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Our Ref : G./16140908/2019/0000674655/v0.1
Re : VAHFR / Advies

Dear,

1. With this letter the Dutch Association of Albert Heijn Franchisees ('Vereniging van Albert Heijn Franchisenemers', the Association of Gall & Gall Franchisees ('Vereniging van Gall & Gall Franchisenemers') and the Association of Etos Franchisees ('Vereniging van Etos Franchisenemers') ('**Associations of franchisees**') submit their observations to the European Commission ('**Commission**') in the framework of the Evaluation of the Vertical Block Exemption Regulation, Regulation 330/2010 (OJ L 102 (2010) p. 1). The Associations of franchisees have taken notice of the public questionnaire, but prefer to submit their own observations and concerns with this letter, which will be limited to specific characteristics of franchising in the Netherlands.
2. The Associations of franchisees represent and safeguards the interest of franchisees of the associated franchisees of the three Ahold brands in the Netherlands (Albert, Gall & Gall and Etos). The Association of Albert Heijn Franchisees has approximately 175 members with a combined total of 267 supermarkets in the Netherlands at the moment. The Association also functions as a consultation body for the franchisees on the one hand and Albert Heijn on the other hand. For further information, reference is made to the VAHFR-website: www.vahfr.nl. Similarly the Association of Gall & Gall Franchisees represents the 201 Gall & Gall franchisees in the Netherlands with a combined total of approximately 260 liquor stores, while the Association of Etos Franchisees has 172 members, totalling approximately 250 drugstores. These associations perform the same functions as their Albert Heijn sister organisation VAHFR. We refer to www.gallfranchise.nl and www.etosfranchisevereniging.nl for further information. The networks Albert Heijn, Gall & Gall and Etos all belong to Ahold Group.

- Preliminary observations
3. Following the judgment of the Court of Justice ('ECJ') in the case Pronuptia de Paris¹ the concept of (distribution) franchising generated a lot of attention, also through a number of Commission decisions which dealt with franchising, the application of the criteria adopted by the ECJ for non-applicability of (now) Article 101 (1) TFEU and the possibility for exemption under (now) Article 101 (3) TFEU. Subsequently the Commission adopted Regulation 4087/88 (block exemption for franchise agreements) of 30 November 1988 (OJ L 359 (1988) p. 46). Upon its expiry in 1999 the specific regime for franchise agreements was replaced by the general block exemption for vertical restrictions of Regulation 2790/1999 (OJ L 336 (1999) p. 21), at its turn replaced by Regulation 330/2010.
 4. It is important to emphasize that the concept of franchising – unlike e.g. selective distribution – is not mentioned explicitly in Regulation 330/2010, although an important aspect of franchising, know how (made available by the franchisor) has been defined (Article 1 (1) (f) and (g) of Regulation 330/2010) and applied (Article 5 (3) (c) and final par. of Regulation 330/2010) for the delimitation post contractual non-competition obligations. The Commission Notice concerning the Guidelines on Vertical Restraints² does mention some aspects of franchising in relation to vertical agreements containing provisions on the protection of intellectual property rights and knowhow. These provisions reflect the interest of the franchisor, not the interest of the franchisees.
 5. The Associations of franchisees are convinced that more and specific attention for (distribution)franchising can contribute to better and effective application of competition law on franchising. The specific chapter on franchising in the Commission's Guidelines on Vertical restraints³ refers mainly to the general observations for vertical relations in par. 23-45 of the Guidelines (p. 6 – 10, 'Scope of the Block Exemption Regulation'). An analysis of specific features and characteristics is lacking.
 6. The present way in which franchising is included in the secondary legislation and guidelines of the Commission's competition policy is manifestly different from the approach in several Member States where franchising is subject to specific legislation, such as Estonia, Italy, Romania and Spain. E.g. the Spanish law on Retail Sales provides a definition of franchising and imposes two pre-contractual obligations on the franchisor, namely registration in a public register of franchisors, and the obligation to provide pre-contractual information to the

¹ ECJ 28 January 1986, case 161/84, Pronuptia de Paris/Schillgallis, ECLI:EU:C:1986:41

² Notice of the Commission, Guidelines on vertical restraints (OJ C 291 (2000) p1, at Chapter VI, par. 2.5, numbers 43-45 and 189-191).

³ Notice of the Commission, Guidelines on vertical restraints (OJ C 291 (2000) p1 (OJ C 291 (2000) p1, at Chapter VI, par. 2.5, numbers 189-191).

franchisee.⁴ Italian legislation mostly focuses on the negotiation on and conclusion of the contract, imposing both formal requirements and disclosure obligations. France has a provision in the French Civil Code⁵ that declares clauses in preformulated standard agreements void and null when it creates a significant imbalance between the rights and obligations of the parties to an agreement. The Associations of Franchisees also refer to recent developments in the Netherlands: the Dutch Franchising Code ('De Nederlandse Franchise Code') published on 17 February 2016⁶. This Code took into account aspects of the European Franchising Code ('Europese Erecode Inzake Franchising')⁷ and wishes to restore the imbalance between franchisors and franchisees. In 2017 the Dutch government has proposed a Bill to Parliament on franchising to adapt the Dutch Civil Code⁸, which also refers to the Dutch Franchising Code (the Bill is still pending). Although legislation in the Member States and the recent developments in the Netherlands primarily concern conditions and obligations to enhance fair competition ('concurrence loyale') and information obligations of franchisors, this legislation and developments emphasize at the same time the specific characteristics and problems that go with franchising, which is at present not mirrored at all in European competition law, unlike in the period 1986-1999. This omission must be repaired. The Association of franchisees also refer to the importance of ensuring the pre-contractual hygiene the Franchise Law Review 2018 mentions.⁹

7. In the next paragraphs the Associations of franchisees will describe a number of competition law issues which are specific for franchising or at least have risen in the sector the Associations of franchisees are familiar with. In the Pronuptia judgment the ECJ has ruled that several types of restrictions in a franchise agreement do not qualify as competition restrictions within the meaning of (now) Article 101 (1) TFEU, more specifically: (i) provisions to ensure that the knowhow and assistance by the franchisor does not benefit competitors; (ii) provisions which establish the control for maintaining the identity and reputation of the franchise network; (iii) price recommendations. However, the ECJ also made clear that such restrictions must be clearly limited; the ECJ did not give 'carte blanche' for any such obligations. The safe harbour for the first two categories ((i) and (ii)) was limited to provisions which are 'strictly necessary' for the objective which can be its justification; in the case of (iii) (price recommendations) the non-applicability of the cartel prohibition only applies in the absence of any collusion between franchisor and franchisees. Consequently, in the former Regulation 4087/88 the Commission defined conditions and criteria for the application of criterion 'strictly necessary', which has disappeared since 2000 (see hereinbefore). Consequently, franchisors will invoke a degree of necessity for the protection of know how or reputation to justify restrictions upon the

⁴ 'Franchising', Study for the IMCO Committee, April 2016 (a report prepared by Policy Department A at the request of the Internal Market and Consumer Protection Committee, <http://www.europarl.europa.eu/studies>), par. 6.2.2 and 6.3.1.

⁵ Article 1171 of the French Civil Code.

⁶ <https://www.rijksoverheid.nl/documenten/rapporten/2016/02/17/de-nederlandse-franchise-code>

⁷ This European Code is considered to be drafted by Franchisors solely, without any relevant input from franchisees.

⁸ 'Wijziging van Boek 7 van het Burgerlijk Wetboek in verband met de introductie van een regeling betreffende de franchiseovereenkomst (wet franchise)': https://www.internetconsultatie.nl/wet_franchise

⁹ The Franchise Law Review 2018, Law Business Research Ltd, Fifth edition, p. 133-135.

franchisees, whereas at the same time the present Regulation 330/2010 is rather liberal as it exempts anything except the restrictions listed in Articles 4 and 5. The following demonstrates that more scrutiny is required, also in view of the lack of equality and balance between franchisors and franchisees in many cases, especially in the supermarket sector and the sectors of the Associations of franchisees.

- Market power/dominance
- 8. In many cases – more specifically in the supermarket sector in the Netherlands – a franchisor will have a dominant position, both on the relevant geographical market¹⁰ and in its relation to its franchisees: as the switching costs for a franchisee to change from one network to another might be extremely high and a franchisee might be severely restricted in case of such switch (e.g. location clause, obligation to sell its premises to the former franchisor; post contractual non-competition clauses) the franchisee is in a captive position, dominated by the franchisor. The franchisee has neither market power nor leverage to stand up to the franchisor's decisions and demands, however questionable these might be from a legal point of view.
- 9. The present remedy in Regulation 330/2010 (Article 3: the Regulation does not apply in case of a market share of the franchisor and/or the franchisee of > 30 %) does not solve this: the definition how to calculate the market share does not take into account that (even) a franchisor with a relatively small market share may have a dominant position in the vertical relation with its franchisee, who will be highly dependent on the franchisor and his franchise contract for his existence and continuity as a reseller. Even if the geographical relevant market – in the case of supermarkets is defined as rather small (e.g. the area within 10 to 15 minutes driving distance for a consumer), and a specific franchisor has a market share of < 30 % in a specific area, he may still have a dominant position in relation to his franchisees.
- 10. Regardless the question whether in general the market share threshold in Article 3 of Regulation 330/2010 should be higher or lower, a specific provision for the case of franchising is needed to establish a level playing field between franchisor and franchisees.
- Market shares
- 11. The Dutch supermarket sector is characterized by a growing degree of consolidation. The market is dominated by a limited number of larger supermarket networks which have considerable market shares nationwide but also in the respective geographical markets. Albert Heijn is the largest supermarket network in the Netherlands with a market share of 35,3% in 2018, followed by Jumbo with a market share 18,7%. The European share of the market of the AH Delhaize-concern is currently 10%.

¹⁰ E.g. the ACM (NMa) decision 7323/81 Jumbo-C1000. Due to too dense concentration in certain geographical areas one specific supermarket cannot be rebranded. For that reason the potential alternatives for rebranding a franchisee's supermarket are diminished even more.

12. The block exemption applies only to those franchisors with a market share of less than 30%. This means that franchisors may, for instance impose maximum price restrictions, but not minimum price restrictions. Hard-core restrictions, such as (total) territorial and client exclusivity, price maintenance and restrictions on cross-supply are not permitted and will imply that franchise agreements containing such provisions will not benefit the block exemption. The combination of franchisors with a large market share and standard franchise agreements with no real pre-contractual phase from the franchisee's perspective causes an imbalance between franchisor and franchisees.
13. Consequently, the options for franchisees to change from one franchise network to another are very limited or even non-existent, unless a franchisee obtains an existing supermarket of another franchise network, which is moreover prohibited by a non-compete clause in the franchise contract (as it is in the case of the VAHFR-members). Moreover, very often a franchisor in the supermarket sector may not be interested in a new franchisor in an area in which it already has own shops or (a) franchisee(s).
14. The effect of this situation is that franchisees in the Dutch supermarket sector are in the position of 'captive clients' of franchisors, which – again – affects the level playing field and bargaining power of franchisees negatively.
15. The Associations of franchisees request the Commission to take this issue into account and address this in the new regulation and/or guidelines.
 - Exclusive purchase obligations
16. Exclusive purchase obligations up to 80% of the total purchase of contract products and services do not qualify as a non-competition claim (Article 1(1) under (d) or Regulation 330/2010).
17. The limit of 80% in the present block exemption regulation is – in the case of franchising – in some (or many?) cases rather artificial and of little practical importance. Many franchisees will try to prevent the necessity to make purchases up to 20% from other sources than the franchisor's. Such free purchases – where compatible with the formula of the franchise network (see Pronuptia judgement)¹¹ - is considered a serious logistical and organisational effort, which should preferably be avoided.¹² For fresh food products (strawberries etc.), franchisors in fact prescribe 100% sourcing by franchisees due to possible issues with food

¹¹ ECJ 28 January 1986, case 161/84, Pronuptia de Paris/Schillgallis, ECLI:EU:C:1986:41.

¹² This is the case for e.g. the AH-franchisees due to Albert Heijn's organisation of the technical infrastructure between the supermarkets and HQ. All manually adjusted pricing made by franchisees will be automatically corrected to the standard pricing every other day. Therefore, all manual pricing must be redone every other day. Again and again. Assuming that Albert Heijn intends to implement electronic price tags to the shelves, it is not clear at all whether this technical solution includes the possibility of individual adjustment of prices.

safety which can affect the brand name. This again emphasises the dominant position of the franchisor.

18. Franchisors are of course aware of this and will be satisfied with an 80%-ceiling in the contract and a quasi-certainty of 100% purchases in practice, which once again influences the level playing field between franchisor and franchisees in favour of the franchisor.
- Location obligations
19. Locations obligations in franchise contracts are a source for conflict and control of the franchisor on the franchisees. Reference is made to par. 8.
20. Apart from the fact that a franchisee may lose its premises in case he chooses to terminate the contract (e.g. to change to another franchise network) as the contract grants the franchisor extensive priority rights and options to take over the lease of the premises or buy the real estate, the contracts will very often also exclude or restrict relocation or extension of the franchisee's shop, subject to losing the franchise contract. Such clauses "fossilize" the market structure and limit the franchisee's to make their own commercial decisions within the context of its franchise relation.
21. The lack of a block exemption regulation which specifically addresses such issues (which seem to be characteristic for franchising) is manifest here as well. The system designer by the Pronuptia-judgement (see par. 3 and par. 7), where specific restrictions were considered as compatible with (now) Article 101 (1) TFEU and where all other restrictions were only acceptable under the conditions of (now) Article 101 (3) TFEU ensured close scrutiny of such provisions, which were and are very often aimed at reinforcing the control and position of the franchisor vis-à-vis its franchisees.
22. The system of the present Regulation 330/2010 is to exempt all restriction unless excluded from exemption in Articles 4 and 5 of Regulation 330/2010 (subject to market shares). Consequently, many provisions in franchise contracts which are not covered by the Pronuptia judgement escape any scrutiny under competition law, although they may seriously affect their position of franchisees in its position towards the franchisor and on the market.
- Non-competition obligations
23. A distinction has to be made between contractual and post contractual restrictions. The application of non-competition obligations during the term of the contract constitutes a major restriction upon franchisees. During the term, the application of non-competition obligations is of importance as it may prevent the franchisees from establishing new outlets (with another brand, formula or product focus) in or outside the contract territory, when a new outlet might – in the opinion of the franchisor – serve (partially) overlapping/concurring markets, or even where such outlet would not compete with the franchisor or other franchisees at all. It also

- prevents the franchisees from expanding or developing its commercial activities in case the franchisor does not allow franchisees to expand its relationship with the franchisor by establishing additional outlets with the same formula in or outside the contract territory.
24. After termination of the franchise contract the application of non-competition obligations is even more restrictive and extremely negative for the franchisee by (in fact) causing the impossibility to continue to exploit and commercialise the goodwill and the franchisee's real estate/location. Post contractual non-competition clauses will in general make it commercially impossible for a franchisee to change to another franchise network or continue independently under its own brand.
 25. At present Article 5 (3) of Regulation 330/2010 allows a post contractual competition restriction for a maximum of one year, subject to several conditions (a to d). Especially condition under (c) is relevant in the context of franchising; it echoes point extent the Pronuptia judgement.
 26. Although the present Article 1 (1) under (g) of Regulation 330/2010 defines the concept of 'knowhow' which protection may require a limited post contractual non-compete clause, serious uncertainties remain to the extent that a franchisee cannot assume that the condition in Article 5 (3) under (d) of Regulation 330/2010 is not fulfilled. This can be illustrated by the fact that – at least tot the knowledge of Associations of franchisees – franchisors in the sector concerned, e.g. Albert Heijn - do not bother to inform their franchisees what know-how they consider relevant and worthwhile being protected (The Associations of franchisees assume that the most important aspect is pricing and promotion and promotion mechanics). In the case of Albert Heijn franchisees are only informed shortly before one or more advertising/discount actions/promotion start or are valid, and that the related knowledge has no value left after the duration of the actions/promotion. It is more a matter of weeks then of one month.
 27. Especially in the sector concerned it may be highly unlikely that all conditions of Article 1 (1) under g of Regulation 330/2010 are fulfilled and that the franchisor has insufficient reason to impose a post non-compete clause in accordance with the conditions of Article 5 (3) under d of Regulation 330/2010. At the same time such condition will be included in the contract (as its eventual illegality will not affect the applicability of the block exemption to other provisions (Article 5 (1) of Regulation 330/2010). Such clause will also impose at the same time a serious fine or penalty on the franchisee in case of its breach. It is relevant to provide for a more limited definition of 'know-how' that can justify restrictions and/or exemption and (a least) to limit such knowhow to predefined know-how.
 28. A franchisee will not be in the position to 'test' the validity of such clause through litigation before the civil courts in view of penalty and damage claims of the franchisor, whereas abiding the non-compete clause will prevent him to start its own business (under its own brand) or change to another franchise network within one year after leaving its former franchise

network. This is unaffordable for the franchisee, which will be tied to the contract for that reason.

29. The new block exemption should provide for a better balance between:
- a. protection of (predefined) know-how (e.g. through a stricter and more precise definition, which excludes 'fake' know-how and commercial 'talk' that does not deserve this qualification);
 - b. the possibility for franchisees to leave a franchise network (e.g. by the prohibition of contractual penalties on the breach of a non-competition clause or otherwise) and
 - c. to enhance a level playing field between franchisor and franchisees and a more competitive supermarket sector.
- Horizontal competition between franchisor and franchisee
30. It is not uncommon that franchise networks consist of shops owned and exploited by the franchisor itself and by shops of franchisees (which qualify as independent companies (or resellers)).
31. Although such franchisees – also from a competition law point of view – qualify as independent companies (no corporate relations with the franchisor) they may and mostly will be entirely commercially dependent of the franchisor. Their margin for an independent commercial strategy is very limited or nil (which is inherent to franchising).
32. The Associations of franchisees have referred to the lack of a level playing field between franchisees and the franchisor hereinbefore. This is the more a problem where franchisees and franchisor are horizontally, competing resellers, which is often the case in the Dutch supermarket sector and has become even more relevant and disturbing through the establishment of online platforms in the sector for online sales by franchisors to the detriment of the commercial position of its franchisees.¹³ These practises raise antitrust concerns and should be restricted.
33. This incongruence has grown over the years in cases where the franchisor has realised a platform for online sales, including the geographical (contractual) territories of the franchisees. Once again a level playing field and sound competition are at stake. It is certainly an issue that the Commission (also) should address in the guidelines: the level playing field

¹³ E.g., this is the case in the Albert Heijn-network. Reference is made to the response to the Commission's Preliminary Report on e-commerce (EU E-commerce Sector Inquiry) of the Associations of Franchisees; http://ec.europa.eu/competition/antitrust/e_commerce_files/vereniging_albert_heijn_franchisenemers_en.pdf.

between franchisees and franchisor where the franchisor has a dominant position towards its franchisees.¹⁴

34. The envisaged new block exemption regulation and guidelines should provide clear rules and guidance in such situations where the proper functioning of the market and the position of franchisees require rules to protect independent resellers which are bound by extensive rules and obligations to the franchisor, to protect franchisees from (the consequences of) horizontal competition from the franchisor which is their supplier / wholesaler at the same time.
- Conclusion
35. Franchising could better fulfil its potential in the EU if the regulatory environment takes into account the following:
- ensure the right of information of the franchisee in the pre-contractual phase;
 - safeguard the balance between the interests of the franchisor and franchisees;
 - draw up a proper, strict and precise definition of 'know-how';
 - impose a mandatory set of rights and obligations for franchisors and franchisees in which the benefit of the franchising agreement is appropriate for both parties, including the consumer;
 - harmonise the regulatory framework throughout the EU.
36. The regulatory competition law framework should be more and better adapted to the characteristics of franchising, especially on the issues and problems indicated in this letter. We kindly request you to ensure a proportionate relationship between franchisor and franchisees in the better version of the regulation and in the process¹⁵ towards a the new regulatory framework (including the Guidelines¹⁶).

¹⁴ Another example: consumer and/or transaction data which the franchisees generate and are obtained by the franchisor through the technical infrastructure between franchisees and franchisor (cash register data) are highly relevant and useful data, both for the franchisor and the franchisees in e.g. the supermarket sector. It is often the practice of franchisors that they claim such data for themselves, not granting access to its franchisees,


¹⁵ The Associations of Franchisees refer to lack of balanced representation of the parties concerned when it comes to franchising mentioned in the EP report 'Franchising', Study for the IMCO Committee, April 2016 (a report prepared by Policy Department A at the request of the Internal Market and Consumer Protection Committee, <http://www.europarl.europa.eu/studies>), p. 9 and 133.

¹⁶ See footnotes 2 and 3.

37. The Association of franchisees and the undersigned are willing to further explain their views and experiences.

Yours sincerely,

Windt Le Grand Leeuwenburgh



G. van der Wal



D.R. Ninck Blok