
STATUTORY INSTRUMENTS

1997 No. 2945

RESTRICTIVE TRADE PRACTICES

The Restrictive Trade Practices (Non-notifiable Agreements) (Sale and Purchase, Share Subscription and Franchise Agreements) Order 1997

<i>Made</i>	- - - -	<i>6th December 1997</i>
<i>Laid before Parliament</i>		<i>11th December 1997</i>
<i>Coming into force</i>	- -	<i>9th January 1998</i>

The Secretary of State, in exercise of the power conferred upon her by section 27A of the Restrictive Trade Practices Act 1976(1), hereby makes the following Order:—

Title and commencement

1.—(1) This Order may be cited as the Restrictive Trade Practices (Non-notifiable Agreements) (Sale and Purchase, Share Subscription and Franchise Agreements) Order 1997.

(2) This Order shall come into force on 9th January 1998 and shall apply to agreements made on or after that date.

Interpretation

2. In this Order—

“the Act” means the Restrictive Trade Practices Act 1976;

“acquired enterprise” means a company in which shares are acquired or an unincorporated business an interest in which is acquired;

“business” means any undertaking which is, or any part of an undertaking which part is—

- (a) carried on as a going concern for gain or reward; or
- (b) carried on as a going concern in the course of which goods or services are supplied otherwise than free of charge;

“company” means a company as defined in section 735 of the Companies Act 1985(2) and an oversea company as defined in section 744 of that Act;

(1) 1976 c. 34; section 27A was inserted by section 10 of the Deregulation and Contracting Out Act 1994 c. 40.
(2) 1985 c. 6.

“contract of employment” means a contract of service whether it is express or implied and (if it is express) whether it is oral or in writing;

“development agreement” means an agreement whereby a person (“the franchisor”) grants to another, for consideration, the right to enter into an agreed number of franchise agreements with the franchisor within a specified area;

“franchise” means a package of industrial or intellectual property rights relating to trade marks, trade names, shop signs, utility models, designs, copyrights, know-how or patents, to be exploited for the sale of goods or the provision of services in which—

- (a) franchisees other than master franchisees, generate their revenue from the sale of the goods or services or goods and services which are the subject of the franchise, or
- (b) master franchisees generate their revenue predominantly from the continuing provision of services to sub-franchisees as well as from the sale of sub-franchises;

“franchise agreement” means an agreement whereby a person (“the franchisor”) grants to another, the franchisee, for consideration, the right to exploit a franchise for the purposes of the sale of specified types of goods or services or goods and services and which includes obligations relating to:

- (a) the use of a common trademark or service mark, trading name and—
 - (i) trading premises which are fitted out and equipped to a certain standard and specification providing an appearance uniform with those of other franchisees of the franchisor (including the range of stock available for sale or services available to be provided); or
 - (ii) a vehicle from which the franchisee conducts his business and which is fitted out and equipped to a standard and specification common to the franchisee and other franchisees of the franchisor providing a uniform appearance (including the range of stock available for sale or services available to be provided);
- (b) the communication by the franchisor or master franchisor to the franchisee of know-how; and,
- (c) the continuing provision by the franchisor or master franchisor to the franchisee of commercial or technical assistance during the term of the agreement;

“group” means a group of interconnected bodies corporate within the meaning of section 43(1) of the Act;

“identified” means described in a sufficiently comprehensive manner so as to make it possible to verify that it is secret and substantial;

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

“master franchise agreement” means an agreement whereby one person (“the master franchisor”) grants another for consideration, the right to exploit a franchise and the right to enter into sub-franchise agreements with other persons;

“secret” means that the know-how, as a body or in the precise configuration and assembly of its components, is not generally known or easily accessible;

“substantial” means that the know-how includes information which is of importance for the sale of goods or the provision of services to consumers and, without prejudice to the generality of the foregoing, in particular for the presentation of goods for sale, the processing of goods in connection with the provision of services, methods of dealing with consumers, and administration and financial management;

“unincorporated business” means the business of a sole trader or a partnership or the assets of a company.

Description of Non-notifiable agreements

Sale and Purchase Agreements

3. For the purposes of section 27A of the Act, and subject to the provisions of that section, an agreement is a non-notifiable agreement if—

- (a) it either:
 - (i) includes provision for the sale and purchase of shares in a company or companies which are members of the same group; or
 - (ii) includes provision for the sale and purchase of an unincorporated business and the vendor is to retain no interest in that unincorporated business; and
- (b) if it is for the sale and purchase of shares in a company or companies which are members of the same group:
 - (i) at least 25% of the equity in the company or each company is to be transferred by the agreement;
 - (ii) on completion of the sale and purchase one of the purchasers will own more than 50% of the equity in the company or each company; and
 - (iii) the equity bought and sold is equity in one company or companies which are members of one group; and
- (c) no restriction accepted will continue for longer than five years from the date of the completion of the agreement;
- (d) the five years' limitation imposed by sub-paragraph (c) of this article shall not apply in the case of restrictions accepted by—
 - (i) an individual who is to have a contract of employment with, or a contract for the supply of services to, the acquired enterprise, the purchaser of the acquired enterprise or a member of the group of the purchaser of the acquired enterprise;
 - (ii) a company which is to have a contract for the supply of the services of an individual controlling that company to the acquired enterprise or the purchaser of the acquired enterprise or a member of that purchaser's group; and
 - (iii) the individual referred to in sub-paragraph (ii) of this sub-paragraph (d).

Share subscription agreements

4.—(1) For the purpose of section 27A of the Act, and subject to the provisions of that section and to paragraph (2) below, an agreement is a non-notifiable agreement if—

- (a) it includes provision for a person to subscribe (whether or not in cash) for shares in a company; and
- (b) no restriction accepted will continue for longer than five years from the date of the completion of the agreement.

(2) The five years' limitation imposed by sub-paragraph (1)(b) of this article shall not apply in the case of restrictions accepted by—

- (a) an individual who is to have a contract of employment with, or a contract for the supply of services to, the company which issues the shares or a member of that company's group;
- (b) a company which is to have a contract for the supply of the services of an individual controlling that company to the company which issues the shares or a member of that company's group;
- (c) the individual referred to in sub-paragraph (b) of this paragraph (2); and

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- (d) the company which issues the shares which limit the nature of the business to be carried on by that company so as to maintain its ability to discharge its liability to its bankers and shareholders.

Franchise agreements

5. For the purpose of section 27A of the Act, and subject to the provisions of that section, an agreement is a non-notifiable agreement if it is a franchise agreement, master franchise agreement or development agreement.

6th December 1997

Nigel Griffiths
Parliamentary Under-Secretary of State for
Competition and Consumer Affairs
Department of Trade and Industry

EXPLANATORY NOTE

(This note is not part of the Order)

This Order specifies descriptions of non-notifiable agreements for the purposes of section 27A of the Restrictive Trade Practices Act 1976 (“the Act”). A non-notifiable agreement is an agreement which is registrable under the Act but of which particulars do not have to be notified to the Director General of Fair Trading unless he requires them by serving a notice on the parties. Section 27A of the Act provides, among other things, that a non-notifiable agreement is one which is not, and never has been, a price-fixing agreement and which is not an agreement in respect of which the Director has entered or filed particulars under section 1(2)(b) of the Act. Subject to those qualifications this Order provides that certain sale and purchase agreements, including those in which assets are sold and where there are wider arrangements, share subscription agreements, including those in which there are wider arrangements, franchise agreements, master franchise agreements and development agreements are non-notifiable agreements. Franchise agreement, master franchise agreement and development agreement are terms defined in the Order. This Order applies to agreements made on or after the date on which it comes into force.