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7 June 2006

RE: New Franchise Regulation

Last April 7, 2006, the Council of Ministers approved Royal Decree 419/2006, which modifies Royal Decree 2485/1998, of November 13, related to franchises and the Franchisors Registry (the "Royal Decree")

The Royal Decree was published in the Spanish Official Gazette last April 27, 2006 and has already entered into force. The main purpose of the Royal Decree is to enhance the functions of the Franchisors Registry. The novelties introduced by the Royal Decree are the following:

1. More precise definition of franchise agreements and distinction with similar contracts

The Royal Decree better defines what a franchise agreement is. According to the new Royal Decree, franchise activity shall be understood to be the activity undertaken under an agreement by which a company, the franchisor, assigns to another, the franchisee, the right to operate a business in a given market in exchange for a direct, indirect, or mixed compensation, the franchisor having been engaged in said activity previously, with sufficient experience and success, selling certain types of products or services. The franchise shall include at least: (i) the use of a common denomination or sign or other intellectual or industrial property rights and a uniform presentation of the premises or transport media for which the agreement was signed, (ii) the franchisor provides the franchisee with its own technical know-how, which must be substantial and singular and (iii) the franchisor provides the franchisee with continual commercial and/or technical assistance for the duration of the agreement, all without prejudice to the power of supervision and business control which may be established by contract.

The Royal Decree includes a differentiation of franchise agreements with other similar contracts. On the one hand, it clarifies that a franchise agreement is different to an exclusive distribution agreement or a *concession*. On the other hand, it further clarifies that a franchise agreement is different to (i) the granting of a license to manufacture, (ii) the assignment of a trademark to use it in a specific area, (iii) the transfer of technology and (iv) the authorization to use a distinctive sign.

2. Information to be provided to the Registry

At present, the current information to be provided includes, in general terms: contact details of the franchisor, description and title of the IP rights to be licensed, a description of the business and details of the master franchisor appointed in case he carries out the registration obligations. Any amendments to the abovementioned data must be communicated to the Registry.

Under the new Royal Decree, franchisors are required to provide some additional information to the Franchisor's registry. This is the following: (i) the number or years while the franchise has been running in Spain and the number of establishments with Spain -both, operated by the franchisor and by third parties, (ii) the authority of the natural person representing the franchisor company and (iii) in case of a master franchisor, the master franchise agreement.

3. Voluntary information to be provided to the Registry

Furthermore, franchisors can also provide the Registry with voluntary information such as: (i) certificates of quality granted in favour of franchisor, (ii) extra-judicial systems agreed between franchisor and franchisee to submit any discrepancies, (iii) deontological codes they may belong to (iv) and any other data that may be of the public interest.

4. Creation of a new category of franchise networks: franchise networks already consolidated.

Under the new Royal Decree and for registration proposes, a distinction between consolidated and non-consolidated franchises has been introduced. A consolidated franchise is any registered franchise that fulfils both of the following requirements: (a) to have been in operation for more than two years with at least two establishments or (b) to have appointed four franchise establishments and, among them, two belonging to the franchisor. This distinction creates no legal consequences but it is to provide eventual franchisees with more information.

5. Obligation to update registration information.

On an annual basis, the franchisor must communicate the number of franchised establishments open or closed in Spain (both, of its own and of any third party); in case the number of franchised establishments has not changed during a year, the franchisor must file a negative communication in this regard (i.e. there has not been any change concerning the number of franchised establishments). If any franchisor does not communicate an amendment to the registration information or does not carry out the annual communication, the competent registry (national or regional) will require franchisor to do so within two months; otherwise, the franchise registration will be cancelled.

It is to note that under former legislation, non compliance with the obligation to update registration information was not specifically sanctioned. The consequence arising thereof was that very few franchisors used to update the registration information or do it on time. Since the new Royal Decree foresees the possibility to cancel the franchise registration in case no update is made, this will certainly require franchisors to comply with the update obligation.

6. Better co-ordination between the National Franchise Registry and the Regional Registries.

Franchisors that operate at a national level may contact the National Franchise Registry or the Regional Registries for registration and information purposes.
