

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 17 December 1986

in proceedings under Article 85 of the EEC Treaty

(IV/30937 — Pronuptia)

(Only the French text is authentic)

(87/17/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17, First Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 6 and 8 thereof,

Having regard to the application for negative clearance or exemption filed on 22 April 1983 by Pronuptia de Paris SA, Paris, of its standard form of retail franchise agreement which it proposed to sign with all its franchisees,

Having published a summary of the agreement in accordance with Article 19 (3) of Regulation No 17 ⁽²⁾,

Having consulted the Advisory Committee on Restrictive Practices and Monopolies,

Whereas :

I. FACTS

A. Pronuptia de Paris

- (1) Pronuptia de Paris (Pronuptia) is a French public limited company incorporated in 1958 which has a registered capital of FF 3,3 million. Pronuptia specializes in the sale of bridal wear and accessories. On 9 December 1985 financial difficulties

forced the company to apply to the Paris Tribunal de Commerce for temporary protection from its creditors, during which it was allowed to continue its operations.

- (2) Pronuptia carries on business mainly in France and other European countries, but is also represented outside Europe in countries such as Canada, Japan, Lebanon and the United States.
- (3) In France, its distribution network numbers 148 of which 135 are franchised, five are subsidiaries and eight are branches.
- (4) In the other Member States (Germany, Belgium, Spain, Greece, Ireland, Luxembourg and the United Kingdom) in which Pronuptia uses franchising to distribute its products, it has a little over 100 franchised outlets. In Germany, Spain and the United Kingdom it also has subsidiaries.
- (5) The total turnover of the Pronuptia network throughout the world in 1985 was about FF 250 million.
- (6) Pronuptia claims to have the biggest chain of shops offering formal wear in the world, and to be the only network specializing in bridal wear in France, where there is no similarly organized competition ⁽³⁾. In France, Pronuptia holds about 30 % of the bridal wear market. Against this, it holds only more modest shares in other Member States.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 178, 16. 7. 1986, p. 2.

⁽³⁾ Pronuptia Operations Manual, Vol. 1. Section I, p. 1, and Section II, pp. 1 and 3.

B. The relevant products and market⁽¹⁾

- (7) The Pronuptia network sells and hires not only wedding dresses but also wedding attire for attendants and guests, including men's formal wear, and a full range of accessories such as hats, veils, tights, gloves, shoes, handbags, garters, scarves, and lingerie. Its collection in any year numbers around 1 000 items of all types.
- (8) The articles offered from Pronuptia outlets fall into three categories which also differ as to their sourcing :
 - (a) fashion goods, of Pronuptia's own design, which are manufactured for it by subcontractors, such as its wedding dress designs which are registered and bear the 'Pronuptia' trade mark ;
 - (b) other fashion goods, not of Pronuptia's design but of designs commissioned or selected 'off-the-shelf' from other suppliers, which Pronuptia buys in and on which it also puts its trade mark ;
 - (c) goods not designed by or for Pronuptia which are purchased by franchisees directly from the supplier of their choice and invoiced to them by the supplier.

The articles in categories (a) and (b) which are supplied and invoiced to franchisees by Pronuptia itself account for about two-thirds of the goods traded through the network. Pronuptia sells at the same prices to all franchisees.

- (9) There are many other manufacturers of bridal fashions in France and other EEC countries. In France, there are, to name but a few, 'Les Mariées de Christina', 'Les Mariées de Marcelle', (Maggy Rouff), 'Les Mariées de France', 'Les Mariées de Rêve', Claude Hervé, and 'Les Mariées Laura' ; in Germany, there are Vera Mont, Pagels and Horn, and the Team Brantude International chain. These manufacturers generally do not use the franchising route to sell their products. There is also competition from small dressmakers' shops and from the large fashion houses, all of which also design wedding dresses.

⁽¹⁾ The services offered by the Pronuptia chain (honeymoons, photographers, receptions, etc.) are disregarded as they are at present only offered in France and only if the franchisee wishes. Their economic impact is therefore probably insignificant.

C. The Pronuptia franchise agreement

- (10) Pronuptia proposes to sign the notified franchise agreement with all its franchisees both in France and in other EEC and non-EEC countries. It wishes the Commission to take a formal decision on its application for exemption of the agreement.
- (11) The main provisions of the standard form agreement are as follows :
 - The franchisor, Pronuptia, grants the franchisee the exclusive right to use the 'Pronuptia de Paris' trade mark in a defined sales territory, where the franchisee agrees to run a retail outlet dealing primarily in bridal wear and accessories under the Pronuptia name and logo or a derived logo approved by the franchisor. The franchisor undertakes to credit the franchisee with 10 % of any mail-order sales it makes to customers in the territory involving products normally sold by the franchisee (clause 1).
 - The franchisor undertakes to assist the franchisee with, in particular, selecting the site and the premises, shopfitting and stocking, regular training of the franchisee and his staff, promotion and advertising (for which the franchisor will provide point-of-sale material and will check that the franchisee's advertising is consistent with the network's brand image), and with continuing information and advice on innovations, promotions, market analysis, purchasing, etc. (clause 3).
 - The franchisee undertakes not to use the Pronuptia trade mark and logo other than in conjunction with his own business name followed by the words 'Franchisee of Pronuptia de Paris' (clause 2).
 - The franchisee agrees to carry on the franchise business in the particular manner developed by the franchisor and to use the know-how and expertise the franchisor has made available (clause 4, second paragraph, first indent).
 - The franchisee is required to carry on the franchised business exclusively from the premises approved by the franchisor and fitted and decorated according to its instructions (clause 4, second paragraph, second indent).
 - The franchisee must obtain the franchisor's approval for his local advertising (clause 4, second paragraph, third indent).

- In consideration of the rights and services received, the franchisee agrees to pay the franchisor an initial non-recurring fee⁽¹⁾ and monthly royalties of between 4 and 5 % of his total turnover from the direct sale of the franchise goods to customers from the franchised shop (clause 5)
- The franchisee agrees to contribute a further sum, equal to his monthly royalty payment, to an advertising and promotional fund. This fund is managed by the franchisor, who however consults with franchisees on how to obtain the maximum benefit from the advertising budget (clause 6).
- The franchisee agrees to pay a minimum amount of royalties each year (clause 7).
- The franchisee agrees to order the goods traded from the franchised business exclusively from the franchisor, and may be required to obtain them exclusively from the franchisor if the franchisor is able to supply all the franchisee's requirements (clause 8, first and third paragraphs). However, the franchisee may obtain goods not connected with the essential object of the franchise business from the supplier of his choice, subject to the franchisor's right to vet such goods afterwards and to forbid the franchisee to market them from the franchised outlet if it judges them to be out of keeping with the brand image (clause 8, fourth and fifth paragraphs).

The franchisee undertakes to order at least 50 % of his estimated sales, based on those of the previous year, in advance according to a fixed timetable and to have the articles shown in the catalogue in stock (clause 8, seventh and eighth paragraphs).

The franchisee is free to obtain Pronuptia products from any other franchise in the network (clause 8, ninth paragraph).

- The franchisee is free to set his own retail prices, the prices circulated by the franchisor in internal literature being only suggestions. However, the franchisee is recommended not to exceed the maximum prices quoted by the franchisor in advertising and promotions (clause 9).

⁽¹⁾ The initial entry fee depends on the population of the allotted sales territory and varies between FF 0,15 and 0,20 per resident. The average population of a territory is about 300 000. The average entry fee is thus between FF 45 000 and 60 000.

- The franchisee may not assign the franchised business in law or in fact to another person without the written consent of the franchisor. In the event of the sale or assignment of the management of the franchised business, or the death or incapacity of the franchisee, or any other circumstance which prevents the franchisee from carrying on the franchise normally, the franchisor is entitled to terminate the contract (clause 10). The contract may also be determined if the franchisee files for bankruptcy, goes into liquidation, ceases trading, or if either party breaches its obligations (clause 13).

- The agreement has a term of five years, which is automatically renewed for further one-year periods unless terminated upon at least six months' notice before the end of any period (clause 11).

- The franchisee agrees not to engage, directly or indirectly, during the currency of the agreement and for one year after its expiry or termination, in any similar business in the same area or in any other area where he would be in competition with another Pronuptia outlet. However, the franchisee may continue to carry on the business in the allotted territory after the agreement has ended if he

- (i) has exercised the franchise for more than 10 years,
- (ii) has discharged his contractual obligations, and
- (iii) does not put the know-how and experience he has accumulated at the service of a competing network (clause 12).

- (12) At the Commission's request, Pronuptia has amended the standard form agreement to put into writing certain rights which the franchisee allegedly had in practice already, namely the rights

- (a) to purchase Pronuptia products from other franchisees,
- (b) to purchase goods not connected with the essential object of the franchise business from suppliers of their choice, subject to *ex post* qualitative vetting by the franchisor, and
- (c) to set their own retail prices, the prices circulated by the franchisor being only suggestions and the franchisee merely being recommended not to exceed the maximum prices quoted by the franchisor in advertising and promotions. Pronuptia has abolished the clause which requires the franchisee not to harm the brand image of the franchisor by his pricing level.

D. The legal proceedings between Pronuptia and one of its German franchises

(13) Following a legal proceeding in 1981, on the subject of a franchise contract and taken by Pronuptia's German subsidiary, Pronuptia GmbH, against one of its franchisees, the Federal Supreme Court asked the Court of Justice of the European Communities for a preliminary ruling on the following questions (*inter alia*):

- (i) whether, franchise agreements such as those before it fell within the scope of Article 85 (1), and, if so,
- (ii) whether such agreements could be covered by Commission Regulation 67/67/EEC (⁽¹⁾), and, if so,
- (iii) whether particular clauses found in the agreements before the Court were covered by Regulation 67/67/EEC.

The Court of Justice gave judgment on 28 January 1986.

(14) In this judgment the Court of Justice defined retail franchises, with which the case and the present proceedings are concerned, as systems whereby 'a firm which has established itself in a certain business in one market, and has developed a system for carrying on that business, licenses independent traders, in return for payment, to use its name and proven formula for the business in other markets. Rather than a method of distribution, the system is a way of exploiting a body of expertise financially without having to invest the firm's own capital' (ground 15 of the judgment).

(15) The use of the same name and a uniform business system, and the payment of royalties for the advantages received, were typical features which set franchise agreements apart, the Court said, from exclusive distribution agreements or dealerships in a selective distribution system (ground 15).

(16) The Court acknowledged that for such a retail franchise operation to work the franchisor had to be able to

- (a) 'make its know-how available to the franchisees and give them the assistance they require to be

able to apply its business system', without running the risk of the know-how and assistance benefiting competitors (ground 16), and to

- (b) 'take measures to preserve the common identity and reputation of the network trading under its names' (ground 17).

(17) After having noted in ground 15 that a retail franchise operation 'does not in itself restrict competition', the Court held in the operative part of the judgment that 'the compatibility of retail franchise contracts with Article 85 (1) is a function of the clauses such contracts contain and the economic context in which they occur.'

(18) It further held not to be restrictions of competition falling within Article 85 (1) 'clauses that are indispensable to prevent the know-how made available and the assistance given by the franchisor from benefiting competitors' and 'clauses that provide for the control essential to preserve the common identity and reputation of the network trading under the name'.

(19) It held on the other hand that 'clauses that involve market sharing between franchisor and franchisee or between franchisees constitute restrictions of competition within the meaning of Article 85 (1) ... and are capable of affecting trade between Member States'.

(20) The Decision in the present proceedings is inspired by the principles established and guidance given by the Court in the above judgment.

(21) Following the publication of a notice pursuant to Article 19 (3) of Regulation No 17, the Commission has received several comments from third parties. These ask the Commission, before adopting a favourable decision, to be particularly careful in its examination of the legal and factual background of this standard agreement. In addition, they express concern over certain clauses of the contract, notably those that concern indicative prices and the prohibition of competition, and those which result in a partitioning of the market. In this respect, it is sufficient to point out that these clauses have been considered in the light of the principles set out in the judgment of the Court in the 'Pronuptia' case, already discussed, and taking very careful account of the factual background.

(¹) OJ No 57, 25. 3. 1967, p. 849/67.

II. LEGAL ASSESSMENT

A. Article 85 (1)

(22) Article 85 (1) prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

(23) The standard form of retail franchise agreement that Pronuptia proposes to sign with all its franchisees is an agreement between business undertakings within the meaning of Article 85.

(a) *Clauses not falling within Article 85 (1)*

(24) First, the obligation on the franchisor to assist the franchisee with selecting the site and premises, shopfitting, promotion and advertising, training, news of products, innovations, etc. (clause 3 of the contract) does not fall within the scope of Article 85 (1) because it forms part of the basic services the franchisor provides to the franchisee.

(25) The clauses in the contract that serve the following purposes are also not restrictions of competition falling within Article 85 (1) according to the Court's judgement (see also paragraph 18), in which many of these clauses were specifically mentioned :

(i) clauses that are essential to prevent the know-how made available and the assistance given by the franchisor from benefitting competitors, namely (*inter alia*):

- the prohibition on the franchisee from engaging, directly or indirectly during the currency of the agreement and for one year after its expiry or termination, in any similar business in the same area or in any other area where he would be in competition with another Pronuptia outlet (clause 12).

The ban on competition during the period of the contract is necessary to protect the know-how and other assistance supplied. These benefits lend themselves to use with other products which would benefit competitors, if only indirectly. Other ways of preventing this risk might not be as effective.

The period of one year after the ending of the contract during which the franchisee continues to be bound by the non-competition covenant can in the present case be regarded as reasonable, within the meaning of the Court's judgment (ground 16), both

for the purpose stated above and to allow Pronuptia to establish a new outlet in the territory of the former franchisee, which it is unable to do during the term of the contract because of the franchisee's exclusivity. It should also be noted that the post-term competition ban is relaxed in certain circumstances (clause 12, second paragraph).

Therefore, in this particular case, it should not be considered as restricting competition within the meaning of Article 85 (1). The assessment of the clause in question does not prejudice any relief available to franchisees under national law at the end of the contract,

- the prohibition on the franchisee from selling the franchised business or assigning its management to another person, under penalty of termination by the franchisor (clause 10);

(ii) clauses that provide for the control essential to preserve the common identity and reputation of the network trading under the franchisor's name, namely (*inter alia*):

- the obligation on the franchisee to carry on the franchised business in the manner prescribed by Pronuptia and to use the know-how and expertise it makes available (clause 4, second paragraph, first indent),
- the obligation on the franchisee to carry on the franchised business from the premises approved by the franchisor and fitted and decorated according to its instructions (clause 4, second paragraph, second indent),
- the obligation on the franchisee to obtain the franchisor's approval for his local advertising (clause 4, second paragraph, third indent); it should be said that this control only concerns the nature of the advertisements with the object of ensuring conformity with the Pronuptia chain's brand image,
- the obligation on the franchisee, owing to the nature and quality of the products traded in the franchise business (fashion goods) and in order to preserve the consistency of the brand image, to order the goods connected with the essential object of the franchise business exclusively from the franchisor or suppliers nominated by the franchisor (clause 8, first paragraph). It is emphasized that the franchisee may purchase such goods from any other franchisee in the network (clause 8, ninth paragraph),

- the right of the franchisor to vet, *ex post*, the quality of products not connected with the essential object of the franchise business that the franchisee may purchase from the supplier of his choice and to forbid the franchisee to market them from the outlet if they are damaging to the brand image (clause 8, fourth and fifth paragraphs),
- the prohibition on the franchisee to assign their contract without the written agreement of the franchisor (clause 10).

(26) The Pronuptia standard form agreement also contains a number of other clauses which do not, by reason of their object, nature or effect, fall within Article 85 (1). They include :

- the prohibition on the franchisee's using the Pronuptia trade mark or logo except in combination with his own business name followed by the words 'Franchisee of Pronuptia de Paris' (clause 2), which merely serves to identify the franchise relationship,
- the obligation on the franchisee to pay the franchisor an initial non-recurring fee and monthly royalties of between 4 and 5 % of his total turnover from the direct sale of the franchise goods to customers from the franchise shop (clause 5), because this is the franchisee's consideration for the rights and services obtained from the franchisor ; it should be noted that no royalties are payable on goods that the franchisee sells to other franchisees in the Pronuptia network,
- the obligation on the franchisee to contribute a further sum, equal to his monthly royalty payment, to an advertising and promotional fund (clause 6), this obligation, while it restricts the commercial freedom of the franchisee as regards how much to spend on advertising, how to advertise and whether to advertise at all, does not appear in the present case likely appreciably to affect competition on the relevant market,
- the circulation of retail prices to franchisees and the recommendation to franchisees not to exceed the maximum prices quoted by the franchisor in his advertising and promotions (clause 9).

With regard to the circulation of retail prices by the franchisor, the Commission has no evidence of any concerted practice between the franchisor and

franchisees or between franchisees *inter se* to maintain these prices. In these circumstances the mere suggestion of prices for the guidance of franchisees cannot be regarded as restrictive of competition, as is acknowledged by the Court in its judgment (see in particular paragraph 1 (e) of the operative part of the judgment).

There is no more evidence of abuse or ground a conclusion other than that reached for the circulation of retail prices, *mutandis mutandis*, in the recommendation to franchisees not to exceed the prices quoted by the franchisor in advertising and promotions, since the recommendation to observe certain prices is not itself likely to restrict the licensee's freedom to determine his prices. The Commission reserves the right to intervene if the franchisor should seek to limit the franchisees' freedom to set their resale prices.

- (27) Retail franchise agreements, as the Court acknowledged in its judgment (see paragraph 15), are different in nature and in content from the bilateral obligations accepted by the parties, both in cases of exclusive distribution contracts and dealerships in a selective distribution system.

This being so, the obligations on the franchisee

- to pay a minimum amount of royalties each year (clause 7),
- to order in advance according to a fixed timetable at least 50 % of his estimated sales, based on those of the previous year (clause 8, seventh paragraph), and
- to hold stocks (clause 8, eighth paragraph),

do not constitute in the present case, restrictions of competition falling within Article 85 (1).

In a selective distribution system, such obligations could be regarded as restricting competition when they exclude from the network firms that fulfilled the uniform qualitative selection criteria but were unwilling to accept such further obligations, and when their effect was that distributors would be forced to push certain products to the detriment of other items. It is a different matter, however, in the systems of distribution franchises operated by Pronuptia in this particular case. In effect, the characteristics of such a system are such that the franchisor grants to the franchisee the exclusive right to use his brand marks and his commercial know-how in a defined territory, and that the franchisor is free to choose his franchisees. The exclusion of any others from the territory allotted to the franchisee is therefore a consequence which is

inherent in the very system of franchising. Likewise, one may consider as a consequence inherent to this franchise system the fact that the franchisee, because of the use of the franchisor's exclusive mark and brand which identifies the franchised sales outlet, and because of the obligation not to compete, will in fact concentrate his promotional efforts on the particular products franchised.

In the circumstances, the real competitive situation in the market should not be influenced by the obligations in question as such.

(b) *Clauses falling within Article 85 (1)*

- (28) As the Court held in its judgment (ground 23 and 24 and operative part, paragraph 1 (d)), 'Clauses that involve market sharing between franchisor and franchisee or between franchisees do constitute restrictions of competition within the meaning of Article 85 (1).' This is the case with the following clauses, which were specifically mentioned by the Court :

- the exclusivity granted to the franchisee to operate under the franchisor's name in a given sales area (clause 1, first paragraph),
- the obligation on the franchisee to carry on the franchise business exclusively from the premises approved for that purpose (clause 4, second paragraph, second indent).

The combined effect of these clauses is to protect each franchisee against competition from other franchisees. Moreover, the further clause (clause 1, fifth paragraph) whereby the franchisor undertakes to pay the franchisee 10 % of any mail-order sales to customers in the franchisee's territory, on products normally sold by the franchisee, implies that the franchisor may not directly operate in the allocated territory.

- (29) The Court also held that 'retail franchise agreements containing clauses that involve market sharing between franchisor and franchisee or between franchisees are inherently likely to effect trade between Member States, even if they are between parties resident in the same Member State, because they prevent the franchisees setting up in another Member State' (ground 26). An effect on trade is all the more likely in the present case as Pronuptia holds a significant share of the French market for the relevant products and its network covers several EEC countries (see paragraphs 4 and 6).

- (30) Consequently, the clauses referred to in paragraph 28 are restrictions of competition falling within Article 85 (1) and are likely to affect trade between Member States.

B. Article 85 (3)

- (31) Article 85 (3) allows the provisions of Article 85 (1) to be declared inapplicable to any agreement or category of agreements between undertakings which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not :

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives ;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

- (32) The Court ruled in the judgment that Regulation 67/67/EEC was inapplicable to retail franchise agreements such as those concerned in the present case. After noting that retail franchise agreements displayed features which distinguished them from exclusive distribution agreements (see paragraph 15), the Court stated that Article 2 of the Regulation expressly referred only to exclusive distribution agreements and did not include among the obligations that could be imposed on the exclusive distributor either an obligation to pay royalties, obligations designed to preserve the common identity and reputation of the network, or obligations to transfer know-how and provide assistance. The standard form agreement is therefore not covered by the block exemption granted by Regulation 67/67/EEC.

- (33) On 1 July 1983 a new block exemption for exclusive distribution agreements, Commission Regulation (EEC) No 1983/83⁽¹⁾, entered into force, replacing Regulation 67/67/EEC for such agreements. The content of the new Regulation is such that the same reasons as the Court gave for holding that Regulation 67/67/EEC was inapplicable to agreements like that concerned in the present case could be adduced for saying that Regulation (EEC)

⁽¹⁾ OJ No L 173, 30. 6. 1983, p. 1.

No 1983/83 was also not applicable. Like the old regulation, Regulation (EEC) No 1983/83 only refers to exclusive distributorships and does not mention any of the above clauses that are typical of retail franchise agreements.

There are then grounds for examination of the standard form agreement in question to see if an individual exemption under Article 85 (3) can be given.

- (34) The standard form of franchise agreement that forms the basis of the Pronuptia distribution network contributes, through the combined effect of all its provisions, to improving the production and distribution of the products concerned, for the following reasons. It enables :

- the franchisor to extend its distribution network without the level of investment it would need to open its own retail network, which for a relatively small company like Pronuptia might not be possible, at least not so quickly. The investment involved in setting up the new outlets is undertaken by the prospective franchisees, in return for which they receive the benefit not only of the franchisor's established name and reputation, but also of its expertise, commercial know-how and marketing, which enables to achieve a larger volume of business at lower cost and with less risk.

The franchise, in which the complementary interests of the franchisor and the franchisee converge, opens up the market to new competitors, intensifying inter-brand competition and increasing the competition faced by firms distributing their products through a branch network using a standard business format and product range ;

- the franchisor to set up a distribution network using a standard business format and product range ;
- the franchisor to keep in touch, thanks to its close and direct business relationship with the franchisees, with changes in consumer tastes and preferences and to reflect such changes in its production ;
- the franchisee to concentrate his sales effort on a given area and to be more active in cultivating

a clientèle there, thanks to the exclusivity which the combined effect of the clauses referred to in paragraph 28 gives him for that area, although consumers resident in the area are not prevented from purchasing the product outside the area and franchisees may freely buy and sell the products among themselves ;

- the franchisee, thanks to his enjoyment of territorial exclusivity and his closeness to the marketplace, to make confident forecasts of his future sales, which help the franchisor to plan his production better and to guarantee regular supplies of the products.

- (35) The standard form of franchise agreement which forms the basis of the Pronuptia distribution network allows consumers a fair share of the benefit resulting from these improvements in production and distribution.

Consumers may be expected to benefit, first of all, from a coherent distribution network offering uniform product quality and a comprehensive range of the articles and accessories available in the trade. Consumers will also benefit from the efficient and attentive service the franchisee will be encouraged to provide as a self-employed businessman who has a personal and direct interest in the success of his business, since he alone bears the financial risks. Consumers will further directly benefit from the continuity of supplies of products which satisfy their wants and reflect changes in tastes and fashion emerging in the market. Finally, the competitiveness of the market (see paragraph 9), and the freedom consumers have to purchase the products elsewhere in the network, will tend to force franchisees to pass a reasonable part of the benefits of the rationalization of production and distribution on to consumers. Post-finally, consumers can tell that they are dealing with independent traders (see paragraph 11 above, third indent), who can be held responsible.

- (36) The Pronuptia standard form agreement does not contain restrictions that are not indispensable to the attainment of the said benefits. The clauses referred to in paragraph 28, which restrict competition by giving the franchisee territorial exclusivity, can be considered, in the circumstances, to be indispensable in that prospective franchisees would

probably be unwilling to undertake the necessary investment and to pay a substantial initial fee to enter the franchise system if they were not provided with some protection against competition from other franchisees and from the franchisor in the allotted territory. It should be noted that franchisees are free to buy and sell the products among themselves.

- (37) Pronuptia's standard form of franchise agreement and the resulting self-contained franchising operation do not give the firms concerned the possibility of eliminating competition for a substantial part of the products in question. As noted above (paragraph 9), the Pronuptia network faces competition from a number of other manufacturers and suppliers in the EEC countries who do not use the franchising route do distribute their products.

Franchisees also compete with one another, because they can sell to any customer whether resident in the allotted territory or coming from outside it, and to any other franchisee. Furthermore, they are entirely free to determine their own sales prices.

- (38) The agreement therefore meets all the requirements for exemption laid down by Article 85 (3).

C. Articles 6 and 8 of Regulation No 17

- (39) Under Article 6 of Regulation No 17, the Commission is required to specify the date from which an exemption decision takes effect. This date may not be earlier than the date of notification.
- (40) Under Article 8 of Regulation No 17, the Commission is also required to state the period of exemption.

- (44) The notified standard form of Pronuptia retail franchise agreement, as it is applied, meets the requirements for exemption laid down in Article 85 (3). An exemption may therefore be granted to take effect from the date of notification, 22 April 1983. It is reasonable in this particular case, in view of the five-year term of the agreement and the date on which this decision takes effect, to grant the exemption for eight years.

HAS ADOPTED THIS DECISION :

Article 1

Pursuant to Article 85 (3) of the EEC Treaty, the provisions of Article 85 (1) are hereby declared inapplicable from 22 April 1983 until 21 April 1991 to the standard form of retail franchise agreement which Pronuptia signs with all its franchisees in the EEC.

Article 2

This Decision is addressed to Pronuptia de Paris SA, 8, Place de l'Opéra, F-75009 Paris.

Done at Brussels, 17 December 1986.

For the Commission

Peter SUTHERLAND

Member of the Commission