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Franchising Law in Nigeria—Part II

FRANCHISING LAW: Does Nigeria Need One? Do other countries have them?

EDITOR'S NOTE

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Should Nigeria pass a specific law to regulate franchising? What should the purpose of such a law be? What are other countries doing with regards to the regulation of franchising? When it comes to regulating franchising, there is no uniform practice among countries. Countries follow a multiplicity of approaches. In general, countries fall into one of four groups. The first group is made up of countries that have laws that explicitly regulate franchising; about 33 countries fall into this group. The second group is made up of countries that have laws that have direct and indirect impact on franchising but do not have laws that explicitly regulate franchising. The third group is comprised of countries that have no national legislation on franchising but individual states and provinces within the country have franchise-specific laws; a good example is Canada. In the fourth group are countries where both federal and state governments in varying degrees regulate franchising; a good example is the United States (U.S.).

Countries with Explicit Franchise Laws

A small but growing number of countries have adopted franchise-specific laws. In Australia, the operative law is the Trade Practices (Industry Codes - Franchising) Regulations 1998. In Brazil the relevant legislation is the Brazilian Franchise Law (Law No. 8955 of December 15, 1994) and in China, the "Measures for the Administration of Commercial Franchise" (2005) is the applicable law. France's Loi Doubin Law of 1989 is reputed to be the first European franchise disclosure law. Although South Africa does not have franchise-specific legislation, many aspects of franchising are covered in the Consumer Protection Act that went into effect in April 2011.

Among countries with franchise-specific legislation, there are wide variations in terms of the scope and depth of such laws. Franchise laws typically cover one or more of the following topics: (1) pre-sale requirements; (2) rules governing the offer and sale of franchises; (3) registration requirements; (4) post-sale relationship between the parties; and (5) dispute settlement.

For the most part when it comes to franchise-specific laws, you have the "disclosure" countries, the "relationship" countries, and the "registration" countries.In disclosure countries, the law typically mandates that prior to signing any franchise agreement and/or before any consideration is paid, the franchisor must provide to a prospective franchisee a disclosure document setting forth specified information relating to the franchisor and the franchising business. In relationship countries, the law regulates some aspects of the relationship between franchisors and franchisees and can regulate issues such as grounds for terminating a franchise and the rights and responsibilities of franchisors and franchisees. In registration countries, the laws merely spell out who and what must be registered in connection with a franchise operation. Such laws may require the registration of the franchise businesses and the registration of the franchise agreements.

Countries That Have Laws that Impact Franchising

Many countries do not have franchise-specific laws but have laws that affect franchising. Countries that do not have franchise-specific laws range from industrialized countries (e.g. United Kingdom, New Zealand, Germany, Finland, and Norway), to emerging economies (e.g. India, Chile, and Czech

Republic) and other developing countries (e.g. El Salvador and most countries in Africa).The European Union does not have a franchise-specific policy and has not adopted a uniform franchise disclosure policy applicable in all member states. Some countries that lack franchise-specific laws nevertheless have extensive disclosure rules that apply to all contracts including franchising contracts. Equally, some countries that lack franchise-specific laws have impressive and well-functioning laws in the areas of consumer protection, anti-competitive business practices, and unfair competition, and fair dealing. For example, New Zealand does not have a franchise-specific law but has laws such as the Fair Trading Act of 1986 and the Real Estate Agent Act of 2008 that are directly relevant to franchising.

Provincial Government and State Government Regulation

Franchising can be regulated at the state or provincial level. This is the case in Canada. Canada does not have a franchise-specific law in operation nationally. However, individual provinces in the country have adopted franchise specific laws. At least five Canadian provinces now have franchise-specific laws: Alberta (Franchise Act, Chapter F-23); Ontario (Arthur Wishart Act (Franchise Disclosure), 2000); New Brunswick (The Franchises Act); Manitoba (The Franchise Act or Bill 15), and Prince Edward Island (RSPEI 1988, c F-14.1). Manitoba's The Franchises Act (CCSM c F156) and Franchises Regulation (Man. Reg. 29/2012) went into force on October 1, 2012.In the main, the different franchising laws in Canada require franchisors to provide a disclosure document to prospective franchisees. The laws also impose a duty of fair dealing on each party to a franchise agreement.

Federal and State Regulation of Franchising

In some countries, both the federal government and individual states within the countries have adopted laws that specifically regulate franchising. The U.S. is an example. In the U.S., federal laws and state laws regulate franchising in varying degrees. At the federal level, franchising is regulated by the U.S. Federal Trade Commission (FTC) and the main rule that is applied is the Franchise Rule which the FTC promulgated in 1979 an updated in 2007 (Disclosure Requirements and Prohibitions Concerning Franchising & Disclosure Requirements Concerning Business Opportunities - 16 CFR Parts 436 and 437). The FTC Franchise Rule requires franchisors to make material disclosures to prospective franchisees. Although requiring disclosure, the FTC Franchise Rule does not require that a franchise or a franchise agreement be registered with the FTC. At the federal level also, the FTC is mandated to enforce the Federal Trade Commission Act of 1914 (15 U.S.C §§ 41-58, as amended) (FTC Act). The FTC Act is a sweeping law that prohibits unfair methods of competition and unfair or deceptive acts or practices in commerce.In addition to the federal regulation, at least fifteen states in the U.S. regulate franchising. The state laws in varying degrees address issues such as registration, disclosure and the relational aspects of a franchising agreement.

Is the Legal Framework for Franchising the Same in Most Countries?

Just because many countries do not have franchise-specific laws does not mean that the regulatory framework for franchising is the same in most countries. Some countries have very robust regulatory framework that support the franchising business model. Unfortunately, many countries, including countries in Sub-Saharan Africa, have extremely weak and fragile regulatory frameworks. To fully assess the strength of a country's legal and regulatory framework for franchising, it is important to evaluate the quality of the laws relating to franchising, the strength and effectiveness of the agencies charged with enforcing the laws, and even the mechanisms for contract enforcement that are available. In the Nigerian context, to determine if Nigeria is franchise-ready and franchise-friendly, it is important not only to look at the quality of the laws that regulate franchising in the Nigeria but also the broader system of law and justice in the country.

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Should Nigeria Pass Franchise-Specific Legislation? Is There a Case for Franchise Law Reform?

Whether or not Nigeria should pass franchise-specific legislation and what form such a law should take is not a question that can be answered with a quick "yes" or "no." In considering the issue, at least four points must be borne in mind.

First, franchise-specific legislation is not the only pathway to regulating franchising. There are at least three options available for regulating franchising: (1) franchise-specific legislation; (2) self-regulation; and (3) generic legislation. Second, whether or not Nigeria needs a franchise-specific law is not a question that can be answered in a vacuum. Such a question can only be answered after a careful and comprehensive review of existing laws. In most countries that have adopted franchise-specific laws, the laws were passed after a careful and thorough review of existing laws and institutions. A thorough, comprehensive, and impartial review of existing laws in Nigeria will reveal the gaps and loopholes that exist in the present legal framework for franchising in the country.

Third, there are good arguments for and against adopting franchise-specific laws.There are at least three reasons why a franchise-specific law may be a bad idea. First, regulation can become too restrictive, could discourage investors, and can make a country an unattractive place to do business. Second, regulation can lull the public into a false sense of security and encourage prospective franchisees to neglect to perform necessary due diligence.Third, laws can create new uncertainties that can lead to endless litigation and drain the limited resources available to the judiciary. Although there are good arguments against adopting franchise-specific legislation, there are many good arguments in support of franchise specific laws. The most compelling argument for a franchise-specific law is that there are often abuses associated with franchising that only clear rules and regulations can address.

Fourth, some countries have rejected calls for franchise-specific laws after extensive review processes.In the United Kingdom, the Minister of Industry, Margaret Hodge, conducted hearings but ultimately rejected calls for government regulation of franchising. The same is also true for New Zealand. In 2008, the then Ministry of Economic Development published a discussion paper on "The Review of Franchising Regulation in New Zealand." Subsequently, the government determined that a franchise-specific law was not the way to go. Conversely, after extensive review processes, some countries have made the decision to adopting franchise-specific laws was warranted.

Ten Steps to a Better Legal Environment for Franchising in Nigeria

While law can be an enabler, law can also be a barrier to franchising. Regulation need not be the first solution to any perceived problem in the franchising sector in Nigeria. In many countries, regulation is viewed as a tool of last resort, to be used when other options prove ineffective. What then for Nigeria?

1. Review Existing Laws

The starting point must be a comprehensive review of existing laws. The relevant ministry can publish a discussion paper and invites input from all stakeholders. Legislative hearings on the subject are also highly recommended.

2. Ask the Right Questions

As part of the review process it is important that the right questions are asked. At least four questions are important: (1) Is there a persistent problem in the franchising sector in Nigeria that needs to be addressed; (2) Is reform of existing laws necessary or merely desirable?; (3) Will the benefits of changing the law outweigh associated risks and costs?; (4) Will a new law create unanticipated problems for market participants or the general public?

3. Strike the Right Balance

Even if law reform is considered advisable, the goal must be to strike a delicate balance between regulation and liberalization. The goal should be to ensure fairness in franchising and prevent deceptive practices without making franchising a less attractive means of doing business in Nigeria. Presently, Nigeria is not widely considered to have a robust and fair legal system. Nigeria ranked 131/183 on the World Bank's Doing Business Report 2013; this isan indication that when it comes to the strength of legal institutions and the complexity and cost of regulatory processes, Nigeria is still doing poorly. What this means is that any tinkering with existing laws must be approached cautiously and only after careful deliberation.

4. Invite Broad and Public Stakeholder Participation

Legislative and administrative reviews of existing laws are important. However, even more important are the forms such reviews take. In this regard, a number of questions must be asked and answered. Will the review be spearheaded by government officials or career politicians? Will the review allow an opportunity for public hearings? Who will be allowed to take part in the review? How much time will be given for interested parties to make submissions? Will the review be well publicized and also publicized beyond the industry? Will the findings of the review body be published and made publicly available? Answers to questions such as these will determine if a review will be meaningful or not.

5. Avoid An All or Nothing Approach

Even if some reform of existing law is deemed necessary, the response need not be a new statute that regulates all aspects of franchising. As already noted, in their franchise-specific statutes some countries focus on disclosure issues, some focus on registration issues, some focus on relational issues, and some focus on all three issues. A gradual approach to legislation may make more sense in Nigeria than a wholesale approach given weak institutional apparatus. It may well be that at this particular time, disclosure rules are all that the Nigerian legal system can handle and all that is necessary given that franchising is still a relatively unknown business model in Nigeria and given the readiness of the institutions needed to implement these rules. Furthermore, in adopting any law, it is important to focus on **broad structural, procedural and regulatory issues rather than on particular franchising disputes that may have occurred in the past or that may be occurring today.**

6. Prioritize

Even if reform of existing laws is deemed necessary and/or desirable, the country may decide that such reform is not yet a priority given so many other areas of law currently clamouring for attention. There are several reasons why Nigeria may not be ready for a franchise-specific law at the present time. First, franchising as a business model is still relatively new in Nigeria. Consequently, it may be too early to talk of systemic problems that need urgent legal attention. Second, franchising is still below-the-radar as far as the government and the legal profession is concerned. There are presently few legal practitioners well-versed in franchising in Nigeria and the Nigerian Franchising Association (NIFA) is still a relatively weak organization compared to similar organizations in some other countries. Simply put, it may be difficult and perhaps premature at the present time to have meaningful discussions about the future direction of franchising laws in Nigeria.

7. Commission A Study on Franchising Laws and Regulations in Emerging Markets

Nigeria can learn a lot from emerging markets like China, Mexico, Brazil, India and South Africa as far as creating the legal and regulatory environment for franchising is concerned. In today's highly competitive global market, countries are taking steps to create business environment that is conducive for innovation and entrepreneurship. To attract international franchisors, countries such as India, China, and Brazil are taking steps to make franchising regulation more transparent and to improve market governance more generally. Examining the regulatory environment for franchising in some emerging market can offer valuable insights to policymakers and stakeholders in Nigeria.

8. Emphasize Market Governance:

In addition to considering franchise-specific legislation, it is important to devote time, resources and attention towards improving the enabling environment for small and medium-sized enterprises in Nigeria and improving the overall environment for doing business in Nigeria. Market governance calls attention to issues such as regulatory uncertainty, market instability, lack of regulatory transparency, and weak judicial systems. What is needed is across-the-board reform that can improve Nigeria's franchise friendliness and at the same time improve the ease of doing business in Nigeria across all sectors. Overall, **for Nigeria to successfully tap into the rapid expansion in international franchising the world is witnessing, serious attention has to be paid to the legal and regulatory environment for doing business in Nigeria and to the specific rules that affect the franchisor-franchisee relationship.**

9. Address Challenges to Franchising and Entrepreneurship in Nigeria

In addition to possibly adopting franchise-specific rules, attention must be paid to the challenges to entrepreneurship and franchising in Nigeria. The challenges to entrepreneurship and franchising in Nigeria and much of Africa are great. These include: lack of capital, political instability/risks, lack of transparency, underdeveloped infrastructure, and lack of managerial and entrepreneurial talents. With emphasis on the needs of small and medium-sized enterprises, effort must be made to reduce the cost of doing business in Nigeria, improve transport and communication networks, address the persistent problem of lack of availability of necessary supplies, and develop local industries that can support the franchising sector.

> A gradual approach to legislation may make more sense in Nigeria than a wholesale approach given weak institutional apparatus.

10. Envision the Potential Contributions of Franchising to Economic Development in Nigeria

Franchising can contribute to economic development. However, the contributions of franchising to economic growth and economic development are not automatic. Having a clear and realistic vision of the potential contribution of franchising to economic development in Nigeria can influence the direction any law that may be passed in the future on issues such as labor, employment, local content requirements, and corporate social responsibility.

Conclusion

Nigeria has no franchise-specific legislation and no mandatory disclosure regime but does it need one? Nigeria may or may not need a franchise-specific law. Much depends on whether and to what extent gaps are found to exist in the legal and regulatory framework for franchising in the country. While there are numerous laws in Nigeria that affect franchising, there are still noticeable gaps in the legal framework for franchising seen, for example, in the absence of a comprehensive law that regulates anti-competitive practices across all sectors of the economy. Policy-makers in Nigeria cannot rely solely oncommon law and inherited colonial laws to spur economic growth and shape the business environment in the country. In a fast-changing global environment, sometimes new laws are needed to address either new problems or to respond better to old problems. Many countries that do not have franchise-specific laws are nonetheless taking steps to update their business and commercial law. For example, although New Zealand does not have franchise-specific legislation, a lot can be found in the country's Fair Trading Act 1986, the Commerce Act 1986, and the Contractual Remedies Act 1989.

Does Nigeria need a franchise-specific law? **The ultimate goal should be to usher in a regulatory framework that is sound, balanced, and will help Nigeria become competitive in the world of franchising. In the march towards regulating franchising in Nigeria, there are several options that the country could consider including: (i) using existing generic contract and commercial laws; (ii) relying on self-regulation by the industry; (iii) adopting franchise-specific laws; and (iv) public education. Should a franchise-specific law be determined to be the best option for Nigeria, there are many forms such a law can take. Nigeria could decide to become a "disclosure country" by regulating the offer and sale of franchises typically by imposing disclosure requirements on franchisors. On the other hand, Nigeria could decide to become a "relationship" country by adopting laws that only regulate the relationship between franchisor and**

franchisee after the franchise contract comes into effect.

Before the task of reforming the laws relating to franchising in Nigeria can be tackled, better information about the state of franchising in Nigeria is needed. Presently, basic information about franchising and the franchising sector in Nigeria is not available. Clear answers and statistical data are needed on a number of issues. For example: what is the annual growth of franchising business models in Nigeria? How many franchise brands and units are operating in Nigeria today? How many people are employed in franchise-operated units in Nigeria? Which sectors of the Nigerian economy are making use of the franchise business model? What is the state of home-grown domestic franchises in Nigeria? Are local franchises maturing and are they now going offshore? Are there more overseas systems wanting to enter Nigeria? What reasons do some international franchises give for their hesitation to enter Nigeria? How many overseas franchises operate outside the major cities in Nigeria? Is the link between franchising and economic development becoming evident in Nigeria? Answers to questions such as these are necessary and will provide the foundation on which Nigeria can build an appropriate legal and regulatory framework for franchising.

Franchising has the potential to contribute to economic growth, economic development, job growth, employment creation, and entrepreneurship in Nigeria and the rest of Africa. Although franchising has experienced tremendous growth internationally over the last two decades, much of this growth has occurred outside Africa in emerging markets like China, India, Mexico, and Brazil. It is imperative that Nigeria take advantage of the fact that franchising appears to have reached domestic saturation in the West and international franchisors are increasingly seeking opportunities in emerging markets. Does Nigeria need a franchise-specific law? Answers to this question requires inter alia a careful review of existing laws, an assessment of the state of the franchising sector in Nigeria, and an understanding of the market conditions driving international franchising emerging markets like China, India, Mexico and Brazil. ◣

Ministry of Science and Technology - Nigeria
NOTAP
National Office for Technology Acquisition and Promotion

Experts tip franchising as an ideal way to tap into Nigeria's huge market

By Nonso Ndumanya and Demola Quadri

Experts at this year's edition of Emerging Franchisors Workshop which held in January, are unanimous in their view that franchising - a practice of using another firm's successful business model - is an ideal way to tap into the business potential of the huge Nigerian market.

The one-day workshop hosted by the National Office for Technology Acquisition and Promotion (NOTAP), is an intensive franchise development and leadership training for Nigerian franchise stakeholders, particularly Franchisors and Franchisees to enable them effectively take their businesses to the next levels of success and growth. NOTAP is a parastatal of the Federal Ministry of Science and Technology with mandate to promote and develop franchising in Nigeria.

With a population of 170 million people, Nigeria is Africa's most populous country by far, and its economy is growing at about 7 percent, vying with South Africa as the continent's largest. And it's franchise market (even though in its infancy stage) is considered a potential market of over one hundred billion dollars in annual revenue in from products and services, 20 percent less than South Africa's.

According to a United States commercial service report on Nigerian franchising, industry sectors where franchising shows the most promise and growth in Nigeria include fast food, quick service restraurants, hotel services, professional and service training, transportation services, telecommunications services, and distributive trade.

"The future of franchising in Nigeria is very bright sequel to the teeming population and enterprising nature of Nigerians," director general, NOTAP, Engr Umar Bindir, said in a lead paper. "Once the concept is well understood, many enterpreneurs and some of the present unemployed youths will hopefully key into it and grow it into small and medium enterprises (SMEs)."

Bindir added that franchising industry has proved itself to be a vital mechanism for jobs' creation, citing the FriestlandCampina WAMCO Plc partnership programme initiated by NOTAP, wherein the former promoted local dairy development with Nigerian farmers for the production and collection of cow milk. The spin-off, according to him, has provided more employment opportunities.

In a presentation on Franchising as a Career, deputy director, NOTAP, Idy Imiyoho noted that as a franchisee, one pays for the privilege of using an established marketing brand or business strategy.

"The key to deciding if a franchise is a good career strategy is conducting extensive research by identifying the products or services that interest one; the different business concepts available; the operating systems involved; and each brand's reputation," she said.

A past research into wider business failures from the African Development Bank found only 15 percent of franchised SMEs folded compared to an 80 percent failure rate among independent businesses. An International Franchise Association report futher says franchise start-ups are more likely to be successful than an independent start-ups.

"Franchising has become a globally accepted business model for small and medium enterprise development in most economies," executive secretary, Nigerian International Franchise Association, Micheal Olayinka said in a presentation on Franchise Opportunities in Nigeria. According to Babalola, franchising not only allows expansion but is also an empowerment tool, which can benefit start-up companies and develop Nigeria's small and medium enterprises (SMEs).

Findings show that aside Coca Cola and Pepsi, which have been established in Nigeria for a long time, KFC was the first US food brand to open outlets in Nigeria. Many more companies are exploring the market, and South African and European brands are establishing a presence in Nigeria, too. Indigenous companies are also in the business; franchising is driving their expansion in Africa. Lagos-based Food Concepts and Entertainment, which owns Chicken Republic and Butterfield Bakery says that South Africa, where it opened its first outlet outside Nigeria in 2007, is a springing board to the rest of the continent. Other local companies offering franchises include retail food chains Mr. Biggs and Chicken Republic and Tantalizers.

Analysts say this growth trend is expected to continue over the foreseeable future, and is already having a spill over effect on other industry sectors.

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