



Position Paper

Franchise Bill, 2019

This position paper is developed as part of the mapping and analysis of national legislations, regulations and policies relevant for business enabling environment, trade and competitiveness, MSMEs and value chains development in Nigeria, commissioned by Nigeria Competitiveness Project (NICOP) and implemented in partnership with Centre for Trade and Business Environment Advocacy (CTBA) and Federal Ministry of Industry, Trade and Investment. NICOP is co-funded by the European Union (EU) and the German Government; and implemented by GIZ SEDIN Programme with the Federal Ministry of Industry, Trade and Investment (FMITI) as national partner.

Overview

This Bill is “for an Act to provide for the regulation of franchising in Nigeria; and for related matters”. The franchise business model dates as far back as the early 1950sⁱ in Nigeria, but mainly regulated by the law of contract. Other laws relating to intellectual property – such as the Trade Marks Act, Patent and Designs Act, NOTAP Act, etc – apply to regulate the transfer and use of intellectual property in a franchise relation. What the Bill seeks to do is to codify the contract rules and international best practices to provide legal certainty for the franchising market.

Franchise business model is “a method of distributing products or services involving a franchisor, who establishes the brand’s trademark or trade name and a business system, and a franchisee, who pays a royalty and often an initial fee for the right to do business under the franchisor’s name and system”ⁱⁱ. Franchising provides MSMEs with opportunity in two ways: first, for an MSME wanting to scale their business, they can adopt the franchise model and enter into franchise agreement (as a franchisor) whereby they allow other entrepreneurs to operate under their brand and business system as franchisees; for an MSMEs building a new businesses, taking up a franchise from an established brand provides an opportunity to bypass the entire rigour of building brand equity and business systems over time.

The Franchise Bill defines franchise as “the rights granted by a party (the franchisor) authorising and requiring another party (the franchisee), in exchange, for direct or indirect financial compensation, to engage in the business of selling goods or services on its own behalf under a system designated by the franchisor which includes know-how and assistance, prescribes in substantial part the manner in which the franchised business is to be operated, includes significant and continuing operational control by the franchisor, and is substantially associated with a trademark, service mark, trade name or logo-type designated by the franchisor and includes: (a) the rights granted by a franchisor to a sub-franchisor under a master franchise agreement; (b) the rights granted by a sub-franchisor to a sub-franchisee under a sub-franchise agreement; (c) the rights granted by a franchisor to a party under a development agreement.

Perhaps, the most important contribution the Bill would make, if enacted into law, is the provisions regarding mandatory disclosure to be made by the franchisor to the franchisee sequel to entering into a franchise agreement. Sections 5 to 9 spell out the duty of disclosure, the circumstances where disclosure is not necessary, the nature of information to be disclosed, the manner of



disclosure and acknowledgment of disclosure, etc. Section 10 spells out the effect of failure to disclosure on the franchise agreement (that is, the remedies available the franchisee) and places a time limitation for the enforcement of the remedies. Hopefully, these provisions have clarified the common law rules in respect of disclosure which are hardly straightforward from a business perspective.

The Bill proposes NOTAP as the agency (regulator) with responsibility to implement the provisions of the Bill (Section 2 and 3). Similarly, Section 11 proposes to grant NOTAP the mandate to register every franchise agreement entered into between franchisees in Nigeria and franchisors outside Nigeria; as well as coordinate the licensing of indigenous business franchise to interested franchisees. Section 12 preserves the need for registration of all proprietary rights associated with any foreign business or franchise licenced to franchisees in Nigeria under the various intellectual property related laws in Nigeria as indicated above. Section 14 mandates every franchise operator to ensure that they meet at least 20% local input in their operations. This aligns with practices in countries like South African and United Arab Emirates (UAE). Failure to comply with the provisions of the Bill when passed would be an offence attracting a term of imprisonment for a minimum of one year or option of fine of not less than NGN1,000,000 (One Million Naira); or both imprisonment and fine (Section 15). The Governing Board of NOTAP has the power to make regulations for the implementation of the Bill when passed into law. (Section 16).

Franchising is particularly important for the fashion as well as food and beverages MSMEs. Franchising provides the opportunities for MSMEs in these markets to expand their distribution networks with minimal investment on their part. A well-developed franchise system also provides backward linkages with the upstream operators (especially farmers) by creating a standard and secure market for their output. This is a good way to promote the value chain approach which NICOP is implementing. Examples of this already abound in the quick service restaurant market where the growth in number of outlets of a franchise brand results in expansion in the demand for farm produce within supply chain. Franchising also holds potentials for deepening the agro-equipment leasing market in Nigeria. A franchise arrangement between foreign leasing companies and Nigerian businesses could provide the much-needed agricultural equipment at rental values to the farmers.

Key issues

Some of the gaps noticed in the Bill include:

- The appointment of NOTAP as the implementing agency: this would be problematic with the level of manpower and efficiency in NOTAP at the moment. There are reports of long delays in registering agreements with NOTAP and general inefficiency. While some countries have public sector bodies that regulate franchising (such as in the USA), others (such as the UK and South Africa) leave the regulation of the operators to industry associations who usually have a well-developed code of ethics. The report of a sturdy titled "Tackling Access to Finance: The Potential of Franchising in Nigeria"ⁱⁱⁱ published in 2016 recommended that the role of NOTAP be confined to that of registering the franchise agreements while the regulation of the franchise business be left to strengthened private sector bodies like the Nigerian International Franchise Association (NIFA).



- The proposed power of NOTAP to coordinate the licensing of indigenous business franchise to interested franchisees under Section 11 need further clarification as to its meaning. This is important because in a situation like this where regulation is trying to catch up with a well-developed business practice, there is a need to minimise disruption to a model that has been largely successful in Nigeria. Undue interference from the public sector in the name of regulation (or ‘coordination’) may not be in the interest of the businesses concerned.

Recommendations

It is, therefore, recommend as follows:

- There is merit in exploring the industry-based regulation of franchising in Nigeria with the public sector regulator(s) being limited to such issues as registration and protection of intellectual property rights, protection of consumer rights and enforcement of competition rules in franchise operations. Since these functions are being performed by different agencies, there may be no need for a centralised regulator in this market. It may just be enough to promote industry-based regulation, and in the Bill or through a regulation, require that for registration or renewal of a franchise agreements by NOTAP, an applicant must show evidence of compliance with the rules of the industry association. This may evidence could be in form of a ‘certificate of good standing’ with the association. This practice would be akin to the model of the Nigerian Stock Exchange, which has its rules and codes, while the Securities and Exchanges Commission still plays overall market oversight role and requires operators to abide by the rules of the Exchange.
- Besides the promotion of industry led regulation advocated above, the Bill (or a regulation issued by a competent authority) should establish a centralised and automated franchise registry where all the necessary registrations relating to proprietary rights and transfer of technology can be done simultaneously, without taking away the existing mandates of the relevant agencies such as Trade Marks Registry. The proposed registry would operate as a one-stop-shop for franchise registration and administration. The extant practice of having to register all component proprietary rights (trademarks, industrial designs and patents) separately before visiting NOTAP for registration of the agreement is clumsy and time consuming.

In conclusion, there is a need to bring other stakeholders on board to engage with the existing promoters of this Bill with a view to widening the consultation and taking on board the informed views of experts and operators from within and outside the country before the Bill is passed.

ⁱ <https://www.stearsng.com/article/micro-franchising-in-nigeria>

ⁱⁱ <https://www.franchise.org/faqs/basics/what-is-a-franchise>

ⁱⁱⁱ <https://nourishingafrica.com/wp-content/uploads/formidable/9/Franchising-Nigeria-abridged-3.pdf> Published by FMITI and DFID-PDFII,