles of the Good Practices in Vertical Relationships in the Food Supply Chain, refusing or avoiding having essential terms of a contract in writing is considered an example of unfair practices.

Fifth, Ms Hoogstraaten brought up the introduction of legal protection of the franchisees’ position in the pre-contractual and the contractual phase. As the Study has shown, under European law and in some national legal systems, there is no specific legal protection for franchisees. Attention should therefore be paid to issues like the content of contracts, side letters, the supply of correct data or the position of the representative bodies.

In her sixth and last point, Ms Hoogstraaten focused on the impact of competition. Quoting the Study, Ms Hoogstraaten expressed full support of the franchisees for the conclusion that competition law measures should be evaluated, not only in light of market integration aims, but also as building blocks of private law relations, at least related to franchise relations, since franchise is not a contract between two equal parties.

Concluding, Ms Hoogstraaten underlined the importance of a balanced franchise regulation that would be equally beneficial for the entrepreneurs (franchisors and SME franchisees), consumers, local suppliers, innovation, employment and for local loyalty.

Dr **Odavia Bueno Díaz’s** expertise on franchising dates back to the time she participated as a member of the Amsterdam Group on the Study Group on a European Civil Code in the work on preparing franchising rules. She also published a book that compared the work of the Amsterdam Group with French and Spanish law. Dr Bueno stressed that the solutions to the franchising problems are in fact already at hand and can be found in the document presented by the Amsterdam Group in 2006, namely in the Principles of European Law on Commercial Agency, Franchise and Distribution Agreements.

Dr Bueno offered several examples of problems that can be observed in the franchising area from her legal practice, where she mostly deals with franchisees. First, she mentioned a neighbourhood baker that cannot deliver specific cereal bread to her customers because, although her franchisor does not supply specific type of bread on a regular basis, she, as a franchisee, is bound to buy the bread exclusively from him. The second example regarded a franchise to run a music school. The franchisee could not update his advertising material dated 2014, because he had an exclusive obligation to obtain it from his franchisor, who would not deliver new materials. The third example was about a supermarket where the franchisee was obliged to buy products from the franchisor at the usual cost of 80 cents for 1 Euro, later offering them to the customers, at the demand of the franchisor, for only 60 cents. This franchisee went bankrupt and, together with 80 other franchisees, has filed a complaint at a Spanish court against his franchisor. Dr Bueno stressed that there are around 40 people in France and Portugal in a similar situation.





Dr Bueno emphasised that franchisors, as the guardians of the formula, should be the stronger party in the relation, and respected. In this sense, restrictions imposed on their franchisees – even when they affect the independence of the franchisees – are justifiable. It becomes problematic, however, when this power is used to the disadvantage of the franchisees. She also stressed that it is not so common a situation where franchisees are stronger than their franchisors, or able to go up against the franchisors without fear of going bankrupt because they do not depend on the continuation of the cooperation and have alternative possibilities.

Dr Bueno emphasised the fact that franchisees are underrepresented and the importance of having the opinion of both parties involved in this atypical bilateral contract, which is more of a network type

agreement.

There is one vital issue that Dr Bueno felt that the Study was missing, and that is the cross-border element in franchising. Very often franchising aims at creating a network where various Member States are present, because franchises are located in different member states. In this situation, the maintenance of the network's reputation requires uniformity throughout the network, in other words, the franchisees of different Member States should be treated at least similarly. If this is not the case, there can be a negative impact on the internal market and consumers' welfare. Dr Bueno referred to the situation in Spain, where franchisees and former franchisees who were cheated, or who think they were mistreated, are going bankrupt, closing their businesses and joining other franchisees in collective complaints. This naturally works against the reputation of the franchise formula as such. Therefore, one of the first important steps should be to enable the franchisees to express their problems and to enforce their representation. Dr Bueno stressed that it is important to cope with the confidentiality of claims without breaking the confidentiality clause. It would also be beneficial to control the lobbying power of franchisors and to overcome the fear they exert on the sector. As the next step, the speaker referred to the need to collect information on the main legal problems, and explained that a lot of information is already there (for example in the sector of unfair trading practices in food and non-food chains). Following this, one should ask the opinion of stakeholders on the further procedures. Basically, there are three possibilities: first no intervention at all, which from Dr Bueno's perspective would lead to further problems on both sides – for the franchisees but also for many franchisors. The second option would be adjusting the existing regulatory framework and going back to the Pronuptia case. Restrictions were allowed, because they were indispensable and essential to protect the franchising formula. Restrictions that are not meant to achieve this (like the exclusive supply-purchase obligation) cause the malfunctioning of competition law. This is why confidentiality for the sake of competition should be tested.

Next, Dr Bueno turned her attention to the subject of self-regulation. She stressed that one should be able to benefit from the European Franchise Federation Code, which provides a good overview of the general principles and on how to collaborate within the franchising network. That being said, approval of the franchisees is needed, as the EFF Code is only used as a tool when franchisors enter the network and does not contain any enforcement mechanism. The franchisees should enter the regulatory bodies and it does not matter how complicated the process of regulating may be.

Dr Bueno also proposed adjusting and extending the already existing directives on UTPs. As the last resort and an extreme option, one could consider creating completely new European principles on franchising. The speaker referred to the already existing tools as models that can be taken into account, like, for example, the Dutch Franchise Code, which reflects also the opinions of the franchisees. Further, there are the Principles of European Law on Commercial Agency, Franchise and Distribution that should be taken into the account. Dr Bueno explained that these principles are based on information from numerous Member States, literature and case law, and provide general and specific principles on how franchisors and franchisees should deal with each other, which makes it fit for the EU environment. Dr Bueno proposed to create a definition of franchise that would contain several variations, as there are many types of franchise (industrial, service or commercial franchise). This would not only allow general principles to be set up that contained such issues as cooperation and proportionality, but it would also introduce specific principles such as balanced pre-contractual informational obligation or balanced contractual rights and obligations of the parties. Dr Bueno concluded her presentation by emphasising the importance of the IMCO study that correctly identified the main problems in franchising networks and indicated the possible ways of solving them.

## 5. DISCUSSION

A participant in the workshop expressed his opinion on the Study, which he considered on the one hand to be extensive, with its 140 pages, but on the other hand to be “thin” because of the lack of empirical research. He referred to the first point of the executive summary of the report that refers to the lack of market transparency. This participant emphasised the output of this chapter of the Study, stating that there is not enough information on this subject and therefore calling for further research, taking the Study as a base for it.

Dr Wiewiórska replied that the need for further study on the subject cannot lead to the conclusion that the Study itself is thin. She stressed the lack of appropriate materials that could be used as grounds for the research and underlined the importance of the direct contact to the stakeholders as a methodological approach. Dr Wiewiórska also emphasised the strikingly similar experience of the Dutch Ministry of Economic Affairs, which she was in contact with. Although it is not possible to present tangible proofs in this regards, as there is no access to franchising contracts, the similarities with the outcome of the Dutch research cannot be denied.

The next question, posed by Michael Eyre (Board Member of the British Franchise Association and chairman and member of the EFF’s Policy Board) was directed to Dr Wiewiórska. Mr Eyre wondered why the researchers of the Study did not have access to the franchise contracts from the United Kingdom, where these contracts

are easily accessible, as for example from his own company. Further, the speaker stressed the fact, that according to a survey that was conducted in the United Kingdom, the vast majority (97%) of the franchisees are profitable and are satisfied about the relationship they are in with their franchisor. In his opinion, the results of the Study are biased and based on very few unfortunate incidents, in which the franchisor-franchisee relationship has broken down.

Dr Wiewiórowska replied by referring to the terms of reference determined by the European Parliament, which chose nine countries as the subject of the research, not including the UK as the subject of the research. The researchers were bound and obliged to follow the indication of the European Parliament.

Mr Eyre held this fact to be most unfortunate and called for a broader research that would also include the United Kingdom.

Next, a participant from the Netherlands Mr Hans van Bell, an independent retailer in the Netherlands and a franchisee for 28 years, expressed his opinion on franchising being a good and beneficial system. According to him the problem is that some franchisees experience problems, which are then ignored. Further, he expressed his opinion that it is not fair and not usual for a franchisor to sell his goods in the area appointed to his franchisee, causing a loss of profit on his side. Mr van Bell also mentioned the practice whereby, after the bankruptcy of a franchisee, a new franchisee can buy the goods, store and equipment at a high price, which then also leads his bankruptcy later. Such behaviour should be avoided, and this is in the best interests of the franchisors as well. The speaker underlined the importance of the NFC and the fact of franchisors and franchisees working together. Should this cooperation fail, then from his point of view a law would be needed.

The next participant in the discussion, engaged with Colruyt, one of the license owners of SPAR as franchisor in Belgium - shared her experience with the business. The company she is involved with took over the franchisee business in 2003, and since then sales have been raised by more than 10% for franchisees and for their businesses. There is approximately one bankruptcy per year. This practitioner stressed that there is a common platform where the franchisee and franchisor can discuss their issues, and from her perspective this kind of negotiation platform is the solution to many problems. She regretted that SPAR had not been interviewed for the purpose of the Study. She also mentioned that their agreements have no clauses on competition issues. She called the Study to be extended, and for more exploration of the market.

A further question was directed to Dr Wiewiórowska by a franchisee managing several supermarkets and non-food businesses and one of the representatives of franchisees on the board creating the NFC. His question concerned the nature of side letters, which are addenda to the contracts and not normally public. The businessman called for their content to be disclosed to the public.

Dr Wiewiórowska stressed that the nature of the side letters can be twofold. On the one hand they can contain unfair contract terms for a franchisee, while on the other hand they can be understood as simply an exercise of contractual freedom. She stressed that it is very difficult to comment on them, without having seen these side letters, which are mostly inaccessible due to the confidentiality clauses.

Ms Engelmann, the managing director of the Dutch Franchise Association, supported Dr Wiewiórowska's opinion, that side letters can be in favour of a certain franchisee, but can also be in favour only of the other party. She considers franchising to be a very good business model giving opportunities to both franchisors and franchisees. From her point of view, there was a good and strong lobby on the part of franchisees at the workshop and, in her observation, mostly representatives of Dutch franchisees, mainly from the food retail sector. Ms Engelmann would welcome the opportunity to hear more voices from other European countries. She stressed the importance of self-regulation and creating codes, but asked for a more balanced approach. From her point of view, the Dutch Franchising Code had been developed in silence by a small team, exerting a huge influence on all the parties. Ms Engelmann called for more time being invested in the subject, and for more discussion with franchisors, who should not be overruled by a certain lobby power.

Ms de la Bursi-Franssen reacted to this remark. She stated that she has already heard several claims that there was a small group established and working in silence. Ms de la Bursi-Franssen emphasised that in the team included representatives of both, franchisors and franchisees. The representatives of the franchisors were appointed by Ms Engelmann herself. She also stressed that think tanks on both sides had been created. On the side of franchisees the think tank had worked really well and provided with a lot of input, whilst respecting confidentiality. Ms de la Bursi-Franssen explained that, for some reason unknown to her, the franchisors were dissatisfied with the output of the think tank on their side.

Next, Mr **Luc Peeperkorn**, on behalf of the **DG Competition**, explained that the role of competition law in the European Union is to protect competition to the benefit of consumers, and that competition law is not concerned with contractual fairness. Fairness in contracts should therefore be addressed by other laws. Issues such as excessive performance criteria or post-non-compete clauses are problems that should be addressed within the framework of unfair trade practices and not competition law.

The EU antitrust policy has been increasingly pursuing a non-sectoral approach, and specific competition rules for franchising are not needed. Although there are UTP-related problems in the franchising sector, the regulation at a European level requires addressing the subjects of cross-border effects. Should there be areas that do not fall within the Union's exclusive competence, evidence of the effects on the internal market is also needed.

Mr **Gerd Heinen**, a representative of **DG Internal Market**, confirmed that the EU Commission is aware of the existence of UTPs in the food supply chain, as well as certain imbalances and the fear factor. Voluntary initiatives, such as self-regulation



and the cooperation of representatives of both parties on codes of conduct, are evaluated as important assets. Mr Heinen stressed that the Study presented no evidence of real problems in the context of the internal market or in cross-border situations. Existing problems often take place at the domestic level. In order to

handle the possible problems at the EU level, more data acquisition needs to be done. Further caution is required in order not to inhibit the functioning of the internal market.



Mr **De Jong** (MEP) reacted to the statements from DG Competition and DG Internal Market by stressing the fact that no research had been done on the subject by the European Commission although the European Parliament expressly asked for it. Therefore, no proper advice from DG Competition on how to proceed in the question of franchising could be offered.

Mr **De Jong** (MEP) stated that he would not formulate the conclusions on the report just yet, as he had not received any proper advice or help from the DG Competition. Mr De Jong would expect to be informed, rather than to hear statements like: "do not do anything and do not

do anything on franchising." Mr Peeperkorn answered that the position of DG Competition is not denying that there may be plenty of UTP-related problems in the sector of franchising. He stressed that regulating some issues at a European level would require confronting the subject of cross-border effects. In any case, evidence on internal market problems was also needed. Mr De Jong (MEP) argued that this was exactly the reason why the European Parliament had asked the European Commission to research the sector, which was not done because of the lack of resources, which concluded the workshop.

## ANNEX 1: DRAFT AGENDA



### Workshop

#### ***Relations between franchisors and franchisees: regulatory framework and current challenges***

Organised by the Policy Department A: Economic and Scientific Policy  
for the Committee on Internal Market and Consumer Protection (IMCO)

**European Parliament, Brussels  
12 July 2016, 15:00 – 17:30  
Room: Altiero Spinelli 1G2**

### AGENDA

**15.00**      **Introduction by** Ms Vicky FORD, MEP, Chair of the IMCO Committee  
(tbc)

**Opening remarks** Mr Dennis DE JONG, MEP, Chair of the Workshop

#### **15:10 – 15:25 Presentation of the report**

Prof. Hans Hans Schulte -Nölke (Osnabrück University)

Dr. Aneta Wiewiórowska – Domagalska (Osnabrück University)

#### **15:25 – 15:35 Presentation of the “Dutch project”**

Ms Jeanine de la BURSI-FRANSSEN (Senior Policy Advisor at the Dutch  
Ministry  
of Economic Affairs)

#### **15:35 – 16:25      PANEL I - Regulatory framework and current challenges**

- Luc Hendrickx (UEAPME)
- Carol Chopra (EFF)
- Dr. Mark Abell (Bird& Bird Law firm)

**Questions and answers**

#### **16:25 – 17:25 PANEL II - Policy options**

- Christel Delberghe (Eurocommerce)
- Patricia Hoogstraaten (Vakcentrum)
- Dr. Odavia Bueno Diaz (legal practitioner)

**Questions and answers**

**17:25      Conclusions by the Chair, Dennis DE JONG, MEP**

## ANNEX 2: SHORT BIOGRAPHIES OF EXPERTS



### **Prof. Hans SCHULTE - NÖLKE (Osnabrück University)**

Prof. Dr. Hans Schulte-Nölke is Chair of Civil Law, European Private and Commercial Law, Comparative Law and European Legal History, Director of the European Legal Studies Institute – Department for European Legal History and European Union Private Law at the Osnabrück University. Prof. Schulte-Nölke was a co-ordinator and co-founder of the European Research Group on Existing EC Private Law (Acquis Group) and a co-ordinator of the “Common Principle of European Contract Law (CoPECL)” Network. He specializes in European and international commercial law, European harmonisation, European Union private law, comparative law, contract law in practice, sales and consumer law.



### **Dr. Aneta WIEWIÓROWSKA (Osnabrück University)**

Dr. Aneta Wiewiórowska is a senior researcher at the European Legal Studies Institute – Department for European Legal History and European Union Private Law at the Osnabrück University. She holds a PhD from Utrecht University; and was a member of the Study Group on a European Civil Code. For several years she worked as a chief specialist for the Polish Ministry of Justice, where she was engaged in negotiations of private law instruments in the European Council and legislative process at the national level.



### **Jeanine de la Bursi-Franssen (Senior Policy Advisor at the Dutch Ministry of Economic Affairs)**

Jeanine de la Bursi-Franssen has a long-standing experience as a policy advisor for various subjects as the Association of Netherlands Municipalities, the City of Leiden or Ministry of transport and Infrastructure. Since 1999 is Ms de la Bursi-Franssen a senior policy advisor with Dutch Ministry of Economic Affairs involved in the field of company law and corporate governance and more specifically insolvency law and prevention. In addition she specializes in insolvency law and debt restructuring, corporate governance and company law; Franchise (NFC - Dutch Franchise Code), further in policy initiatives against late payments and insolvency prevention initiatives.



### **Luc Hendrickx (UEAPME)**

Luc Hendrickx has a Law degree from the Catholic University of Leuven (B), a Diploma from the Institut Européen des Hautes Etudes Internationales of Nice (F) and a Master in European Studies from the Universitat Autònoma de Barcelona (S). He is since 2000 Director of Enterprise Policy and External Relations at UEAPME, the European employer's organisation representing the interests of crafts and SMEs at EU level. From 1997 until 2000 he was member of cabinet of the Flemish Minister of Environment and Employment. In 1989 he joined

UNIZO, the Belgian SME organisation, as Legal Counsellor. Between 1992 and 1998 he was also professor at the Flemish Economic High School (VLEKHO) in Brussels. He started his career in 1986 as salesman in his sister's DIY shop.



**Carol CHOPRA (EFF)**

MA Sociology, as of 2000 Executive Director at the European Franchise Federation.



**Nicola Broadhurst**

Nicola Broadhurst is a commercial transactional lawyer specialising in franchising and commercial exploitation of intellectual property. She heads up the franchise team at Stevens & Bolton LLP law firm in Surrey UK. She has served on the British Franchise Association's legal committee. The BFA members Services Committee and currently serves as the legal representative on the BFA's Quality Standards Committee Nicola is a member of the American Bar Association and the ABA Franchise Forum



**Dr. Mark Abell**

Dr. Mark Abell is a partner of Bird&Bird Law Firm based in London, heading the Franchising, Licensing and Multi-Channel Strategies Team. He has written his doctoral thesis on "The Law and Regulation of Franchising in the EU" and has acted as an expert to the WIPO and WTO on franchising. He is a member of the IBA Franchise Committee and the ABA Franchise Forum. Dr. Abell is co-editor of the legal periodical "The International Journal of Franchising Law". He is a visiting lecturer in Franchising at Queen Mary University of London, where he teaches part of the LLM course.



**Christel DELBERGHE (Director, EuroCommerce)**

Christel Delberghe is Director of Policy, Competitiveness & Food, at EuroCommerce. In that capacity, Christel leads EuroCommerce policy and advocacy work related to supply chain relations and trading practices, including the retail input into the Supply Chain Initiative. She represents EuroCommerce in the Sherpa group of the High-Level Forum on a better functioning food supply chain. She joined EuroCommerce in 2001. Prior to that, she worked as a European affairs consultant (2000-2001), and as European affairs officer at Marks and Spencer (1996-2000). Christel holds a master degree in European economics from the University of Brussels (ULB).



**Patricia Hoogstraaten (Vakcentrum)**

Patricia Hoogstraaten is secretary general of Vakcentrum, member of the social and economic council in the Netherlands and board member of the Koninklijke MKB-Nederland. From 1990 to 1993 she was secretary of the Committee on Commerce and Distribution, and was on the advisory board to the European Commission dealing with all retail related proposals coming from the commission. In 2014 Patricia was appointed by the Dutch Ministry of Economic Affairs as one of the members, on behalf of Dutch franchisees, of the committee in charge of drafting the Dutch Franchise Code. The Dutch Franchise Code was published in February 2016.



**Odavia Bueno Díaz (legal practitioner)**

Odavia Bueno Díaz has been a legal practitioner since 2013 in Las Palmas de Gran Canaria (BuenoLegal). She worked as a Civil Academic at the University of Amsterdam (UvA) from September 2000 until December 2012. Since 2000 she was a member of the Amsterdam group within the Study Group on a European civil Code, which in 2006 published the Principles of European Law on Commercial Agency, Franchise and Distribution Contracts (PEL CAFDC). Odavia Bueno was responsible for the principles on franchising, which were later incorporated in the Draft Common Frame of Reference (DCFR).



## ANNEX 3: PRESENTATIONS

### Presentation by H. Schulte-Nölke / A. Wiewiórowska- Domagalska



# Franchising - a study for the European Parliament

prepared in cooperation with Policy Department A for European  
Parliament's Committee on the Internal Market and Consumer  
Protection

Brussels, 12.07.2016  
Prof. Dr. Hans Schulte-Nölke  
Dr. Aneta Wiewiórowska  
European Legal Studies Institute Osnabrück



- **Effect of existing EU legislation** on the well- and malfunctioning in the area of franchise?
- Does EU Regulation No 330/2010 need **adjustments / better enforcement**?
- Could possible European solutions be found in **self-regulatory initiatives**?
- The **current systems at EU level** (cross-border cooperation, exchange of best-practices)?
- Would additional action e.g. the **introduction of a new EU instrument be needed**?

Prof. Dr. Hans Schulte-Nölke, Dr. Aneta Wiewiórowska  
European Legal Studies Institute Osnabrück



## Legal landscape:

- EU Regulation No 330/2010 (on vertical restraints)  
Possible Adjustments: (long-term competition clauses, purchase options, multi-franchising, block exemptions)
- National laws (competition law, private law)

Prof. Dr. Hans Schulte-Nölke, Dr. Aneta Wiewiórowska  
European Legal Studies Institute Osnabrück



## Scope of research:

**Belgium** (dr. Stijn Claey's), **Estonia** (prof. Irene Kull), **France** (prof. Juliette Senechal), **Germany** (Anne-Katrin Suilmann), **Italy** (dr. Guido Comparato), **The Netherlands** (dr. Joasia Luzak), **Poland** (dr. Aneta Wiewiórowska-Domagalska), **Romania** (dr. Lucian Bojin), **Spain** (dr. Odavia Bueno Diaz)

Prof. Dr. Hans Schulte-Nölke, Dr. Aneta Wiewiórowska  
European Legal Studies Institute Osnabrück



## Initial assumptions v market reality:

- Availability of sources
- Market transparency
- Intensive contacts with parties' representatives
- Necessary methodological adjustments

Prof. Dr. Hans Schulte-Nölke, Dr. Aneta Wiewiórowska  
European Legal Studies Institute Osnabrück



## Franchising – the double jeopardy:

- **Structural superiority** of the franchisor over the franchisee *combined with*
- **Mutual vulnerability** of the parties (franchisor gives up his trade secrets, franchisee gives up his independence)

Prof. Dr. Hans Schulte-Nölke, Dr. Aneta Wiewiórowska  
European Legal Studies Institute Osnabrück





## **EU approach and the MS reaction:**

- Franchising specific rules evolved into general rules for distribution contracts
- Private law repercussions: disregarded?
- MS: all but one: either (soft) law or case law that tries to support franchisees
- The chain reaction: competition law while removing some barriers introduces new ones

Prof. Dr. Hans Schulte-Nölke, Dr. Aneta Wiewiórowska  
European Legal Studies Institute Osnabrück



## **Conclusions:**

- Markets highly differentiated
- Lack of balance in self-representation
- No convincing arg. to support competition law choices
- Content of vertical restraints sets private law standards

Prof. Dr. Hans Schulte-Nölke, Dr. Aneta Wiewiórowska  
European Legal Studies Institute Osnabrück



## Recommendations:

- Strengthening franchisees self-organisation
- Verifying market reality (anonymous contact points)
- Verifying competition law assumptions and impact
- Considering further actions

Prof. Dr. Hans Schulte-Nölke, Dr. Aneta Wiewiórowska  
European Legal Studies Institute Osnabrück

**Presentation by J. de la Bursi-Franssen**

## The Dutch Franchise Code

Jeannine de la Bursi-Franssen  
Ministry of Economic Affairs

### Start of policy involvement

- 2014/2015
- media attention for franchise court cases
- signals from our national and european network
- similarities with issues in payment delays and unfair trade practices
- interviews with franchisors, franchisees, representative organisations, (legal) service providers

## 2 different problems

- fraud under the guise of franchise
- offers directed at unsuitable 'entrepreneurs'
- often recently laid off with a severance pay
- business model aimed at 'cleaning out' the franchisee
- problems in 'real franchise'
- differing goals and ambitions (e-commerce)
- skewed balance of power
- lack of up-front transparency about the rights and duties

Overall: high levels of distrust

## 2 round tables

1. discuss the fraud issue to 'break the ice' and hand it over to public prosecution
2. discuss the dream: franchise in 2020, how does that look and how do we get there.

Unanimous conclusion:

- need for a code of conduct written by franchisors and franchisees together
- need for a system of out-of-court dispute resolution

## Project NFC

Support by Minister of Economic Affairs

- 2 people support staff
- budget for research and expert advice

Sector input for writing committee

- 2 members appointed by Dutch Franchise Association NFV
- 2 members chosen by franchisees
- think tanks on both sides

## First draft NFC

- mid 2016 consultation about first draft
- 150 reactions
- half franchisees: positive and mostly short response
- half franchisors: more technical, legal and more negative comments
- september 2016: consultation-debate to resolve conflicting preferences; massive resistance by a group of franchisors



## A deeper look at the franchisors

- resistance based on fear of restrictions to develop business, make profit
- in part unwillingness to allow 'outside involvement' with 'their business'
- but also: a quiet majority of franchisors that doesn't care because the NFC is in line with their practice
- some franchisors find they can 'code proof' their contract with minor adjustments

## So what is this NFC?

- very flexible to accomodate pluriform sector
- (precontractual) transparency requirements
- items that should be addressed in the contract
- guidance on the content of those items
- guidance on procedures for collective decision making
- how to end the franchise cooperation with respect to all interests involved
- comply or explain

## Franchise dispute resolution

- all ADR options studied
- a 'blue print' has been established
- sector needs to create a neutral platform to house this dispute resolution system

## Next steps

- sector needs to declare adherence to the code
- neutral platform needs to be established
- dispute resolution needs to be developed
- if progress is too slow: legislative push

## Presentation by L. Hendrickx



“Relations between franchisors and franchisees :  
Regulatory framework and current challenges”

European Parliament Workshop

Luc Hendrickx  
Brussels, 12<sup>th</sup> July 2016



[www.ueapme.com](http://www.ueapme.com)

### UEAPME

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- Employers' organisation representing the interests at European level of crafts, trades and Small and Medium-Sized Enterprises
- 64 member organisations (national cross-sectoral associations and European trade federations)
- Represents 12 million enterprises in EU which employ over 55 million people in 34 countries
- Recognised European Social Partner



## Positive approach towards franchising but...

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- To remain competitive self-employed /SMEs need to co-operate, especially in retail.
- Good commercial co-operation depends on the efforts of every party
- Different formulas
- With internationalisation of the retail: tendency, becoming clear in the 80ties, to impose unacceptable unilateral provisions



## Old problem

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- Non-disclosure obligation
- Fear factor
- Culpabilisation of the franchisee
- Scarce and “biased” legal literature
- Unbalanced standard contracts
- Attempts to solve the problem through self-regulation and codes failed
- Legislation in some countries since beginning of this century
- No attention at EU level (Commission DG COMP and DG Internal Market) despite our attempts.



## Main problems

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- Non-disclosure clause
- Non-competition clause
- No transfer of know-how (certainly not in the case of a family business)
- Pre-emptive rights (valuation of the business)
- Performance obligations
- Extremely limited commercial freedom
- Too high prices: limited advantages
- Direct internet selling
- Digitalisation not taken into account
- ...



## Non-competition clause

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- Main problem: no or limited transfer of know-how
- Definition of know-how in Regulation 330/2010 is vague
- Protection of know-how does not justify the exclusion from the market
- Ineffective
- Not balanced
- Prevents effective competition between brands





## Self regulation? - European code

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- European Codes (1972; 2016) do NOT give an answer to the main problems franchisees encounter
- Give extremely high importance to “know-how”
- Even contracts of adhering franchisors deviate from the code
- Unilateral
- Experience of more than 30 years confirms: does not function
- Loosing time again is no option
- Improved reporting or complaint system: complaints are known, can be even considered as a breach of the non-disclosure clause!



## Regulation 330/2010

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- Better enforcement is necessary but will not solve the immediate problems of the franchisees and will take too much time. (Art 29(1) Regulation 1/2003)
- Urgent need to adapt immediately Regulation 330/2010 in order to achieve a general solution and adapt it to digitalisation
- Better balance in representation? Is taken up by UEAPME.



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## Presentation by C. Chopra, N. Broadhurst

### The European Franchise Federation's POSITIONS with regard to EP/IMCO's FRANCHISE REPORT

Brussels  
European Parliament Workshop  
July 12, 2016

Presented by **Carol Chopra**, EFF Executive Director &  
**Nicola Broadhurst**, legal member of the British Franchise Association's  
Quality Standards Committee

1

#### EFF POSITIONS RE IMCO's FRANCHISE REPORT



##### The European Franchise Federation

- Represents the interests of the franchise industry in Europe
- Promotes and speaks for franchising as a commercial development strategy which is inclusive of franchisors and franchisees → **franchise network**

##### •2 Founding principles

1. What constitutes a franchise?
2. Relationship must be built on ethical behaviour → EFF's  
Co Ethics for Franchising = **Self Regulation**

##### •Members

- National Franchise associations
- Zor-Zee on Boards of Directors

##### •Code of Ethics: last slide

2

**EFF POSITIONS RE IMCO's FRANCHISE REPORT**



**Franchising as a strategy for business expansion**

- Diversity across sectors and types of agreements
- Distinctiveness of franchise agreements
- Franchisees are independent business people required to carry out their own due diligence; they are not consumers
- Franchisors are often SMES despite the publicity given to the few super brand franchisors.

3

**EFF POSITIONS RE IMCO's FRANCHISE REPORT**



**Vertical Restraints ("VRs")**

- Validity of VRs:
  - Essential to protect know how and intellectual property;
  - Presumption that they are pro-competitive within narrow criteria – BER 330
- Role of national courts in applying and interpreting competition law in this area

4

## EFF POSITIONS RE IMCO's FRANCHISE REPORT



### Vertical Restraints vs Unfair Trading Practices ("UTPs")

- Reg. 1/2003, Recital L 1 /2(9) 9: expressly draws a demarcation between competition law (....) and laws on UTP

**Quote:**

*"Member States may implement on their territory national legislation that prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual. Such legislation pursues a specific objective, irrespective of the actual or presumed effects of such acts on competition on the market. This is particularly the case of legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration."*

- Food Retail sector is distinct and cannot be used as evidence for wide-spread UTPs across the franchise sector.
- Amending BER 330 or GL is not the solution to UTPs

5

## EFF POSITIONS RE IMCO's FRANCHISE REPORT



### Potentially unfair clauses in franchise agreements

- Cited evidence of problems faced by franchisees not a fair or balanced representation of franchisee sentiment across Europe;

• Examples raised:

**1. Post termination non-compete clauses**

- No amendment required - these are assessed at national level
- Failure to protect Franchisor know-how could substantially deter franchising as a chosen method of business expansion

**2. Franchisee prevented from selling his business as a going concern**

- Not accepted that this is a common provision in franchise agreements.

**3. Direct competition via internet selling from franchisors and suppliers;**

- The commercial reality tends to dictate that franchisors either share proceeds of internet sales with franchisees or their franchisees fulfil orders in their territories.

**4. Linking mandatory turnover requirements to termination provisions**

- A commercial necessity in many vertical agreements where a degree of exclusivity is conferred.

6



## EFF POSITIONS RE IMCO's FRANCHISE REPORT



### Limitations of the Franchise Study:

- the examples cited in the Study as alleged unfair practices are not widespread to the whole franchise industry;
- where there are misuses of the VRs these are efficiently dealt with by multitude of national laws at national level
- Due to the nature and size of most franchise systems they are most often, not “caught” by EU competition law and any issues are efficiently dealt with by **national** competition law.
- Most franchisors are SMEs too
- Incorrect and unfair to present franchising as a “David & Goliath” / “win-lose” strategy
- The language of the Study is ill founded and its findings unsubstantiated.

7

## EFF POSITIONS RE IMCO's FRANCHISE REPORT



### Remedies suggested by the Franchise Study

- At the level of EU:
  - COMP LAW:
    - adjust BER 330 GL before 2022
    - Reconsider if BER 330 should be renewed
  - EU-level franchise specific instrument
- In addition:
- Self-Regulation for specific sectors (ie. Food supply chain, Zing)
- + EU-level reporting and complaint schemes

8

## EFF POSITIONS RE IMCO's FRANCHISE REPORT



### EFF's positions re Remedies of Report

- EU BER 330 + GL + Reg. 1/2003: adequate
- EU-level franchise-specific instrument? Model franchise law? not in favour
- COMP or contractual issues adequately dealt with at national level (ECN, ADR, courts)
- Self-Regulation: Yes, cf EFF's CoE

9

## EFF POSITIONS RE IMCO's FRANCHISE REPORT

### EFF's Code of Ethics for Franchising

1. Devised for the mutual interests of the franchisor and franchisee
2. Values: mutual good faith, transparency, fairness & loyalty
3. At all stages of the relationship: pre, contract, post
4. Recommends full and truthful pre-contractual disclosure of all facts relevant to the business relationship including all of the rights & obligations of both parties, during the contract and at the end of the contract
5. Supports Zor-Zee dialogue structures
6. For the industry as a whole, not just assoc. members
7. Living Code: evolves
  1. National annexes
  2. Review 2016

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**Thank you for your attention**

EFF

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## Presentation by M. Abell

### Legal perspective of regulatory framework and challenges for Franchising in the EU & Bird & Bird

Dr. Mark Abell

Global Head of Franchising, Licensing  
and Multi-Channel Distribution

## A. EXECUTIVE SUMMARY

- Franchising has failed to fulfil its potential in the EU. This is in part due to regulatory environment.
- This failure can be remedied by re-engineering the regulatory environment in the EU.
- Over 30 years as a specialist franchise lawyer and 5 years research for my doctorate has lead me to draw the following three conclusions as to what needs to be addressed about franchising and its regulatory framework in the EU.

- Franchising is not achieving its full potential in the EU.
- This failure is due, at least in part, to the regulatory framework in the EU.
- The regulatory environment in the EU should be re-engineered to enable franchising to better fulfil its potential in the EU.

Page 3

Bird & Bird

## B. THE FIRST CONCLUSION

### **Franchising is not achieving its full potential in the EU**

- Franchising plays an important role in the EU economy. It is an important vehicle for entrepreneurship that has appeal to large corporations and small businesses alike.
- The 9971 or so franchise networks operating in the EU and the 405 000 or so outlets make a substantial contribution to the GDP of a number of member states, with a roughly estimated total turnover of €215 billion (US\$300 billion).

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- It has great potential to stimulate economic activity within the EU. It can do this by improving the distribution of goods and/or services within and between member states.
- However, it is therefore over-concentrated in a small number of EU member states with an estimated 83.5% of its turnover concentrated in only 25% of the member states.
- In comparison with the USA and Australia franchising in the EU is under performing.

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## Franchising always involves six basic features:

- independence of the parties involved,
- economic interest,
- a business format,
- a brand,
- control of the franchisee by the franchisor and
- provision of assistance to the franchisee by the franchisor.

These features are not impacted by either economic or sectoral contextualisation

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## Franchisors use Franchising because;

- Improved access to appropriately qualified managerial resource
- Improved access to capital (the Agency, Transaction Cost and Resource Scarcity theories)
- Bulk purchasing,
- Economies of scale and
- Enhanced product development

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## Franchisees use franchising because;

- an increased chance of success (such as access to a proven format, a nationally recognised brand, on-going support, economies of scale and so on)
- various situational, and personality correlatives

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## Franchisors are exposed to risks arising from;

- information asymmetry and
- moral hazard (such as underpayment, in-term competition, abuse of the franchisor's brand and non-compliance with the business format)

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## Franchisees are exposed to the risk of

- misrepresentation,
- encroachment,
- poor quality business formats and
- inadequate support

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## What should Regulation should focus on?

Any regulation of franchising should support the reasons that franchisors and franchisees are involved with it and reduce – but not remove - the related risks for both parties as much as is commercially appropriate

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Franchising is a symbiotic relationship between two legally independent businesses that is used in a wide range of sectors and on a broad spectrum of scale and value which can be differentiated from commercial agency and distribution.

Franchising is distinct from agency and distribution, the main difference being;

- the business format and
- the ongoing support

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## **C. THE SECOND CONCLUSION – Franchising's failure to fulfil its potential in the EU is due to the way it is regulated.**

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### **Self-regulation of franchising in the EU does not work**

The self-regulatory environment in the EU is marked by

- a complete lack of homogeneity,
- the lack of a clear or consistent approach to enforcement,
- a significant conflict of interest between the interests of franchisors and franchising as a whole and
- an inability to have any influence whatsoever on nearly 80% of franchise chains in the EU, as they are not members of the national franchise associations.

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It lacks

- transparency,
- consistency,
- accountability and
- proportionality

and so will never be able to provide franchisees, potential franchisees or indeed franchisors with the level of protection that they require.

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- National Franchise Associations in the EU represent franchisors rather than franchising
- Few, if any, of the national franchise associations in the EU have been willing to take decisive steps to enforce their code of conduct
- National franchise associations only account for just over a fifth of franchisors in the EU

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- Many EU member states do not have a franchise association and some of those that do exist are weak and under resourced.
- The self-regulatory environment in the EU does not adequately support the economic drivers or reduce the consequential risks inherent in the franchisor/ franchisee relationship.

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## The Legal Regulatory Environment in the EU

### **Disclosure.**

- There are franchise-specific disclosure laws in six member states
- The lack of any uniform approach to pre-contractual disclosure weakens the impact of franchise-specific laws

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**Non-franchise-specific laws impact upon the pre-contractual regulatory environment in the EU in five distinct ways.**

They impose

- a duty not to misrepresent facts,
- an obligation to disclose relevant information to potential franchisees,
- an extra contractual obligation to disclose relevant information to potential franchisees,
- an extra contractual obligation of confidentiality,
- an obligation to enter into the franchise agreement once negotiations have passed a certain point and a right to withdraw from the contract within a limited time period.

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Each member state takes a different approach to each of these issues resulting in the lack of any homogeneous approach.

This in turn substantially weakens their impact upon cross-border franchising within the EU and creates a technical barrier to franchising between EU member states.

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## The Ongoing franchisor/franchisee relationship

In the EU this is impacted by a regulatory environment that includes;

- Good Faith.
- Anti-trust
- Unfair Competition
- Consumer law
- The application by analogy of commercial agency law
- The application of Employment law to protect franchisees

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## The Impact of this Regulatory Matrix

The result is that Franchisors embarking upon a European 'roll out' of their concept must expect to encounter delays and costs that are a direct result of this heterogeneous approach.

This Regulatory matrix is an artificial barrier to pan-European expansion

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## **D. THE THIRD CONCLUSION - The need to re-engineer the Regulatory Environment.**

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### **A Directive is Needed**

- The current heterogeneous regulatory environment creates obstacles that hinder franchisors from taking full advantage of the single market. The same problem confronted commercial agency and was overcome by the adoption of a directive
- The catalyst for such harmonisation should be a directive

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## Definition of Franchising

Franchising should be defined by reference to :

- independence,
- economic interest,
- the brand,
- the business format,
- control, and
- ongoing support

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## "Carrot" rather than a "Stick" The "Exchange of Benefits" approach

In order to encourage entrepreneurs to use franchising to expand across member state borders, Franchisors should be offered benefits in exchange for complying with the Directive

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## Three Commercial Imperatives – Ensuring that the Directive is fit for purpose.

The Directive must accentuate the influence of three Commercial Imperatives.

These are

- maintaining market confidence,
- ensuring pre-contractual hygiene, and
- imposing mandatory terms onto the franchisor/franchisee relationship through the franchise agreement.

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## Increasing Market Confidence in Franchising

This can be done by;

- enabling franchisors to require pre-contractual disclosure by franchisees,
- focusing regulation only where it is required (by excluding fractional franchisees, "*de minimis*" franchisees, sophisticated investors, large investors, large franchisees and insiders),
- allowing franchisees to compete on a level playing field with corporate chains

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It should establish this by changes to anti-trust law

- allowing franchisors to set the prices their franchisees may charge ( on a rule of reason basis) , and
- Some restriction of franchisee sales over the internet.

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## Ensuring Pre-contractual Hygiene

This can be done by;

- Education and Pre-contractual processes
- Mutual Disclosure , and
- Empowering National Franchise Associations with a new Role.

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## Education and Pre-Contractual Processes

Potential franchisees must be;

- given access to appropriate information ,
- equipped to interpret that information in an appropriate manner.
- obliged to take advice from professionals with appropriate experience and expertise.

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It is therefore proposed that;

- Their advisors (particularly lawyers) are required to take short on-line franchise education courses if they are to advise potential franchisees;
- Potential franchisees investing more than US\$20 000 must produce a certificate from their advisors to prove that they have taken such advice.
- Potential Franchisees must undertake a short on-line educational programme about the risks and rewards of franchising and certify that they have done this before signing the agreement.

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## **A new role for National Franchise Associations**

National franchise associations should ;

- Be part funded by government
- Represent Franchising not Franchisors
- Run the franchisee pre-contractual education programme ,
- Run a professional education programmes for advisors, and
- Generally promote Franchising.

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## **The pre-contractual education programme**

This should stress four basic principles- that franchisees have to;

- work hard,
- follow the franchise format,
- risk failure and economic loss, and
- take and follow expert advice from appropriately experienced professionals.

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## Pre-contractual disclosure should emphasise the quality and timing of disclosure, not quantity and;

- be given in a set form 15 working days before execution or payment
- cover details of the identity and experience of the franchisor, the franchise network, the terms of the franchise agreement and any earning claims
- be in plain language
- contain an appropriate risk statement
- be accompanied by a copy of the franchise agreement in the form in which it is to be executed
- include a five day cooling-off period after execution

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- be allowed electronically
- apply to foreign franchisors with no presence in the relevant member state who should be under an obligation to disclose relevant information about analogous markets.

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## Failure to comply should result in

- the right for the franchisee and government authorities to terminate or claim damages within 12 months of the franchisee becoming aware of the non-compliance or 24 months of the date of execution, whichever is the later, if it resulted in defective consent having been given
- personal liability for any individual responsible for the disclosure document being inaccurate
- the regulatory authorities being able to rescind the franchise and related agreements or claim damages
- the regulatory authorities being able to impose penalties including disqualification

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## Mandatory Clauses in Franchise Agreements

### **Franchisees must**

- not challenge the franchisor's intellectual property,
- implement the business format,
- not compete with the franchisor during the term and for a reasonable period thereafter,
- allow the franchisor the right to purchase the franchisee's business on termination,
- allow termination for cause without compensation,
- allow the franchisor a pre-emptive right of purchase,
- impose a duty of confidentiality, and
- purchase tied goods and services from the franchisor or its nominated suppliers.

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**The franchisor must**

- be the owner of or have the right to license the intellectual property rights on which the franchise is based,
- provide a reasonable level of training,
- refrain from encroachment,
- allow the franchisee the right to sell its business (subject to the franchisor's pre-emptive right), and
- not supply goods or services to the franchisee at overinflated prices or which are unfit for purpose.

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In order to take account of the franchise agreement's long term and changing nature unconscionable behaviour must be prohibited

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## E. CONCLUSION

- Franchising has failed to fulfil its potential in the EU and that this is in part due to the regulatory environment.
- Vigorous re-engineering of the regulatory environment is needed to remedy this failure.
- This re-engineering involves accentuating the impact of three Commercial Imperatives:
  - market confidence,
  - pre-contractual hygiene and
  - mandatory rights and obligations.

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Thank you & Bird & Bird

Dr. Mark Abell

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## Presentation by C. Delberghe



# RELATIONS BETWEEN FRANCHISORS AND FRANCHISEES: POLICY OPTIONS

**Christel Delberghe**  
European Parliament policy department workshop, 12 July  
2016



## Structure

- About EuroCommerce and retail
- The contribution of franchising
- Policy options
- Conclusion



## Franchising contributes with...

- Nearly 14.000 brands & over 500.000 outlets in Europe
- Over 3 million employed
- Easier access to markets –local, regional or national
- Lively city centers
- SMEs competitiveness and Entrepreneurship
- Transfers of know-how and innovation

5



## Franchising definition

- **A special type of agreement** whereby one undertaking (the franchisor) grants to the other (the franchisee), in exchange for direct or indirect financial consideration, **the right to exploit a package of industrial or intellectual property rights** (franchise) for the purposes of **producing and/or marketing specified types of goods and/or services**.
- Cuts across sectors: furnishing, food, retail, car services, cleaning, hair dressers, other services to people, business services, training, fast foods, catering, hotels, travel agencies, real estate
- Huge variety of franchise relationships and formulas

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## Policy options

- **Establish facts**
  - > Franchising is complex, involves many sectors and formulas
  - > A generic approach, not a sector specific approach
- **Competition law**
  - > Protect competition on the European market; consumer benefit
- **Contract law - subsidiarity**
  - > Usually has a fairness element
- **Self-regulation**

7



## Conclusion

- **Establish the facts**
- **Avoid a sector specific approach**
- **Subsidiarity should prevail**

8



## Presentation by P. Hoogstraaten



### Opinion on the report **Franchising**

Ms Patricia Hoogstraaten, RAE  
General manager Vakcentrum, the Netherlands



### **Need of protecting the franchisee**

Joining a franchise formula is a good option but:

- SME businesses survive if they **can be entrepreneurial**
- Lack of (pre)contractual protection
- Terms becoming one-sided
- Prohibition multi-franchising, the non-competition clause and purchase obligations
- Franchising and the digital economy: not regulated

**Position SME franchisees is being threatened**





## 1. Removing stumbling blocks in Regulation 330/2010

• Question 1: “Does the model of franchising reflect the needs of the nowadays franchise market?”

**NO: Current digital developments, e-commerce and data are not regulated**

• Question 2: “Is there any proportionality between the implementation of the rules set in Regulation and the effect on the economic position of franchisees?”

**NO: Ban on multifranchising, non-competition clause and purchasing obligations**

### Solutions

1. Forbid the non-competition clause after termination, unless the franchisor can prove there will be abuse of his knowhow
2. Intermediate adjustment of the Guidelines



## 2. Set up a low threshold review as requested by the EP in 2013

The European Commission is requested to:

“Examine price-fixing mechanisms in franchise systems and the effects of long-term competition clauses, purchase options and the prohibition of multi-franchising, and to reconsider in this respect the current exemption from competition rules for contracting parties having a market share of less than 30%.”

**Unfortunately, nothing has happened yet**







### 3. Introducing new rules related to franchising & digital economy

- Digitalisation is ignored in EU Regulation 330/2010
- E-commerce & consumer data
  - Prevent unfair competitive advantages
  - Both parties generate consumer data, use and valuation should be divided proportionally
  - Transparency is essential

**Regulation of the digital components of the franchise relationship is necessary**



### 4. EP should request the Commission to promote good cooperation between DG Competition and DG Internal Market

DG Competition, Barnier 2011:

“It is not a competition problem as such – for example the Regulation does not allow post contractual non-competition clauses, unless severe conditions are met - but franchisors abusing the lack of level playing field. This should be addressed as an internal market issue.”

Bienkowska 2015: “I support franchise”





## 5. Is Selfregulation the Solution?

**Dutch Franchise Code (NFC):  
a healthier and more balanced playing field is achieved**

Dutch Franchisors organisation:

“We do not support the NFC as presented to the minister”

**Franchisees need legislative support  
This need is also proved in the study**



## 5. Is Selfregulation the Solution? (2)

- The European code of Ethics on Franchising (1972) has not fully contributed to a decrease of UTP's
- EFC 2016 is again a one sided document set up by franchisors without consulting the counterpart
- Franchise shall not embrace the EFC 2016, it is even more focused on a unbalanced position
  - ‘Franchisors obligations’ are altered into ‘Franchisors commitments’
  - The condition in writing has been skipped (is considered as unfair practices!)

**Even balanced selfregulation needs a legal guarantee**



**Presentation by O. Bueno Díaz**

# *Future policy options in franchising in the EU*

EP Workshop on “Relations between franchisors and franchisees: regulatory framework and current challenges”  
Panel II: Policy Options

Prepared for IMCO Committee  
in cooperation with Policy Department A



Odavia Bueno Díaz (Law firm: BuenoLegal.gc)

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## The structure of franchise private relations: the stronger and the weaker party

- ▶ Franchisor, stronger: guardian formula
- ▶ Franchisee, weaker: dependent on formula
- ▶ Restrictions on franchisee justified to protect formula , uniformity, reputation



2

## Main legal problems in franchise private relations in the EU\*:

- 1) No definition of franchise
- 2) Unfair Trade Practices (UTPs)
- 3) Ineffective enforcement mechanisms

\*information from research of the Study group on a ECC, based on national case-law and literature, IMCO project and experience as legal practitioner

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## Main legal problems:

### 1) No definition

- ▶ Scope obligations?
- ▶ Difference between types of franchise relations?
- ▶ Difference between distribution relations?

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## Main legal problems: 2) UTPs in franchise

- ▶ See EC findings on UTPs in B2B supply chains
- ▶ Specificities UTPs franchise
  - Franchisee always the weaker (=victim)
  - Measure unfairness = Protection formula justifies restrictions
  - Uniform treatment franchisees in cross border franchise
  - Unjustified exemptions of Vertical Restraints (IMCO)
  - Vertical Restraints which on application lead to UTPs



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## Main legal problems: 3) Ineffective enforcement

- ▶ No success in overcoming contingencies
- ▶ Inaction franchisees due to “fear factor”
  - Dependence on continuation to recuperate investments
  - No switch possibilities
- ▶ Remedies mean no continuation
- ▶ Compensation requires court intervention



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## Current policy approach in the EU

- ▶ EU-level
- ▶ Allowing pro-competitive Vertical Restraints (BER 330/2010)
- ▶ Soft-law to promote ethic and standard relations (EFF's code of conduct)
- ▶ National level
- ▶ Specific franchising laws
- ▶ General contract law and case-law



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## Current policy approach fails to solve problems: BER 330/2010

- ▶ No definition (Franchise = selective distribution)
- ▶ Definitions in previous BER, applicable?
- ▶ Unjustified exemption Vertical Restraints
- ▶ Vertical Restraints when applied lead to UTPs
- ▶ No enforcement mechanisms



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## Current policy approach fails to solve problems: EFF Self-regulation

- ▶ Specific definition, but unknown impact
- ▶ “*Pre-qualification mode of self-regulation*” (EFF):
  - Fair standards code only as control on admission
  - No redress mechanism



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## Current policy approach fails to solve problems: National laws

- ▶ Focus on precontractual information
- ▶ Different definitions
- ▶ Different unfairness tests, if any
- ▶ Disregard cross-border element – uniformity
- ▶ General contract law remedies: no emphasis on continuation



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## The way forward: EU-level solutions to main problems?

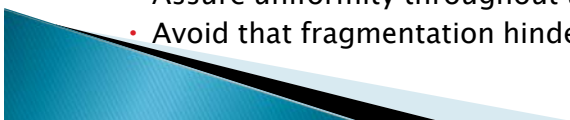
- ▶ EU uniform definition of franchise
- ▶ Fair standards against UTPs in franchising
- ▶ Effective enforcement mechanisms



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## The way forward: justification for EU-level (re)action

- ▶ Direct negative impact on franchisees
- ▶ Impact on functioning Internal Market?
- ▶ Consumer's welfare?
- ▶ Under-representation franchisees
- ▶ Disregard cross-border element
  - Assure uniformity throughout the network
  - Avoid that fragmentation hinders trade



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## The way forward.

### Step 1: Create a level playing field

- ▶ Organise participation franchisees
  - Strengthen franchisee associations
  - European digital franchise platform
- ▶ Cope with confidentiality claims
  - Eg: Online anonymity (Your Europe, SOLVIT)
- ▶ Controlling franchisor's lobby power
- ▶ Overcoming franchisor's fears



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## The way forward:

### Step 2: Public consultation

- ▶ Collect **information** on main legal problems
- ▶ Collect reactions to **policy options**
  - 1) No intervention
  - 2) Adjust existing regulatory framework
  - 3) EU-level principles for franchising



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## Policy Options:

### 1) No intervention

#### ▶ Pros:

- Follow view franchisors
- Respect “safe-harbor” Vertical Restraints (EFF)
- Problematic situations are the exemption
- Franchisees should take more precautions

#### ▶ Cons:

- No protection franchisees
- Under-representation franchisees remains
- Favor collective complaints in court
- Attacks to reputation in Internet
- It does not neutralise the “bad franchisee” (EFF)
- Disregard cross-border element – uniformity



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## Policy options:

### 2) Adjust regulatory framework

#### ▶ Adjust BER 330/2010

- Franchise = selective distribution?
- Proportionality of Vertical Restraints
- Enforcement mechanisms

#### ▶ Adjust Self-regulation

- Get approval franchisees
- Enforcement mechanisms

#### ▶ Search for fair representation of franchisees in regulating bodies

#### ▶ Broaden the scope of existing directives?



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## Policy options: 2) Adjust regulatory framework

- ▶ Pros:
  - Initiative remains with stakeholders
  - Regard cross-border element
  - Benefit from work already done
- ▶ Cons:
  - Guarantee of enough support franchisees?
  - Agreement on enforcement mechanisms?



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## Policy options: 3) EU-level principles

- ▶ Adjust BER 330/2010
  - Franchise = selective distribution?
  - Proportionality of Vertical Restraints
  - Enforcement mechanisms
- ▶ Draft private law principles
  - Definition of franchise
  - Fair standards: proportionality of restrictions
  - Enforcement mechanisms



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## Policy options: 3) EU-level principles

- ▶ Inspiring models for private law principles
  - EFF's Code of Conduct
  - Netherlands Franchise Code of Conduct
  - *Principles of European Law on Commercial Agency, Franchise and Distribution Contracts (PEL CAFDC)*



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## Policy options: 3) EU-level principles

- ▶ Definition of franchise
- ▶ General principles
  - Cooperation
  - Proportionality
  - Mutual profitability (win-win)
- ▶ Specific principles
  - Pre-contractual obligation to inform
  - Contractual rights and obligations of the parties
  - Specific remedies and alternative dispute resolution



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## Policy options: 3) EU-level principles

- ▶ Other issues that should be dealt with:
  - General or/and specific principles?
  - Legislation or self-regulation?
  - Mandatory or default?



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## Policy options: 3) EU-level principles

- ▶ Pros
  - Inspired by franchisor's Code of Conduct
  - Strengthened with protection franchisee
  - Balance in representation from the very beginning
  - Regard cross-border element – uniformity
  - Neutral measurement unfairness
  - Closer to outcome of consultation
- ▶ Cons
  - Initiative not given to stakeholders
  - Overcome fears franchisors to intervention
  - Convince franchisor to accept protection franchisee



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## The way forward: Outcome consultation

- ▶ Inventory “core” problems
- ▶ Adjust chosen policy option
  - Not expecting main surprises on definition
  - Verify “proportionality” test of restrictions
    - Pro-competitive restraints vs. interests franchisee
    - Protection formula vs. interests franchisee



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## Conclusions

- ▶ Perceived problems in franchise relations ask for action at EU-level
  - Correct the unfair representation imbalance
  - Correct the unfair contractual imbalance
  - Respect uniformity in cross-border franchise
- ▶ The study for IMCO
  - Presents the right overview on main problems
  - Proposes a well thought way forward



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Thank you very much  
for your attention

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## DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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