COMMISSION DECISION

of 13 July 1987

relating to a proceeding under Article 85 of the EEC Treaty (IV/32.034 — Computerland)

(Only the French text is authentic)

(87/407/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, 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 notification and application for negative clearance submitted on 18 September 1986 by Computerland Europe SA ('CLE'), Findel, Grand Duchy of Luxembourg, with regard to the standard form franchise agreement it has developed for the retailing of microcomputer products in Europe,

Having regard to the summary of the notification published [2] pursuant to Article 19 (3) of Regulation No 17,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. FACTS

A. General description of the Computerland franchise system

(1) CLE is a wholly-owned subsidiary of the Computerland Corporation of California (USA). CLE has subsidiaries in France, Spain, the United Kingdom and Italy with varying responsibilities, a subsidiary in Luxembourg which handles the distribution of products for the franchise network, and various branches, called regional offices, which handle marketing, advertising and public relations and provide on-the-spot support to franchisees, such as assistance in recruiting personnel. The Computerland group has approximately 850 retail stores worldwide. Its operations in Europe started in the late 1970s. Since then, 100 outlets have been established in Western Europe, of which approximately 85 in all of the Member States except Ireland; the largest number of Computerland stores are found in France, the UK and Germany. According to CLE's prognosis, the number of outlets will more than double over the next three years. The average turnover of a Computerland store in the Community is 1,5 million ECU. The turnover of the Computerland group worldwide in 1986 was over one thousand million US dollars.

(2) Using the Computerland name, trademarks and the Computerland system, Computerland franchisees sell to end-users (predominantly business-users as opposed to home-users) numerous different brands of microcomputer products (hardware, software and peripheral products), and provide pre- and after-sales service and, usually, training facilities. CLE assists franchisees in setting up and running their stores, providing both commercial and technical know-how. Its continuing support services include training, information, advice, guidance and know-how regarding the Computerland methods in store management, operation, financing, advertising, sales and inventory, based on Computerland's extensive empirical experience in the area of retail sales of microcomputer products throughout the world. CLE procures advance information on numerous brands of new products and how they can be used together, and passes this on to franchisees, as well as advice as to which among the many new products are likely to succeed on the market. Franchisees can thus offer their customers a broad range of up-to-date products and well-researched technical advice. In return, franchisees make various financial contributions and are bound by obligations aimed at preserving the uniformity and quality standards of the system.

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No C 114, 29. 4. 1987, p. 2.

(3) There are approximately 20 major manufacturers of microcomputer products in the world, of which five are estimated to account for the top five market shares on the European market. They use various ways of marketing these products, some of which overlap. Sales can be divided broadly into direct sales by the manufacturers to end-users, on the one hand, which account for 20 % of total sales in Europe, and sales through various types of intermediaries on the other. While some manufacturers use non-specialized outlets such as retailers of consumer electronics, many others, believing that for the time being these sophisticated technical products can only be sold effectively by specialised dealers capable of offering pre- and post-sales service and generally fulfilling certain standards of quality, have chosen to sell through authorized dealers. Such dealers can be independent retailers authorized by one or more manufacturers, or part of a dealer chain offering a broad range of products of different brands, pre-sales advice and after-sales service; some of these dealer chains, such as Computerland, are in the form of franchise networks.

Computerland stores sell the products of approximately half of the major manufacturers, including the five biggest on the European market. Their competitors are thus all retailers of whatever form selling the same or similar products. Leaving aside non-specialized retailers, statistics indicate that there are approximately 10 000 authorized microcomputer dealers in Western Europe, of which less than 1 % are Computerland stores. Although Computerland is the only pan-European chain, there are half a dozen multi-country chains (franchised or not), of which the largest after CLE has some 50 outlets in four countries. Furthermore, there are several single-country chains. In the three Member States in which CLE has its greatest number of outlets (France: 22, United Kingdom: 16, Germany: 12), it is competing with at least half a dozen dealer chains, some having a comparable number of outlets.

In 1985, Computerland stores accounted for less than 3,3 % of retail sales in the Community as a whole, while in 1986 the largest market share in any given Member State was approximately 4 %. Worldwide, the Computerland group has much larger market shares, for example going even beyond 20 % in the United States, Canada, Australia and Japan.

B. Relevant features of the notified standard-form agreement

(4) *Choice and legal form of franchisees*

Franchisees are chosen on the basis of their personal and financial standing and their prior experience in the retail trade, and subject to successful completion of a training programme organized by CLE; employees are also expected to be fully trained in the Computerland system. Every franchisee is obliged to form a corporation for the purpose of running his Computerland store business, and a sign indicating that the franchisee independently owns and operates the business under a franchise from Computerland must be conspicuously posted in the store. The products sold must likewise bear labels indicating the franchisee's name, address and telephone number.

(5) *Use of the Computerland names, trademarks and system*

The franchisee is given the non-assignable right to use the Computerland names, marks and system in connection with the operation of the Computerland store and for no other purpose. In signing the agreement, the franchisee acknowledges the validity of the names and marks and CLE's ownership thereof, but there is no restriction of his right to contest CLE's industrial property rights.

The franchisee agrees to adhere to the standard business operating methods (set out in an 'Operator's Manual') and respect the confidentiality of the information he receives from CLE and to divulge it only, if necessary, to his employees, subject to a written statement in which the latter likewise acknowledge the confidential nature thereof. The franchisee must report to CLE any innovations or improvements he makes, and grants to CLE a worldwide, royalty-free non-exclusive right to use these during the term of the agreement. Upon termination for whatever reason, the franchisee must stop using the Computerland names, marks and system, and return the Operator's Manual and any other copyrighted material, but he may continue using any innovations or improvements he has developed which are demonstrably separable from the operation of the Computerland store and system.

(6) *Best personal efforts*

The franchisee undertakes to devote his best personal efforts to the day-to-day operation of his store; he may not engage in any other type of business at the store without prior written approval by CLE.

(7) *Location clause and protected area*

The franchisee must operate his Computerland store exclusively at the location approved in advance by CLE, but he is not obliged to make 'over-the-counter' sales, i. e. customers do not actually have to buy the products in the store itself. He must adhere to CLE's instructions regarding the interior and exterior of the premises and may not relocate without its prior approval.

Each location is surrounded by a 'protected area' having a radius of less than one kilometre after the first year of the agreement (during the first year it is double that distance) in which no other Computerland outlet may be established.

The protected area is not one of marketing or clientele exclusivity, which means that any franchisee can sell to any end-user customer, wherever the customers may reside or do business. They can also set up so-called 'satellites', which offer showroom and selling facilities and can be inside or outside the 'mother store's' protected area, but not in the protected area of another Computerland franchisee. For stocking and servicing purposes and other operational support, such satellite outlets remain dependent on the Computerland store to which they are contractually attached.

(8) *Products and services — advertising/pricing policy*

The franchisee may only sell those products and perform those services specifically authorized in the Operator's Manual or in other instructions from CLE, or products and services of equivalent quality, subject to prior approval by CLE, which will not be unreasonably withheld. Franchisees play an active role in establishing the range of products they sell, *inter alia* by participating in regular meetings of the 'European Network Product Council', where proposals can be made to CLE to authorize new products.

Advertising material must be made or approved by CLE, but approval may not be withheld or withdrawn because of the franchisee's pricing policy, for which he bears sole responsibility.

Franchisees may purchase their requirements from CLE, which exercises a central purchasing function, but they are not obliged to do so, nor are there any minimum purchasing requirements. Franchisees are thus free to buy approved products from any supplier they choose.

CLE leaves franchisees free to determine their own resale prices; franchisees may, of course, receive recommended resale price lists from their other sources of supply.

(9) *Training facilities*

Most franchisees provide training facilities at the approved location, although there is no obligation to do so. Customers may sign up for training courses even without purchasing any of the franchisee's products. In general, the revenue derived from operating these training facilities, over which the monthly royalty must be paid, represents a very limited percentage of the franchisee's overall turnover.

(10) *Sales to end-users*

The Computerland system has been devised and developed to promote sales of microcomputer products at retail level. Franchisees are accordingly required to sell to end-users, unless otherwise authorized. Sales to other Computerland franchisees are expressly allowed. Furthermore, the obligation to sell to end-users does not prevent a franchisee from carrying out his obligations or exercising his rights under agreements he may have with any manufacturer as its authorized dealer.

(11) *Financial obligations/reporting requirements/right to inspect*

In return for being admitted into the Computerland franchise network, the franchisee must pay an initial entrance fee which varies between Lfrs 250 000 (5 800 ECU) and Lfrs 1 250 000 (28 750 ECU), depending on the type of outlet. Subsequently, a monthly royalty payment amounting to 3,5 % of the

preceding month's gross revenue, which is any income, from which certain items, such as VAT and interfranchisee sales, are deducted. Normally, a monthly payment is also made as an advertising contribution. Franchisees must submit regular financial statements including balance sheets and profit-and-loss statements, and CLE's representatives must be allowed into the premises during working hours in order to inspect the operation of the store, including the quality of the goods being sold, the supplies on hand and the services rendered.

(12) *Non-competition clauses*

During the term of the agreement, the franchisee may not engage or have an interest in any business whose activities include the sale or service, at retail or wholesale level, of computer hardware, software and related products and services offered by Computerland stores. The franchisee must, however, remain free to acquire financial interests in the capital of a competing enterprise, provided such investment does not enable him effectively to control such a business.

Under the agreement as notified, the above non-competition obligation continued for three years after termination of the agreement at a given distance from the ex-franchisee's former outlet, for two years after termination at a given distance from any Computerland store and for one year after termination at any location. Following discussions with the Commission in the course of the notification procedure, CLE decided that a non-competition obligation of one year after termination of the agreement within a radius of 10 kilometres of the ex-franchisee's former outlet would be sufficient to safeguard the confidentiality of the know-how transmitted to the ex-franchisee during the term of the agreement and to allow a new Computerland store to be established and start accumulating good-will and clientele in the ex-franchisee's former zone of business activities.

(13) *Guarantees*

CLE will only agree to sell a manufacturer's products if they are covered by a Europe-wide guarantee of at least six months. Products which franchisees acquire from other sources, for example directly from the manufacturer, must be covered by each manufacturer's respective guarantee, otherwise approval by CLE will be withheld.

(14) *Term and renewal*

The term of the agreement is 10 years, unless terminated by mutual consent. Both franchisor and franchisee have the right to terminate unilaterally 'for good cause', with regard to which a non-exhaustive list of examples is given in the agreement.

Renewal for a further 10-year period is possible subject to certain conditions, including payment of a renewal fee.

Transfer of the agreement to third parties must be consented to by CLE.

On termination for whatever reason, CLE may choose to have assigned to it the franchisee's lease.

C. Other Computerland agreements

(15) Some Computerland franchisees have chosen not to replace their existing contracts with the notified standard form agreement which was introduced in 1983, for varying reasons, such as the royalty level, the size of the protected area or other reasons not relevant for the present purposes. CLE has undertaken to ensure that to the extent these agreements, which are not standard, contain obligations which might be considered as being more restrictive of competition than their counterparts in the notified standard agreement, the necessary adaption will take place.

(16) The same undertaking applies with respect to the special standard franchise agreement developed in 1986 for the German market in order to facilitate State-backed financing arrangements for the franchisees, which entails prior approval of the agreement by the lending bank.

(17) For Denmark and the Italian province of Tuscany, CLE has devised a slight variation to the standard agreement, 'Development Area Agreements', whereby a single enterprise is granted the exclusive right to open a fixed number of Computerland stores in a designated area over a limited period of time. This form of agreement is chosen for areas in which there are no existing Computerland stores and a franchisee is willing to take on the high economic risk of single-handedly setting up several stores in an

undeveloped market. In return, he receives the abovementioned exclusivity, unless the timetable is not met, in which case CLE is again free to grant third parties the right to open stores in the area. These special agreements are an exception to the rule that a franchisee normally operates only one shop, and also offer a wider protected area to the successful developing franchisee. The Development Area Agreements do not impose any obstacles to exports or imports.

D. Third parties' observations

(18) The Commission did not receive any observations from interested third parties following publication of the notice required by Article 19 (3) of Regulation No 17.

II. LEGAL ASSESSMENT

A. Article 85 (1)

(19) The standard franchising agreement notified by CLE is an agreement within the meaning of Article 85 (1) of the EEC Treaty. The individual franchisees who have entered into the standard agreement with CLE, a corporation under Luxembourg law, are the proprietors of their business and carry out economic and commercial activities at their own risk; the agreement is an instrument legally binding upon the parties.

(20) Both the Court of Justice [1] and the Commission [2] have been called upon to assess the applicability of Article 85 to distribution franchises, that is, franchise agreements under which the franchisee offers certain products and ancillary services, using the franchisor's business name and applying uniform business methods developed by the franchisor, usually subject to certain financial contributions. The main principle established by the Court, and followed by the Commission in its subsequent decisions, is that such franchise systems, which on the one hand allow a franchisor to profit from its success and expand into new geographical markets without making significant investments and on the other hand enable interested candidates to use the franchisor's name and reputation to set up a new business more easily and rapidly than if they had to acquire the necessary expertise independently, are not in themselves caught by Article 85 (1) where competitive market conditions prevail. The applicability of Article 85 (1) can, however, not be determined in the abstract, but depends on the specific provisions concerned.

An effective transfer of the business formula can only take place:

(i) if the franchisor is able to communicate his know-how to the franchisees and provide the necessary assistance without running the risk that competitors may benefit therefrom;

(ii) if the franchisor is able to take the necessary measures for maintaining the identity and reputation of the network bearing his business name or symbol.

All contractual provisions which are necessary to ensure that these conditions are met can be deemed to fall outside the scope of Article 85 (1). Other provisions, in particular those which may lead to market sharing between the franchisor and the franchisees, or between the latter, or those which interfere with the franchisees' individual pricing policies, may on the contrary be considered restrictions of competition.

(21) The franchise network set up by CLE by means of the notified standard franchise agreement is a distribution franchise: the franchisor has devised an original method for selling microcomputer products and accessories to end-users, which in the interest of expansion it is willing to share with others, the franchisees. In return for receiving the package of Computerland's specifically developed commercial and technical know-how and the use of the franchisor's business name, trademarks, symbols and business methods, franchisees must make certain financial contributions and adhere to the standards of operation devised by the franchisor. Although franchisees offer pre- and after-sales advice and make product repairs, such services are ancillary to their main task, which is the sale of products to the public. Furthermore, some franchisees may also choose to offer training facilities, not necessarily in connection with the sale of products. This service normally represents a minor part of their activities and can be viewed as a means of developing goodwill.

---

[1] See Court of Justice of the European Communities, 28. 1. 1986, Case 161/84 (Pronuptia), not yet reported.

[2] See Commission Decisions 87/14/EEC, 'Yves Rocher', OJ No L 8, 10. 1. 1987, p. 49, and 87/17/EEC, 'Pronuptia', OJ No L 13, 15. 1. 1987, p. 39.

Having thus established that the Computerland system is a distribution franchise, the following tests can be applied.

PROVISIONS NOT FALLING WITHIN THE SCOPE OF ARTICLE 85 (1)

In the specific circumstances of this case, the following provisions are not caught by Article 85 (1).

a. *Provisions aimed at preventing the know-how and other assistance given by the franchisor from benefiting competitors*

(22) (i) The franchisee's obligation to respect the confidentiality of the information received and to ensure that his employees do the same;

(ii) The franchisee's obligation not to carry on competing activities during the term of the agreement; at the Commission's request, the scope of the non-competition clause was adjusted so as to allow franchisees to acquire financial interests in the capital of competing undertakings, although not to the extent that such participation would enable them to control those undertakings;

(iii) The franchisee's obligation not to engage in competing activities for one year after termination of the agreement within a radius of 10 kilometres of his previous outlet. The post-term non-competition obligation which was included in the agreement as notified was considered to be unreasonably broad as regards both duration and geographical extent, but as amended the clause is deemed sufficient to prevent the ex-franchisee from using the know-how and clientele he has acquired to the benefit of CLE's competitors. Also, given the time it takes CLE to choose, train and establish a new franchisee and for the latter to start acquiring goodwill and clientele, the clause as modified is a reasonable compromise between the franchisor's concern to protect the confidentiality of his business formula and to open a new outlet in the ex-franchisee's former exclusive territory on the one hand, and the ex-franchisee's legitimate interest in continuing to operate in the same field on the other hand. In view of the fact that, during the term of the agreement, a franchisee is not bound to over-the-counter sales and is furthermore free to sell anywhere, he can develop goodwill and clientele far beyond his own protected area; during the one year in which the post-term non-competition obligation is in force, he can thus continue to reap the benefits of the efforts he has made as a franchisee, only being prevented from competing during that period in the vicinity of his former outlet.

The post-term non-competition clause is thus in the particular circumstances of this case not considered to be restrictive of competition within the meaning of Article 85 (1). This assessment does not prejudice any provisions of national law which may bestow certain rights on franchisees upon termination of the contract.

b. *Provisions which allow the franchisor to safeguard the identity and reputation of the network bearing his business name or symbol*

(23) (i) The criteria which CLE applies in selecting franchisees and their obligation to follow training courses and to familiarize employees with the Computerland system are justified means of ensuring that every Computerland outlet is managed in keeping with the business standards developed by the franchisor; the same concern underlies the provision that transfer of the agreement to third parties can only take place with CLE's consent;

(ii) The franchisee's obligation to use the Computerland names, trademarks and system only for the operation of the Computerland store and to stop using them immediately upon leaving the network are aimed at ensuring that the network image is not tarnished by activities not developed specifically by the franchisor; at the Commission's request, however, ex-franchisees are now expressly entitled to continue using innovations or improvements they have developed which are demonstrably separable from the Computerland system;

(iii) The franchisee's obligation to adhere to the franchisor's standard business methods is an inherent part of the franchise system and ensures the standards of uniformity and quality of the network;

(iv) The franchisee's obligation to devote his best personal efforts to the day-to-day operation of his store is necessary to ensure that the business methods developed by the franchisor are properly and fully applied; his obligation in principle not to engage in any activities in his store which are not included in the business formula transmitted by the franchisor, is acceptable in the light of the concern to preserve the reputation and uniform identity of the network;

(v) The franchisee's obligation to obtain the franchisor's prior approval for the location of his store, and to adhere to the franchisor's instructions regarding its interior and exterior aspects, is aimed at ensuring the reputation of the network, which is a concern not only of the franchisor but of every franchisee. In the Operator's Manual, CLE outlines the objective criteria it uses in site approval, such as the structure and dimensions of the building, its location in relation to key intersections and business centres, its accessibility for customers and the nature of the surrounding business centres. The main objective in setting up these criteria for site approval is to ensure that the success of the outlet is not hampered because of a possibly unfavourable location.

(vi) The franchisee's obligation to sell only the products and provide the services authorized by CLE, or products and services of equivalent quality, is necessary to preserve the network's reputation as a source of high-quality microcomputer products mainly for the business community; sales of sub-standard products which do not meet the technical norms applied by CLE would damage the reputation of the network, thereby harming not only the franchisor but all other franchisees as well.

The franchisor's prior approval of the goods and services offered in Computerland stores ensures buyers that they will be able to obtain goods of the same quality from all franchisees, regardless of their location. In the case at hand, given the wide product range (there are over 3 000 items on CLE's product list) and the very rapid technological evolution in this product market, it would be impracticable to ensure the necessary quality control by establishing objective quality specifications which franchisees could apply themselves. In fact, laying down objective standards could be detrimental to the franchisees' freedom to sell the most up-to-date products, unless the specifications were constantly up-dated, an overly burdensome if not impossible task. In the present system, franchisees have a substantial voice in proposing products for approval, in bilateral contacts with CLE as well as collectively in the 'European Network Product Councils', which meet regularly; most products aimed at business users will be approved, and such approval covers all relevant accessories and future improvements; furthermore, should a manufacturer introduce new products of a higher standard than an existing range which has been approved, franchisees do not require prior approval to sell such new products. Also, as CLE's main source of income is derived from royalties on sales of all products by franchisees, it is in its interest to allow franchisees to sell products which are expected to be commercially successful, as long as they are technically suitable for the customers for which the Computerland network caters.

One essential element in assessing this provision under Article 85 (1) is the fact that once a given product has been approved by CLE, franchisees are free to procure it from any source of supply they wish. Although franchisees may purchase their requirements from CLE, they are not obliged to do so, nor are there any minimum purchasing requirements if they do.

Furthermore, in selecting products which it will itself sell to franchisees, as well as in approving products which franchisees can procure from any source, CLE ensures that a Europe-wide guarantee is given. This policy is in line with the Commission's concern for market integration and consumer protection [1].

(vii) The franchisee's obligation to use only advertising material made or approved by CLE.

Advertising plays an essential role in the development of a network's reputation. A franchisor therefore has a legitimate interest in ensuring that publicity undertaken by the franchisees will not adversely affect the reputation established by the franchisor. In the present case, the policy regarding advertising is clearly based on a justifiable concern for quality control and not aimed at interfering with the franchisee's freedom to determine his own prices: the notified agreement expressly states that approval of advertising material will not be conditioned on, or subject to any change in, the pricing policy or the price quotations of the franchisee.

(viii) The franchisee's obligation to submit to inspections of the premises by CLE's representatives

[1] See for example Twelfth Report on Competition Policy, points 77 and 78, and Commission Regulation (EEC) No 123/85, OJ No L 15, 18. 1. 1985, p. 16, recital 12.

and to present financial statements allows the franchisor to verify whether the franchisee is operating in accordance with the Computerland business format and fulfilling his financial commitments.

c. *Other Provisions*

(24) The franchise system includes a number of provisions which are not relevant to competition and can therefore by their very nature in the present case be excluded from the scope of Article 85 (1):

(i) The franchisee's obligation to pay entrance fee and subsequent monthly royalty payments and advertising contributions; the financial commitment, which is applied on a non-discriminatory basis, is merely the consideration which the franchisee must pay for being admitted into the network and receiving the resulting rights and benefits; to ensure the possibility of interfranchisee sales, the agreement now specifies that royalties are not payable on such transactions;

(ii) The franchisee's obligation to form a corporation, which is based on the consideration that his business dealings will thus be facilitated;

(iii) The franchisee's obligation to post a sign on the premises indicating that he is the independent owner thereof, operating under a franchise from CLE, which ensures that the public is in no way misled as to the true ownership of and responsibility for each individual outlet;

(iv) The franchisee's obligation to indicate on each product he sells his name and address, which is required solely for the purpose of directing end-users to sales and service assistance;

(v) The provisions relating to the term and renewal of the agreement, and the assignment of the franchisee's lease to the franchisor.

The assessment of these provisions is without prejudice to any relevant constraints under national law.

PROVISIONS WHICH CONSTITUTE RESTRICTIONS OF COMPETITION WITHIN THE MEANING OF ARTICLE 85 (1)

(25) The conjunction of the location clause, which obliges the franchisee to operate from the premises specified in his contract and thus prevents him from opening further stores, and the exclusivity clause, which assures him of a protected zone in which no other Computerland outlets can be established, either by the franchisor or by other franchisees, results in a certain degree of market-sharing between the franchisor and the franchisees or between the latter, thus restricting competition in the network in which the Computerland business format is exploited.

In the present case, it is particularly the prohibition from opening further outlets which interferes with franchisee's commercial independence: in this context, it is important to take into account the fact that Computerland outlets are generally not one-man operations, but medium-sized enterprises employing on average ten to twenty persons and sometimes even substantially more. For such entrepreneurs, for whom expansion may be a logical and desirable development, the limitation to one outlet unless otherwise authorized is clearly restricitive.

Although franchisees are allowed to operate 'satellite shops' for display and selling purposes, also outside their protected areas, this freedom is only relative, in that prior approval by CLE and payment of a fee similar to the usual entrance fee, albeit reduced, are required. Also, such outlets may not be located in another franchisee's protected area.

(26) Under the specific circumstances of this case, the franchisee's obligation to sell only to end-users or to other Computerland franchisees unless otherwise authorized is likewise deemed to be a restriction of competition. In certain franchise systems, for example where franchisees sell products bearing the franchisor's name and/or trademark, the prohibition on resale by franchisees to resellers who do not belong to that franchise network is based on the legitimate concern that the name, trademark or business format could be damaged if the contract products were sold by resellers who do not have access to the franchisor's know-how and are not bound by the obligations aimed at preserving the reputation and unity of the network and its identifying marks.

In the case at hand, however, the Computerland name and trademark cover the business format as such, but not the microcomputer products being sold, which bear the name and trademark of each individual manufacturer. The prohibition on Computerland franchisees to sell the products to

otherwise qualified resellers is thus restrictive, both as regards the franchisees themselves, who while being independent enterpreneurs are thereby limited in their freedom in deciding to whom to sell, and as regards third party resellers, who are thereby deprived of a possible source of supply.

In the present case, this restriction is mitigated by a characteristic which is peculiar to sales in the microcomputer field, namely the fact that retailers can be part of a franchise network such as Computerland and at the same time be appointed an authorized dealer in a selective distribution system established by a manufacturer to ensure that his products are handled only by qualified resellers. A Computerland franchisee who thus operates simultaneously in two or more different networks must be in a position to fulfil the obligations and exercise the rights which flow from each one. In this context, the Commission has sought to ensure that a Computerland franchisee who is at the same time authorized by one or more manufacturers, can function both within the Computerland network and within the selective distribution network(s) to which he belongs.

(27) The provisions which lead to market sharing within the network and the obligation to sell to end-users are liable to affect intracommunity trade, because franchisees are not free to expand their operations to other Member States, either at retail or wholesale level. This effect on trade between Member States is liable to be appreciable, in view of:

— the expanse of the existing Computerland network, which is the only one of its kind having outlets in all Member States except Ireland (where two outlets are, however, planned for the near future),

— the growth of the network: although the market share has not yet reached the 5 % mark in the EEC, the rate of growth which the network has experienced already in its first years of existence in Europe should lead to substantial expansion in the years to come. Indeed, sales by the network will probably increase more rapidly than the current trend, in view of the expected increase in the total number of outlets before 1990 to more than 150,

— the fact that the products sold by Computerland stores are those of the most important European and worldwide manufacturers.

In view of the above considerations, the notified standard agreement is deemed to fall within Article 85 (1).

(28) The 'Development Area Agreements' referred to above under point 17, which contain similar provisions to the standard form agreement regarding location clause, protected area and sales to end-users, are accordingly likewise deemed to be restrictive of competition.

B. Article 85 (3)

(29) The block exemption regulations relating to exclusive dealing and exclusive distribution agreements [1] are not applicable to distribution franchise agreements such as the one at hand, which go beyond the category of agreements covered by those regulations [2]. The characteristics which are typical of distribution franchises, such as the franchisee's right to use the franchisor's business name and symbol in return for certain financial contributions and the obligations to adhere to uniform business standards developed by the franchisor, are not referred to in either block exemption regulation. The notified agreement must therefore be examined in the light of the conditions laid down in Article 85 (3) for exemption on an individual basis.

(30) Distribution in the field of microcomputer products is improved by the Computerland system, since the franchisor, who acts as a link between the main microcomputer producers and the franchisees, is able to establish outlets throughout the Community without any major financial investments, while franchisees are closely assisted in rapidly setting up and operating retail outlets in which a wide range of products and services are offered. Given the technical nature of the products in question and the fact that they are normally not sold as single items but as part of a range, potential buyers attach particular importance to trying out different systems and receiving pre-sales advice regarding possible

[1] Commission Regulation No 67/67/EEC, OJ Nr. 57, 25. 3. 1967, p. 849/67, and its successor, Commission Regulation (EEC) No 1983/83, OJ No L 173, 30. 6. 1983, p. 1.

[2] Case 161/84 (Pronuptia), points 15 and 33.

applications and configurations and post-sales repair and maintenance services. Furthermore, the franchise system promotes both intra-brand and interbrand competition: the products offered are also sold via specialized dealer networks set up by the manufacturers as well as various other types of outlets, and the Computerland stores thus offer an alternative source of supply which stimulates competition, and thereby distribution, at retail level. Moreover, Computerland franchisees are free to compete with each other, also as regards the prices at which they sell to customers, which equally enhances the distribution of the products concerned.

(31) The Computerland system also contributes to rationalizing distribution: CLE takes orders from franchisees, buys the products from manufacturers or other sources of supply and resells them to the franchisees, thereby rapidly channeling the products concerned to the Computerland outlets. This central purchasing function enables CLE to negotiate favourable terms for its franchisees, with respect to prices and quantities supplied, and often allows franchisees to procure the products in question much sooner than other retail sellers.

(32) The benefits resulting from the improvement and rationalization of distribution accrue directly to consumers, which in this case are mainly professional end-users.

In the first place, the Computerland stores provide a single location at which customers can compare the prices and characteristics of a wide range of different brands of up-to-date microcomputer products and benefit from the advice of specially trained personnel especially as regards the possibility of using different brands of products together, and the training facilities offered. Customers who decide to buy their products at the Computerland outlet are ensured of further advice, maintenance and repair services and if necessary further training possibilities.

Secondly, the Computerland system offers consumers an expanding network of outlets at which they can buy microcomputer products. Computerland stores compete directly with the numerous other outlets selling the same products, with the result that all retailers should, because of the pressures of heightened competition, offer better quality, services and prices.

(33) The restrictions of competition which the Computerland system entails are indispensable to ensure the existence of the network: potential franchisees would not be willing to make the investments necessary for opening up a new outlet if they were not assured that no other Computerland outlets will be established in their near vicinity. Aside from the restrictions which are thus the necessary cornerstone of the franchise system, franchisees are free as to the sources from which they procure approved products, the prices at which they wish to sell those products, the territories in which they operate, and the clientele they cater to.

(34) The franchisee's obligation to sell to end-users only, unless otherwise authorized by the franchisor, is a direct consequence of the fact that the basic concept underlying the franchisor's business formula is the operation of a network of retail stores in which products and services are offered to final consumers. The training and support services given to franchisees, who are willing to pay a fee in return, are therefore specifically aimed at helping them to become and remain efficient and profitable retail sellers. The Computerland business formula and all the efforts put into making it successful would be diluted if franchisees were free to divert their efforts to activities other than retail sales and servicing. In order for the benefits relating to improved and rationalized distribution to accrue and be passed on to consumers, in this case business users, it is therefore indispensable that franchisees accept the obligation to operate as retail sellers and not, for example, as wholesalers.

An important relaxation of this rule is the express freedom of franchisees to sell to other franchisees within the network; no royalties are due in the case of such interfranchisee sales.

(35) The Computerland franchising system does not afford its members the possibility of eliminating competition in respect of a substantial part of the products concerned.

Computerland franchisees offer products which are at the same time sold by a very large number of competing outlets. Even in the Member States in which the greatest number of Computerland stores are located, they are faced by competing chains having a comparable number of outlets. Finally, given the overall competitive structure of this market, there is no danger that the Computerland network will reduce or otherwise distort competition between competing brands and distribution outlets.

Furthermore, there is a substantial amount of competition within the network itself: the protected zone surrounding each franchisee is relatively small, and does not entail any marketing or clientele

exclusivity, which means that franchisees are free actively to seek and to sell to any customers. CLE does not in any way impose or recommend prices at which the franchisees sell to customers which, combined with the franchisees' freedom as to their sources of supply, results in a substantial degree of price competition within the network.

Under these circumstances, the agreements between CLE and its franchisees do not individually or collectively afford the parties the possibility of eliminating competition with respect to the goods concerned.

(36) Consequently, the provisions of Article 85 (1) may, under the terms of Article 85 (3), be declared inapplicable to the standard form Computerland franchise agreement. The same arguments referred to in points 29 to 35 apply *mutatis mutandis* to the 'Development Area Agreements' and other existing franchise agreements which are equally or less restrictive of competition than the standard form agreement.

C. **Articles 6 and 8 of Regulation No 17**

(37) The agreement as notified by CLE on 18 September 1986 contained a number of provisions which stood in the way of a favourable decision, in particular the clauses relating to the non-competition obligation both during the term of the agreement and after termination thereof, which was considered to be unreasonably broad. Following the discussions with the Commission during the course of the notification procedure, CLE has redrafted the standard franchise agreement taking into account the comments made.

Pursuant to Article 6 (1) of Regulation No 17, the Commission is required to specify the date from which an exemption is granted. As the notified agreement did not fulfil the requirements for exemption, the date on which the exemption takes effect is not the date of the notification, but the date on which the franchisees were informed by CLE of the amended version of the agreement.

(38) According to Article 8 (1) of Regulation No 17, a decision in application of Article 85 (3) must be issued for a specified period. Given the 10-year term of the standard franchise agreement, a corresponding period would seem appropriate. In view of the changeable nature of the retail market for microcomputer products as a whole and the expanding tendency of the Computerland network, the exemption should, however, not be more than 10 years either. CLE should be obliged, pursuant to Article 8 (1) of Regulation No 17, to communicate any substantial changes in the franchise system to the Commission and furthermore, halfway through the period of exemption, to inform the Commission of the number of outlets per Member State and the market share of the network in the Community as a whole and in each Member State individually.

(39) Finally, to the extent CLE maintains franchise agreements which differ from the standard agreements, provisions which are more restrictive of competition will be adapted to be in line with the standard agreement as amended,

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 to the Computerland standard-form franchise agreement, including the 'Development Area Agreements', devised for the sale of microcomputer products at retail level in the common market, and to the other notified Computerland franchise agreements which have been adapted to the standard form agreement.

Article 2

With respect to the standard form agreement, including the 'Development Area Agreements', this Decision shall apply with effect from 10 July 1987 and shall be valid until 31 December 1997. With respect to other notified Computerland franchise agreements containing provisions which were more restrictive of competition than those contained in the standard form, this Decision shall take effect as of the date Computerland confirms to the Commission that those provisions have been adapted to be in line with their counterparts in the standard form agreement, and shall be valid until 31 December 1997.

Article 3

On 31 December 1992, CLE shall submit to the Commission an overview of:

— the number of outlets per Member State,

— the market share of the network in the Community as a whole and in each individual Member State.

Any substantial changes in the franchise system shall be communicated to the Commission on an *ad hoc* basis.

Article 4

This Decision is addressed to:

Computerland Europe SA,
Zone Industrielle,
Route de Trèves,
L-2632 Findel.

Done at Brussels, 13 July 1987.

For the Commission

Peter SUTHERLAND

Member of the Commission