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CONTRIBUTION RELATING TO THE FRANCHISE SECTOR

1. The franchise is a distribution system that **has clearly unique features** compared to other distribution systems, which pertain essentially to the need for a network of uniform points of sale. Of these features, two stand out.

2. On the one hand, the **relations between a franchisor and a franchisee are not those between a mere seller and buyer**, as is the case in other networks. The franchise is much more than that: it involves the provision of know-how, signs recognisable by the customer and the provision of assistance. It should also be noted that the supply of goods by the franchisor to the franchisee is not essential to the franchise.

3. On the other hand, **the franchise does not in itself restrict competition** but may include restrictions on competition, some of which are essential and others are useful to its smooth running.

4. Franchising plays such a significant role in the European economy and among distribution systems that the Commission cannot fail to incorporate provisions specific to franchising into the Draft Exemption Regulation (hereinafter the DER).

5. In this regard, the Commission is expected to:

   - Specify the relevant franchise market(s) (1)

   - Specify the franchise analysis reference system with regard to Article 101 (1) and (3) TFEU (2)

   - Adjust the conditions on application to the franchise of the new rules on dual distribution (3)

   - Provide clarification on platforms by recognising the specific features of franchising (4)

1. SPECIFY THE RELEVANT FRANCHISE MARKET(S)

1. As was already noted twenty years ago**,** the relevant franchise market raises serious difficulties that do not appear to have been taken onboard by the various, successive exemption regulations and the guidelines that have accompanied them[i].

2. The DER covers, in the wake of its predecessors, the market on which the seller sells "contractual goods or services" and the market on which the buyer buys « the contract goods or services » (art. 3).

3. However, in franchising, the concept of « the contract goods or services » leaves broad scope for interpretation. Leaving aside the master franchise, which makes matters even more complex, it could be said that this concept refers to:

   (i) the franchise itself, i.e. know-how, signs recognisable to the customer and assistance - there would be a franchise market, as could be attested by the many trade fairs devoted to it;

   (ii) the goods or services supplied by the franchisor to the franchisee throughout the franchise agreement;

   (iii) goods or services supplied by the franchisee to consumers, which may differ from the previous ones, particularly if the goods have been transformed.

   With regard to the distinction between goods falling under (ii) and (iii), there is the example of a pizza franchise: the goods which make up the pizza, which the franchisee procures from the franchisor, fall under (ii) and are very different from the pizzas themselves, which fall within the remit of (iii).

4. In a competitive analysis, the concept of the relevant market is so crucial that it would be to the Commission's advantage to specify its conception of the market(s) to be taken into account.

   In fact, point (158) of the draft Guidelines (hereinafter, DGL), which is also consistent with the previous Guidelines, is very obscure or even contradictory on certain aspects:

   > « Where the vertical agreement, in addition to the supply of the contract goods or services, also contains IPR provisions (such as a provision concerning the use of the supplier's trademark), which help the buyer to market the contract goods or services, the supplier's market share on the market where it sells the contract goods or services is relevant for the application of the VBER. Where a franchisor does not supply goods or services for the resale of these goods or services, but provides a bundle of goods or services combined with IPR provisions that together form the business method being franchised, the franchisor needs to take account of its market share as a provider of a business method for the provision of specific goods or services to end users. For that purpose, the franchisor needs to calculate its market share on the

> market where the business method is exploited by the franchisees to provide goods or services to end users. The franchisor must therefore base its market share on the value of the goods or services supplied by its franchisees on this market. On such a market, the franchisor's competitors may be providers of other franchised business methods, but also suppliers of substitutable goods or services not applying franchising. For instance, without prejudice to the definition of such a market, if there was a market for fast-food services, a franchisor operating on such a market would need to calculate its market share on the basis of the relevant sales figures of its franchisees on this market"

The following are successively referred to as « the [supplier] market (…) where it sells the contract goods or services or « the market where the business method is exploited by the franchisees to provide goods or services to end users »…

Recommendation: Include provisions specific to the relevant franchise market(s) in the DER

2. SPECIFY THE FRANCHISE ANALYSIS REFERENCE SYSTEM WITH REGARD TO ARTICLE 101 (1) AND (3) TFEU

6. The franchise agreement does not, in essence, restrict competition. This was what the Court of Justice decided in the *Pronuptia* judgement[ii]:

> The system in which « *an undertaking which has established itself as a distributor on a given market and thus developed certain business methods grants independent traders , for a fee , the right to establish themselves in other markets using its business name and the business methods which have made it successful. Rather than a method of distribution , it is a way for an undertaking to derive financial benefit from its expertise without investing its own capital. (…) Such a system , which allows the franchisor to profit from his success , does not in itself interfere with competition . In order for the system to work two conditions must be met.* » (point 15)[iii].

7. According to the *Pronuptia* case law, any restrictions on competition that a franchise agreement may include do not need to be exempted since they are essential to the franchise. Although the exemption does not fall within the remit of Article 101 (1) TFEU, invoking Article 101 (3) TFEU was of no use.

8. However, the Commission considered it appropriate to adopt a franchise exemption regulation, Regulation (EEC) No 4087/88 of 30 November 1988. This regulation suggested that, in the Commission's view, franchise systems would require an exemption in the same way as selective or exclusive distribution systems[iv].

9. But, subsequently, the *general* exemption regulations no. 279/2010, then no. 330/2010, ceased to make mention of the franchise, only mentioning selective distribution and exclusive distribution.

10. Now, in the wake of these regulations, the DER still contains no mention of the franchise, while continuing to mention exclusive distribution and selective distribution[v].

11. While this lack of explicit consideration of the franchise may be understood as a manifestation of the *Pronuptia* case law (the franchise does not need an exemption), this is not expressly stated by the DER and this leaves hanging the treatment of clauses *a priori* restrictive of competition which cannot be considered essential to the franchise, and therefore require an exemption.

12. This latter consideration opens the door to questionable comparisons between franchise and other forms of distribution. Thus, the Draft Guidelines (hereinafter, the DGL) invite, for the first time, an assessment of the validity of the clauses of the franchise agreement with regard to the *« to the distribution system that most closely relates to the nature of the specific franchise agreement* », by mentioning exclusive distribution and selective distribution (point 151):

> « *Vertical restraints contained in franchise agreements will be assessed under the rules applicable to the distribution system that most closely relates to the nature of the specific franchise agreement. For instance, a franchise agreement that gives rise to a closed network since members are forbidden from selling to non-members shall be assessed under the rules applicable to selective distribution. In contrast, a franchise agreement that grants territorial exclusivity and protection from active sales by other franchisees shall be assessed under the rules applicable to exclusive distribution* »

This guideline poses many more problems than it solves, since:

- selective or exclusive distribution is sometimes considered to be a component of the franchise (point 149), or a distribution system more or less similar to franchise (point 151);

- the franchise is very different in nature from selective or exclusive distribution in that it is a system which entails strict repetition of a concept resulting from the franchisor's know-how, such reiteration being made necessary by the requirement of brand consistency. In this respect, it differs intrinsically from other distribution systems which are only a distribution method. It is therefore contrived to compare the franchise to selective or exclusive distribution and to apply their regulations to it as the case may be;

- *With regard in particular to the comparison with selective distribution*, it is clear that a franchise agreement does not contain the reciprocal commitments which define a selective distribution system as adopted by the DER (Article 1(f)):

    - The idea of selection « *on the basis of specified criteria* », at the very least of the criteria which bind the franchisor, is alien to the franchise. In the franchise system, the franchisor never refers to criteria to identify its future franchisees. This lack of reference to such criteria, which is observed in all franchise networks, is due to the fact that the franchisor wishes to be able to choose its franchisees at its discretion. The franchisor has no criteria for selecting franchisees, the franchisor-franchisee relationship being marked by a strong *intuitu personae* and the franchisor's decision to admit a new franchisee is eminently subjective. The "closed" nature of a franchise network

therefore responds to a rationale which differs from that of a selective distribution network. The application of the selective distribution regime to the franchise, based on the finding that the franchise network is closed, is therefore not relevant;

- In many franchise networks, members of a franchise network do not sell « *goods* » of the network to distributors outside the network, which is not so much by virtue of commitments made in the franchise agreement, but because these sales are incompatible with a franchise network for which the requirement for uniformity of the network's points of sale is the very condition for its existence.

- *With regard in particular to the comparison to exclusive distribution*, it will be noted that while franchise agreements may indeed provide for territorial exclusivities, the franchise is never limited to these exclusivities alone. In other words, while it is true that territorial exclusivities may constitute components of certain franchise agreements, these are only simple components. Moreover, in *Pronuptia*, the Court of Justice ruled that Regulation 67/67 on exclusivity agreements was not applicable to the franchise (paragraph 34);

- If we follow the DGL, in assessing the sales restrictions admissible in a franchise network, should we adopt the rule applicable to exclusive distribution networks, Article 4 b), to selective distribution networks, article 4 c) or to other networks, Article 4 d)[vi]? Or should we consider the cumulative application of the rules applicable to selective and exclusive distribution networks?

13. In addition to the erroneous likening of the franchise with distribution systems from which it essentially differs, the DGL, where it directly concerns the franchise, does not draw all the consequences from the *Pronuptia* judgement, so that it leaves grey areas around the rules applicable to the franchise and retains inadequate solutions.

    What are the clauses of a franchise agreement that would not fall under Article 101(1) TFEU? In *Pronuptia*, there was a substantial list of clauses that do not require an exemption, and again, it only concerned the contract that was under discussion. The DGL (point 150) expands more on this point than Regulation 330/2010, since it mentions the provisions which are "*strictly necessary for the functioning"* of the franchise by taking as an example those intended to protect the know-how and assistance provided, as well as the non-competition obligations relating to goods or services (exclusive supply clauses) that are necessary for the identity of the network (specific), which should include - albeit not only these - post-contractual non-competition clauses (are we to understand from this that their compliance with competition law would not be conditional on compliance with the strict conditions laid down by the various, successive exemption regulations?), in accordance with the *Pronuptia* judgement.

    It follows from this lack of special treatment of the franchise that the framework for analysing the provisions of franchise agreements with regard to competition law remains uncertain as regards their qualification and therefore their regime: ancillary restrictions? Exemption? The DGL, like the previous Guidelines, lack the clarity and precision required to provide franchise networks with the necessary legal certainty[vii].

This can be illustrated by taking the crucially important example of non-competition obligations relating to goods or services (exclusive supply clauses).

To read the Guidelines on vertical restraints 2000/C 291/01 (point 200) and 2010/C 130/01 (point 190), it is assumed that, in a franchise system, only the exclusive supply clauses of products *specific* to the network would not fall under Article 101(1) TFEU and would therefore not have to meet the conditions laid down in the exemption regulation, in particular, the five-year period. But, *what about* exclusive supply clauses of non-specific products? It would be very questionable to consider that their term should be limited to five years, even if only because the franchisor would then be bound by asynchronous contracts to franchisees, which some national laws prohibit moreover[viii]. That is why it would be appropriate to consider that the duration of the exclusive supply clauses may be equal to the duration of the franchise agreement, regardless of the products that are the object thereof.

14. It therefore appears necessary to make room for the franchise in the DER due to its irreducibility to other distribution systems, which are only that, by specifying the reference system of analysis, in line with the *Pronuptia* judgement, with a clause-by-clause approach, in three orders, guaranteeing legal certainty, namely: (i) clauses which are *a priori* non-restrictive or which are exempt from certain conditions[ix]; (ii) restrictive competition clauses requiring an exemption[x]; and (iii) restrictive competition clauses, which cannot benefit from the exemption regulation[xi].

    The *Pronuptia* judgement also showed the way by distinguishing between:

    (1) clauses that constitute essential or incidental restrictions to the main operation and which do not require an exemption:

    - « *Provisions which are strictly necessary in order to ensure that the know-how and assistance provided by the franchisor do not benefit competitors* »
    - « *Provisions which establish the control strictly necessary for maintaining the identity and reputation of the network identified by the common name or symbol »*
    - « *The fact that the franchisor makes price recommendations to the franchisee does not constitute a restriction of competition , so long as there is no concerted practice between the franchisor and the franchisees or between the franchisees themselves for the actual application of such prices* » (point 27).

    (2) clauses that constitute restrictions on competition and which require an exemption:

    - « *Provisions which share markets between the franchisor and the franchisees or between franchisees* » (point 27).

15. In the end, the framework for analysing the franchise and the provisions a franchise agreement may contain is lacking in clarity.

    The franchise is a particular system that cannot be blended into other systems: it is unique among all the others because of the need for absolute uniformity at all points of sale, physical or online.

These **are** the reasons that call for provisions specific to franchises in the future exemption regulation.

Recommendation: Include in the DER provisions specific to the franchise by distinguishing clauses (i) which are essential or which constitute restrictions incidental to a franchise system (ii) from those which require an exemption, providing, where appropriate, conditions for exemption different from those required for other distribution systems.

3. ADJUST THE CONDITIONS ON APPLICATION TO THE FRANCHISE OF THE NEW RULES ON DUAL DISTRIBUTION

16. According to the new Article 2(4) of the DER,

> "*The exemption provided for in paragraph 1 shall not apply to vertical agreements entered into between competing undertakings. However, the exemption provided for in paragraph 1 shall apply to all aspects of a non-reciprocal vertical agreement between competing undertakings where:*
>
> *(a) the supplier is a manufacturer, wholesaler, or importer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing, wholesale or import level, and their aggregate market share in the relevant market at retail level does not exceed [10]%; or*
>
> *(b) the supplier is a provider of services at several levels of trade, while the buyer provides its services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services, and their aggregate market share in the relevant market at retail level does not exceed [10]%."*

17. The exemption from vertical agreements between competing companies now assumes that the combined market share of the supplier and distributor on the retail market concerned exceeds [10]%[xii].

18. However, if the franchise requires an exemption (see above), numerous networks could be threatened.

    In fact, almost all franchise networks are based on a dual distribution system. Indeed, the franchisor must continue to operate a certain number of points of sale, physical or online, due to (i) the crucial need to improve its methods in the interests of know-how, (ii) to operate strategic points of sale and to benefit from significant territorial networking in the interests of the network.

19. According to the new Article 2(5) of the DER,

> "*If the competing supplier and buyer referred to in Article 2(4)(a) or (b) have an aggregate market share that exceeds [10]% in the relevant market at retail level but that does not exceed the market share thresholds of Article 3, the exemption provided for in paragraph 1 shall apply, except for any exchange of*

information between the parties, which has to be assessed under the rules applicable to horizontal agreements"

This provision establishes an additional but "second" security zone for dual distribution, when the total market share of the supplier and its distributors at the retail market level is greater than 10% but the thresholds of Article 3 of the DER are not met. In such a case, the vertical agreement shall remain exempt, save for exchanges of information between the parties to the vertical agreement.

Such a situation is not satisfactory, since the sharing of certain information, which is necessary for the proper performance of the contract, is con-substantial to the franchise agreement and has even intensified with the increasing digitisation of franchise networks. It is common, in fact, for the franchisee to send the franchisor information of all kinds on its business, while the franchisor analyses this information and compares it with that of other franchisees in order to provide detailed advice to each franchisee of the network.

Depending on the case, the counsel thus provided by the franchisor participate in its obligation to provide know-how and/or its obligation to provide assistance. In other words, Article 2(5) of the DER is applied to prevent the franchisor from performing the essential obligations incumbent upon it under the franchise agreement, albeit without facilitating normal competition.

20. In any event, according to the new Article 2(6) of the DER, the exemption from vertical agreements concluded between competing companies does not apply, even below the new 10% threshold, if they:

"*have as their object to restrict competition between the competing supplier and buyer*"

This provision raises many questions - this time not specific to the franchise - due to (i) the difficulty in distinguishing between restrictions by object and effect and (ii) the lack of reference to restrictions by object that could be considered as restrictions incidental to the franchise. This approach cannot be used in an exemption regulation which aims to give companies clear indications.

Recommendation: Keep the pure and simple exemption from dual distribution in the franchise, as provided for in Article 2(4) of Regulation No. 330/2010**.**

4. PROVIDE CLARIFICATION ON PLATFORMS BY RECOGNISING THE SPECIFIC FEATURES OF THE FRANCHISE

21. As has always been said, the franchise is unique in relation to all other distribution systems on account of the need for brand consistency, i.e. uniformity of the point of sale and therefore the "customer experience", regardless of the distributor of the network.

22. This consistency cannot be threatened when distribution takes place online so as to only be protected when distribution takes place at a physical point of sale.

23. Two interests must therefore be reconciled: (i) the consistency of « online point of sale» and (ii) the freedom for franchisees (or even the franchisor) to be able to distribute products and services online.

24. That is why the franchisor should be able to require franchisees to sell products and services only on a platform common to the network.

Recommendation: The franchisor should be able to require franchisees to sell products and services only on a platform common to the network.

25. Subject to exceptions, the DER, as we have seen (see above), excludes the "*vertical agreement between competing undertakings*" from the benefit of the exemption (Art. 2 §4).

    However, these exceptions do not apply when the "competitor company" is a platform "*that also sells goods or services in competition with undertakings to which it provides online intermediation services enters into a nonreciprocal vertical agreement with such a competing undertaking*" (art. 2 §7).

26. According to the Commission's Explanatory Note[xiii], these are referred to "providers of online intermediation services (…) if they have a hybrid function, namely when they sell goods or services in competition with undertakings to which they provide online intermediation services."[xiv].

27. This provision is a very serious threat to the legal security of franchise networks whenever the franchisees' products and services and the franchisor's products and services are distributed on the online sales platform of the network.

Recommendation: Retain the particular case where the franchisor is the online intermediation service provider for the network products and services by maintaining the benefit of the exemption from restrictive competition clauses contained in a franchise agreement.

28. Pursuant to Article 5(1), d) of the DER, a restriction is excluded from the benefit of the exemption:

> "any direct or indirect obligation causing a buyer of online intermediation services not to offer, sell or resell goods or services to end users under more favourable conditions using competing online intermediation services."[xv]

29. It emerges from the Commission's Explanatory Note that « all parity clauses are currently block exempted under the VBER, but have been increasingly subject to enforcement actions by competition authorities during the last years » » and that « [a]s these enforcement actions have focused on parity clauses relating to indirect sales channels, the revised draft VBER removes the benefit of the block exemption for such across-platform retail parity obligations imposed by providers of online intermediation services» but that the draft revised VBER « still block exempts retail parity obligations relating to direct sales or marketing channels (so-called narrow parity) »

30. The main reasons for refusing to exempt the parity between platforms clauses are explained in the DGL:

> "Retail parity obligations which cause a buyer of online intermediation services not to offer, sell or resell goods or services to end users under more favourable conditions using competing online intermediation services, as defined in Article 5(1)(d) VBER, are more likely than other types of parity obligation to produce net anti-competitive effects. Across-platform retail parity obligations may restrict competition as follows:
>
> (a) They may soften competition and facilitate collusion between suppliers of online intermediation services. In particular, it is more likely that a supplier which imposes this type of parity obligation will be able to raise the price or reduce the quality of its intermediation services without losing market share. Irrespective of the price or quality of its services, sellers of goods or services which choose to use its platform are obliged to offer conditions on the platform that are at least as good as the conditions they offer on competing platforms.
>
> (b) They may foreclose entry or expansion by new or smaller suppliers of online intermediation services, by restricting their ability to offer buyers and end users differentiated price-service combinations." (point 337)

31. The fact remains that the legitimate fear of a restriction of competition between platforms cannot arise in the same way with regard to third-party platforms and the platform of the franchisor at the head of the network. Indeed, in the latter case, the franchisor's platform is in fact the platform of all the members of the network and will sometimes constitute the only sales channel for franchisee products so as to best ensure the principal objective of the franchise: consistency.

Recommendation: Retain the particular case where the franchisor is the online intermediation service provider for the network products and services by accepting the validity of the parity clauses, assuming that distribution on third-party platforms is not prohibited for franchisees.

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FOOTNOTES

[i] M. MENDELSOHN, S. ROSE, *Guide to the EC Block Exemption for Vertical Agreements*, International Competition Law Series, V. 4, Kluwer Law International, 1st edition, 2001.

[ii] See judgment in Case 161/84, 28 January 1986, *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis.*

[iii] As it is noted, "*franchise agreements for the distribution of goods differ in that regard from dealerships or contracts which incorporate approved retailers into a selective distribution system, which do not involve the use of a single business name , the application of uniform business methods or the payment of royalties in return for the benefits granted"* (paragraph 15).

[iv] Recital (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 by 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*."

Art. 1.1 Regulation n°4087/88**:** "*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 untertakings are party, which include one or more of the restrictions listed in Article 2*."

[v] The Guidelines accompanying the various exemption regulations nevertheless refer to the franchise.

[vi] Indeed, Article 4 of the ERP on hardcore restrictions no longer distinguishes, as did the previous exemption regulations, according to a transversal approach, the restrictions of competition that may be contained in a franchise agreement, but distinguishes, according to a vertical approach (by "silo"), depending on the nature of the distribution network.

[vii] This is evident from the Guidelines on Vertical Restraints (2000/C 291/01) (bearing in mind that the Guidelines on Vertical Restraints (2010/C 130/01) repeat the substance in mostly identical terms in paragraphs 190 and 191: "*As for the vertical restraints on the purchase, sale and resale of goods and services within a franchising arrangement, such as selective distribution, non-compete or exclusive distribution, the Block Exemption Regulation applies up to the 30 % market share threshold for the franchisor or the supplier designated by the franchisor (…). The guidance provided earlier in respect of these types of restraints applies also to franchising, subject to the following specific remarks: 1) (…) the more important the transfer of know-how, the more easily the vertical restraints fulfil the conditions for exemption. 2) A non-compete obligation on the goods or services purchased by the franchisee falls outside Article 81(1) when the obligation is necessary to maintain the common identity and reputation of the franchised network. In such cases, the duration of the non-compete obligation is also irrelevant under Article 81(1), as long as it does not exceed the duration of the franchise agreement itself.*" (point 200).

In other words, the only particularity of the franchise would be the exclusive supply obligation, which would not have to be limited to 5 years, for *products specific* to the network.

But, further on, it is stated: "*Most of the obligations contained in the franchise agreements can be assessed as being necessary to protect the intellectual property rights or maintain the common identity and reputation of the franchised network and* ***fall outside Article 81(1)****. The restrictions on selling (contract territory and selective distribution) provide an incentive to the franchisees to invest in (…) the franchise concept and, if not necessary for, at least help to maintain the common identity, thereby offsetting the loss of intra-brand competition*." (point 201, we underline).

The Commission concludes by noting that the "*franchise agreements of this franchisor are likely to fulfil the conditions for exemption under Article 81(3) in as far as the obligations contained therein fall under Article 81(1)*" (point 201).

[viii] In french Law, v. art. L. 341-1 C. com.: "*All contracts concluded between, on the one hand, a natural person or a legal person governed by private law grouping together traders, other than those mentioned in Chapters V and VI of Title II of Book I of this Code, or providing the services mentioned in the first paragraph of Article L. 330-3 and, on the other hand, any person operating, on his own behalf or on behalf of a third party, a retail store, having as a common goal the operation of this store and including clauses likely to limit the freedom of exercise by this operator of his commercial activity provide for a common deadline. (...)" (free translation).*

[ix] 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 manufcturer 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 cary 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."

Adde Recital (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.*"

[x] 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."

Adde Recital (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*."

[xi] 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."

Adde Recital (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*."

[xii] This mode of distribution is currently exempted by article 2§4 of the Regulation n° 330/2010: "*where competing undertakings enter into a non-reciprocal vertical agreement and* (…) *the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level"* (art. 2§4, a*) ; adde* art. 2§4, b) for the distribution of services).

[xiii] https://ec.europa.eu/competition-policy/public-consultations/2021-vber_en

[xiv] See the various relevant Recitals:

Recital (10): "*The online platform economy plays an increasingly important role in the distribution of goods and services. The undertakings active in the online platform economy enable new ways of doing business, some of which are not easy to categorise using the concepts traditionally associated with vertical relationships between suppliers and distributors in the brick and mortar environment. However,* ***where such undertakings are providers of online intermediation services, it is appropriate to categorise them as suppliers under this Regulation****. Providers of online intermediation services allow undertakings to offer goods or services to other undertakings or to consumers with a view to facilitating direct transactions between such undertakings or between such undertakings and consumers, irrespective of whether and where those transactions are ultimately concluded. This categorisation also applies when the provider of online intermediation services provides multiple services or services at multiple levels in the distribution chain*".

Recital (11): "*only agreements between providers of online intermediation services and other undertakings fall within the scope of this Regulation. These agreements are considered to be vertical agreements within the meaning of this Regulation.*"

Recital (12): "***Providers of online intermediation services should not benefit from the block exemption established by this Regulation where they have a hybrid function, that is where they sell goods or services in competition with undertakings to which they provide online intermediation services***. *This is because the retail activities of providers of online intermediation services that have such a hybrid function typically affect inter-brand competition and may therefore raise non-negligible horizontal concerns" (we underline).*

[xv] And see Recital (14): "*parity obligations causing buyers of online intermediation services not to offer, sell or resell goods or services to end users under more favourable conditions using competing online intermediation services should also be excluded from the benefit of this Regulation*".