

# International Comparative Legal Guides



## Franchise 2020

A practical cross-border insight into franchise law

**Sixth Edition**

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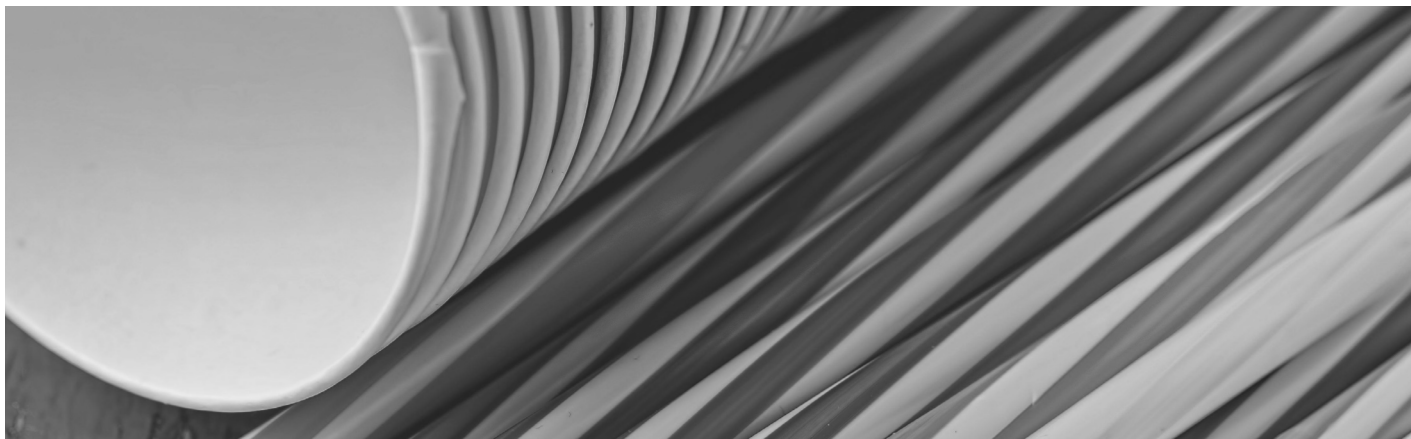
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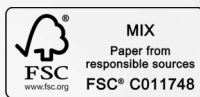
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## Franchise 2020

**Sixth Edition**

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**Iain Bowler**

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# Sweden

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## 1 Relevant Legislation and Rules Governing Franchise Transactions

### 1.1 What is the legal definition of a franchise?

There is no general legal definition of a franchise. However, the Swedish Franchise Disclosure Act (*Sw: lag (2006:484) om franchisegivares informationskyldighet*) provides a definition for a *franchise agreement* as an agreement between a franchisor and a franchisee for the use of a business concept, for remuneration, involving marketing and the sale of goods or services. A franchise agreement should also, according to the definition, include an arrangement concerning the use of the franchisor's intellectual property rights, and also an obligation for the franchisee to participate in regular contract compliance reviews.

### 1.2 What laws regulate the offer and sale of franchises?

Other than the Swedish Franchise Disclosure Act, which provides an obligation for the franchisor to disclose information to the franchisee under certain circumstances (please refer to question 1.5 below), there are no specific laws which specifically regulate the offer and sale of franchises. The principle of freedom of contract as well as other general contract principles, e.g. as provided by the Swedish Contracts Act (*Sw: lag (1915:218) om avtal och andra rättshandlingar på förmögensrättens område*), apply.

### 1.3 If a franchisor is proposing to appoint only one franchisee/licensee in your jurisdiction, will this person be treated as a "franchisee" for purposes of any franchise disclosure or registration laws?

Yes, they will be treated as such.

### 1.4 Are there any registration requirements relating to the franchise system?

There are no requirements under Swedish law to register a franchise with any governmental or administrative authority.

### 1.5 Are there mandatory pre-sale disclosure obligations?

According to the Swedish Franchise Disclosure Act, a franchisor is obliged to, within a reasonable time period (approximately two weeks) before a franchise agreement is concluded, provide to the

prospective franchisee clear and comprehensible information as to the substance of the agreement and, depending on the circumstances, other relevant information. Such information should at least include:

- a description of the franchise concept;
- information about other franchisees that the franchisor has entered into agreements with regarding the same franchise and the magnitude of their business;
- the remuneration that the franchisee shall pay to the franchisor and other economic conditions for the franchise;
- the intellectual property rights that are to be licensed to the franchisee;
- the goods or services that the franchisee is obligated to buy or rent;
- the prohibition of competition that applies during or after the franchise agreement has expired;
- details regarding the terms of the agreement, the terms applied in respect of changes, extension and termination of the franchise agreement and the economic consequences of a termination; and
- details concerning the procedure for any future proceeding in connection to the agreement and the cost responsibilities in terms of such proceedings.

The requirements also apply when an existing franchise agreement, with the franchisor's permission, shall be transferred to a new franchisee.

As for remedies for failure to comply with these requirements, please refer to questions 1.8 and 5.1 below.

### 1.6 Do pre-sale disclosure obligations apply to sales to sub-franchisees? Who is required to make the necessary disclosures?

This question has thus far not been tried by Swedish courts. However, it can be assumed that mandatory pre-sale disclosure obligations provided in the Swedish Franchise Disclosure Act apply to sub-franchisees. The master franchisee, as party to the agreement, should be the one required to make the necessary disclosures to the franchisee.

### 1.7 Is the format of disclosures prescribed by law or other regulation, and how often must disclosures be updated? Is there an obligation to make continuing disclosure to existing franchisees?

The Swedish Franchise Disclosure Act requires the information to be provided in written form. Please refer to the answer to question 1.5 above regarding content requirements. The Swedish Franchise Disclosure Act does not stipulate any obligation for the franchisor to make continuing disclosures to the existing franchisees.

### 1.8 What are the consequences of not complying with mandatory pre-sale disclosure obligations?

If a franchisor fails to comply with the Swedish Franchise Disclosure Act, a court may issue an order for the franchisor to disclose the information. The order may be subject to a fine.

### 1.9 Are there any other requirements that must be met before a franchise may be offered or sold?

No, not according to Swedish law.

### 1.10 Is membership of any national franchise association mandatory or commercially advisable?

Membership in the Swedish Franchise Association (SFF) (*Sw: Svenska Franchiseföreningen* or *Svensk Franchise*) is not mandatory. It is, however, often commercially advisable. A member of the association has the benefit of, *inter alia*, being a part of their professional franchise network and to advertise free of charge on their website when recruiting franchisees or selling businesses. Please visit [www.svenskfranchise.se](http://www.svenskfranchise.se) for more information.

### 1.11 Does membership of a national franchise association impose any additional obligations on franchisors?

A member of the SFF undertakes to comply with the SFF's Code of Ethics, which in turn is predominantly based on the European Franchise Federation's (EFF) Code of Ethics. As a member of the SFF, a franchisor or franchisee may also request an independent ethical committee to examine any matter relating to the Code. In addition, the SFF offers mitigation between, for example, franchisors and franchisees.

Even if it is not a member of the SFF, a court may, when relevant, in determining accepted business practices for franchises, take into consideration the provisions of the Code of Ethics.

### 1.12 Is there a requirement for franchise documents or disclosure documents to be translated into the local language?

No. Local language requirements provided by law apply only to consumers. In a standard franchise concept, neither the franchisor nor the franchisee is considered as a consumer under Swedish law. However, according to the SFF Code of Ethics (regarding the applicability of the Code of Ethics, please refer to questions 1.10 and 1.11 above), franchise documents should be provided in the local language where the franchisee is established or in a language which the franchisee masters.

## 2 Business Organisations Through Which a Franchised Business Can be Carried On

### 2.1 Are there any foreign investment laws that impose restrictions on non-nationals in respect of the ownership or control of a business in your jurisdiction?

There are no restrictions on non-nationals in respect of the ownership or control of a business in Sweden. Foreign franchisors may, e.g., own equity or real estate in Sweden.

### 2.2 What forms of business entity are typically used by franchisors?

The form of business entity typically used by a franchisor in Sweden is a private or public limited liability company (*Sw: Aktiebolag* or *AB*) with a minimum capital of SEK 50,000 (if private) or SEK 500,000 (if public). The entity is established when a document referred to as a memorandum of association is signed by the founders. Additionally, the company has to apply for registration at the Swedish Companies Registration Office within six months after the signing of the memorandum.

### 2.3 Are there any registration requirements or other formalities applicable to a new business entity as a pre-condition to being able to trade in your jurisdiction?

There are no registration requirements or other formalities applicable as a pre-condition to being able to trade in Sweden. As a member of the European Union (EU), Sweden recognises the principle of the right of free movement of goods, persons, services and capital.

## 3 Competition Law

### 3.1 Provide an overview of the competition laws that apply to the offer and sale of franchises.

The applicable competition laws include articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), the Vertical Agreement Block Exemption Regulation, and the Swedish Competition Act (*Sw: Konkurrenslag (2008:579)*).

### 3.2 Is there a maximum permitted term for a franchise agreement?

No. Non-compete clauses valid for longer than five years may, however, be challenged as such clauses fall outside the scope of the Vertical Agreement Block Exemption Regulation.

### 3.3 Is there a maximum permitted term for any related product supply agreement?

No. However, the Vertical Agreement Block Exemption Regulation applies only on product supply agreements shorter than five years, meaning that such product supply agreements must be assessed on a case-by-case basis.

### 3.4 Are there restrictions on the ability of the franchisor to impose minimum resale prices?

Yes, it is a violation of article 101 of the TFEU as well as the Swedish Competition Act to impose minimum resale prices.

### 3.5 Encroachment – are there any minimum obligations that a franchisor must observe when offering franchises in adjoining territories?

No, this matter falls within the scope of the principle of freedom of contract. It is advisable to make sure that the franchise agreement clearly outlines the terms under which franchises in adjoining territories may be offered.

### 3.6 Are in-term and post-term non-compete and non-solicitation of customers covenants enforceable?

Yes, provided that they are not excessive and to the extent they are permitted under applicable competition law. Please refer to question 3.2 above.

## 4 Protecting the Brand and Other Intellectual Property

### 4.1 How are trade marks protected?

Under Swedish law, trademarks are protected either by registration or establishment on the market. An application for a trademark registration should be filed with the Swedish Patent and Registration Office (PRV) (*Sw: Patent- och registreringsverket*). To reduce the risk of legal disputes concerning the rights of a trademark, it is advisable to register a trademark rather than relying on protection by establishment on the market through usage of the trademark.

A trademark registration is valid for 10 years but can be renewed.

In addition, a company can register an EU trademark or an international trademark. An application for registration of an EU trademark is filed with the European Union Intellectual Property Office (EUIPO). As regards an international trademark, such registration may be obtained from the World Intellectual Property Organization (WIPO).

### 4.2 Are know-how, trade secrets and other business-critical confidential information (e.g. the Operations Manual) protected by local law?

Trade secrets are protected under the Swedish Trade Secrets Act (*Sw: lag (2018:558) om företagshemligheter*). Any unlawful acquisition, disclosure or use of trade secrets may give rise to civil and criminal sanctions.

It is often advisable to protect this type of information through, e.g., non-disclosure agreements.

### 4.3 Is copyright (in the Operations Manual or in proprietary software developed by the franchisor and licensed to the franchisee under the franchise agreement) protected by local law?

Yes, provided that the manual and/or the software constitute an original work of authorship. There is no requirement (nor possibility) to register copyright under Swedish law.

## 5 Liability

### 5.1 What are the remedies that can be enforced against a franchisor for failure to comply with mandatory disclosure obligations? Is a franchisee entitled to rescind the franchise agreement and/or claim damages?

If a franchisor fails to comply with the Swedish Franchise Disclosure Act, a court may issue an order for the franchisor to disclose the information. The order may be subject to a fine.

Additionally, negligence in contract negotiations in general may, in accordance with the concept of *culpa in contrahendo*, lead to an obligation for the negligent party to pay damages.

### 5.2 In the case of sub-franchising, how is liability for disclosure non-compliance or for pre-contractual misrepresentation allocated between franchisor and master franchisee? If the franchisor takes an indemnity from the master franchisee in the Master Franchise Agreement, are there any limitations on such an indemnity being enforceable against the master franchisee?

The perception is that the master franchisee, as party to the contract, is subject to disclosure obligations under the Swedish Franchise Disclosure Act in relation to any sub-franchisees. The master franchisee is also liable for any misrepresentation in relation to sub-franchisees. However, the franchisor and the master franchisee are free to contractually allocate the liability, to the extent that such allocation is not considered unreasonable by Swedish courts.

### 5.3 Can a franchisor successfully avoid liability for pre-contractual misrepresentation by including disclaimer clauses in the franchise agreement?

Disclaimer clauses are generally accepted by Swedish courts, as long as they are reasonable. The subject at hand has not yet been tried by Swedish courts. Such clause must be assessed based on the circumstances in an individual case. An excessive disclaimer of substantial misrepresentation by a party, e.g. due to wilful acts or gross negligence, may very well be deemed unreasonable by Swedish courts and therefore not enforceable.

### 5.4 Does the law permit class actions to be brought by a number of aggrieved franchisees and, if so, are class action waiver clauses enforceable?

Yes, Swedish law permits class action lawsuits under certain conditions. Such lawsuits are, however, very rare.

Waiver clauses are governed by the principle of freedom to contract. There is no explicit prohibition for a class action waiver under Swedish law. However, a class action waiver clause may be deemed unreasonable and hence not enforceable by Swedish courts as it could be considered excessive.

## 6 Governing Law

### 6.1 Is there a requirement for franchise documents to be governed by local law? If not, is there any generally accepted norm relating to choice of governing law, if it is not local law?

There is no requirement for franchise documents to be governed by local law, nor is there any generally accepted norm concerning this matter. In general, the parties are free to choose the governing law.

### 6.2 Do the local courts provide a remedy, or will they enforce orders granted by other countries' courts, for interlocutory relief (injunction) against a rogue franchisee to prevent damage to the brand or misuse of business-critical confidential information?

Under certain conditions, Swedish courts provide remedies against damage to the brand by prohibition under penalty of a fine.

The enforcement of orders granted by courts in EU Member States will be subject to assessment under the provisions of the so-called Brussels-I Regulation and may be enforced under this regulation. The Swedish courts may enforce orders granted by other countries' courts provided that the enforcement is based on treaties, conventions or international agreements with such other countries.

**6.3 Is arbitration recognised as a viable means of dispute resolution and is your country a signatory to the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Do businesses that accept arbitration as a form of dispute resolution procedure generally favour any particular set of arbitral rules?**

Yes, arbitration is recognised as a viable alternative to civil litigation in Swedish courts. Sweden has signed and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards without any reservations. The Arbitration Institute of the Stockholm Chamber of Commerce's (SCC) rules are the most commonly used.

There is no obligation for the parties to engage in mediation before commencing formal arbitration or court proceedings, unless so agreed in the franchise agreement.

## 7 Real Estate

**7.1 Generally speaking, is there a typical length of term for a commercial property lease?**

The length of term for a commercial property lease varies greatly and depends on the type of property. Typically, such contracts provide a fixed period of at least three years.

**7.2 Is the concept of an option/conditional lease assignment over the lease (under which a franchisor has the right to step into the franchisee/tenant's shoes under the lease, or direct that a third party (often a replacement franchisee) may do so upon the failure of the original tenant or the termination of the franchise agreement) understood and enforceable?**

In general, the concept should be enforceable under Swedish law provided that such arrangement is clearly agreed upon and foreseen in the agreement. An assessment on a case-by-case basis must be made.

**7.3 Are there any restrictions on non-national entities holding any interest in real estate, or being able to sub-lease property?**

No, there are no restrictions.

**7.4 Give a general overview of the commercial real estate market. Specifically, can a tenant reasonably expect to secure an initial rent free period when entering into a new lease (and if so, for how long, generally), or are landlords demanding "key money" (a premium for a lease in a particular location)?**

In general, a tenant may not reasonably expect to secure an initial rent free period. However, this varies greatly depending on, e.g., the market, type of property and geographical location, and is a matter of negotiation with the property owners.

## 8 Online Trading

**8.1 If an online order for products or request for services is received from a potential customer located outside the franchisee's exclusive territory, can the franchise agreement impose a binding requirement for the request to be re-directed to the franchisee for the territory from which the sales request originated?**

The franchise agreement may not impose such requirement. The Treaty on the Functioning of the European Union (TFEU) as well as the Swedish Competition Act prohibit such passive sales and re-directions.

**8.2 Are there any limitations on a franchisor being able to require a former franchisee to assign local domain names to the franchisor on the termination or expiry of the franchise agreement?**

No, such arrangement should be enforceable provided that it is clearly stated and foreseen in the agreement. The usage of local domain names by a former franchisee which includes a trademark of the franchisor may constitute a trademark infringement.

## 9 Termination

**9.1 Are there any mandatory local laws that might override the termination rights that one might typically expect to see in a franchise agreement?**

Yes. Swedish courts might override termination rights in an agreement if the terms are regarded as unfair or unreasonable under the Swedish Contracts Act.

Terms which are regarded as unfair or unreasonable may also be prohibited for future use under the penalty of a fine under the Swedish Terms of Contract between Tradesmen Act (*Sw: lag (1984:292) om avtalsvillkor mellan näringsidkare*).

**9.2 Are there local rules that impose a minimum notice period that must be given to bring a business relationship that might have existed for a number of years to an end, which will apply irrespective of the length of the notice period set out in the franchise agreement?**

There is no minimum notice period provided in Swedish legislation which applies to franchise agreements. A very short notice period may, however, under certain circumstances be deemed unreasonable and overridden by Swedish courts.

## 10 Joint Employer Risk and Vicarious Liability

**10.1 Is there a risk that a franchisor may be regarded as a joint employer with the franchisee in respect of the franchisee's employees? If so, can anything be done to mitigate this risk?**

Assuming that the franchisee and franchisor are separate and independent legal entities and that the employment agreements are



entered into with the franchisee, the risk that the franchisor will be considered as a joint employer with the franchisee is unlikely.

**10.2 Is there a risk that a franchisor may be held to be vicariously liable for the acts or omissions of a franchisee's employees in the performance of the franchisee's franchised business? If so, can anything be done to mitigate this risk?**

Please refer to the answer to question 10.1 above.

## 11 Currency Controls and Taxation

**11.1 Are there any restrictions (for example exchange control restrictions) on the payment of royalties to an overseas franchisor?**

No, there are no restrictions.

**11.2 Are there any mandatory withholding tax requirements applicable to the payment of royalties under a trade mark licence or in respect of the transfer of technology? Can any withholding tax be avoided by structuring payments due from the franchisee to the franchisor as a management services fee rather than a royalty for the use of a trade mark or technology?**

There is no withholding tax on interest or royalties, but this is the case in relation to dividends unless reduced or eliminated under tax treaties, domestic rules or EU directives. The most notable exception, much simplified, is that dividends paid to a foreign parent may be entirely exempt from withholding tax if the receiver is comparable to a Swedish limited liability company and the shares are held for business purposes. Furthermore, royalty payments are generally considered business income in Sweden for the receiver and taxed at the corporate income tax rate of 22 per cent. However, the tax liability may be eliminated by tax treaties or under an EU directive.

**11.3 Are there any requirements for financial transactions, including the payment of franchise fees or royalties, to be conducted in local currency?**

No, there are no requirements.

## 12 Commercial Agency

**12.1 Is there a risk that a franchisee might be treated as the franchisor's commercial agent? If so, is there anything that can be done to help mitigate this risk?**

According to the Swedish Commercial Agency Act (*Sv: lag (1991:351) om bandelsagentur*), a commercial agent is defined as an independent intermediary which, on a permanent basis, acts on behalf of another person for the sale or purchase of goods by negotiating and forwarding tenders or concluding agreements in the name of the other person. A franchisee that falls under the definition would therefore, in theory, be regarded as a commercial agent. However, in most

of the franchise concepts, the franchisee does not act directly on behalf of the franchisor when selling goods or services, and would therefore not be regarded as a commercial agent.

To reduce the risk of the franchisee being regarded as the franchisor's commercial agent, it is advisable to consult local counsel, e.g. in drafting the franchise agreement.

## 13 Good Faith and Fair Dealings

**13.1 Is there any overriding requirement for a franchisor to deal with a franchisee in good faith and to act fairly in its dealings with franchisees according to some objective test of fairness and reasonableness?**

The perception in the legal doctrine is that there is, more or less, a principle of good faith between contractors under Swedish law. It is usually described as a duty to take notice of and look after the counterparty's interests. Good faith as a general principle is, however, not expressed in any legislation in Sweden.

## 14 Ongoing Relationship Issues

**14.1 Are there any specific laws regulating the relationship between franchisor and franchisee once the franchise agreement has been entered into?**

There are no specific franchise laws regulating ongoing relationship issues. The relationship between a franchisor and a franchisee would instead be governed by general contract laws and principles.

## 15 Franchise Renewal

**15.1 What disclosure obligations apply in relation to a renewal of an existing franchise at the end of the franchise agreement term?**

The disclosure obligations would generally not apply, unless a renewal of an existing franchise at the end of the franchise agreement term is deemed to be regarded as the conclusion of a new and separate franchise agreement. An assessment should be made on a case-by-case basis.

**15.2 Is there any overriding right for a franchisee to be automatically entitled to a renewal or extension of the franchise agreement at the end of the initial term irrespective of the wishes of the franchisor not to renew or extend?**

Swedish law does not provide such an overriding right.

**15.3 Is a franchisee that is refused a renewal or extension of its franchise agreement entitled to any compensation or damages as a result of the non-renewal or refusal to extend?**

In general, that would not be the case, unless the franchisee is entitled to such according to the agreement. Thus, they are not, unless agreed otherwise in the franchise agreement.

## 16 Franchise Migration

**16.1** Is a franchisor entitled to impose restrictions on a franchisee's freedom to sell, transfer, assign or otherwise dispose of the franchised business?

Yes, provided that such restrictions are reasonable and regulated in the franchise agreement.

**16.2** If a franchisee is in breach and the franchise agreement is terminated by the franchisor, will a "step-in" right in the franchise agreement (whereby the franchisor may take over the ownership and management of the franchised business) be recognised by local law, and are there any registration requirements or other formalities that must be complied with to ensure that such a right will be enforceable?

This falls within the scope of the principle of freedom of contract. To our knowledge, there is, to date, no precedent concerning the status of "step-in" rights under Swedish law. Depending on the circumstances, an excessive "step-in" right might be deemed unreasonable by Swedish courts.

**16.3** If the franchise agreement contains a power of attorney in favour of the franchisor under which it may complete all necessary formalities required to complete a franchise migration under pre-emption or "step-in" rights, will such a power of attorney be recognised by the courts in the country and be treated as valid? Are there any registration or other formalities that must be complied with to ensure that such a power of attorney will be valid and effective?

Please refer to the answer to question 16.2 above.

## 17 Electronic Signatures and Document Retention

**17.1** Are there any specific requirements for applying an electronic signature to a franchise agreement (rather than physically signing a "wet ink" version of the agreement), and are electronic signatures recognised as a valid way of creating a binding and enforceable agreement?

In general, electronic signatures are recognised as a valid way of creating a binding and enforceable agreement, such as a franchise agreement. There are exceptions that primarily aim at contracts for which the validation requires a certain form, e.g. the purchase of real estate. The perception, in those cases, is that an electronic signature does not always meet the legal requirements relating to a specific form.

**17.2** If a signed/executed franchise agreement is stored electronically (either having been signed using e-signatures or a "wet ink" version having been scanned and saved as an electronic file), can the paper version of the agreement be destroyed?

Yes, in general, there are no requirements to store the original version of an agreement. It might, however, be advisable to keep the original version as evidence in the event of legal proceedings.

Nor are there, in general, any requirements to have a "wet ink" version of an agreement. However, some contracts require a certain form (e.g. "wet ink") in order to be valid, e.g. the purchase of real estate, where the perception in most cases is that an electronic version does not meet such requirement.



**Elisabeth Vestin** heads the Intellectual Property & Technology practice at Hannes Snellman's Stockholm office. Her fields of expertise include IT, outsourcing, telecoms, data protection, IP, marketing, consumer, e-commerce and distribution, sports, media, music and entertainment law, as well as general commercial law. Innovation, technology, know-how, data, e-commerce, trademarks and other intellectual property rights are often central to the businesses that Elisabeth advises.

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Elisabeth is ranked amongst the leading franchise lawyers in Sweden and internationally.

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