National legislation in collision with franchising or The Swedish Franchise Disclosure Act – total failure or total success?*

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The modern form of franchising – business format franchising – has its origin in the USA in the 1850s when two companies, Singer Sewing Machine Company on the business-to-consumer market and McCormick Harvesting Machine Company on the business-to-business market, first established the business model.[1] It soon spread to other business sectors, such as cars, soft drinks, hotels, and fast food. The business model also spread to other countries, appearing in my country (Sweden) as early as 1933.[2] Franchising is without national boundaries and soon became known as a perfect vehicle for international expansion. Neither the word "franchising" nor a description of the business model could be found in any law anywhere in the world before 1971.

The first law on franchising was the California Franchise Investment Law (CFIL), which came into force in the state of California in the USA in 1971.[3] The law was enacted by the California State Legislature already in 1970 as the California Franchise Investment Act, but this was repealed and replaced by the CFIL in 1975. The reason for the structure of the law as a prospectus law and its placement in the legal structure as an investment law

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1 T.S. Dicke (1991) *Franchising in the American Economy 1840–1980*, p. 12–57.

2 STF Svenska Turistföreningen's yearbook 1934.

3 CORP, sections 31000–31516.

was the increasing number of fraud cases related to franchising that was seen in California. The law was a disclosure law, i.e., it required pre-contractual disclosure of important issues related to the contractual relationship, with the aim to educate the investor, i.e., the potential franchisee, regarding what they were about to invest in. The state law CFIL served as a guideline for the federal law called the FTC Rule, which was enacted in 1979.[4]

Once the USA had a federal law governing how franchise offers should be presented to prospective franchisees, the world started to react. The EU created a Block Exemption Regulation regarding franchise agreements (FBER) in 1988, France enacted the "Loi Doubin" in 1989, and in the 1990s, 12 countries enacted specific franchise laws.[5] Currently, there are 46 countries around the world with specific franchise laws. Most of them are disclosure laws, but some are relationship laws or combined laws.

Some countries have had political discussions regarding the necessity of having specific franchise laws and concluded that their general contract law and competition law can apply to franchising activities as well. Germany is one such country, where pre-contractual disclosure and good faith are required in general terms in contract law and the need for specific laws regarding these issues in franchise activities is therefore considered to be limited.[6] Case law from Germany has also shown that the general laws are sufficient to handle the cases in a way similar to how specific franchise laws handle them where such laws are applicable.[7]

Is the development with national franchise laws desirable?

As franchising is an international – or even transnational – business model, it is confusing and somewhat disturbing for businesspeople that some countries apply general laws while other countries apply specific laws when dealing with the same issues in cases regarding franchising. Even among the countries with specific laws, there are so many different approaches and even

4 Section 5 of the Federal Trade Commission Act (FTC Act) (15 USC 45).

5 Commission Regulation (EEC) No 4087/88 and Law no. 89-1008 of 31 December 1989.

6 Bürgerliches Gesetzbuch, sections 311 and 242.

7 OLG Hamm, 22.12.2011 – I-19 U 35/10 and OLG Düsseldorf, 25.10.2013 – I-22 U 62/13.

different issues regulated in these laws, that friction arises for the franchisor with business covering more than one jurisdiction.[8]

If all countries had had a common template for franchise laws, franchising could be used as a business model all around the world without implementation problems. With this idea as a guiding light, UNIDROIT conducted a study in 1986–2002 which led to the UNIDROIT Model Franchise Disclosure Law.

> "The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental Organisation with its seat in the Villa Aldobrandini in Rome. Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles, and rules to achieve those objectives."[9]

UNIDROIT gathered experts on franchise-related law from all around the world, both practicing lawyers and academics. The scope of the project was (a) to investigate and summarize if franchising is perceived in the same manner all around the world and (b) to investigate if the laws regarding international franchising could be unified. Each part of the full study is well documented on UNIDROIT's webpage.[10]

Ahead of the presentation of the final result, it was obvious that not all members of the Study Group agreed on presenting a model law. Among those against legislation were groups that preferred self-regulation. There were also pragmatists who believed that a model law was in any case better than individual countries enacting their own laws without a well-thought-out template. One member of the Study Group, Mr. Phil Zeidman, general counsel of the International Franchise Association, submitted a proposal for amendment of the implementing regulations that were to come. The purpose of the amendment was to make legislators at the national level aware that a number of questions must be answered before commencing legislative work. The amendment was presented in Study LXVIII – Doc. 23 and reads as follows:

[8] In the study I published in my Ph.D. dissertation (Fernlund – *Friction between transnational business models and national legislation*), I identified 23 issues that were differently legislated in the 36 different countries included.

[9] www.unidroit.org – visited September 25, 2023.

[10] www.unidroit.org/studies/franchising/ – visited October 2, 2023.

"A national government considering the adoption of franchise legislation may wish to consider these questions –

- Is it clear that there is a problem; that its nature is known and understood; and that some action is necessary?
- Is the evidence of abuse empirical, or only anecdotal?
- Is there any pattern of widespread abusive conduct, or is it isolated or limited to particular industries?
- Do existing laws address the concerns? Are they adequate?
- Does a system of self-regulation exist? If not, should it not be tried before governmental intervention/is considered?
- Is there a risk that, in the legislative process, even more onerous and harmful provisions will be appended to any proposal?
- Have the views of the national franchising association been sought?
- Have any analyses been made of –
  - The financial burden the new legislation will impose on franchisors? Of how that will be passed on in additional costs to franchisees? In turn, to consumers?
  - How much of a barrier to entry it will represent to small and new franchisors?
  - The effect on jobs which would have been created by plans for franchising which will be abandoned?
  - The negative effect on foreign franchisors considering entering the country?"

The final result of the UNIDROIT study on franchising was presented in 2002 as Draft Articles for a Model Franchise Disclosure Law with a Draft Explanatory Report.[11]

Legislative studies

Within the field of legal philosophy there is an area called legislative studies focusing, inter alia, on legislatures, their functioning, and their processes. A well-known profile in this group of legal philosophers is Grant Thornton, who created a five-step model concerning the legislative process.[12] The steps – (1) *"understanding the proposal,"* (2) "*analyzing the proposal,*" (3) "*designing the law,*" (4) "*composing and developing the draft,*" and (5) "*verifying the*

[11] Study LXVII – Doc. 48.

[12] Xanthaki, Helen, *Drafting Legislation – art and technology of rules for regulation*, Hart Publishing Ltd, Oxford, UK, 2014, p. 21.

draft" – help legislatures consider all aspects during the process of creating a new law. Already *understanding the proposal* requires a description of a problem and a suggestion of a solution. As the proposal may originate from the "floor," i.e., from members of parliament, the description may not always be as clear as when a proposal is given by the government. Without an established problem, there would be no reason to proceed with either an investigation or a bill, which can be summarized in the well-known expression: *If it ain't broke, don't fix it*.[13] During the second stage, the legislators need to analyze the proposal to understand if legislation is the only, or the best, way to solve the problem. This investigation should include self-regulation as a possible solution. In the third stage, the legislators have to decide if amendments to an existing law would be sufficient or if a new law is the only solution. The fourth stage is focused on the characteristics of the end product, such as clarity, precision, unambiguity, and simplicity.[14] The final stage, *verifying the draft*, encompasses both internal and external verification. Before introducing a new law, the legislator needs to know if the proposed law is in line with the original proposal, if it encompasses the entire problem and if it serves a solution; in short: if it is adequate. In Sweden, a special governmental authority called *Lagrådet* will verify important legislative proposals and, among other things, determine whether a proposal is designed so that the law can be adopted to satisfy the purposes that have been stated, and what problems may arise in such application.

The theory described above has been interpreted in so-called *Drafting Instructions* in various countries.[15] Some supranational bodies such as the Organization for Economic Co-operation and Development (OECD) and the European Union (EU) have also adopted these legislative theories and interpreted them in their own guiding principles.[16] In the following analysis of the Swedish Franchise Disclosure Act, I will return to these Drafting Instructions and the necessity of dealing with drafting legislation in a more academic way.

[13] Attributed to T. Bert Lance, Secretary of the Budget in the Jimmy Carter administration in 1977, in a US Chamber of Commerce newsletter, Nation's Business, May 1977.

[14] Xanthaki, p. 85.

[15] See §§ 14–15 the Swedish Ordinance (1996:1515) with instructions for the Government Office (Förordning med instruktion för Regeringskansliet) and A Guide to Legislation and Legislative Process in British Colombia.

[16] OECD guiding principles for regulatory quality and performance and EU – Better Regulation Guidelines.

The birth of the Swedish Franchise Disclosure Act

The history of the Swedish Franchise Disclosure began in 1982 when a Swedish Member of Parliament (MP) made a parliamentary motion for the investigation of franchising as a business model.[17] The MP, Mr. Stig Gustafsson, the former general counsel of TCO (the Confederation of Professional Employees; Swedish: *Tjänstemännens Centralorganisation*), considered franchising to violate the labor laws passed during the 1970s. The motion questioned whether a franchisee should be considered an independent entrepreneur, a dependent contractor, or an employee. The Parliament decided to set up an investigation and appointed Mr. Stig Gustafsson as the sole investigator. Many actors within the Swedish franchise business reacted to this appointment, as an objective investigation would probably be impossible with a biased investigator at the helm. The investigation was presented in a report entitled *Franchising*, which contained a proposed law.[18] The report was heavily criticized because of the labor law influence in the legislative proposal. The proposal was dismissed a few years later.

In the 1990s, the legal focus within franchise legislation was on the FBER.[19] As Sweden became a member of the European Union in 1995, the Swedish Competition Law was amended to align with the EU competition rules. In connection with this, the FBER was adopted and converted into a national law, with the country as the territory and references to the Rome Treaty changed to references to the national competition act.[20]

MPs from the same grouping that started the battle against franchising restarted the flow of parliamentary motions connected to franchising in the beginning of the 21st century. The nature of the motions changed from labor law to contract law and marketing law. The MPs referred to the UNIDROIT Model Franchise Disclosure Law that was soon to be presented and suggested a new investigation. The Parliament concurred and appointed a senior appellate court judge, Mr. Gudmund Toijer, as a sole investigator.[21] The investigation was presented in a governmental report in 2004 entitled *Enlightened franchising* (Sw. *Upplyst franchising*).[22] The investigation advised against a

17 Parliamentary motion 1982/83:2016 (S).
18 Swedish Government Official Reports SOU 1987:17.
19 Commission Regulation (EEC) No 4087/88 of 30 November 1988 on the application of Article 85 (3) of the Treaty to categories of franchise agreements.
20 SFS 1993:79.
21 Today, Mr. Toijer is vice chair of the Swedish Supreme Court.
22 Ministry Publications Series Ds 2004:55.

statutory information obligation in accordance with the UNIDROIT Model Law and instead proposed a new section in the Contract Terms Act.[23] The new Section 2 presented in the constitutional proposal was as follows:[24]

> "If a franchisor concludes a franchise agreement without, in a timely fashion, having given the franchisee the information about the content of the agreement and other conditions necessary in view of the circumstances, the Market Court can prohibit the franchisor from entering into essentially the same franchise agreement in the future without having provided such information in a timely fashion.
>
> Franchise agreement, in this Act, refers to an agreement whereby a trader (the franchisor) agrees with another trader (the franchisee) that the latter shall use the franchisor's special business concept for the marketing of goods or services for or against a direct or indirect compensation. However, this only applies if the franchisee must, according to the agreement, use the franchisor's trademarks and other intellectual property rights, must participate in regular checks to ensure that the agreement is followed, and has the right to support in the form of training, administrative assistance, or the like."[25]

For reasons that remain unknown, the Ministry of Enterprise did not accept the proposal from the investigation but presented a government bill proposing a national franchise disclosure act.[26] The government bill was rushed through the legislative apparatus and became the Swedish Franchise Disclosure Act on October 1, 2006.[27]

Analysis of the Swedish Franchise Disclosure Act

With the Disclosure Act, Sweden transitioned from having governed the regulation of pre-contractual information through general legal principles to regulating this in special legislation specifically on information in franchise relationships. The main purpose of this legislation was to create the conditions for well-thought-out and balanced agreements in the franchise area.[28]

[23] Lag (1984:292) om avtalsvillkor mellan näringsidkare.
[24] Ministry Publications Series Ds 2004:55, p. 21.
[25] Unofficial translation by the author.
[26] Government bill 2005/06:98 – Enhanced protection for franchisees (Sw. *Förstärkt skydd för franchisetagare*).
[27] Lag (2006:484) om franchisegivares informationsskyldighet.
[28] Government bill 2005/06:98, p. 14.

The Disclosure Act consists of only six sections and should therefore be easy to overview and understand. In my presentation, the act will be analyzed based on the legal text, legislative history, practice, and doctrine. The presentation follows the numbering in the act, but the intention is not for the presentation to be a handbook-like legal commentary. Instead, uncertainty arising from the choice of words and assumptions underlying the law will be highlighted. The first section of the law is a content declaration.

> **Section 1**
> This law contains provisions on the franchisor's obligation to provide the franchisee with certain information before concluding a franchise agreement.

A content declaration in a law has the advantage that you can deduce limitations therefrom. It appears from the legislative history that the law is not an exhaustive regulation in the franchise area.[29] What has previously been regulated by general laws and principles shall continue to be regulated by general laws and principles, exemplified in the legislative history by the Contract Terms Act, the Contracts Act, and regulations in intellectual property law, labor law, and competition law.[30]

The second section is a legal definition of the object. For some reason, the definition does not focus on franchising but rather on the franchise agreement.

> **Section 2**
> Franchise agreement in this law refers to an agreement whereby a trader (the franchisor) agrees with someone else (the franchisee) that, in return for compensation to the franchisor, the latter shall use the franchisor's special business idea for the marketing and sale of goods or services. As additional prerequisites for an agreement to be considered a franchise agreement according to this law, the franchisee must, according to the agreement, use the franchisor's trademarks or other intellectual property rights and participate in recurring checks that the agreement is followed.

A legal definition was justified by the fact that such a specific legal regulation assumes that it is possible to define the regulation's scope of application in a clear and predictable way.[31] It was claimed that no legal definition existed in

[29] Government bill 2005/06:98, p. 33.
[30] Government bill 2005/06:98, p. 34.
[31] Government bill 2005/06:98, p. 22.

Swedish legislation. However, this claim was false, as Sweden had adopted the FBER as Swedish national law at the time of Sweden's entry into the EU in 1995.[32] Both the FBER and the succeeding VBER contained legal definitions that could have been used for the Swedish Franchise Disclosure Act.[33] Instead, the legislator proposed a legal definition divided into two sentences, where the first sentence was intended to describe the typical elements of a franchise agreement and the second sentence set out criteria intended to delimit other forms of cooperation.[34]

The typical elements are thus that (a) two parties conclude an agreement where (b) one provides compensation to the other for (c) the use of a business idea for the marketing and sale of goods or services. Regarding the two parties, it should be noted that the franchisor has been identified as a company or trader, whereas the franchisee has been defined as "someone else." It is clear from the legislative history that this is because the legislator wanted to include cases where the prospective franchisee had not yet started a business and thus was not a businessperson in the sense of the law. The argument for this is that the Disclosure Act refers to the early stage when the prospective franchisee is still considering whether it should take the step to become its own entrepreneur and thus may not yet be a trader. Regarding the compensation, there was no discussion in the legislative history regarding why compensation should be considered a typical element. This requirement can be questioned from two starting points. First: is this just a sloppy import of Anglo-American legal tradition? Second: was there an intention to exclude social franchising? Regarding the third element in the first sentence, one can question if the legislator knew the difference between business idea and business concept. As a business concept is a package of many components, where "business idea" is one, the legal definition can be considered misleading. In most translations of the VBER, the object is called the business concept, the system, or the business method. The third element also encompasses a duty. The use of a business idea has been specified as mandatory and the legislative history points out that the granting of a business idea does not only entail a

[32] Commission Regulation (EEC) No 4087/88 of 30 November 1988 on the application of Article 85 (3) of the Treaty to categories of franchise agreements.

[33] VBER = Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices.

[34] Government bill 2005/06:98, p. 34.

right but – which is characteristic of franchising – also an obligation.[35] The legislator claims – without further explanation – that this obligation "delimits the franchise relationship from, for example, the commercial agency, a form of cooperation which in some cases can otherwise be very close to franchising."[36] This statement shows the ignorance of the legislators, as a franchise relationship can include a distribution or intermediary relationship of some kind, for instance through a commercial agency. This in no way prevents establishment of a franchise relationship.

The additional prerequisites for an agreement to be considered a franchise agreement are stated in the second sentence as requirements for the franchisee (a) to use the franchisor's trademark or other intellectual property rights, and (b) to participate in recurring checks that the agreement is followed. As stated above, it is a basic requirement in franchising that the franchisee has not only a right but also an obligation to use the franchisor's business concept. Through this addition, it is established that the franchisee must also be obliged to use the franchisor's business marks. This obligation existed in the FBER already from 1988 and was presented there as a minimum requirement for an agreement to be considered a franchise agreement and thus win exemption from the EU competition law restrictions.[37] However, the legislator chose not to mention the two other minimum requirements found in the FBER – know-how transfer and ongoing support – in the legal text.[38] However, know-how transfer was included as a prerequisite in the legislative history through the following statement: "A central element in the transfer of the business idea is that the franchisor transfers the so-called know-how to the franchisee."[39] Ongoing support was included in the investigator's proposal through the last clause in the legal definition. In the governmental bill, that clause was removed with the explanation that an agreement that lacks such regulation should not fall outside the definition and thus be exempt from the law's provisions.[40] No further explanation was given as to why a requirement previously considered fundamental could be overlooked.

The final criterion that must be met is that the franchisee participates in recurring checks that the agreement is followed. To my knowledge, no similar

35 Government bill 2005/06:98, p. 34.
36 Government bill 2005/06:98, p. 34.
37 FBER, Article 1 (3 b) first bullet point.
38 FBER, Article 1 (3 b) second and third bullet points.
39 Government bill 2005/06:98, p. 35.
40 Government bill 2005/06:98, p. 24.

criterion has previously existed in any legal or general definition of franchise agreement. As the text of the law is written, it is required that the obligation to participate in controls appears in the agreement. It may seem obvious that the franchisor wants such an obligation from its franchisees. However, it is not uncommon for franchisors to perform their quality reviews entirely without the franchisee's conscious involvement, e.g., through mystery shoppers. With the current legal text, a franchisor who wishes to avoid disclosing in accordance with the Swedish Franchise Disclosure Act can refrain from introducing provisions in the franchise agreement regarding checks to ensure that the agreement is followed.

> **Section 3**
> In due time before a franchise agreement is concluded, a franchisor must give the franchisee written information about the content of the agreement and other conditions that are necessary given the circumstances. The information must be clear and understandable. It must contain at least:
> 1. a description of the franchise business that the franchisee must conduct,
> 2. information about other franchisees with which the franchisor has concluded agreements within the same franchise system and the extent of their business,
> 3. information about the compensation that the franchisee must pay to the franchisor and other financial conditions for the franchise business,
> 4. information on intellectual property rights to be granted to the franchisee,
> 5. information about the goods or services that the franchisee is obliged to buy or rent,
> 6. information on non-competition that shall apply during or after the term of the agreement,
> 7. information on the term of the agreement, the conditions for change, extension, and termination of the franchise agreement, as well as the financial consequences of a termination, and
> 8. information on how a dispute arising from the agreement will be tried and where liability for the costs for such a dispute shall fall.
>
> What is said in the first paragraph also applies when an existing franchise agreement, with the franchisor's permission, is to be transferred to a new franchisee.

We have now reached the main section of this act, the provision that tells us who, what, when, and how information shall be disclosed.

Who should act is undoubtedly the franchisor. However, the law says nothing about whether this only applies to Swedish franchisors granting franchise rights in Sweden or whether all franchisors granting franchise rights in Sweden or whether all Swedish franchisors granting franchise rights any-

where in the world. We can directly dismiss the last alternative because Swedish jurisdiction does not extend beyond the borders of the kingdom. That the Franchise Disclosure Act applies to all franchisors granting franchise rights in Sweden is evident from a statement in the constitutional commentary to Section 4, where it is stated that employees of a foreign franchisor conducting business in Sweden can be held accountable for disclosing information.[41] With this finding, it should be clear by analogy that all franchisors granting franchise rights in Sweden are bound by this act, including franchisors and master franchisees, which in the role as local franchisors grant franchise rights. It is also unquestionable that the information must be given to the franchisee. Who is a franchisee has been clarified through Section 2, starting from companies or traders, but expanding the group by specifying "someone else," to encompass the case that the franchisee is a private person who cannot yet be classified as a businessperson.[42]

What needs to be done is also clear, i.e., the franchisor must disclose information. However, what the information should contain is less clear. It is stated that the franchisor must inform "about the content of the agreement and other conditions that are necessary given the circumstances." It is then specified that the information must contain at least eight defined items. The legislator's attitude is somewhat passive or even thoughtless in this regard. The constitutional commentary begins by justifying the general requirement with the statement that: "With such a generally held provision, conditions are created for a flexible and purpose-oriented application of the regulations."[43] This would have been a stance – a finding that information is a quantity that can be required in different amounts and of different kinds, depending on the circumstances. However, the legislator did not dare to be so free in its opinion but stated that something more is required for predictability and guidance. It is stated that certain concrete items should be present and a minimum list of eight items was constructed. Considering that both the UNIDROIT Model Law and the American FTC Rule were available as models, there should not have been any problems finding items for the minimum list.[44] So why did the Swedish legislators choose these eight items?

41 Government bill 2005/06:98, p. 41.
42 Government bill 2005/06:98, p. 34.
43 Government bill 2005/06:98, p. 26.
44 Government bill 2005/06:98, p. 53, Article 6 in the UNIDROIT Model Law with its twenty-eight items, and the FTC's Amended Franchise Rule (16 C.F.R. § 436) with its twenty-three items.

The Swedish law does not require information disclosure of what experience the franchisor has of business operations.[45] Furthermore, there is no requirement for information about convictions relating to the business in question, the franchisor, or its affiliated companies.[46] One item that has been copied from the Model Law is the requirement for information about other franchisees.[47] One could wonder, however, why the Swedish act did not specify what kind of information is required, how many franchisees must be mentioned, or what is meant by "the extent of their business"?[48] Certain information is indicated as being particularly important and the legislator has stated that it wanted to "ensure that these issues are considered carefully before the conclusion of the agreement and that the franchisor (*sic!*) is informed of what shall apply in these respects."[49] However, the justification concludes with the nonchalant wording "that it should be left to law enforcement to […] decide which information should be included in the information material in an individual case."[50]

When the disclosure is to be given is not clearly specified. The legislator indicates that it is not appropriate to establish any specific time period in the legal text. The reason is claimed to be that some flexibility is required with regard to the different conditions that may prevail. Instead of specifying a minimum time – the UNIDROIT Model Law specifies fourteen days – it was considered sufficient to specify that information must be provided in due time before the conclusion of the agreement.[51] In connection with the question of when information must be given, many referral bodies have stated that information should also be given in the event of changed circumstances, when renewing the agreement, and in the case of transfers. Here, the Swedish legislator took a stance and announced that "[l]ater changes in or additions to the agreement are in principle not covered."[52] This means that the disclosure obligation normally occurs only once in a franchise rela-

45 Article 6 E in the UNIDROIT Model Law.

46 Article 6 G in the UNIDROIT Model Law.

47 The Swedish act Section 3, para 1, bullet point 2, compared with the UNIDROIT Model Law Article 6 I–K.

48 As there are no limitations in the Swedish act, a franchisor has to give all the information about every franchisee to fulfill its lawful obligations under the act. An interesting issue for the courts to settle.

49 Government bill 2005/06:98, p. 26.

50 Government bill 2005/06:98, p. 26.

51 Government bill 2005/06:98, p. 27.

52 Government bill 2005/06:98, p. 36.

tionship, prior to the conclusion of the agreement, i.e., "the time when the contractual relationship between the parties is first established,"[53] The disclosure document is thus – much like a balance sheet in business finance – a snapshot of current conditions at the time when the document is dated. As the law is written, there is no requirement for franchisors to have a standardized disclosure document lying around that must be continuously updated or changed.[54] Franchisors can prepare completely new and different disclosure documents for each occasion when information is to be given, as long as the disclosure document meets the requirements of the law. Further, there is no obligation to provide disclosure when extending existing franchise agreements. This is evident from the following constitutional commentary: "The same applies to agreements to extend an existing agreement on essentially the same terms."[55] If there are extensive changes to the terms in connection with the extension of an existing agreement, the agreement can be considered to constitute a new agreement and must then be covered by the Franchise Disclosure Act. Another special situation that the legislator chose to highlight is when a franchisee transfers an existing franchise agreement to a new franchisee, and this takes place with the franchisor's approval.[56] The duty to inform arises in such cases and falls on the franchisor, not the transferring franchisee.

How the information is to be disclosed contains only two elements: it must be in writing, and it must be submitted in a clear and comprehensible manner. The detailed way – as seen in the UNIDROIT Model Law or the FTC Rule – has not been adopted. In the constitutional commentary, the legislator states: "How the information is to be presented and disposed of has not been regulated in the law."[57] Already in next sentence in the constitutional commentary, it is remarked that the UNIDROIT Model Law requires that the information be provided in a single document at one time. Thus, one can perhaps conclude that the legislator was aware of the UNIDROIT Model Law's solution but chose not to adopt it in the Swedish act. No further explanation is given as to why the Swedish act does not prescribe a single document being presented on one occasion. However, it is explained that

[53] Government bill 2005/06:98, p. 36.

[54] In other franchise disclosure legislation around the world, e.g., in USA and Australia, there are registration provisions and a duty to keep an updated disclosure document available at all times.

[55] Government bill 2005/06:98, p. 36.

[56] The Swedish act Section 3, para 2.

[57] Government bill 2005/06:98, p. 37.

the need for information must be assessed in each particular case and can vary between different franchisees, even within the same franchise system.[58]

> **Section 4**
> A franchisor that has concluded a franchise agreement without having fulfilled their obligation under Section 3 may be required to, in respect of that agreement and future franchise agreements, provide information in accordance with what is said in that section. Such an order can also be directed against someone who is employed by the franchisor or who acts on their behalf.

As mentioned above, the intention is for the Swedish Franchise Disclosure Act to have a market law character that gives franchisors opportunities to change their behavior if they have breached the information obligation.[59] The moment when the offense (lack of disclosure) can be considered committed is when a franchise agreement has been concluded without the statutory information having been disclosed. The sanction for the offense has been determined to be an order to provide the stipulated disclosure. This is in line with the approach of market law. However, it is a soft sanction compared with corresponding laws around the world, where there are both contractual and criminal sanctions.[60] The penalty may also be considered strange for the franchisee who signs a franchise agreement, receives the statutory information after the fact, thanks to an injunction, and is not at all satisfied with the information disclosed. Admittedly, the legislator has stated that "shortcomings in the provision of information may in some cases be attributed importance in terms of contractual law."[61] In that discussion, reference is made to Section 36 of the Swedish Contracts Act and the possibility to adjust an agreement or leave it without regard due to circumstances at the time of its creation. However, the franchisee is not normally in a forced position in relation to the franchisor when the agreement has been concluded, as important point in the Swedish Supreme Court's judgment in the decision NJA 1992 p. 290. Achieving an adjustment according to Section 36 of the Contracts Act in a contractual relationship between businesspersons – which is the case in the franchise relationship – requires not only that information

58 Government bill 2005/06:98, p. 37.
59 Government bill 2005/06:98, p. 21.
60 The Belgian equivalent of the Swedish Franchise Disclosure Act stipulates that the franchise agreement becomes null and void if the obligation to disclose has not been observed, and under the French law, failing franchisors can be fined.
61 Government bill 2005/06:98, p. 36.

has not been provided, but that the lack of information has entailed a consequence that the franchisee could not reasonably have anticipated and with knowledge of which the franchisee would have refrained from concluding the agreement. This creates high evidentiary requirements. The legal consequences of lack of an information according to the Franchise Disclosure Act will stop at the order to provide the relevant information. If the legislator had wanted to have a contractual impact, it should have chosen invalidity as the legal consequence in the event of non-fulfilment.[62] Leaving that issue to law enforcement is not governing legislation, especially not given current practice in relation to Section 36 of the Contracts Act.[63]

The second sentence of the paragraph covers cases where, e.g., a foreign franchisor that intends to operate in Sweden, recruits franchisees and signs agreements through persons who are directly employed by the foreign franchisor.[64] Even representatives – employed or hired by the franchisor – can be required to provide information according to the Swedish Franchise Disclosure Act.

> **Section 5**
> An action for injunction pursuant to Section 4 is brought before the Patent and Market Court.
>
> Such an action may be brought by:
> 1. a franchisee in an agreement of the kind referred to in Section 4,
> 2. an association of traders, or
> 3. another association that has a legitimate interest in representing traders.
>
> The entity that has the right of action according to the second paragraph has the right to participate in the trial as an intervener according to Ch. 14 of the Code of Judicial Procedure.
>
> In cases of injunctions pursuant to Section 4, the provisions of the Marketing Act (2008:486) which regulate the procedure and the distribution of legal costs in cases of injunctions to provide information pursuant to Section 24 of that Act otherwise apply. However, the provisions in §§ 28, 42–46, and 61 on the Consumer Ombudsman shall not be applied.

Matters related to the Franchise Disclosure Act, being as it is market law legislation, are handled by the Patent and Market Court. Those with a right of action in these cases are the same group of stakeholders that have been

62 The Belgian law is one example of an act with such a provision.
63 See the Swedish Supreme Court's judgment in the decision NJA 1992 p. 290.
64 Government bill 2005/06:98, p. 41.

identified in the Contract Terms Act, i.e., the affected trader, an association of traders, or "another association."[65] It is specifically noted that the entity that has the right of action also has the right to appear as an intervener in the trial, with direct reference to the Code of Judicial Procedure.[66] The section ends with a reference to the Marketing Act on the rules for the procedure and the distribution of legal costs.[67]

> **Section 6**
> An order according to Section 4 must be combined with a fine unless this is unnecessary for special reasons.
>
> An action for the imposition of a fine is brought before the Patent and Market Court.
>
> The action may be brought by the entity that requested the fine.

The law ends with a section on fines. It is stated that orders according to the Franchise Disclosure Act must be combined with fines. This is thus the principal rule, which is confirmed by the subordinate clause which states "unless this is unnecessary for special reasons." A special reason could be that the applicant refrains from demanding a fine or that the franchisor has already changed its procedures in accordance with the legislator's intentions. The action for the imposition of the fine may be brought by the entity that requested the fine. However, it should be noted that this is a fine, payable to the state, not damages covering the inconvenience or the damage the franchisee might have suffered. With this remedy one can ask why a franchisee would take the risk to initiate an action against a franchisor when there is a potential risk regarding the legal costs (see Section 5) and yet no possibility of getting damages.

Summary

We have a transnational business model called business format franchising that has been used by many companies and businesspeople for more than

[65] See 3 § Contract Terms Act (Sw. *lag (1984:292) om avtalsvillkor mellan näringsidkare*).

[66] This solution differs from how the Contract Terms Act deals with the issue. In that act, according to Section 3 a, an association of traders must apply for, and be granted, participation in the procedure.

[67] The provisions on the procedure refer to, among other things, an obligation to provide information (Section 24), interim decisions (Section 27), and legal force (section 53) in the Marketing Act, and legal costs (Section 64), with reference to Ch. 18 of the Code of Judicial Procedure.

170 years. The business model has proven successful in many business sectors and countries around the world, often despite national borders. Still, national legislators have felt the urge to create national laws around this business model. Among these laws, different issues have been focused and different solutions presented. One of the countries that has a national law regarding franchising is Sweden, which has implemented the Swedish Franchise Disclosure Act.

As described in this article, creating legislation is a craft that follows certain rules. This craft is embraced by the science of legal philosophy, and especially the field called legislative studies, which focuses inter alia on legislatures, their functioning, and their processes.

One might assume that the legislators – when the Swedish Franchise Disclosure Act was created – did not "understand the proposal" as suggested in Grant Thornton's five-step model. There was no description of a problem or a suggestion of a solution in the proposal from the parliament. Even after a thorough investigation, there was no clear problem visible. The parliament investigator acted accordingly and did not propose a bill. However, the investigator was not convinced that the self-regulation that had been established some years before by the Swedish Franchise Association was sufficient, so instead suggested an amendment to the already established Contract Terms Act.[68]

When the proposal came back to the Ministry of Enterprise together with the parliament report, they entered the third stage in Grant Thornton's model. They did not, however, accept the proposal from the investigation but instead presented a government bill proposing a national franchise disclosure act. There are no explanations to be found regarding this decision.

As regards the fourth stage in Thornton's model (clarity, precision, unambiguity, and simplicity), the legislators did not put much effort into the end product. Speaking as someone who has followed the entire process from the first attempts by some parliament members in the early 1980s to get specific franchise legislation in Sweden to the Swedish Franchise Disclosure Act in 2006: they could have done a better job.

As a final comment, and perhaps as a test of the final stage (verifying the draft) in Grant Thornton's model, it should be pointed out that the Swedish Franchise Disclosure Act has not yet been applied by the Patent and Market Court in any case. This could mean that the law has worked preventively and

[68] Lag (1984:292) om avtalsvillkor mellan näringsidkare.

that everyone follows the law – or that the law is so substandard that it is *de facto* circumvented or ignored and thus does no good. It is up to the reader to decide which explanation is more likely.