L.N. 151 of 1996

COMPETITION ACT, 1994
(ACT NO. XXXI OF 1994)

Categories of Franchise Agreements (Block Exemptions) Regulations, 1996

IN exercise of the powers conferred by subsection (1) of section 8 of the Competition Act, 1994, the Minister for Economic Services, after consultation with the Commission for Fair Trading, has made the following regulations:—

Citation.

1. These regulations may be cited as the Categories of Franchise Agreements (Block Exemptions) Regulations, 1996.

Commencement and Termination.

2. These regulations shall come into force on the 1st August, 1996 and shall terminate on the 31st October, 1999.

Scope.

3. These regulations specify the block exemptions subject to such conditions and limitations and as applicable to categories of franchise agreements, decisions and practices in terms of subsection (1) of section 5 of the Act.

Interpretation.

4. For the purposes of these regulations, and unless the context otherwise requires:—

"Act" means the Competition Act, 1994 which regulates competition and provides for fair trading in Malta;

"Commission" means the Commission for Fair Trading;

"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);

"Director" means the director of the Office for Fair Competition;

"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;

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

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

(ii) the communication by the franchisor to the franchisee of know-how,

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

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

"identified" means that the know-how must be described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfills 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;

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

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

"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;

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

Block Exemption.

5. (1) Subject to the provisions of these regulations, the provisions of subsection (1) of section 5 of the Act shall not apply to franchise agreements to which two undertakings are party, which include one of the restrictions listed in regulation 6 of these regulations.

(2) The exemption provided for in paragraph (1) of this regulation shall also apply to master franchise agreements to which two undertakings are party. Where applicable, the provisions of these regulations 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.

Restrictions of Competition.

6. The exemption provided for in regulation 5 of these regulations shall apply to the following restrictions of competition:

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

(i) grant the right to exploit all or part of the franchise to third parties,

(ii) itself exploit the franchise, or itself market the goods or services which are the subject-matter of the franchise,

(iii) itself supply the franchisor's goods to third parties;

(b) an obligation on the master franchisee not to conclude franchise agreements 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 of certain types of goods and spare parts or accessories thereof, that obligation may not be imposed in respect of these spare parts or accessories.

Obligations.

7. (1) Regulation 5 of these regulations 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 the 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 the contract territory where it would compete with a member of the franchise 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 contract territory where it has exploited the franchise;

(d) not to acquire financial interests in 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, and other franchisees and to re-sellers 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) Regulation 5 of these regulations 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 to change the location of the contract premises without the franchisor's consent;

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

(3) In the event that, because of particular circumstances, obligations referred to in paragraph (2) of this regulation fall within the scope of subsection (1) of section 5 of the Act, they shall also be exempted even if they are not accompanied by any of the obligations exempted by regulation 5 of these regulations.

Applicability of Exemption.

8. (1) The exemption provided for in regulation 5 of these regulations 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 authorised 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;

(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.

(2) The exemption granted by regulation 5 of these regulations 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 paragraph (e) of regulation 2 and subparagraph (b) of paragraph (1) of regulation 3 of these regulations, the franchisee is prevented from obtaining supplies of goods of a quality equivalent to those offered by the franchisor;

(c) without prejudice to paragraph (e) of regulation 2 of these regulations, 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 authorised 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 defined contract market the goods or services which are the subject-matter of the franchise to end users because of their place of residence.

Commission may withdraw benefit.

9. The Commission is hereby being granted the power to withdraw the benefit of these regulations in relation to a particular case, on a request by the Director, where such agreement exempted by these regulations nevertheless does not contribute towards the objective of improving production or distribution of goods or promoting technical or economic progress and which does not allow consumers a fair share of the resultant benefit, and in particular where:

(a) access to the 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 defined contract 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 defined contract market;

(d) franchisees engage in concerted practices relating to 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.

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