Franchising
in Denmark 2012

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Introduction

The retail market in Denmark is characterized by a great variety of ways to organize a business. On the one hand, a relatively small number of large companies owns several large retail chains within different sectors of the market; on the other hand, a fairly large number of companies or associations runs or administers many (usually smaller) retail chains in which the members are organized on a voluntary basis.

Retail chains are often referred to as "voluntary chains", as opposed to chains in which the individual shop (or similar establishment) does not have any freedom to decide its own course of action because it is owned by the owner of the chain.

The term "voluntary chains", however, covers a broad range of ways of organizing a chain operation, including franchise operations. Although "franchise" is not defined in Danish law, it is still possible to point out some characteristics distinguishing a proper franchise from other types of voluntary chains — not least in terms of organization.

Thus, several retail chains in Denmark are organized in a more horizontal manner than franchise systems, as the members of the chains also are owners of the company or members of the association owning the right to the chain concept. In such systems, the chain members naturally have much more influence on the operations and running of the chain.

As a business format in Denmark, franchising has experienced rapid growth, not only over the past few years, but over the past decade. This development is based partly on foreign franchise systems entering the Danish market, but also on Danish firms expanding through the use of franchise systems, realizing and acknowledging the advantages of franchising as a business format.

Even though franchise systems are not confined to retail markets, this is usually where franchise systems are found in Denmark. Traditionally, franchising has been used as a business format for clothing and shoe stores, such as the brands Benetton, Claire, Bianco, and Vero Moda. However, other lines of business also are exploiting the virtues of using a franchise system, including paint stores (Flügger Farver A/S), opticians (Thiele A/S), and furniture and kitchen stores (e.g., Jysk A/S, HTH-køkkener A/S, and Kvik A/S). Another important franchise market is the fast food sector, comprising franchise restaurants such as Burger King, McDonald's, and Domino's Pizza, as well as other types of food vendors such as HJEM-IS, a direct distributor selling large volumes of ice cream to consumers from vans.

Danish companies have not only chosen franchising as a way to promote their businesses within Denmark, but also as a method to expand internationally. This group of companies comprises Aqua d'or (bottled mineral water), Bang & Olufsen (up-market electrical equipment, mainly stereos and televisions), Jysk A/S (furniture, bedding, curtains, and other home furnishings), ID Design (furniture), Hi-Fi Klubben (HiFi equipment), and the clothing brands Bison Bee-Q, and Vero Moda.

This chapter presents a number of aspects of Danish law governing franchising, although in a non-exhaustive way. This generality should be seen in light of the fact that, in Denmark, there is no specific or aggregate set of rules regulating franchise systems. Every aspect of a franchise system and a franchise agreement is regulated through the general rules of law. Therefore, the focus here is on aspects of Danish law that will generally be of interest or relevance to all franchise systems.[1] For improved readability, this chapter discusses the different legal areas in the chronological order in which a franchisor will encounter the legal challenges, beginning with the franchise contract.

Contract Law

In General

An overarching principle of Danish contract law is the principle of freedom of contract. This means that, as a general rule, with only minor — although important — exceptions, the parties to a contract are free to draw up their agreement so that it reflects their particular needs and preferences.

Over time, a number of restrictions and exceptions to this clear starting point have found their way into Danish law. Today, every agreement entered into must be drafted in the light of a number of provisions that cannot be dispensed with by agreement between the parties.

In addition to the principle of freedom of contract, the law also holds a principle of freedom of form. Therefore, the parties to an agreement may decide whether a written or an oral agreement is preferable, although (understandably, and for practical reasons) written agreements are the norm in complex cooperations such as franchise systems.

Furthermore, the parties may decide whether the language of the agreement should be Danish or not. In other words, even if it is the general impression that foreign franchise operators usually have their contracts

1 This chapter includes prevailing law and practice up to 1 December 2011.

translated into Danish, this is not a requirement; however, it is recommended that the franchisor choose a language that the franchisee understands.

The rules setting out restrictions of particular importance to franchise agreements are contained in the Competition Act,[2] the Marketing Practices Act,[3] the Commercial Leasing Act,[4] the Product Liability Act,[5] and others. All of these are dealt with below.

Contracts Act

The basic rules of Danish contract law may be found in the Contracts Act (*Aftaleloven*). This Act comprises provisions within three main areas: the formation of agreements, the granting of powers of attorney, and the invalidity of agreements. The provisions of the Contracts Act are generally applicable to all agreements, including franchise agreements, but the rules on invalidity are of particular importance in franchise agreements.

The Contracts Act lists several specific elements that may invalidate an agreement, including the use of coercion, fraud, and clerical errors. Besides the more specific grounds for invalidity, the Contracts Act also holds an important general clause that is particularly relevant to franchise agreements, as will be apparent below.

The general clause of the Contracts Act states that agreements may be changed or set aside if they are either unfair or contrary to honest conduct. This clause is to be interpreted by the courts, and it is for the courts to set out the contents of the legal standards "unfair" and "contrary to honest conduct". In addition, it is ultimately for the courts to decide what the consequences of an infringement of the legal standards is to be, in terms of setting aside the agreement, either entirely or in part, or even changing the agreement.

Even though the general clause is rarely applied between business partners, the possibility of such application is not ruled out. This would usually require that one party is substantially disadvantaged, in one way or another, compared to the other party. Some franchise systems show examples of situations where the negotiation power of the franchisee is significantly inferior to that of the franchisor. The general clause may well

2 Consolidated Act Number 1027 of 21 August 2007 on Competition.
3 Consolidated Act Number 839 of 31 August 2009 on Marketing Practices.
4 Consolidated Act Number 1714 of 16 December 2010 on Commercial Leasing.
5 Consolidated Act Number 261 of 20 March 2007 on Product Liability.

be applied to modify such an agreement if, in such situations, this inferiority of the franchisee is reflected in the terms of the agreement.

Regarding entering into agreements, as mentioned above, no special franchise legislation exists in Denmark. Particularly, there are no rules regarding disclosure, prior to entering into a franchise agreement. Several countries — such as Denmark's neighboring country, Sweden — have chosen to introduce rules on disclosure, implying that the (main) terms of the franchise agreement, information on the franchise system, franchisor's experience, and similar information, should be disclosed to the franchisee a certain period of time in advance of the parties entering into the agreement. The purpose of such legislation is obviously to give a potential franchisee an opportunity to carefully consider the consequences of entering into the franchise agreement. So far, however, the Danish legislator has chosen not to follow this tendency.

There are no legal requirements to disclose such information prior to entering into the franchise agreement. It cannot, though, be ruled out that a court's interpretation of whether the legal standards of the general clause of the Contracts Act will be affected by the fact that the franchisee did or did not have a chance to assess the agreement — perhaps together with its legal adviser — before it was entered into.

In Denmark, notwithstanding the legal situation, the usual practice is that serious franchisors allow a potential franchisee to at least assess the franchise agreement and, typically, also provide additional information. As a final point on this issue, the Danish Franchise Association (*Dansk Franchise Forening*) has issued a set of ethical rules comprising provisions on disclosure.

An important question for both franchisors and franchisees is whether it is possible for either party to transfer its rights and obligations under the agreement to a third party. If nothing is agreed to that effect, Danish law predicts that neither party may transfer any obligations under the agreement. However, as this applies only to a party to an agreement, it is possible to overcome this by conducting business through a limited liability company.

If either the franchisor or a franchisee is a limited liability company, it is possible for the owner of the shares to transfer the shares to a third party, thereby effectively transferring the franchise (or the franchise system, as the case may be). Both situations are, however, subject to the agreement between the parties and, hence, it is possible to either allow one or both of the parties to transfer their obligations to a third party, or to introduce a

provision for change of control that prevents the owner of a limited liability company from transferring the shares to a third party without prior approval by the other party to the franchise agreement.

Another area of an agreement subject to legislative regulation in some countries is the question of cancellation and termination of the agreement. Again, in Denmark, such provisions are subject to the principle of freedom of contract. If these issues are not dealt with in the agreement, case law has set out generally applicable default rules. An agreement may be cancelled with immediate effect if one of the parties is in "substantial" breach of the agreement. If nothing is agreed on in the agreement regarding termination, either party to the agreement is entitled to terminate the agreement without cause. Such termination may be done with ordinary notice, which will typically be three months.

If a franchisor combines an unusually long notice period with a prohibition against transferring the franchise, the agreement may be considered unfair and, hence, an infringement of the general clause of the Contracts Act. Additionally, this may raise a competition law issue (see text, below).

Petrol Dealers Act

The only exception to the statement that no particular legislative regulation of franchise agreements exists under Danish law may be found in the Petrol Dealers Act[6] (*Benzinforhandlerkontraktloven*). The Parliament considered that the restrictions that were placed on petrol dealers due to their inferior strength of negotiation with the multinational oil companies were so onerous that legislative intervention was warranted. The result of these considerations is the Petrol Dealers Act, which has the very limited scope of regulating the relationship between petrol wholesalers and petrol retailers.

Several issues are dealt with by the Petrol Dealers Act, including the content of petrol dealers' agreements, the duration of and notice under such agreements, and subsidies from the supplier to the retailer.

Pursuant to the provisions of the Petrol Dealers Act, setting out the range of products to be sold from the premises of the dealership is prohibited, save for provisions regarding petrol. The Petrol Dealers Act also has provisions determining opening hours, provisions setting out minimum sales quotas, and restrictive covenants regarding time or place.

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[6] Consolidated Act Number 1718 of 18 December 2010 on Petrol Dealers.

To ensure that a petrol dealer is not tied to the wholesaler for long periods of time, the Petrol Dealers Act limits the duration of a petrol dealer agreement to three years, at the end of which period the parties to the agreements must be allowed to give one-year notices of termination. On termination, a petrol dealer may be entitled to payment for damages.

Commercial Agents

Several regulations regarding agents exist in Denmark. The main regulations are found in the Commercial Agents Act (*Handelsagentloven*)[7] and the Commissions Act (*Kommissionsloven*).[8] The Commercial Agents Act only regulates the relations between a commercial agent and its principal and, to some extent, the relations between the principal and third parties. A commercial agent is defined as a person acting in the name of and for the account of the principal. Primarily, the Act regulates the relations between an independent agent and its principal, but a few provisions are aimed at the relations between traveling salesmen and their principals.

The Commissions Act regulates the relations between a commission agent and its principal, as well as the relations between the principal and third parties. A commission agent is characterized as being independent of the principal and by the fact that it acts in its own name, but for the account of the principal.

Traditional franchisees are characterized as being independent of the franchisor, and by the franchisees acting in their own names and for their own accounts. Therefore, neither the Commercial Agents Act nor the Commissions Act is applicable to the traditional franchise system.

From a legal point of view, franchisees resemble an independent dealer, for which no general regulations exist in Denmark. Danish law is based on the principle of reality, not formality. Consequently, for the legal assessment of an agreement, it is irrelevant how the parties have chosen to characterize the agreement.

Regarding the relations between the franchisee and the franchisor, the decisive issue is the contents of the agreement; regarding the relations between the franchisor and a third party, the decisive issue is the display of the concept to the public. In this respect, case law has seen examples of a traditional franchise system comprising independent franchisees (that,

7 Act Number 272 of 2 May 1990 on Commercial Agents and Traveling Salesmen.
8 Consolidated Act Number 636 of 15 September 1986 on Commissions.

according to the franchise agreement, were to operate in their own names and for their own accounts) being set aside and liability placed on the franchisor, because the marketing of the concept gave the impression that the franchisees operated in the name of the franchisor.

Company Law

In General

Danish company law is governed by the principle of freedom of contract, which provides a variety of many different types of corporate organizations when considering establishing a franchise business in Denmark (both for franchisor and franchisees). Taking a broader perspective, this gives a wide range of opportunities starting from the sole tradership, where the owner runs a business without a legal distinction between the person and the business, and ending with different kind of organizations with a separate legal entity.

In Denmark, the most common businesses are the sole tradership, the partnership, and the subject in this section, the public limited companies (*Aktieselskaber* – A/S) and private limited companies (*Anpartsselskaber* – ApS). Public limited companies and private limited companies are governed by the Companies Act.

The rules that govern the two types of companies are somewhat similar, even though some of the rules differ. One of the most commonly known differences is that a public limited company must have a minimum share capital of DKK 500,000 (approximately EUR 67,500), whereas a private limited company must have a minimum share capital of DKK 80,000 (approximately EUR 10,800).

A Danish company (regardless of the company being a public limited company or private limited company) must be registered with the Commerce and Companies Agency (*Erhvervs- og Selskabsstyrelsen*).

The Commerce and Companies Agency (the "Agency") is responsible for the administration of the Companies Act and Danish companies in general, including the registration of information and documents in relation to many aspect of the companies (annual accounts capital increases, capital decreases, the Board and management, mergers, and demergers). This information is public, and interested parties may gain access to the information. A small fee must be paid for some of the information, such as copies of annual accounts.

The requirements of reporting to the Agency do not differ substantially from similar requirements elsewhere. For instance, the Agency must be notified of a change in a company's address, in the company's management, or of the company's auditor, within two weeks from the date on which the relevant resolution was passed. Other changes, such as amendments to the articles of association, also must be notified to the Agency within two weeks from the date of the resolution.

Listed companies at the Copenhagen Stock Exchange (*Københavns Fondsbørs*) also must abide by these rules. In addition, listed companies have a duty to immediately notify the Stock Exchange about any changes in the company's management and about any other significant matters that may influence the price of the company's shares.

Until the company is duly registered with the Agency, the persons acting on behalf of the company are personally liable for all obligations undertaken by the (not yet established) company. A company does not formally exist until the registration procedure has been completed, but it is recognized that an unregistered company can operate on an active basis. However, the registration of a company can easily be carried out online. In the following a more specific description of public limited companies and private limited companies will be provided.

Public Limited Companies

A public limited company must have a two-level management structure, comprising of either a board of directors or a supervisory board (both must have at least three members), and at least one managing director. In both situations, the management is appointed by the board of directors or the supervisory board as the case may be.

The distinction between the board of directors and the supervisory board lies overall with the fact that the board of directors has the overall management responsibility of the company. If the company does not have a board of directors (and thus have a supervisory board) the managing director(s) have the overall management responsibility. The managing director is in any case in charge of the day-to-day management of the company. The supervisory board has, as the name implies, only a supervisory role.

Since 1973, public limited companies have been obligated to allow their employees to elect representatives to the board of directors or the supervisory board, provided that the company, over a three-year period, has employed at least thirty-five employees. In this situation, the employees have the right to choose at least two employee representatives who

subsequently will join the board. Employee representatives on the board are subject to the same duties and obligations as other board members.

The shareholders' influence is normally exercised at the general meeting. Shareholders are not allowed to interfere directly with the company's operations. However, shareholders may, through their decisions at the general meeting, participate in the company's operations. The general meeting is normally characterized as the company's highest authority and thus completes a three-level structure of public limited companies. This means that the board of directors or the supervisory board and the management must follow all legal decisions arrived at during the general meeting.

General meetings must be held annually. However, extraordinary general meetings can be convened at any time, with a notice of no less than two weeks and no more than four weeks.

According to the Companies Act, all companies are as a starting point required to elect one or more auditors, and the auditor or auditors must make sure that the annual accounts are prepared in accordance with the Financial Statements Act (*Årsregnskabsloven*).[9] Smaller companies are allowed to choose not to have their accounts audited by an auditor, however, often banks and other creditors, suppliers, and the like demand an audit even though the company due to its size is not obliged to have an audit performed.

The (audited) annual report must be approved at the annual general meeting, and the report must be received by the Agency no later than five months (four months for listed companies) after the end of the financial year. Dividends may be declared once each year, following the approval of the annual report at the ordinary general meeting. However, payment of interim dividends also is allowed. In either case, the declaration of dividends must be approved by the board of directors, and if the company does not have a board of directors (and thus have a supervisory board), the declaration of dividends must be approved by the management.

The Companies Act does not contain provisions regarding shareholders' agreements. These are permitted, accepted, and widely used in Denmark. Even though shareholders' agreements are valid between the shareholders, the Companies Act has introduced a new provision which limits the

9 Consolidated Act Number 323 of 11 April 2011 on Financial Statements.

shareholders' agreements' effect on the general meeting and the interaction with the company's articles of association, hence careful drafting of the shareholders' agreements and the company's articles of association is required.

Private Limited Companies
Contrary to public limited companies, the management of private limited companies may consist of a sole managing director and no board of directors or supervisory board, or a board of directors and a managing director, or a supervisory board and a managing director. Hence, the Companies Act does not require a two-level management, as is required for public limited companies. However, a two-level management can be established, if so desired as stated above and thus identical with the two-level management in the public limited companies, however, there are no minimum requirements for the number of members in the board of directors or the supervisory board.

Private limited companies also are obligated to allow their employees to elect representatives to the board of directors or the supervisory board, provided that the company, over a three-year period, has employed at least thirty-five employees. In this case, the private limited company must have a board of directors or a supervisory board.

The main difference between the public limited company and the private limited company (despite the difference in required share capital) is that private limited companies to a wide extent are more flexible and not subject to all the mandatory regulations imposed on public limited companies.

For example, in private limited companies the board of directors or the management, as the case may be, may be subject to authorization from the shareholders in the articles of association to perform a share capital decrease. In public limited companies such share capital decrease must always be adopted at the general meeting. The Companies Act has several of such exceptions for private limited companies when compared to public limited companies.

For that reason, private limited companies are often used in smaller businesses with only a few shareholders and as an alternative to the partnership (with no limitation to liability). To the contrary, public limited companies are used in larger businesses with many shareholders. This also is the underlying intention/purpose of the distinctions between the two types of companies; however, the choice is free (except for listed companies).

Real Property

In General

For most businesses, the location of their premises is of great importance. This is especially the case in the retail trade and, since franchising is often used as a business concept in this line of business, it is vital to have knowledge about the area of real property.

The economic success of franchise businesses depends largely on the location of the franchisee's business. It is well known that market competition in Denmark is not limited to products, prices, quality, and the like, but also depends on the precise location of the stores. Therefore, it is of great importance as to where the franchisee decides to establish a franchise store, which makes the location of a store one of the main issues when entering into a franchise agreement.

There are different possibilities for finding and establishing a store in the right location. First, both the franchisor and the franchisee may acquire the right premises. Second, the franchisor may enter into a commercial lease agreement with a third party, and subsequently sublet the premises to the franchisee. Third, the franchisee may enter into a commercial lease agreement with a third party with a right for the franchisor to enter into the agreement. Finally, the franchisor can, after acquiring the right to the premises, impose an obligation on the franchisee to lease such premises, either by inserting a provision to this effect in the franchise agreement or by entering into a separate agreement. These different possibilities will be discussed in further detail below.

Acquisition of Real Property

Normally, real property is acquired by a purchase commitment. Subsequently, a deed of transfer is prepared and registered in the Land Registry, where all real property in Denmark is registered. The Land Register provides information on the identity of the owner, all registered mortgages, and other rights. Other covenants and easements may often appear in the Land Register, such as local construction restrictions. In some cases, contaminated land liabilities also will be registered.

As mentioned above, a mortgage will often be registered in the Land Register. In practice, this will always be the case, as the registration of a mortgage will protect the mortgagee against subsequent purchasers and against the mortgagor's other creditors. The information in the Land Register can easily be obtained at a low cost, and most of the information can be accessed online. Nevertheless, some of the information still must be found at the Land Registry Office.

The main principle in Danish legislation is that the right to acquire real property in Denmark is unlimited. This main principle is, however, not without exception. Special permission from the Ministry of Justice is required if the buyer is not a resident of Denmark and if the buyer has not previously been a resident of Denmark for a total period of five years. This also applies to companies, associations, and similar business entities with no registered office in Denmark.

In consideration of Denmark's obligations under the Treaty establishing the European Community (EC Treaty), citizens of the European Union (EU), citizens of the European Economic Area (EEA), or companies domiciled in the EU or EEA may, under certain conditions, purchase real property in Denmark without the permission of the Ministry of Justice.

The first and second exemptions to the requirement of permission particularly apply to EU or EEA citizens who have established, or intend to establish, a business in Denmark, and to EU or EEA citizens residing in another member state who have established or will establish an agency or branch in Denmark. The third and forth exemptions to the requirement of permission particularly apply to EU and EEA companies that have been legally established under the laws of an EU member state or an EEA state, and which deliver services to Denmark.

In addition, such a company must have either a main branch within an EU/EEA member state or its registered address must be in such a state. In the latter case, it is a condition that the company has a real or an actual association with commerce in the particular member state or EEA state. Furthermore, the consent of the Ministry of Justice is not required if the purchase is a prerequisite for operating the purchaser's own business or supplying services, or if the property is intended to serve as a permanent residence of the purchaser. These rules are enforced by the Land Registry, because certain forms must be filled in when a purchase of real property is to be registered in the Land Registry. This procedure is needed to declare whether the mentioned consent from the Ministry of Justice is required and, if it is, whether the consent has been granted.

Financing

Normally, purchases of real property in Denmark are financed by a combination of one or more mortgages on the real property and cash payment. Typically, a specific mortgage-credit institution or a bank will grant the loan against a registered mortgage on the real property and on the basis of mortgage credit bonds. These credit bonds are mass debt instruments or securities issued as part of a mortgage credit business and admitted for public quotation on a stock exchange.

Mortgage-credit institutions or banks are allowed to mortgage up to a certain percentage of the value of the real property, depending on the category of the real property. Residential properties are allowed to be mortgaged up to eighty per cent. However, non-residential property and holiday homes are only allowed to be mortgaged up to sixty per cent. The remaining percentage must be financed by other means, such as cash or loans granted by banks or the seller. Mortgages also may be used by the bank or the seller as security for the remaining percentage of the real property's estimated value.

Acquisition of real property is a seldom-used option for the franchise and the franchisor, because such a purchase often means a reduction in the franchisor's liquidity (or that of the franchisee). An improvement of liquidity is often sought as an objective when entering into a franchise agreement. When this is combined with a long-term commercial objective of creating a chain of businesses, the reduction of liquidity is so great for the average franchisor that the possibility of purchase is not used.

In recent years, the Danish loan market has been part of the global economic crisis and the mortgage-credit institutions and banks have been reluctant to lend money for purchase of real property. But even when it is easier to obtain a loan and even though new loan opportunities have become available (for example, the possibility for a loan where no repayment is required for up to ten years), taking into account other substantial investments, the financing of business premises in addition to this becomes a difficult task for a franchisee.

Loan institutions are usually reluctant to grant a loan to a new, young entrepreneur, who probably cannot provide the necessary security. The result is often that relevant premises are not purchased, but leased instead.

Property Leases

Regarding premises, a commercial lease agreement entered into between a franchisor, a franchisee, and/or a third party is regulated by the Commercial Leasing Act (*Erhvervslejeloven*).[10] The Act governs the lessor's and lessee's rights and obligations regarding defects, notice of termination, rent increase, and assignment.

The Commercial Leasing Act came into effect on 1 January 2000, and made significant changes to existing rules regarding commercial leases. Even though the Act ensures greater freedom of contract between the parties, a

10 Consolidated Act Number 1714 of 16 December 2010 on Commercial Leasing.

number of the rules are binding, to the extent that they cannot be deviated from to the detriment of the lessee.

Irrespective of an agreement to the contrary, the lessor may only terminate a lease in certain cases, such as when the lessor wishes to make use of the rental property, in which case one year's notice must be given. A lessee, on the other hand, can always terminate a lease, unless otherwise stipulated in the lease agreement.

The greater freedom of contract leads to the effect that the rent and subsequent adjustments in the amount are agreed between the lessee and lessor. During the term of the lease, either party may demand that the rent be adjusted to the market rate at the time in question, but only if the rent is substantially higher or lower than the market rate.

Such a demand can be made as soon as four years after the commencement of the lease. However, the principle of freedom of contract implies that the parties can agree that this provision of the Commercial Leasing Act will not govern the lease agreement.

The Commercial Leasing Act also allows the parties to agree, as part of the lease agreement, that the lessor may demand a change of terms for the lease to the effect that the lessor can terminate the lease agreement if the parties, after negotiations, fail to reach a settlement regarding a lease agreement on new terms. However, the Act only allows such a demand for change of terms eight years after the commencement of the lease.

Furthermore, the Commercial Leasing Act contains special provisions regarding termination of a lease agreement when the location of the premises is of significant importance to the lessee. When terminating such lease agreements, the lessor may be liable for damages and compensation under the Act. However, these rules are not binding, and the agreement between the parties can deviate from the stated rules.

Typically, the lessor will demand the payment of a deposit, or even key money, and the Commercial Leasing Act does not prohibit such a demand or set a maximum limit for this amount. When taking competition into account, such demands for cash payments may often be substantial. In the event that the lessee pays a large deposit, an extract of the commercial lease agreement ought to be registered in the Land Registry.

This also applies in the case of provisions regarding pre-payments, fixed terms of the agreement, and the like. Registration in the Land Registry

ensures that a subsequent purchaser or creditor will have to respect the lessee's rights under the lease agreement.

The Commercial Leasing Act does not contain regulations regarding subletting. However, most commercial leases generally regulate subletting by requiring that the lessee, prior to granting a sublease, is obligated to obtain the lessor's consent. Often, commercial leases prohibit certain forms of subletting, such as subletting part of the premises.

Even though the Commercial Leasing Act does not contain regulations regarding subletting, a sublease agreement is still governed by the Act. This is because subletting does not change the agreement entered into between the lessor and the lessee, and this also means that all rights and obligations between the lessor and the lessee still exist after subletting the leased property.

Under the Commercial Leasing Act, the lessee has a right to assign the lease to another lessee (for example, if the new lessee is in the same line of business as the lessee). This might be important if the choice of premises is important for the business (for example, in a franchise arrangement where the franchisor wishes to have the opportunity to take over the premises from the franchisee).

However, it is a condition that the assignee conduct business in the same line as the assignor and, even in this case, the lessor might hinder the assignment with reference to weighty reasons, such as the new lessee's knowledge of the business or the new lessee's financial status. The rules regarding assignment under the Commercial Leasing Act are not binding, which means that the lessor and the lessee can enter into an agreement that contains provisions that waive this right.

Practical Application Regarding Lease of Real Property

A franchise agreement will usually incorporate several different types of contracts. The most common types are contracts regarding marketing, intellectual property rights, product purchase, and lease of real property. Such agreements can be referred to as "compounded" agreements.

If the compounded agreement regulates a specific topic, the relevant provisions are normally used to solve a dispute regarding this topic. However, when a lease agreement concerning real property is compounded with other types of lease agreements, such as agreements concerning intellectual property or personal property, an assessment of the compounded agreement in its entirety is applied. If the compounded agreement mostly consists of provisions regarding the lease of real

property, the compounded agreement in its entirety is assumed to be governed by the Commercial Leasing Act.

These special criteria of assessment are based on case law with reference to the binding rules of the Commercial Leasing Act.[11] The rules are primarily laid down to protect the lessee, who, under the law, is presumed the weaker of the two parties. If the above-mentioned assessment is applied and the agreement mostly consists of provisions regarding the lease of real property, one party cannot terminate the contract without reason or warning. The governing rules under the Commercial Leasing Act are binding, and therefore cannot be changed by an (earlier) agreement between the franchisor and franchisee.

The parties may, instead, enter into different and independent agreements regarding different issues. In this case, each agreement will be governed by the relevant specific rules and regulations. However, this may sometimes cause disputes, because one party might argue that instead of viewing the agreements as different and independent, the agreements are, in fact, a compounded agreement. The presumption is that the agreement is independent, but this presumption can be disproved. In the end, it always depends on an interpretation of the existing material.

One party, typically the franchisor, often wants to make certain that the Commercial Leasing Act does not govern the franchise agreement as a whole. This can be ensured, as stated above, by entering into separate agreements, or the franchisor can lay down provisions in the agreement regarding various different rights and obligations, such as regarding the lease of goodwill or the lease of personal property, hence ensuring that the franchise agreement does not mostly contain provisions regarding the leasing of the real property. This should always be considered when preparing the franchise agreement.

Competition and Antitrust

In General

In a number of jurisdictions, including Denmark, competition law has received increased focus from the public and the media. As Denmark is a member of the European Union (EU), competition law in Denmark is heavily influenced by the competition rules of the EU. This influence is to

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11 Case Number U1954.592, High Court (East); Case Number U1960.749, City Court; Case Number U1962.702, High Court (West); Case Number U1970.763, Supreme Court; and Case Number U1977.748, High Court (West).

such an extent that in the *travaux preparatoires* to the Competition Act (*Konkurrenceloven*),[12] the main provisions of which are drafted *vis-à-vis* the competition provisions of the EU, it is stated that the provisions of the Act are to be interpreted in accordance with the EC Treaty.

Whereas the Competition Act deals with antitrust issues, the Marketing Practices Act deals with issues of unfair competition, thereby supplementing the Competition Act. The scope of the two Acts differs: the declared aim of the Competition Act is to ensure effective utilization of the resources of society, while the Marketing Practices Act aims at protecting the general public, consumers, and competitors from unfair behavior.

In franchise agreements, the franchisor most often wants to restrict the franchisee's freedom of operation. Although such restrictions do not necessarily imply a restriction of competition, this may be the case. Therefore, it is crucial that the parties pay due attention to competition law issues when regulating the relationship between them. As Denmark is a member of the EU, agreements entered into with effect for Denmark must be assessed in light of the EU competition law provisions as well.

Introduction to the Competition Act

Like the Treaty on the Functioning of the European Union, the Competition Act comprises two main prohibitions. Article 6 prohibits agreements restricting competition; Article 11 prohibits the abuse of a dominant position. Both prohibitions may be relevant when thinking about starting a franchise system in Denmark, although, looking at the average franchise system in Denmark, the prohibition on competition restricting agreements is probably more relevant, and will be the focus of this section.

All competition law assessments are a question of assessing what impact the agreement or behavior in question has on competition. It is only if the agreement or behavior affects competition that competition rules are used to intervene with free market forces. To assess this impact, "competition" must be defined, for which a frame of reference is needed. This frame of reference is the relevant market, both in terms of a relevant product and a relevant geographic market. In Denmark, the relevant market is for all practical purposes defined in the same way as under EU competition law.

12 Consolidated Act Number 972 of 13 August 2010.

Prohibition against Competition-Restricting Agreements

In General
The Competition Act prohibits agreements that restrict competition, irrespective of whether such agreements are restrictive of competition directly, indirectly, or by way of their object or their effect. The prohibition applies to both vertical and horizontal restrictions; however, strictly looking at the relationship between a franchisor and a franchisee in isolation, only the former is relevant.

The Danish rules differ from the EU provisions on a few points, such as the *de minimis* regulations. Pursuant to the Competition Act, the Danish prohibition only applies to agreements where the parties have an aggregated annual turnover of more than DKK 1,000,000,000 and a market share of more than ten per cent, or an aggregated turnover of more than DKK 150,000,000. This exempts many smaller franchise systems from the prohibition altogether except if the agreements comprise certain hard core restrictions, e.g., fixed retail prices, which are not covered by the *de minimis* rules at all.

Exemptions other than the *de minimis* rules also exist. In Denmark, in addition to block exemptions, the possibility of obtaining an individual exemption still exists. Agreements are exempted from the prohibition when, in spite of containing elements restricting competition and taking into consideration the pro-competitive elements of the agreement, they, in aggregate, contribute positively to competition (i.e., to an effective utilization of the resources of society).

It is characteristic that while chains where the members are centrally owned (in Denmark these are often referred to as "capital chains") may dictate the behavior of the controlled shops because these "systems" are considered to be a single economic unit, this is not so regarding so-called “voluntary chains”.

Primarily due to the vast use of voluntary chains in Denmark, a special competition law history is attached to these voluntary chains. As mentioned above, different types of voluntary chains exist. Whereas franchise systems are considered to be vertical agreements and hence benefit from the less onerous assessment of such agreements, such as the Block Exemption for

Vertical Agreements,[13] this has not been the case for voluntary chains characterized by a more horizontal organization.

The Danish legislator was well aware of the disadvantaged situation such horizontally organized voluntary chains are in, particularly when compared to capital chains. This resulted in the issuance of a Block Exemption on agreements concerning chain cooperations in the retail sector, creating a safe harbor for voluntary chains in an attempt to equalize the competition situation between these two types of chains. The Chain Cooperation Block Exemption was, however, found to be too rigid and inflexible, did not achieve its purpose, and was withdrawn in July 2005.

To ensure that the (horizontal) voluntary chains were not left in a legal vacuum, the Danish Competition Authority (*Konkurrencestyrelsen*) issued a set of Guidelines for Voluntary Chains. These Guidelines not only cover horizontal chain cooperation, but all types of voluntary chains, including franchise chains and "mixed chains" (chains comprising, for example, both fully-owned members and franchise members). Hence, Danish competition law now provides some legal guidance to franchisors when they are setting up their franchise systems. Given the broad scope of the Guidelines, they should not, however, be read too rigidly by franchisors.

Competition-Restricting Clauses
Article 6 of the Competition Act comprises a non-exhaustive list of agreements that are covered by the prohibition. This list comprises agreements that:

- Fix purchase or selling prices or any other trading conditions;
- Limit or control production, markets, technical development, or investments;
- Share markets or sources of supply;
- Apply dissimilar conditions to equivalent transactions with trading parties, thereby placing them at a competitive disadvantage;
- Make the conclusion of a contract subject to acceptance by the other party of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of the contract;

13 Government Order Number 739 of 23 June 2010 on Block Exemption for categories of vertical agreements and concerted practices. This Block Exemption is identical to Commission Regulation (EU) 330/2010 of 20 April 2010 on Vertical Agreements

- Coordinate the competitive practices by two or more undertakings through the establishment of a joint venture; or
- Determine binding resale prices, or in other ways try to make one or more trading partners not deviate from recommended resale prices.

Not all of these are relevant when looking at an agreement between a franchisor and a franchisee, but may still be relevant for a franchisor's relationship with its competitors. The interpretation of the prohibition *vis-à-vis* franchise systems has been explained by the Danish Competition Authority in its Guidelines for Voluntary Chains, discussed below.

Guidelines for Voluntary Chains
The Guidelines for Voluntary Chains are organized by first setting out a rule of thumb. Subsequent sections each list and assess a certain type of provision that is often used by voluntary chains. Naturally, the types of provisions have been selected on a pick-and-choose basis, as the Guidelines only cover a limited number of provision types. Each section is divided into a short introductory part and two sections of dos and don'ts.

The Guidelines cover provisions on advertising, the chain concept, information exchange, restrictive covenants, and related matters, and expressly indicate that they do not apply to cases of dominance. The rule of thumb indicates that the chains may freely set out requirements as to what a chain member must live up to, while limitations that restrict chain members' possibility to provide services are usually considered more problematic.

In terms of the chain concept, the Guidelines establish that requirements as to the facade of a shop, the internal decoration, furniture, and other interior design elements, as well as to the minimum level of service are almost always legal. Conversely, it is not legal to restrict chain members from providing improved service. In terms of new members, the Guidelines expressly state that there is no legal obligation for a chain to accept new members, and that it will usually be possible for a chain to give preference to existing members if a new shop is to open.

It also is legal for a chain to establish standards in terms of marketing, both in respect of the media to be used and the contents and layout of the marketing material. It is not legal, however, to restrict a member from carrying out additional marketing activities than those decided at chain level, although it will still be possible to require that such marketing is carried out pursuant to the chain standards. Generally, there are broad possibilities for exchange of information. However, information on prices may not be used as a means to ensure retail price maintenance.

Another important issue is whether it is possible for a franchisor to place requirements on the franchisee in terms of the products the franchisee may buy, and under what conditions. Following the Block Exemption on Vertical Agreements on this point, the Guidelines establish that it is possible to require that a franchisee purchases all or a major part of its products from the franchisor, or someone designated by the franchisor, for at least a five-year period, provided that the market share of the franchisor as well as the market share of the franchisee in the relevant market is below thirty per cent.

However, depending on the structure of the franchise system, it may be possible to set out such requirements for the duration of the franchise agreement, and even for a subsequent period (although this does not follow from the Guidelines). This follows from the case law of the European Court of Justice interpreting the EU competition rules, as the Competition Act must be interpreted in accordance with these rules.

Consequences of an Infringement

Agreements that infringe the prohibition against competition-restricting agreements are invalid both *inter partes* and toward a third party. The parties are subject to fines, which, under the Competition Act are less severe than under EU law, particularly in respect of vertical agreements.

Parties that have infringed the competition rules are liable for damages corresponding to the amount that the infringement may have cost. Potentially, such liability may be substantial, but, in Denmark at least, the burden of proof is rather high when seeking damages. Finally, the consequences of bad publicity in the media should not be underestimated.

Intellectual Property Rights

In General

Intellectual property rights can be defined as the right to control and take advantage of something that has been created, invented, or discovered by a creator. Some common types of intellectual property rights are copyrights, patents, utility models, designs, trade marks, and domain names.

Intellectual property rights are acceptable only within certain boundaries. This means that intellectual property rights must face some limitations, to achieve a balance between public interest and the right of the holder and/or creator. The most important of these limitations is that intellectual property often is subject to a time limit.

The purpose of a franchise project is that the franchisor will provide the franchisee with know-how concerning the business. Typically, the franchisor also will provide the franchisee with a trade mark license and with any other licenses for intellectual property rights that are used for the franchise concept in question. The granting of such rights is an essential element of a franchise project. In the following sections, the rules concerning know-how, industrial designs, trade marks, and domain names will be treated separately.

Know-How

Know-how is somewhat different from other intellectual property rights. Danish law acknowledges that know-how is an important element of a business, although know-how is not defined by statute. In general, know-how can be defined as information or knowledge on how to complete a certain business or assignment, or how to complete a certain process, or how a certain objective is achieved.

This raises the need for special treatment of this intellectual property, and know-how must first and foremost be protected by creating safeguards within a business organization or between the business and other entities, such as by using confidentiality agreements.

Even though know-how is not defined by statute, some regulations on know-how can be found in the Marketing Practices Act (*Markedsføringsloven*).[14] The Act includes specific provisions that protect trade secrets and technical drawings, and a general standard that prohibits all conduct that is not in accordance with "good marketing practices", these representing a legal standard. More detailed information regarding the relevant section of the Marketing Practices Act can be found below.

When drafting a franchise agreement, it should be considered how know-how is to be handled. Typically, a franchise agreement will contain detailed and sanctioned provisions regarding know-how, not only when the agreement is in force, but also to secure the know-how after the termination of the agreement.

Industrial Designs

One of the oldest and one of the most important intellectual property rights is copyright. This also is the case when dealing with franchise agreements, because a copyright may exist, for example, on the menu card, advertising material, operation manuals, or software. Danish practice in this area is

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14 Consolidated Act Number 839 of 31 August 2009 on Marketing Practices.

fairly liberal regarding the granting of protection under the Copyright Act (*Ophavsretsloven*)[15] for works of applied art, for example, in the case of furniture, lamps, and the like. However, the scope of protection for works of applied art is limited, compared to the protection for aesthetic art.

Works of applied art also may be protected under the Design Act (*Designloven*),[16] and there may therefore be overlaps between the two Acts in the area of industrial designs. The Design Act is almost identical to the European Directive on the protection of designs.[17]

Under Danish law, protection under the Design Act does not exclude protection under the Copyright Act. However, protection under these two Acts is limited to the product's appearance, and it does not protect the "technical idea" of the product. Protection of the product's "technical idea" is found in the Patent Act (*Patentloven*)[18] and the Utility Models Act (*Brugsmodelloven*).[19]

The Patent Act is based on the traditional and generally accepted principles of European patent laws. This applies to the formal procedures as well as to conditions for obtaining patents and the rules of the legal effect of a patent. The Danish system regarding utility models is inspired by German law and supplements the patent system. A utility model is commonly known as "the small patent".

According to the Act on Employee's Inventions (*Lov om arbejdstageres opfindelser*),[20] inventions and creations covered by the Patent Act and the Utility Models Act are the property of the employee from the outset, in the event that such inventions are produced in the course of the employee's normal duties.

On the other hand, the Act on Employee Inventions entitles the employer to request that ownership of such inventions is transferred to the employer by payment of a fair compensation to the employee. Payment of this compensation is limited, as compensation should not be paid if the value of the invention is within what could reasonably be expected from the employee in return for his salary.

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15 Consolidated Act Number 202 of 27 February 2010 on Copyright.
16 Consolidated Act Number 89 of 28 January 2009 on Design.
17 Directive 98/71/EC of 13 October 1998 on protection of designs.
18 Consolidated Act Number 91 of 28 January 2009 on Patents.
19 Consolidated Act Number 88 of 28 January 2009 on Utility Models.
20 Consolidated Act Number 131 of 18 March 1986 on Employee's Inventions.

Trade Marks

Overall, there are two different methods of obtaining trade mark protection in Denmark. A trade mark may be obtained by filing a trade mark application, or through use of particular characteristics in the course of trade. Because of the certainty of having a trade mark registered rather than only using it in the course of trade, most Danish trade marks are registered either as an EU Community trade mark or as a trade mark obtained under the Trade Mark Act (*Varemærkeloven*).[21]

The Trade Mark Act was initially amended to incorporate EC legislation on trade marks, the First Directive on trade marks.[22] The Trade Mark Act is, with a few exceptions, identical to the EC legislation. The appropriate government authority is the Patent and Trade Mark Office. A trade mark can be any symbol that distinguishes a product or service from others. Trade marks can be words, phrases, letters, animations, audio marks, figures, packaging, or other such distinguishing features.

The application for a trade mark may be filed by any individual or legal entity. Being a Danish national or having a Danish branch are not conditions for the registration of a trade mark. However, appointment of a Danish agent is expedient in relation to the registration of a trade mark, as all material submitted to the Patent and Trade Mark Office must be in Danish. A written proxy may only rarely be needed to document the appointment of the agent.

The application must contain a reproduction of the mark, information about the applicant (holder), information about the applicant's agent (if appointed), and specification of the goods and services for which the trade mark application is submitted, in accordance with the Nice Agreement.

On receipt of an application for a trade mark, the Patent and Trade Mark Office will examine whether the trade mark complies with registration conditions (e.g., whether the mark lacks distinctiveness or is misleading). If the mark is confusingly similar to an existing registered trade mark, a trade mark application, a company name, or the name of a person, the applicant will be notified of these existing rights.

The applicant may then choose to make limitations to the application, or simply let the Patent and Trade Mark Office register the trade mark

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21 Consolidated Act Number 90 of 28 January 2009 on Trade Marks.

22 Directive 89/104/EEC of 21 December 1988 to approximate the laws of the member States relating to trade marks.

anyway. The application fee is currently DKK 2,350 (approximately EUR 315), for registration in three classes of goods and services, and an additional fee of DKK 600 (approximately EUR 80) for each extra class applied for.

After examination, the registration of the trade mark will be published in the *Danish Trade Mark Gazette*. However, the registration procedure is not over until any and all eventual oppositions have been decided on. Any opposition to the registration must be filed within two months after the publication. In the event that the Patent and Trade Mark Office deems that a trade mark does not comply with the registration conditions, it will refuse a registration or terminate a registration based on an opposition.

A trade mark registration also may be terminated in the event that the trade mark has become a common designation of the concerned product or service. However, it is a condition for the termination of the trade mark registration that either the holder of the trade mark has remained passive to the common use of the trade mark, or that the trade mark has become a common designation of the concerned product or service because of the trade mark holder's activities.

The protection period for a registered trade mark is ten years from the registration date, and the registration is renewable without limitations on payment of an official fee, which is equal to the application fee. To uphold the exclusive right, a trade mark owner must exploit the trade mark. The exploitation of the trade mark does not need to be carried out by the owner, but also can be carried out by a licensee or a franchisee. In either case, the trade mark must be used within five years from the conclusion of the registration procedure.

The exploitation of the trade mark must be an actual effort to sell or provide goods or services under the trade mark. As mentioned above, if the rights to the trade mark have been transferred to a person who makes actual use of the trade mark (e.g., to a franchisee), this will be sufficient to fulfill the requirement of use.

If the trade mark has not been used for five years, the registration (and protection) may lapse, and cannot be invoked against third parties claiming a lack of use of the mark. However, there must be a request from a third party. The Patent and Trade Mark Office will not initiate deregistration on its own. Trade marks established through use in the course of trade remain in force until the use permanently ceases. On the other hand, such trade marks must be used continuously. If the trade mark holder fails to do so, the trade mark will be lost.

A trade mark license can be granted by the trade mark holder to any individual or legal entity. With reference to the principle of freedom of contract, there are no specific restrictions on the granting of licenses. The parties are, therefore, free to agree on the specific conditions for the use of the trade mark (e.g., whether it is an exclusive right, whether it requires the payment of royalty, who has the right and obligation to take action against infringements, duration of license, termination of the right to use the trade mark, and similar conditions).

Any infringement of a trade mark may be prevented through injunctions, penalties, and claims for compensation and damages. Furthermore, the courts may rule that steps will be taken to prevent infringements, if necessary, by removing the trade mark from the goods or by destroying the goods that carry the trade mark. A foreign trade mark holder, who has a Community trade mark or an international trade mark designating Denmark, also can use the above-mentioned remedies in case of infringement.

A holder of a foreign trade mark has limited protection in Denmark. However, a foreign trade mark, which is "well-known" in Denmark as interpreted under the Paris Convention,[23] will be protected in Denmark as well. The holder of a foreign trade mark in a country that is a party to the Paris Convention or a member of the World Trade Organization (WTO) may, when applying for a Danish trade mark, claim priority within six months after the filing of the first application for the foreign trade mark.

Domain Rights

Domain rights regarding the top-level domain in Denmark (.dk) are regulated through the Act on Internet Domains.[24] The Act introduced a provision that states that Internet domains must be registered and used in accordance with good domain name practices. The closer content of this rule will be laid down by the Complaints Board and the courts. The rule is often used with great effect against "domain pirates", which makes it easy to deal with such disloyal registrations.

The right to a certain domain name is obtained through the Danish public limited company DK Hostmaster A/S. The company administers the rules regarding the top-level domain, .dk. The right to a domain name is acquired

23 Paris Convention for the Protection of Industrial Property of 20 March 1883. Denmark is a signatory to the Convention.

24 Act Number 598 of 24 June 2005 on Domain Names.

on a first-come, first-served basis, and only through a written application via a registrar. A registrar can either be an individual or a legal entity that has been approved by DK Hostmaster A/S to register domain names.

The domain holder can be any individual or legal entity. The right to a domain name may be transferred to any third party. However, the parties must advise DK Hostmaster A/S about the transfer, in writing. Typically, the franchisor acquires and administers relevant domain names. In any case, the rights and obligations concerning domain names should be dealt with in the franchise agreement, such as the right to a domain name registered by a franchisee.

Any disputes between two parties can be solved easily through the Complaints Board for Domain Names (*Klagenævnet* for *Domænenavne*) with payment of a fee of DKK 500. However, the Complaints Board for Domain Names can only decide on issues regarding the transfer, suspension, or deletion of domain names.

The Complaints Board has no authority to rule compensation or remuneration disputes. These issues must be resolved through the Danish courts. The Complaints Board is highly competent and currently consists of a Supreme Court judge as chairman, a High Court judge as deputy chairman, and eminent legal experts within the field of intellectual property rights.

Marketing Practices Act

The Marketing Practices Act (*Markedsføringsloven*)[25] sets the framework within which businesses are obligated to conduct their affairs. The overall purpose of the Act is to ensure that businesses are operated in a reasonable and fair manner with regards to competitors, other businesses, consumers, and general public interest.

One of the most important rules in the Marketing Practices Act is the general clause, which states that businesses must exercise "fair marketing practice". This represents a legal standard that evolves over time, and its content is laid down by the courts. The general clause is, and will be, receptive for what is, at any time, considered to be acceptable in business life.

The general clause is often referred to in cases regarding intellectual property, such as in cases concerning trade mark rights, or cases

25 Consolidated Act Number 839 of 31 August 2009 on Marketing Practices.

concerning copyright. However, the field of application is much wider, which means that the general clause also may be referred to in cases of misrepresentation to consumers.

The Marketing Practices Act also contains specific provisions that protect business characteristics, trade secrets, and technical drawings. The provision that protects business characteristics is often referred to as "the small general clause", by which it is implied that the provision has a general field of application for miscellaneous forms of characteristics.

For instance, the provision may protect a business characteristic that is not, for whatever reason, protected as a trade mark. The provision that protects trade secrets and technical drawings is based on the presumption that there is a service or cooperative relationship between a possible infringer and a possible aggrieved party. Industrial espionage is not governed by this provision, but is governed by the Penal Code.

The Danish Consumer Ombudsman (*Forbrugerombudsmanden*) regularly issues guidelines and guidance on specific topics covered by the Marketing Practices Act. On 1 March 2010, he announced his updated guidelines on price marketing, including saving announcements.

In relation to chain operations and thus franchising, a special provision applies (in addition to the general provisions on savings and the use of promotional announcements). If the sales prices differ between the stores within the chain, it must appear from the general marketing in television, brochures, and catalogues when a saving announcement is marketed. Thus, all marketing material produced by the franchisor must explicitly state a "saving announcement gap", e.g., "Save €50 – €75", "Save up to €50", and similar announcements, provided that not all franchisees sell the product/service at the same price. Furthermore, if the marketing material refers to a guideline price, such price may only be referred to if a representative cross-section of the franchisees sells the product/service to said price.

Infringements of the Marketing Practices Act are, however, most often opposed by competitors through preliminary injunctions or lawsuits. Typically, the sanctions are prohibitions against continuing the infringing actions, and payment of damages to cover losses suffered. However, in case of infringement of the Act, especially if the infringements concern actions against consumers, the Danish Consumer Ombudsman also can bring a case before the courts. In some cases, the Consumers' Ombudsman also may place a preliminary injunction on possible infringers, if it is deemed necessary.

Product Liability

In General

Product liability is a generic term used for claims that arise when a product causes damage to a person or property. Under Danish law, two bases of product liability exist.

First, there is the Product Liability Act (*Produktansvarsloven*),[26] which mainly incorporates the EU Directive of 25 July 1985 on product liability. Second, before the implementation of the EU Directive, the regulation of product liability under Danish law was governed by case law, which still applies as an alternative basis for liability. This means that rules may still be developed under case law.

This two-way regulation gives a claimant alleging that a product or goods distributed resulted in damage a ground for his claim on either or both of the above bases of liability. To avoid uncertainties, this is stated explicitly in the Product Liability Act.

Product Liability in Case Law

Under Danish case law, a "product" means any item or performance that can be placed in production, sale, or use. This includes personal property, but services and real property also are included. If such a product causes damage to other property or causes personal injury, any manufacturers, distributors, or sellers of that product are liable, on the basis of negligence, for the damage so caused.

Any link in the commercial supply chain is liable toward the end user, be that a consumer or another business operator, even if no negligence on their part may be established. This enables the consumer to assert his claims against any link in the commercial supply chain.

Product Liability Act

In contrast to case law, under the Product Liability Act, the manufacturer of goods is only liable if the concerned goods are sold for non-commercial use and used mainly for non-commercial purposes. Goods include real property and animals as well. However, the Act excludes liability on the defective product itself.

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26 Consolidated Act Number 261 of 20 March 2007 on Product Liability.

When determining the overall damages, an amount of DKK 4,000 is deducted. If the defective product causes damage to several things in the same event, only DKK 4,000 is deducted for all the damages.

Liability for Suppliers

According to the Product Liability Act, any supplier is subject to the same product liability as the manufacturer of the goods. This means that a supplier may be held liable for product liability either directly by the claimant, or indirectly, as liable toward later suppliers, although this depends on whether the parties are manufacturers or not.

If one of the parties, most likely the franchisee, has had to pay damages to the claimant, the party in question cannot validly be barred from directing a claim in recourse toward the next level of the distribution chain, or toward the manufacturer. Still, as implied in the Product Liability Act, in case both the franchisee and the franchisor are manufacturers, they may make provisions in the franchise agreement as to how product liability should be distributed between them.

Thus, the recourse between two manufacturers may, as a starting point, be validly determined by the parties' own agreement. The rule that a disclaimer may not be invoked in the face of the disclaiming party's own gross negligence or intent still applies, as does the general rule of Danish contract law but, in the end, it will be the parties' bargaining position that will tend to determine the issue.

Regardless of what is stated above, the franchise agreement may provide, for example, that the franchisee will insert provisions in its general conditions that, to the greatest possible extent, disclaim the product liability toward the franchisee's buyer/user. To what extent this may be done depends on which basis for product liability is in question.

If the basis for liability is the product liability as developed in case law, the franchisee may disclaim liability toward the end user as long as this is not contrary to case law. Provided that the disclaimer is sufficiently clear and has become a part of the parties' contract, a disclaimer is generally valid. However, there is firm case law according to which a disclaimer may not be invoked in case the party invoking it has caused the damage by acting intentionally or with gross negligence.

On the other hand, if the basis for liability is the Product Liability Act, no agreement to the detriment of the claimant may be validly entered into in advance, so a disclaimer will be ineffective.

As a final point of caution when entering into a franchise agreement, the parties would always be well-advised to consider inserting provisions governing lawsuits by third parties (e.g., whether one of the parties sued by a third party on the basis of a claim for product liability would have the right to bring the other party into the proceedings with the third party).

Taxation

Danish legislation regarding taxation is extensive and detailed, but also is supplemented by extensive case law and administrative practice. Besides, the legislation is often changed and amended. This requires that any transaction must be construed carefully to prevent inexpedient consequences. The corporate tax rate is twenty-five per cent and corporate taxes must be paid on account.

Overall, the tax system distinguishes between full tax liability and limited tax liability. Taxpayers that are subject to full tax liability are liable to Danish taxation on their worldwide income. A company that is obligated to register with the Danish Commerce and Companies Agency is subject to full tax liability. However, a company also is subject to full tax liability if the company has its head office in Denmark.

For that matter, it may be difficult to determine whether or not a company has its head office in Denmark or in another country. Normally, the decisive element is where the company's daily decisions are made. Principles for this assessment can be found in the Organization for Economic Cooperation and Development (OECD) Model Treaty.

This way of establishing full tax liability may result in a taxpayer being liable for taxes on the same income in Denmark and abroad. The solution to this well-known double-taxation problem is addressed by the more than seventy-nine bilateral tax treaties to which Denmark is a party.

Taxpayers that are subject to limited tax liability are liable to Danish taxation in respect of income and gains deriving from certain sources in Denmark. This includes royalties, such as those from franchisees in Denmark. Basically, a Danish company is liable for the difference between all its gross revenues and all its deductible expenses. Expenses are deductible if they are used to "obtain, secure, and maintain" the company's income. Expenses also might be deductible according to the Tax Assessment Act (*Ligningsloven*),[27] which contains specific provisions allowing the taxpayer to deduct certain expenses.

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27 Consolidated Act Number 1061 of 29 November 2010 on Tax Assessment.

Pursuant to the Act on Depreciation (*Afskrivningsloven*),[28] taxpayers also are allowed to depreciate their assets. This includes depreciation on certain commercial buildings, movable property, and intellectual property rights. Furthermore, the Act on Depreciation includes provisions that allow the depreciation of certain lump sums paid in respect of goodwill and similar intangible assets. This enables a franchisee to depreciate such lump sums paid at the time of entering into the franchise agreement. When dealing with the Danish tax system, the various expenses, whether paid as lump sums or current expenses, must always be evaluated one by one.

Ethical standards of franchising

Besides the different laws applicable to franchising, the franchisor and franchisee might want to comply with certain ethical standards. In this regard the Danish Franchise Association has issued a code of ethics, based on the European Code of Ethics for Franchising as adopted by the European Franchise Federation (EFF).

Such code of ethics is by nature not legally binding; however, membership of the Danish Franchise Association is conditional on the franchisor's willingness to comply with these rules and guidelines.

The code provides ethical standards regarding different aspects of the franchise system. Among others standards concerning the recruitment of franchisees, the initial phase of the franchise, the ongoing relationship between the parties and certain minimum terms of franchise agreement.

The code consists of conditions of both general and specific character.

As an overall guidance the code stipulates that franchisor and the franchisee shall exercise fairness in their dealings with each other. In relation to potential complaints and disputes it is prescribed that they should be resolved in good faith and through fair and reasonable direct communication and negotiation.

More specific it is stipulated that the franchisor must have operated the business concept with progress, and with at least one "pilot store" (or pilot unit), for a reasonable time prior to establishing the franchise system. Further, the franchisor should provide the franchisee with training in the initial phase of the franchise and provide continued commercial and technical assistance. As regards the individual franchisee he must supply the franchisor with verifiable operating data, keep confidential information

28 Consolidated Act Number 1191 of 11 October 2007 on Depreciation.

about know-how and devote his full working effort to generate growth in the franchise and to the maintenance of the common identity and reputation of the franchise network.

Finally, the code requires that the franchise agreement between the franchisor and its franchisee is written in Danish, reflects the parties' interests and contains essential manadatory terms. The purpose of the mandatory terms is to prevent and resolve conflicts during the ongoing relationship and in case of termination of the franchise agreement. As examples of such minimum terms, the agreement must contain provisions regarding:

- the parties' rights and obligations;
- the payment by the franchisee;
- the duration of the agreement;
- the franchisee's right to use the franchisor's trademarks, business name etc.;
- services and goods covered by the franchisee and
- termination of the agreement

Besides the consideration for the individual franchise system, the purpose of having a code of ethics is among others to prevent restrictive legislation on the area and encourage fair behaviour for franchise practitioners in general.

It is noticed that the code of ethics only applies in the relationship between the franchisor and its individual franchisee and between a potential master franchisee and its individual franchisee. The code does not apply to the relationship between the franchisor and its potential master franchisee.

Certification of the franchise system
The Danish Franchise Association provides various certification services of its members' franchise systems. Such certification consists of several parts: legal, financial,commercial and ethical.

The certification is expected to be a seal of approval of the franchise system and enhance the franchisor's and its franchisees' position in raising finance and finding business partners in general.

Further, especially the legal part of the certification aims to encourage internal stability, as it is ensured that the basis of the franchise is made in compliance with Danish and European legal requirements and meets the

ethical standards. In general the parties may be able to focus on the business solely, instead of being concerned about the underlying agreement.

It is noticed that a certification is not a legal requirement and an issued certification does not entail a warranty of any kind.

The legal certification
Given that there is no franchise law in Denmark the franchise agreement may play an even more important role as the mere basis of the franchise system. In this regard the certification is to be considered as an acceptance of the franchise on certain parameters and may strengthen the credibility of the franchise. This part of the certification is conducted by a legal advisor authorized by the Danish Franchise Association.

The certification encompasses an assessment of whether the franchise agreement is in compliance with mandatory Danish and European legislation as well as the Code of Ethics. In relation to franchise systems especially competition law issues may arise; this could be regarding the validity of non-competition clauses and fixed resale prices. Other issues could be in relation to general contract law and custom. Above is a non-exhaustive review of laws applicable to franchising in Denmark.

As regards the expediency of the agreement, the legal part of the certification assess if the agreement meets the ethical standards. As described above, the ethical standards contains certain mandatory terms of the franchise agreement. In addition to these mandatory terms, the franchise agreement should deal with some of the most important issues which might arise during the life span of the franchise. However, every franchise system is unique and the franchise agreement should – besides the mandatory terms – be customised in accordance with the the parties' specific needs.

The financial certification
The focus of financial certification is an assessment of the financial strength and prospects of the franchise system. This is made by an accountant and is based on annual reports, budgets, sources and needs of financing etc.

The commercial part of the certification is conducted by Vækstfonden[29] and focucses on the commercial outlet and potential of the franchise system.

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29 Vækstfonden is a state investment fund which aims to create new growth companies by providing venture capital and competence.

This assessment is among other based on the concept as such, business plans, prior development and outlook of the business.

The financial certification will also include a limited legal assessment of the legality of the franchise system and compliance with ethical standards.

Forum, Choice of Law, and Enforcement of Foreign Judgments and Arbitral Awards

In General

When dealing with international commercial activities, the issues of choice of forum and applicable law should always be considered. Franchise contracts are, of course, no exception, and provisions dealing with these issues should always be inserted (or at least reflected on) in a franchise contract.

In the event that the parties, for whatever reason, choose not to insert any provisions, the Danish rules on venue and choice of law apply. The statutory regulations on these points are contained in the Administration of Justice Act (*Retsplejeloven*),[30] the Brussels Convention and the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, the Rome Convention on the law applicable to contractual obligations, and the Hague Convention relating to uniform law on the international sale of goods.

Choice of Forum

Overall, when entering into a contract, the parties have two options regarding choice of forum. First, the parties may agree that any disputes should be dealt with by an arbitral tribunal. This means that the parties can decline the court's jurisdiction. Second, the parties may, instead, decide that any disputes should be settled by the courts. In this case, the parties can decide in which country the matter should be judged and, to some extent, the parties may decide on which court should have jurisdiction in that specific country.

In the event that the parties decide on an arbitral tribunal, even though Danish law does not require that jurisdiction or arbitral agreements satisfy any formal criteria, there is still a requirement for a clear agreement to arbitrate between the parties, entailing both that the clause or agreement should clearly become a part of the parties' contract according to the rules of formation of contracts, and that the content of the clause or agreement

30 Consolidated Act Number 1053 of 29 October 2009 on Administration of Justice.

should be clear. This means that arbitration agreements should always be in writing, as an oral or implied agreement to arbitrate is unlikely to be accepted by the Danish courts in the event that a party opposes that an agreement to arbitrate has been made.

Besides this, and as mentioned above, there are no formal requirements for jurisdiction or arbitral agreements, which is in keeping with the general informality of Danish law on the formations of contracts. However, if a jurisdiction clause is opted for, jurisdiction clauses within the scope of application of the Brussels and Lugano conventions on jurisdiction and the enforcement of judgments in civil and commercial matters must satisfy the requirements of these conventions.

Choice of Law

In Denmark, the choice of law regarding contractual obligations is governed by the Rome Convention on the law applicable to contractual obligations and the Hague Convention relating to uniform law on the international sale of goods.

The parties will be at liberty to determine which law should govern their disputes, in accordance with the relevant convention. If they do not make such a choice, the rules of the applicable convention will determine the matter. If the matter is to be determined by the Rome Convention, the applicable law would be that of the place with which the contract is (presumably) most closely connected. If the matter is determined by the Hague Convention, the general rule is that the applicable law would be that of the place where the seller has his residence.

Enforcement of Foreign Judgments and Arbitral Awards

A foreign judgment is neither binding nor enforceable in Denmark. A party that seeks to enforce a foreign judgment in Denmark must initiate a new proceeding before a Danish court. In such a proceeding, the courts will tend to accept the foreign judgment, but the court may, at its own discretion, try the whole subject matter again. The court will do so if given reason to assume either that minimum standards of procedural fairness have not been maintained in the foreign legal proceedings, or that errors of substance have been committed.

There are, of course, exceptions to the courts' discretion in accepting foreign judgments. One of those exceptions is that all judgments given in EU member states and European Free Trade Association (EFTA) states are recognized and/or enforced in Denmark without the need to initiate new proceedings before a Danish court. This is governed by the Brussels and Lugano conventions on jurisdiction and the enforcement of judgments in

civil and commercial matters, which provide authority to recognize and enforce judgments given in states that are party to those conventions.

Foreign arbitral awards are recognized as binding on the parties and are, as a rule, enforceable in Denmark under the Arbitration Act, which incorporates the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention of 1958).

As all these rules are rules of procedure, the parties to a franchise agreement cannot, by prior agreement, bring about the recognition in Denmark of a judgment to a greater extent than what is stated above. However, in case a foreign judgment has been given, the parties may subsequently make an out-of-court settlement on the terms given in the judgment. This settlement will then be enforceable before the Danish courts. However, for obvious reasons, this option will not always be realistic.

Amendment of the Administration of Justice Act

As of 1 January 2007, the Administration of Justice Act was amended. The amendment was one the largest in Danish legal history in recent years. Some of the changes in the Administration of Justice Act concern the initiation of legal proceedings. Thus, since 1 January 2007, almost all legal proceedings must be filed at the district courts. If the case concerns a principal matter, the district court may choose to refer the case to the High Court.

However, in some cases, the district court also may choose to rule on the matter with the participation of three legal judges instead of the usual one judge. Cases concerning intellectual property rights, such as patents, utility models, designs, and trade marks can be filed with the Danish Maritime and Commercial Court. However, cases concerning copyrights must be filed with the District Court.

Legal proceedings will be handled more easily and faster by courts when the claim is no more than DKK 50,000 (approximately EUR 6,750). The district courts will achieve this purpose by preparing most of the case. This means that such cases can be brought to court without the need for a lawyer, as the court will guide and control the parties. However, a party may still choose to be represented by a lawyer.

In cases where both parties are businesses, it will be possible to waive the right to appeal even before any dispute has arisen. This rule has been inspired by the rule under arbitration, and its purpose is to attract some of the cases in which the parties normally would agree on having the dispute

settled by arbitration. Furthermore, the Act provides, to some extent, the possibility of holding court meetings through video conferencing or teleconferencing.

Conclusion

Denmark's retail market is organized on a variety of business models. While a relatively small number of major companies own large retail chains, there also are a number of companies that run voluntary chains, giving individual establishments some measure of control over their business operations. Franchising is considered to be one such business model.

There is no specific law regulating franchises in Denmark, and a franchise contract is regulated by general rules of law. The Contracts Act regulates the formation and validity of a franchise agreement. It provides the parties with an unfettered freedom to determine their rights and obligations, which may only be invalidated if unfair or contrary to honest conduct.

The Guidelines for Voluntary Chains cover franchise chains and provide provisions on advertising, information exchange, restrictive clauses, and similar matters. Laws that also may apply to franchises include the Competition Act, the Marketing Practices Act, the Commercial Leasing Act, the Trade Marks Act, other laws for the protection of intellectual property, and the Product Liability Act, among others. The Danish Franchise Association also has its ethical rules and guidelines, which are based on the European Code of Ethics for franchising.

To obtain a seal of approval of the franchise, the franchisor may apply for a financial certification of the franchise system. It is probable that such certification enhances both the franchisors and its franchisees' opportunities in raising finance; finding business partners in general and creates inernal stability.

Franchises in Denmark are experiencing growth, not only with foreign franchisors coming to Denmark, but also with existing companies using this business model to expand in the market. Franchising is used as a business model for all varieties of products, from fast food, clothing, and show stores to furniture, opticians and kitchen goods stores. Danish companies have used the franchise model to expand internationally, as well.

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