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NIGERIAN FEDERAL COMPETITION LEGISLATION AND FRANCHISING

The Federal Competition and Consumer Protection Commission Act (2019) (the "**Act"**) became law on January 30, 2019. The Act in very broad terms prohibits actors from entering into agreements that have the effect of restraining or preventing competition (ss. 59 and 63). It does not explicitly address franchising and gives no specific guidance on granting franchises. No Nigerian legislation does. This paper contends that we need specific rules on the extent to which granting franchises will amount to anti-competitive conduct contravening the Act.

Franchising involves one party (Franchisor) empowering another (Franchisee) to supply products to third parties using the Franchisor's brand or other intellectual property in return for paying the Franchisor money and accepting the Franchisor's control over the supply operations to a greater or lesser degree. The products may be goods, services or even real estate. The control may involve clauses on quality standards, territorial limits, exclusive buying or selling and pricing.

In principle, franchising can, and to a greater or lesser degree in fact will, have anti-competitive effects. The elements of intellectual property ownership, money remittances to Franchisors and Franchisors' control over operations may give the Franchisor enough market power to frustrate the competitors of the Franchisor and its preferred suppliers in the market place, maintain high consumer prices for the products and ensure that the Franchisees cannot become competitors to the Franchisor.

This paper is concerned only with the competition law dimension to the granting of franchises. It is not concerned with either (a) competition law issues arising out of the sales of franchisors or franchises or (b) abuses of bargaining power by franchisors in negotiating franchise agreements. (a) is part of broader merger control law. (b) is conceptually part of the law relating to contracts of adhesion.

To avoid confusion and uncertainty, Nigeria needs specific competition law rules on franchising. To be sure, having new rules at all will not in itself ensure either coherence or certainty. To be certain, the new rules should give meaningful guidance as to the extent and division of fragmentation that is acceptable in given markets. Such guidance should be issued by way of Federal regulations to be made under the Act (s.163(2)). Seeking Federal primary legislation will take time and may be politically controversial, and the States have no constitutional power to legislate on competition law matters.

To be coherent, Nigerian law should insist that actual anti-competitive effects be proved in every particular case rather than be presumed fairly conclusively to be present once the facts in issue fit into given broad categories. Nigerian law should not, as USA law widely did in the days before decisions such as *White Motor Co. v US* (1963) 372 US 253 and *Leegin Creative Leather Products v PSKS* (2007) 551 US 877, deem anti-competitive conduct to be present whenever there are, for example, territorial division, price-fixing or exclusive dealing clauses in franchising agreements.

It is to be hoped that such new regulations will be promulgated without delay, that they will provide certainty and coherence, and that the competition regulator under the Act will in this effort draw on the invaluable experience of Anglophone developed country jurisdictions. The law in these jurisdictions is not always fully satisfactory, but they undoubtedly have instructive history, policy variations, special exemptions and mature rules which can be very helpful on the subject.