

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

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices (1), as last amended by the Act of Accession of Spain and Portugal, and in particular Article 1 thereof,

Having published a draft of this Regulation (2),

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation No 19/65/EEC empowers the Commission to apply Article 85 (3) of the Treaty by Regulation to certain categories of bilateral exclusive agreements falling within the scope of Article 85 (1) which either have as their object the exclusive distribution or exclusive purchase of goods, or include restrictions imposed in relation to the assignment or use of industrial property rights.

(2) Franchise agreements consist essentially of licences of industrial or intellectual property rights relating to trade marks or signs and know-how, which can be combined with restrictions relating to supply or purchase of goods.

(3) Several types of franchise can be distinguished according to their object: industrial franchise concerns the manufacturing of goods, distribution franchise concerns the sale of goods, and service franchise concerns the supply of services.

(4) It is possible on the basis of the experience of the Commission to define categories of franchise agreements which fall under Article 85 (1) but can normally be regarded as satisfying the conditions laid down in Article 85 (3). This is the case for franchise agreements whereby one of the parties supplies goods or provides services to end users. On the other hand, industrial franchise agreements should not be covered by this Regulation. Such agreements, which usually govern relationships between producers, present different characteristics than the other types of franchise. They consist of manufacturing licences based on patents and/or technical know-how, combined with trade-mark licences. Some of them may benefit from other block exemptions if they fulfil the necessary conditions.

(5) This Regulation covers franchise agreements between two undertakings, the franchisor and the franchisee, for the retailing of goods or the provision of services to end users, or a combination of these activities, such as the processing or adaptation of goods to fit specific needs of their customers. It also covers cases where the relationship between franchisor and franchisees is made through a third undertaking, the master franchisee. It does not cover wholesale franchise agreements because of the lack of experience of the Commission in that field.

(6) Franchise agreements as defined in this Regulation can fall under Article 85 (1). They may in particular affect intra-Community trade where they are concluded between undertakings from different Member States or where they form the basis of a network which extends beyond the boundaries of a single Member State.

(7) Franchise agreements as defined in this Regulation normally improve the distribution of goods and/or the provision of services as they give franchisors the possibility of establishing a uniform network with limited investments, which may assist the entry of new competitors on the market, particularly in the case of small and medium-sized undertakings, thus increasing interbrand competition. They also allow independent traders to set up outlets more rapidly and with higher chance of success than if they had to do so without the franchisor's experience and assistance. They have therefore the possibility of competing more efficiently with large distribution undertakings.

(8) As a rule, franchise agreements also allow consumers and other end users a fair share of the resulting benefit, as they combine the advantage of a uniform network with the existence of traders personally interested in the efficient operation of their business. The homogeneity of the network and the constant cooperation between the franchisor and the franchisees ensures a constant quality of the products and

services. The favourable effect of franchising on interbrand competition and the fact that consumers are free to deal with any franchisee in the network guarantees that a reasonable part of the resulting benefits will be passed on to the consumers.

(9) This Regulation must define the obligations restrictive of competition which may be included in franchise agreements. This is the case in particular for the granting of an exclusive territory to the franchisees combined with the prohibition on actively seeking customers outside that territory, which allows them to concentrate their efforts on their allotted territory. The same applies to the granting of an exclusive territory to a master franchisee combined with the obligation not to conclude franchise agreements with third parties outside that territory. Where the franchisees sell or use in the process of providing services, goods manufactured by the franchisor or according to its instructions and or bearing its trade mark, an obligation on the franchisees not to sell, or use in the process of the provision of services, competing goods, makes it possible to establish a coherent network which is identified with the franchised goods. However, this obligation should only be accepted with respect to the goods which form the essential subject-matter of the franchise. It should notably not relate to accessories or spare parts for these goods.

(10) The obligations referred to above thus do not impose restrictions which are not necessary for the attainment of the abovementioned objectives. In particular, the limited territorial protection granted to the franchisees is indispensable to protect their investment.

(11) It is desirable to list in the Regulation a number of obligations that are commonly found in franchise agreements and are normally not restrictive of competition and to provide that if, because of the particular economic or legal circumstances, they fall under Article 85 (1), they are also covered by the exemption. This list, which is not exhaustive, includes in particular clauses which are essential either to preserve the common identity and reputation of the network or to prevent the know-how made available and the assistance given by the franchisor from benefiting competitors.

(12) The Regulation must specify the conditions which must be satisfied for the exemption to apply. To guarantee that competition is not eliminated for a substantial part of the goods which are the subject of the franchise, it is necessary that parallel imports remain possible. Therefore, cross deliveries between franchisees should always be possible. Furthermore, where a franchise network is combined with another distribution system, franchisees should be free to obtain supplies from authorized distributors. To better inform consumers, thereby helping to ensure that they receive a fair share of the resulting benefits, it must be provided that the franchisee shall be obliged to indicate its status as an independent undertaking, by any appropriate means which does not jeopardize the common identity of the franchised network. Furthermore, where the franchisees have to honour guarantees for the franchisor's goods, this obligation should also apply to goods supplied by the franchisor, other franchisees or other agreed dealers.

(13) The Regulation must also specify restrictions which may not be included in franchise agreements if these are to benefit from the exemption granted by the Regulation, by virtue of the fact that such provisions are restrictions falling under Article 85 (1) for which there is no general presumption that they will lead to the positive effects required by Article 85 (3). This applies in particular to market sharing between competing manufacturers, to clauses unduly limiting the franchisee's choice of suppliers or customers, and to cases where the franchisee is restricted in determining its prices. However, the franchisor should be free to recommend prices to the franchisees, where it is not prohibited by national laws and to the extent that it does not lead to concerted practices for the effective application of these prices.

(14) Agreements which are not automatically covered by the exemption because they contain provisions that are not expressly exempted by the Regulation and not expressly excluded from exemption may nonetheless generally be presumed to be eligible for application of Article 85 (3). It will be possible for the Commission rapidly to establish whether this is the case for a particular agreement. Such agreements should therefore be deemed to be covered by the exemption provided for in this Regulation where they are notified to the Commission and the Commission does not oppose the application of the exemption within a specified period of time.

(15) If individual agreements exempted by this Regulation nevertheless have effects which are incompatible with Article 85 (3), in particular as interpreted by the administrative practice of the Commission and the case law of the Court of Justice, the Commission may withdraw the benefit of the block exemption. This applies in particular where competition is significantly restricted because of the structure of the relevant market.

(16) Agreements which are automatically exempted pursuant to this Regulation need not be notified. Undertakings may nevertheless in a particular case request a decision pursuant to Council Regulation No 17

(1) as last amended by the Act of Accession of Spain and Portugal.

(17) Agreements may benefit from the provisions either of this Regulation or of another Regulation, according to their particular nature and provided that they fulfil the necessary conditions of application. They may not benefit from a combination of the provisions of this Regulation with those of another block exemption Regulation,

HAS ADOPTED THIS REGULATION:

Article 1 1. Pursuant to Article 85 (3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 85 (1) of the Treaty shall not apply to franchise agreements to which two undertakings are party, which include one or more of the restrictions listed in Article 2.

2. The exemption provided for in paragraph 1 shall also apply to master franchise agreements to which two undertakings are party. Where applicable, the provisions of this Regulation concerning the relationship between franchisor and franchisee shall apply mutatis mutandis to the relationship between franchisor and master franchisee and between master franchisee and franchisee.

3. For the purposes of this Regulation:

(a) 'franchise' means a package of industrial or intellectual property rights relating to trade marks, trade names, shop signs, utility models, designs, copyrights, know-how or patents, to be exploited for the resale of goods or the provision of services to end users;

(b) 'franchise agreement' means an agreement whereby one undertaking, the franchisor, grants the other, the franchisee, in exchange for direct or indirect financial consideration, the right to exploit a franchise for the purposes of marketing specified types of goods and/or services; it includes at least obligations relating to:

- the use of a common name or shop sign and a uniform presentation of contract premises and/or means of transport,

- the communication by the franchisor to the franchisee of know-how,

- the continuing provision by the franchisor to the franchisee of commercial or technical assistance during the life of the agreement;

(c) 'master franchise agreement' means an agreement whereby one undertaking, the franchisor, grants the other, the master franchisee, in exchange of direct or indirect financial consideration, the right to exploit a franchise for the purposes of concluding franchise agreements with third parties, the franchisees;

(d) 'franchisor's goods' means goods produced by the franchisor or according to its instructions, and/or bearing the franchisor's name or trade mark;

(e) 'contract premises' means the premises used for the exploitation of the franchise or, when the franchise is exploited outside those premises, the base from which the franchisee operates the means of transport used for the exploitation of the franchise (contract means of transport);

(f) 'know-how' means a package of non-patented practical information, resulting from experience and testing by the franchisor, which is secret, substantial and identified;

(g) 'secret' means that the know-how, as a body or in the precise configuration and assembly of its components, is not generally known or easily accessible; it is not limited in the narrow sense that each individual component of the know-how should be totally unknown or unobtainable outside the franchisor's business;

(1) OJ No 35, 10. 5. 1962, p. 1118/62.

Official Journal of the European Communities No L 359/ 28. 12. 88 (h) 'substantial' means that the know-how includes information which is of importance for the sale of goods or the provision of services to end users, and in particular for the presentation of goods for sale, the processing of goods in connection with the provision of services, methods of dealing with customers, and administration and financial management; the know-how must be useful for the franchisee by being capable, at the date of conclusion of the

agreement, of improving the competitive position of the franchisee, in particular by improving the franchisee's performance or helping it to enter a new market;

(i) 'identified' means that the know-how must be described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality; the description of the know-how can either be set out in the franchise agreement or in a separate document or recorded in any other appropriate form.

Article 2 The exemption provided for in Article 1 shall apply to the following restrictions of competition:

(a) an obligation on the franchisor, in a defined area of the common market, the contract territory, not to:

- grant the right to exploit all or part of the franchise to third parties,
- itself exploit the franchise, or itself market the goods or services which are the subject-matter of the franchise under a similar formula.
- itself supply the franchisor's goods to third parties;

(b) an obligation on the master franchisee not to conclude franchise agreement with third parties outside its contract territory;

(c) an obligation on the franchisee to exploit the franchise only from the contract premises;

(d) an obligation on the franchisee to refrain, outside the contract territory, from seeking customers for the goods or the services which are the subject-matter of the franchise;

(e) an obligation on the franchisee not to manufacture, sell or use in the course of the provision of services, goods competing with the franchisor's goods which are the subject-matter of the franchise; where the subject-matter of the franchise is the sale or use in the course of the provision of services both certain types of goods and spare parts or accessories therefor, that obligation may not be imposed in respect of these spare parts or accessories.

Article 3 1. Article 1 shall apply notwithstanding the presence of any of the following obligations on the franchisee, in so far as they are necessary to protect the franchisor's industrial or intellectual property rights or to maintain the common identity and reputation of the franchised network:

(a) to sell, or use in the course of the provision of services, exclusively goods matching minimum objective quality specifications laid down by the franchisor;

(b) to sell, or use in the course of the provision of services, goods which are manufactured only by the franchisor or by third parties designed by it, where it is impracticable, owing to the nature of the goods which are the subject-matter of the franchise, to apply objective quality specifications;

(c) not to engage, directly or indirectly, in any similar business in a territory where it would compete with a member of the franchised network, including the franchisor; the franchisee may be held to this obligation after termination of the agreement, for a reasonable period which may not exceed one year, in the territory where it has exploited the franchise;

(d) not to acquire financial interests in the capital of a competing undertaking, which would give the franchisee the power to influence the economic conduct of such undertaking;

(e) to sell the goods which are the subject-matter of the franchise only to end users, to other franchisees and to resellers within other channels of distribution supplied by the manufacturer of these goods or with its consent;

(f) to use its best endeavours to sell the goods or provide the services that are the subject-matter of the franchise; to offer for sale a minimum range of goods, achieve a minimum turnover, plan its orders in advance, keep minimum stocks and provide customer and warranty services;

(g) to pay to the franchisor a specified proportion of its revenue for advertising and itself carry out advertising for the nature of which it shall obtain the franchisor's approval.

2. Article 1 shall apply notwithstanding the presence of any of the following obligations on the franchisee:

(a) not to disclose to third parties the know-how provided by the franchisor; the franchisee may be held to this obligation after termination of the agreement;

(b) to communicate to the franchisor any experience gained in exploiting the franchise and to grant it, and other franchisees, a non-exclusive licence for the know-how resulting from that experience;

(c) to inform the franchisor of infringements of licensed industrial or intellectual property rights, to take legal action against infringers or to assist the franchisor in any legal actions against infringers:

(d) not to use know-how licensed by the franchisor for purposes other than the exploitation of the franchise; the franchisee may be held to this obligation after termination of the agreement;

(e) to attend or have its staff attend training courses arranged by the franchisor;

(f) to apply the commercial methods devised by the franchisor, including any subsequent modification thereof, and use the licensed industrial or intellectual property rights;

(g) to comply with the franchisor's standards for the equipment and presentation of the contract premises and/or means of transport;

(h) to allow the franchisor to carry out checks of the contract premises and/or means of transport, including the goods sold and the services provided, and the inventory and accounts of the franchisee;

(i) not without the franchisor's consent to change the location of the contract premises;

(j) not without the franchisor's consent to assign the rights and obligations under the franchise agreement.

3. In the event that, because of particular circumstances, obligations referred to in paragraph 2 fall within the scope of Article 85 (1), they shall also be exempted even if they are not accompanied by any of the obligations exempted by Article 1.

Article 4 The exemption provided for in Article 1 shall apply on condition that:

(a) the franchisee is free to obtain the goods that are the subject-matter of the franchise from other franchisees; where such goods are also distributed through another network of authorized distributors, the franchisee must be free to obtain the goods from the latter;

(b) where the franchisor obliges the franchisee to honour guarantees for the franchisor's goods, that obligation shall apply in respect of such goods supplied by any member of the franchised network or other distributors which give a similar guarantee, in the common market;

(c) the franchisee is obliged to indicate its status as an independent undertaking; this indication shall however not interfere with the common identity of the franchised network resulting in particular from the common name or shop sign and uniform appearance of the contract premises and/or means of transport.

Article 5 The exemption granted by Article 1 shall not apply where:

(a) undertakings producing goods or providing services which are identical or are considered by users as equivalent in view of their characteristics, price and intended use, enter into franchise agreements in respect of such goods or services;

(b) without prejudice to Article 2 (e) and Article 3 (1) (b), the franchisee is prevented from obtaining supplies of goods of a quality equivalent to those offered by the franchisor;

(c) without prejudice to Article 2 (e), the franchisee is obliged to sell, or use in the process of providing services, goods manufactured by the franchisor or third parties designated by the franchisor and the franchisor refuses, for reasons other than protecting the franchisor's industrial or intellectual property rights, or maintaining the common identity and reputation of the franchised network, to designate as authorized manufacturers third parties proposed by the franchisee;

(d) the franchisee is prevented from continuing to use the licensed know-how after termination of the agreement where the know-how has become generally known or easily accessible, other than by breach of an obligation by the franchisee;

(e) the franchisee is restricted by the franchisor, directly or indirectly, in the determination of sale prices for the goods or services which are the subject-matter of the franchise, without prejudice to the possibility for the franchisor of recommending sale prices;

(f) the franchisor prohibits the franchisee from challenging the validity of the industrial or intellectual property rights which form part of the franchise, without prejudice to the possibility for the franchisor of terminating the agreement in such a case;

(g) franchisees are obliged not to supply within the common market the goods or services which are the subject-matter of the franchise to end users because of their place of residence.

Article 6 1. The exemption provided for in Article 1 shall also apply to franchise agreements which fulfil the conditions laid down in Article 4 and include obligations restrictive of competition which are not covered by Articles 2 and 3 (3) and do not fall within the scope of Article 5, on condition that the agreements in question are notified to the Commission in accordance with the provisions of Commission Regulation No 27 (1) and that the Commission does not oppose such exemption within a period of six months.

2. The period of six months shall run from the date on which the notification is received by the Commission. Where, however, the notification is made by registered post, the period shall run from the date shown on the postmark of the place of posting.

3. Paragraph 1 shall apply only if:

(a) express reference is made to this Article in the notification or in a communication accompanying it; and  
(b) the information furnished with the notification is complete and in accordance with the facts.

4. The benefit of paragraph 1 can be claimed for agreements notified before the entry into force of this Regulation by submitting a communication to the Commission referring expressly to this Article and to the notification. Paragraphs 2 and 3 (b) shall apply *mutatis mutandis*.

5. The Commission may oppose exemption. It shall oppose exemption if it receives a request to do so from a Member State within three months of the forwarding to the Member State of the notification referred to in paragraph 1 or the communication referred to in paragraph 4. This request must be justified on the basis of considerations relating to the competition rules of the Treaty.

6. The Commission may withdraw its opposition to the exemption at any time. However, where that opposition was raised at the request of a Member State, it may be withdrawn only after consultation of the advisory Committee on Restrictive Practices and Dominant Positions.

7. If the opposition is withdrawn because the undertakings concerned have shown that the conditions of Article 85 (3) are fulfilled, the exemption shall apply from the date of the notification.

8. If the opposition is withdrawn because the undertakings concerned have amended the agreement so that the conditions of Article 85 (3) are fulfilled, the exemption shall apply from the date on which the amendments take effect.

9. If the Commission opposes exemption and its opposition is not withdrawn, the effects of the notification shall be governed by the provisions of Regulation No 17.

Article 7 1. Information acquired pursuant to Article 6 shall be used only for the purposes of this Regulation.

2. The Commission and the authorities of the Member States, their officials and other servants shall not disclose information acquired by them pursuant to this Regulation of a kind that is covered by the obligation of professional secrecy.

3. Paragraphs 1 and 2 shall not prevent publication of general information or surveys which do not contain information relating to particular undertakings or associations of undertakings.

Article 8 The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation No 19/65/EEC, where it finds in a particular case that an agreement exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions laid down in Article 85 (3) of the EEC Treaty, and in particular where territorial protection is awarded to the franchisee and:

(a) access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar agreements established by competing manufacturers or distributors;

(b) the goods or services which are the subject-matter of the franchise do not face, in a substantial part of the common market, effective competition from goods or services which are identical or considered by users as equivalent in view of their characteristics, price and intended use;

(c) the parties, or one of them, prevent end users, because of their place of residence, from obtaining, directly or through intermediaries, the goods or services which are the subject-matter of the franchise within the common market, or use differences in specifications concerning those goods or services in different Member States, to isolate markets;

(d) franchisees engage in concerted practices relating to the sale prices of the goods or services which are the subject-matter of the franchise;

(e) the franchisor uses its right to check the contract premises and means of transport, or refuses its agreement to requests by the franchisee to move the contract premises or assign its rights and obligations under the franchise agreement, for reasons other than protecting the franchisor's industrial or intellectual property rights, maintaining the common identity and reputation of the franchised network or verifying that the franchisee abides by its obligations under the agreement.

Article 9 This Regulation shall enter into force on 1 February 1989.

It shall remain in force until 31 December 1999.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 30 November 1988.

For the Commission Peter SUTHERLAND Member of the Commission (1) OJ No 36, 6. 3. 1965, p. 533/65.

(2) OJ No C 229, 27. 8. 1987, p. 3.

(3) OJ No 13, 21. 2. 1962, p. 204/62.