

G. ELIAS

Who Should Regulate Franchising in Nigeria?



Introduction

In 2022, the Franchising Regulation Bill (the “**Bill**”) was introduced. The Bill seeks to create a framework for the regulation of franchising, guide the relationship between franchisors and franchisees, and promote the growth of franchising through the adoption of international best practices. The Bill also designates the National Office for Technology Acquisition and Promotion (“**NOTAP**”) as the regulatory agency for matters addressed in the Bill.

One of the objectives of the Bill is to enhance the capacity of NOTAP for effective regulation, administration, and enforcement of the provisions on franchising in the Bill.¹ However, given that the nature and scope of franchising is such that other agencies have a legitimate interest in overseeing other aspects of franchising, the suitability of NOTAP as a primary regulator of franchising may be open to question.

The Case for NOTAP

NOTAP was established by the National Office for Technology Acquisition and Promotion Act (“**NOTAP Act**”)² to regulate, monitor and facilitate the transfer of technology into the country. In this role, NOTAP functions primarily as both an authorizer and a registry for agreements for the transfer of technology between a foreign transferor and a Nigerian transferee³. NOTAP also provides a range of services to support the transfer of technology including the negotiation of technology transfer contracts, and the facilitation of technology transfer.

The importance of registering the transfer of technology agreements with NOTAP has been the subject of legal debate. The Court of Appeal has had multiple occasions to decide this point. In *Stanbic IBTC Holdings Plc v Financial Reporting Council of Nigeria & Anor*⁴ and *Essdee Food Products (Nig.) Ltd. v. Beecham Group Limited*,⁵ the Court of Appeal held that failure to register an agreement that is required to be registered under the NOTAP Act would result only in preventing payment of money in Nigeria to any person outside Nigeria for financial obligations related to that contract or agreement but such agreements or contracts will still be valid and legally enforceable in Nigeria. On the other hand, the Court of Appeal in the case of *Limak Yatirim, Enerji Uretim Isletme Hizmetleri Ve Insaat A.S. & Ors v. Sahelian Energy & Integrated Services Ltd*,⁶ held that an obligation under the registrable agreement which was not registered was unenforceable. The court in this case was referring specifically to an arbitration award that sought to compel the payment of money to an entity outside Nigeria under the unregistered agreement. The court reasoned that the arbitral award was based on an agreement that breached the laws and public policy of Nigeria and thus was unenforceable.

The category of agreements that are registrable at NOTAP is broadly defined. It includes agreements that are wholly or partially for or in connection with the use of trademarks, the use of patented inventions, the supply of technical expertise, the supply of detailed engineering drawings, the supply of machinery, and the provision of operating staff, managerial assistance and training of personnel.⁷ It is usual for franchise transactions to include one or more clauses disclosing agreements on these matters. The

¹ S. 1(c), Franchising Regulation Bill, 2022.

² Cap N68, LFN 2004.

³ S. 4, NOTAP Act.

⁴ (2018) LPELR-46507(CA).

⁵ (1985) 3 NWLR (Pt. 11) 112.

⁶ (2021) LPELR-58182(CA).

⁷ S. 4, NOTAP Act.

franchisor will typically grant the franchisee the right to use the franchisor's trademark.⁸ Also, depending on the type of franchise, the franchisor may undertake to supply the franchisee with technical expertise, drawings, or operating staff to help the franchisee set up and run the business.⁹

Perhaps, more vitally, in international franchise arrangements, registration with NOTAP is necessary to enable the franchisee to get a permit for the purchase of foreign currency with which to remit licence fees at Central Bank rates.¹⁰ The foreign currency obtained would typically be used to pay royalties to the franchisor. Because of its role as a registrar of these agreements, NOTAP undoubtedly has a significant role to play in the franchising industry. NOTAP has embraced this role and has even put out guidelines to regulate some aspects of franchising. NOTAP's Revised Guidelines for Registration and Monitoring of Technology Transfer Agreements in Nigeria, 2022 ("**NOTAP Guidelines**") provides that where the franchise is granted for departmental stores, there must be evidence that the materials were sourced from local producers.¹¹ Also, a franchising or continuing fee of 0.5% - 2% of net sales or revenue is payable in respect of a franchise agreement.¹² Further, all transfer of technology agreements must contain a provision for hiring and training of Nigerians to ensure the domestication of skill¹³ as well as a provision that Nigerian laws of arbitration shall govern all Nigerian Government Projects.¹⁴

From the standpoint of experience, NOTAP has significant experience in regulating the types of agreements that typically underlie franchising arrangements – including agreements for licensing intellectual property – and thus appears well-positioned to assume the role of a primary regulator of the sector. The power of NOTAP under the NOTAP Act to refuse to register certain agreements provides a legislative basis for the protection of Nigerian franchisees.¹⁵ As such, NOTAP can refuse to register any transfer of technology agreement under a franchise where the price paid by the Nigerian franchisee is not commensurate with the technology to be acquired or where there is an onerous obligation on the transferee (usually the franchisee) to the transferor (usually the franchisor) or any other person designated by the transferor under the Agreement.¹⁶

NOTAP can also refuse registration of such agreement where the transferee is obliged to acquire equipment or materials exclusively from the transferor¹⁷ or even where the transferee is required to submit to a foreign jurisdiction in any controversy arising from the agreement.¹⁸ The Bill contains similar protections for a franchisee including the compulsory applicability of Nigerian law in dispute resolution¹⁹ and the mandated use of local raw materials by franchise operators.²⁰ The statutory powers available to NOTAP ensure that it would be able to make regulations to adequately protect the interests of Nigerian franchisees in the manner contemplated by the Bill. This is because franchisees typically have less negotiating power in comparison with the franchisor.

⁸ See also S.4(1)(f)(i), Franchising Regulation Bill, 2022.

⁹ For instance, the definition of a franchise in the Bill envisages the franchisor's assistance in the franchisee's method of operation under a business plan, building design, and furnishings, marketing strategies or training, etc. See S. 21, Franchising Regulation Bill, 2022.

¹⁰ S. 7 NOTAP Act.

¹¹ Chapter 2, para.2.2.7, NOTAP Guidelines.

¹² Chapter 2, para 2.2.7, NOTAP Guidelines.

¹³ Chapter 2, para. 2.1(c), NOTAP Guidelines.

¹⁴ Chapter 2, para 2.1(g).

¹⁵ S. 6, NOTAP Act.

¹⁶ S. 6(2)(o), NOTAP Act.

¹⁷ S. 6(2)(f), NOTAP Act.

¹⁸ S. 6(2)(r), NOTAP Act.

¹⁹ S. 19(1), Franchising Regulation Bill 2022.

²⁰ S. 17, Franchising Regulation Bill 2022.

Despite the strong arguments in favour of NOTAP being the primary regulator for franchising in Nigeria, NOTAP is only concerned with the transfer of technology from a foreign country into Nigeria. Although foreign franchises are the predominant form of franchising, domestic franchises are not only a commercial possibility, but also widely used, especially in the quick-service restaurant industry (e.g. Chicken Republic, Tantalizers, and Mr. Biggs). The Bill recognizes the possibility of domestic franchises by providing that the Bill is intended to apply to a franchise agreement “whether the agreement is with a Nigerian or foreign franchisor.”²¹ While NOTAP may be largely suited to be a regulator for foreign franchise arrangements, it has no mandate or experience in respect of regulating domestic franchise arrangements.

Also, although the NOTAP Act grants the Minister of Trade and Industry significant oversight powers in respect of NOTAP,²² NOTAP is a parastatal under the supervision of the Ministry of Science and Technology. As such, its overarching concern is not regulating the commercial relationship between a franchisor and a franchisee but rather to manage the inflow of technology into Nigeria. This focus is too narrow to encompass the diverse aspects of franchising. An agency directly housed under the Ministry of Trade and Industry will certainly possess a broader mandate in respect of franchising. Further, in countries like the United States, there is no agency that directly corresponds to NOTAP in terms of its functions and responsibilities. Instead, a combination of regulators with varied interests including the United States Patent and Trademark Office and the National Institute of Standards and Technology (NIST) regulate the transfer of technology in some manner.

The Case for the Trademarks Office

The Trademarks, Patents and Designs Registry (part of the Ministry of Industry, Trade and Investment) (the “**Trademarks Registry**”) also has a vital role to play in franchising agreements. Since franchising frequently involves the franchisor granting legal rights to the franchisee to use the intellectual property of the franchisor, including the franchisor’s trademarks, it is vital to ensure that the trademarks are properly registered and protected. The Bill recognizes the role of intellectual property in franchising and mandates the franchisor to register and maintain any mark, patent, design, or intellectual property that is related to the franchise.²³

The role of the Trademark Registry in franchising is to review and approve trademark applications for use by franchisees as part of the franchisor's brand and to register such trademarks in the Trademarks Register.²⁴ The Trademark Registry also helps to enforce trademark laws and prevent infringement, ensuring that franchisees use the approved marks accurately and consistently in accordance with the franchisor's standards. This helps protect the franchisor's brand and intellectual property and provides franchisees with the ability to benefit from the franchisor's established reputation and branding.

Given the nature of a franchise transaction and the fact that the franchisee is heavily dependent on the image of the franchisor for its commercial success, the law of intellectual property and the regime for protecting same become prime issues for consideration in any attempt to set up a framework for regulating franchising. The Trademarks Registry is the recognized regulator in this regard and its regulatory interest in the franchising sector is at least as strong as that of NOTAP.

However, the case for designating the Trademarks Registry as the primary regulator of franchising is detracted from by the lack of experience of the Trademarks Registry in reviewing franchise agreements. Franchise agreements are complex legal documents that require an in-depth understanding of contract

²¹ S 3(1)(a), Franchising Regulation Bill 2022.

²² including the power to give general directions to the NOTAP Governing Council, SS. 3 & 22 NOTAP Act.

²³ S. 11, Franchising Regulation Bill 2022.

²⁴ S. 2(1), Trademarks Act, CAP T13 Laws of the Federation of Nigeria 2004.

law, franchise regulations, and the dynamics of franchising. Without the necessary expertise and experience, the Trademarks Registry may not be able to effectively identify and address potential inequities in franchise agreements, leaving franchisees vulnerable to unfair practices by franchisors. This lack of regulatory oversight could lead to an imbalance in negotiating power, resulting in the exploitation and abuse of franchisees.

The Case for the FCCPC

The role of the FCCPC as defined in the Federal Competition and Consumer Protection Act 2019 (“**FCCPA**”) is to prevent unfair competition and market practices by companies and at the same time protect the interests of the consumer.²⁵ While the FCCPA does not expressly bring franchising within the regulatory purview of the FCCPC, it is easy to see how relevant the agency is within the context of franchising.

To understand the scope of the FCCPC's regulatory interest in franchising, we have to carefully consider the provisions of the FCCPA. S. 163 of the FCCPA gives the FCCPC the power to make regulations and issue guidelines for the effective implementation of the provisions of the Act. The apparent consequence of this wide mandate is that the FCCPC is empowered to make regulations regarding such matters as unfair competition,²⁶ restrictive agreements,²⁷ and monopolies²⁸— all matters which are contemplated under the FCCPA and which come to the fore in the business of franchising. To the extent that the business of the franchisee involves providing goods and/or services to consumers, the franchise falls within the regulatory purview of the FCCPC. It, therefore, behoves the FCCPC to ensure that franchisees operate in a manner that does not result in unfair competition or cause harm to the consumer in any manner contemplated under the FCCPA. In order to perform its functions in this regard, the FCCPC has to be able to maintain continuous supervision over franchises from the point of registration through the running and operation of the franchise.

The case for the FCCPC as the primary regulator of franchising in Nigeria is helped by the fact that in jurisdictions where the franchising sector is more developed, the primary regulator of franchising is the equivalent of the FCCPC. In the United States, the Federal Trade Commission (“**FTC**”) is responsible for administering the primary federal franchising regulation – the Federal Franchise Rule.²⁹ The FTC in the United States, like the FCCPC in Nigeria, is responsible for the enforcement of antitrust laws and for the protection of consumers.³⁰ In Canada, franchising is regulated on a provincial level and there is no overarching regulatory body. However, the Competition Bureau, which is the equivalent of the FCCPC in Canada assumes some regulatory functions where a franchise arrangement gives rise to competition concerns.³¹

The parallels in the regulatory mandates of these agencies coupled with the developed state of franchising in the USA constitute a persuasive argument for designating the FCCPC as the primary regulator of franchising in Nigeria. Moreso, franchising arrangements, almost invariably, raise competition concerns³² which typically involve considerations that are wider in scope than intellectual property or transfer of

²⁵ S. 17, FCCPA.

²⁶ Part XIV, FCCPA.

²⁷ Part VIII, FCCPA.

²⁸ Part X, FCCPA.

²⁹ ICLG, ‘Franchise Laws and Regulations USA’ (ICLG, 21 October 2022) <<https://iclg.com/practice-areas/franchise-laws-and-regulations/usa>> accessed 28 April 2023.

³⁰ S. 5(a), FTC Act, 15 U.S.C.

³¹ ICLG, ‘Franchise Laws and Regulations USA’ (ICLG, 21 October 2022) <<https://iclg.com/practice-areas/franchise-laws-and-regulations/canada>> accessed 28 April 2023.

³² These concerns arise from resulting vertical or horizontal integration to the franchisor’s business and possible economies of scale benefits for the franchisee.

technology as in the case of the Trademarks Registry and NOTAP respectively. The existing mandate of the FCCPC in respect of the regulation of competition, therefore, presents a strong argument for making the FCCPC the primary regulator of franchising.

However, the principal role of the FCCPC – which is to regulate the relationship between businesses and consumers, and between competitors in an industry – undermines the argument for the FCCPC as a primary regulator of franchising in Nigeria. Although the FCCPC may still have a role in ensuring that franchise agreements are fair and transparent, franchise arrangements involve a distinct contractual relationship between a franchisor and a franchisee, which differs from the relationships typically regulated by the FCCPC. For instance, franchise arrangements may not typically entail relationships between competitors in an industry. While franchises of the same brand may operate in the same market, they are generally considered to be part of the same franchise system and work collaboratively rather than as direct competitors.

Recommendation and Conclusion

By its very nature, franchising implicates more than one aspect of the economy and more than one kind of regulatory concern. There is, therefore, bound to be some overlap between government agencies that seek to regulate various aspects of franchising. There is also the tendency to have conflicting regulations and inefficiencies in enforcement. More so, given the diverse and strong interests of different regulators in regulating franchising, it is difficult to make the case that one of the existing regulators should be designated the sole or even primary regulator of franchising. In the interest of ensuring effective regulatory oversight in the franchising sector, it is important to ensure that the different regulatory interests are reconciled in an efficient manner.

One conceivable way to achieve this could be to establish a new agency to address issues of shared interest and concern of the various regulatory and supervisory authorities in the franchising sector. The function of such an agency will be to coordinate and oversee the regulation of franchising in Nigeria. This approach will allow the different regulators to make regulations on the aspects of franchising that concerns them while ensuring some level of harmony in the regulatory regime. This new agency could also be responsible for facilitating the setting up of franchises in Nigeria including such matters as obtaining the relevant regulatory approvals. In this regard, it may be conceptually similar to the One-Stop Investment Centre housed under the Nigerian Investment Promotion Commission.³³

In conclusion, franchising is a viable means of introducing foreign investment into Nigeria and has great potential for growth. However, this potential can only be realized if the proper regulatory framework exists to ensure that the interests of all the stakeholders, including consumers, are adequately protected.

³³ NIPC, 'Guide to Investing in Nigeria' (NIPC, Undated) <nipc.gov.ng/iguide/getting-started/#osic> accessed March 03, 2023.

Authors



Eberechukwu Ezike
Associate
eberechukwu.ezike@gelias.com



Chima Uzochukwu-Obi
Associate
chima.uzochukwu-Obi@gelias.com

LOCATIONS

LAGOS OFFICE
6 Broad Street
Lagos, Nigeria

T: +234 (1) 460 7890
E: gelias@gelias.com

ABUJA OFFICE
2nd Floor, Abia House,
Plot 979, First Avenue,
Central Business District
F.C.T, Abuja.

T: +234 (1) 888 8881

Practices • Arbitration • Banking • Capital Markets • Competition • Compliance • Corporate • Data Protection • Derivatives • Employment • Fintech • Foreign Investment • Intellectual Property • Litigation • Mergers and Acquisitions • Tax • "White Collar" Sanctions •

Sectors • Agribusiness • Commercial Banks • Commodities • Construction • Distributors • Development Finance • Electric Power • Entertainment • External Trade • Fintech • Healthcare • Infrastructure • Insurance • Investment Banks • Manufacturing • Media • Mining • Oil and Gas • Pension Managers • Private Equity • Real Estate • Services • Technology • Telecommunications • Transport •

www.gelias.com