

## Editor's Note

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Professor Uche Eweluka Ofodile's two-part article series, "Franchising Law in Nigeria" is a valuable resource and could not have come at a better time during the ongoing discussion and effort to introduce a franchise-specific law in Nigeria.

"Franchising Law in Nigeria" is a must read for all franchising stakeholders and legislators involved in drafting the bill on franchising that is currently before the House Committee on Commerce (Trade and Investment) at the Nigeria National Assembly.

This edition of NIFA newsletter was inspired in part by NIFA president, Dr. Augustine Egbunike.

- Demola Quadri

## Franchising Law in Nigeria

The International Franchise Association defines a franchise as "the agreement or license between two legally independent parties which gives: a person or group of people (franchisee) the right to market a product or service using the trademark or trade name of another business (franchisor); the franchisee the right to market a product or service using the operating methods of the franchisor; the franchisee the obligation to pay the franchisor fees for these rights; the franchisor the obligation to provide rights and support to franchisees. "For franchisors and prospective franchisees interested in operating in Nigeria the question is what is the legal and regulatory framework for franchising in Nigeria? Does Nigeria have a franchise-specific legislation? What laws affect franchising in Nigeria? Which agency or agencies regulate franchising in the country? Is the offer and sale of franchises regulated in Nigeria? Is the legal and regulatory framework for franchising in Nigeria adequate and sound?

### No Franchise-Specific Legislation

Nigeria does not have franchise-specific legislation. In this respect, Nigeria differs from countries like Malaysia (The Franchise Act of 1998), Romania (Franchise Law No. 79/1998) and Sweden (The Swedish Franchise Disclosure Act of 2006) that have franchise-specific legislation. Because Nigeria does not have franchise-specific legislation there are few franchise-specific legal obligations that the franchisor or the franchisee must fulfill at the pre-contractual, contractual, or post-contractual stage. This means that:

- There is no definition of "a franchise" in Nigeria's statutory law;
- There is no specific mandatory legal regulation of pre-sale disclosures;
- No law creates a requirement that must



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be met before a franchisor can offer a franchise in Nigeria;

- No law regulates the offer and sale of franchises in Nigeria;
- Nigerian law does not stipulate what information the franchisor must disclose before the franchise agreement is signed and/or consideration is received;
- There is no specific law regulating the on-going relationship between franchisors and franchisees once the franchise agreement is signed and comes into effect; and
- No government agency is specially designated to regulate the offer and sale of franchises, although certain technology transfer agreements must be registered with the National Office of Technology Acquisition and Promotion (NOTAP).

### Laws Affecting Franchising in Nigeria

Just because Nigeria does not have a franchise-specific law does not mean that the franchise business model is not regulated in Nigeria. There are numerous laws in Nigeria that affect franchising.

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In the absence of a franchise-specific law, the offer and sale of a franchise in Nigeria is subject to the general commercial laws and practices in Nigeria. Although franchising falls first and foremost within the purview of commercial/contract laws in Nigeria, laws that affect franchising go well beyond the domain of commercial law/contract law. To understand the legal and regulatory framework for franchising in Nigeria, one must delve into the laws that address a host of issues including: the forms of business entities that can be used by franchisors, the formation of business entities in Nigeria, restrictions that apply to foreign investment and foreign investors, the tax system in Nigeria and how it applies to individuals and business entities, and labor and employment law issues. A long list of laws affects franchising including: Company Law, Intellectual Property Law, Tax Law, Labor Law, and Employment Law. When the franchisor is a foreign entity, several other areas of law apply including Immigration Law, Foreign Investment Law, Foreign Exchange Law and Money Laundering Law. In countries where they exist, Competition Law, Fair Dealing Law, and Consumer Protection Law will also apply. Overall, in Nigeria, franchising arrangements are affected by at least one or more of the following laws:

1. The Companies and Allied Matters Act Cap. 59 Laws of the Federation of Nigeria 1990 as amended, now on Act cap C20 Laws of Federation of Nigeria;

2. The Patents & Design Act 1970 (Cap 344, Laws of the Federation of Nigeria 1990);

3. The Trademark Act 1965 (Cap 436, Laws of the Federation of Nigeria 1990);

4. The Copyright Act 1988 (Cap 68, Laws of the Federation of Nigeria 1990);

5. National Office of Technology Acquisition and Promotion (NOTAP) Act No.70 of 1979 (Cap 268 Laws of the Federation of Nigeria 1990). To register a technology transfer agreement NOTAP requires evidence of registration of intellectual property e.g. trademark, patent, know-how.

6. Investment and Securities Act 2007 (repealed the Investment and Securities Act No. 45 of 1999);

7. The Immigration Act Cap. 171 Laws of the Federation of Nigeria 1990;

8. The Nigerian Investment Promotion Commission Act (Decree No. 16 of 1995), now Cap. N117 Laws of the Federation of Nigeria;

9. The Foreign Exchange (Monitoring and Miscellaneous Provisions) Decree No. 17 of 1995;

10. The Industrial Inspectorate Act Cap. 180 Laws of the Federation of Nigeria 1990; and

11. Consumer Protection Council Act of 1992, Decree 66 of 1992. Chapter C25, Laws of the Federation of Nigeria.



### Agencies that Regulate Franchising in Nigeria

In some countries, a special agency regulates franchising and implements franchise-specific laws and regulations. This is not the case in Nigeria. In Nigeria, there is no specially-designated franchise agency. No agency regulates what information the franchisor discloses to prospective franchisees or reviews the franchise agreement for fairness. No agency is mandated to step in if it is found that the franchisor engaged in deceptive practices in connection with the offer and sale of franchises. However, the activities of a number of agencies affect franchising arrangements in Nigeria. Depending on whether the franchisor is a foreign or

local entity and depending on whether the Franchisor already has a presence in Nigeria, the following agencies will become relevant.

- The Registrar of Trademarks, Patents and Industrial Design, Federal Ministry of Commerce (administers, the trademarks, patents and industrial design legislations);
- The Nigerian Copyright Commission which is under the Federation Ministry of Culture (administers Nigeria's copyright legislation);
- The National Office for Technology Acquisition and Promotion (oversees the registration of technology licensing agreements);
- Nigerian Investment Promotion Commission (overseas foreign investment in Nigeria and implements the Investment Promotion Act);
- The Corporate Affairs Commission (CAC) of Nigeria (responsible for regulating the formation and management of companies in Nigeria); and
- The Securities and Exchange Commission Nigeria (agency mandated to regulate and develop the Nigerian capital market).

Depending on the type of service or product that a particular franchise offers, other agencies are likely to be involved as well. For example, the National Agency for Food and Drug Administration and Control (NAFDAC), a parastatal of the Federal Ministry of Health, was established pursuant Decree No. 15 of 1993 as amended, with the mandate to inter alia regulate and control the importation, exportation, manufacture, advertisement, distribution, sale and use of drugs, cosmetics, medical devices, bottled water and chemicals. The Consumer Protection Council was established pursuant to the Consumer Protection Council Act of 1992 with wide ranging powers and functions. Amongst its functions, is that of providing speedy redress to consumers' complaints through negotiation, mediation and conciliation. It is also the responsibility of the Consumer Protection Council to "seek ways and means of removing or eliminating from the market hazardous products and causing offenders to

replace such products with safer and more appropriate alternatives.” Other potentially relevant agencies include the Standards Organization of Nigeria (SON), the Nigerian Communications Commission, Nigerian Export Promotion Council, Nigerian Export Processing Zones Authority, the Federal Ministry of Foreign Affairs, the Federal Ministry of Industry and the Federal Ministry of Finance.

### Franchising, Technology Transfer and Registration

Franchise agreements typically involve the licensing of intellectual property (IP) to the franchisee. Trademarks, copyrights, trade secrets, and even patents and know-how may be transferred under a franchising agreement. The NOTAP Act mandates that all agreements for the transfer of foreign technology to Nigerian parties must be registered with NOTAP. The NOTAP Act is triggered whenever there is an agreement having effect in Nigeria for the transfer of foreign technology to Nigerian parties. Every such contract or agreement shall be so registrable if its purpose or intent is in the opinion of NOTAP, wholly or partially, for or in connection with any of the following purposes: the use of trademarks; the right to use patented inventions; the supply of technical expertise in the form of the preparation of plans, diagrams, operating manuals or any other form of technical assistance of any description whatsoever; the supply of basic or detailed engineering; the supply of machinery and plant, and the provision of operating staff or managerial assistance and the training of personnel. Because franchising agreements involve at the very least the use of trademarks, franchising agreements inevitably trigger registration with NOTAP.

An Agency of the Federal Ministry of Science and Technology (FMST), NOTAP was established by Decree No. 70 of 1979, amended by Decree No. 82 of 1992 (hereinafter NOTAP Act cap 268 LFN 1994). For franchisors and prospective franchisees knowledge of the Revised Guidelines on Acquisition of Foreign Technology Under NOIP Act Cap 268 LFN (as amended by decree no. 82 of 1992)[hereinafter “The Guidelines”] is important. The Guidelines is an updated version of an earlier guideline

published in 2002 entitled ‘Revised Guidelines on Acquisition of Foreign Technology under Decree No 70 of 1979 (As amended by Decree No 82 of 1992).’ The stated goals of the Guidelines are: to “ensure the effective assimilation and diffusion of foreign technology within a specific time-frame at fair and equitable contractual terms”; to “create better understanding in the implementation and interpretation of the NOTAP Act to enhance the capabilities of Nigerians”; to “Improve the quality of agreements submitted to the office in order to facilitate their evaluation and registration within the shortest time”; and to “Serve as a guide in the drafting of technology transfer agreements by Nigerian parties.”

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Simply put, there is  
no competition law  
operating in Nigeria.

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### Gaps in Nigeria’s Legal Framework for Franchising

There are noticeable gaps in Nigeria’s legal framework for franchising. A complete inventory of these gaps is beyond the scope of this article. One noticeable gap in the legal and regulatory framework for franchising in Nigeria is in the areas of competition law. Simply put, there is no competition law operating in Nigeria. No statute in Nigeria deals specifically with competition law issues. Anti-competitive practices, abuse of dominant position by enterprises, and combinations (acquisition, acquiring of control and Merger and acquisition), which cause or are likely to cause adverse effects on competition within Nigeria are not fully regulated. Although efforts to regulate anti-competitive practices can be found in the provisions of the Investment and Securities Act, 2007 (the “ISA”) and the Rules and Regulations of the Securities and Exchange Commission (“SEC”) made pursuant to the ISA (the “SEC Rules”), this is far short of what obtains in most countries and what is anticipated in the draft Federal Competition Bill (the “Bill”). This is a problem given that in dealing with franchisees, franchisors often have and exercise market power. Competitive abuse can occur in franchising and several provisions in franchising agree-

ments can have anti-competitive effects. Examples are: exclusivity clauses, restrictions on sources from which the franchisee may purchase goods or lease services, and the fixing of minimum prices for the resale of goods. It is important that laws are in place to ensure and maintain competitive discipline in franchising. Many other jurisdictions have well-developed and up-to-date competition law rules including:

- **The European Union:** Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices);
- **China:** The Anti-Unfair Competition Law (promulgated by the Standing Committee of the National People’s Congress and effective as of 1 December 1993) and the Anti-Monopoly Law (promulgated by the National People’s Congress and effective as of 1 August 2008);
- **Canada:** The Competition Act (R.S.C., 1985, c. C-34);
- **Brazil:** Law No. 12529/2011 (the Anti-trust Law);
- **Australia:** The Competition and Consumer Act of 2010 (Act No. 51 of 1974 as amended);
- **India:** The Competition Act, 2002 as amended by the Competition (Amendment) Act, 2007;
- **Malaysia:** The Competition Act 2010 (came into force 1 January 2012); and
- **Romania:** Romanian Competition Law No. 21/1996.

### Conclusion

Nigeria does not have franchise-specific legislation and no government agency specifically regulates offering and selling franchises. However many laws in Nigeria affect franchising arrangements directly and indirectly. To fully understand the legal framework for franchising in Nigeria, one must go beyond the black letter law and look at how the courts in Nigeria have shaped franchising rules in the country. Does Nigeria need franchise-specific legislation? Is Nigeria’s law on franchising adequate? These questions are addressed in the next issue. ▀

# Preview of “Franchising Law in Nigeria” —Part II

## Franchising Law: Does Nigeria need one? Do other countries have them?

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

## A Comprehensive Review of Existing Laws in Nigeria:

The starting point must be a comprehensive review of existing laws. The relevant

ministry can publish a discussion paper that invites input from all stakeholders. Legislative hearings may also be very important.

## Ask the Right Questions:

As part of the review process, it is important that the right questions are ask. At least four questions are important: (1)Is there a persistent problem in the franchising sector which 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 participation ▀



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