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Towards An Enabling Legal and Regulatory Framework for International Franchising Business in Nigeria

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Abstract

UNCTAD has estimated that around 18 – 21 million people are employed under Non – Equity Modes (NEMs) of production, with the bulk of them being in contract manufacturing, outsourcing, and franchising. 80% of these employments are mostly in developing countries. If well-strategised, NEMs can present massive potential for developing countries such as Nigeria to increase their share of value addition, build productive capacity, integrate the country into the Global Value Chain (GVC), and increase its participation in international trade. Nigeria has signed and ratified the African Continental Free Trade Area (AfCFTA) Agreement, is a member of the WTO, and has integrated Sustainable Development Goals (SDGs) into its development strategy. It seeks to develop its productive capacity through industrialisation, pursue export-led growth through trade under the AfCFTA and increase participation in the GVC. Franchising as a business model is used to mitigate against certain risks, create jobs, and is used as a tool to gain entry into a new and/ or uncertain business environment making it worth exploring to improve international franchising in Nigeria. The research observed that although attempts have been made to woe international franchisors by Nigeria, the sector performed below expectation. The paper finds that the legal and regulatory environment does not create an enabling environment for franchises to thrive, This makes the business environment unattractive for international franchising. Hence, using the doctrinal approach, this paper seeks to analyse the legal and regulatory framework for franchising business in Nigeria to determine how prepared it is to regulate franchising business in Nigeria to assess its capability to support Nigeria, and proffering suggestions on how to improve it to enable Nigeria leverage on it to undergird its industrialisation and export market development.

INTRODUCTION

International Franchising is a Non-Equity Mode (NEM) of investment[1] alongside contract farming, licensing, contract manufacturing, management contracts, and services outsourcing, [2] which is carried out using a contract–based international business model that allows businesses to secure market entry, [3] or enhance efficiency in the production of goods and services.[4] It enables the investor, including Multi-National Enterprise (MNE), who is the franchisor, to allow the host, who is the franchisee, access to either its intellectual property, skills, technology, business process, or brand name,[5] for a fee and royalties.[6]

In 2010, it was estimated that cross–border NEMs activities generated sales of $2 trillion, out of which franchising contributed $330 – 350 billion, behind contract manufacturing and outsourcing, which generated between $1.1 – 1.3 trillion.[7] This income share cannot be ignored, mainly because it presents an opportunity for a developing country like Nigeria to develop its productive capacity and position itself as a significant player in regional and global trade and investment.

Although Nigeria does not currently have an industrialization policy, it has developed industrialisation - supporting Medium-Term National Development Plan (NDP).[8] The plan sets out some NEMs enabling strategies

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[1] Priyanka Kher and Peter Kusek, How Can Local Capital and Foreign Brands Join Forces to Create Millions of Jobs? The Case of Non – Equity Modes of Investment (2018), https://blogs.worldbank.org/psd/how-can-local-capital-and-foreign-brands-join-forces-create-millions-jobs-case-non-equity-modes accessed 17th April 2022

[2]UNCTAD World Investment Report (WIR) 2011, https://unctad.org/system/files/official-document/wir2011_en.pdf accessed 17th April 2022

[3] World Investment Report WIR, 2020, https://unctad.org/system/files/official-document/wir2020_en.pdf accessed 17th April 2022

[4] Ibid note 1

[5]Ibid note 1; WIR 201 note 21

[6]Illan Allon, Indri Dwi Apriliyanti, Massiel Carolina Hneriquez Parodi, A Systematic Review of International Franchising, Multinational Business Review (MBR), (2020)Vol.29, no.1, **https://doi.org/10.1108/MBR-01-2020-0019**, https://www.emerald.com/insight/search?q=A+systematic+review+of+international+franchising&showAll=true accessed 17th April 2022 p.44; Nigerian International Franchise Association (NIFA), About Franchising, http://www.nigerianfranchise.org/aboutfranchising.html accessed 17th April 2022

[7]Ibid note 2

[8] Ibid

which could be implemented through laws.[9] While leveraging franchising is a welcome development, the enabling and regulatory laws present some gaps that, if not addressed, can create a regulatory chill that will make Nigeria unattractive for franchising businesses.[10] This is without prejudice to any mitigating steps that can be taken under the franchise agreement.

To analyze the legal framework for franchising business in Nigeria, this paper begins with a brief overview of the theoretical basis of the franchise business model, highlighting its risks and benefits. The discussion will be followed by a review of Nigeria's legal framework for franchise business. The challenges facing franchise businesses in Nigeria will be reviewed. Observations and recommendations will also be made at the end of the paper.

THEORY OF FRANCHISE BUSINESS MODEL

On a conceptual level, the franchising business model gives the franchisor the right to allow a franchisee to use its goods or services in a specified manner.[11] This provides a franchisee with license and privilege, which include access to managerial skills and training.[12] Various types of franchising exist; they include product, name, and business format franchising.[13] Franchising as a form of business has been traced back to the middle ages when catholic churches were given franchises to collect taxes,[14] which evolved over time and got extended to commercial practices which subsequently became embraced by global brands such as General Motors, Coca-Cola,[15] Hertz,[16] Marriot Hotels, MacDonalds,[17] Hilton, KFC, etc.[18]

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[9] Ibid

[10] Ifeanyi E. Okonkwo and Munirah Yaqoub, Trademar Franchising in Nigeria: the impact of NOTAP Act and what brands need to know, World Trademark Review, 2022, https://jee.africa/wp-content/uploads/2022/02/World-Trademark-Review-Trademark-franchising-in-Nigeria_-the-impact-of-the-NOTAP-Act-and-what-brands-need-to-know.pdf accessed 27 April 2022

[11] Olafemi Ayopo Olotu, Reinventing Business Growth through Franchising in Developing Economies: A Study of the Nigerian FastFood Sector, International Journal of Marketing Studies Vol.3 No.1, 2011, https://www.ccsenet.org/journal/index.php/ijms/article/view/9284 accessed 29 April 2022 p.163; see also Olumide Ale, Franchising in Nigeria: Opportunities and Challenges, (2007), http://www.nigerianfranchise.org/images/Ale_Olumide_CTO_2007_Presentation.pdf accessed 30 April 2022

[12] Olotu, Ibid p.163

[13] Ibid p.163

[14] Ibid, p.164

[15] Ibid p.163

The franchise business model is developed to give firms some entrepreneurial flexibility that will allow them to leverage some firm and location-specific conditions to mitigate against cash-related risks and or uncertainties.[19] It will enable firms to sustain their competitiveness by mitigating costs and exploring entrepreneurial value creation. [20]Hence, from a theoretical perspective, the franchise business model will allow a firm to maintain leveraged growth and sustain its competitive position.[21] The theory explains the factors that inform a firm's decision to engage in franchising; they include the following:

1) Resource Acquisition Theory:

This theory approaches franchising from averting resource scarcity and induced growth constraint perspective whereby firms opt for franchising to build economies of scale,[22] after which the franchisor will halt franchising and recover its most profitable outlets.[23] It is expected to help firms deal with constraints to their growth and surmount challenges posed by a lack of financial capital and lack of skilled managers.[24] This theory's advantage is in harnessing resources (financial capital, information on strategic locations, managers, and labour supply) in the initial/ formative years of the business.[25] Although the theory explains that firms are motivated to franchise by capital constraint, and when the constraint eases, they will regain ownership of some of the franchised businesses,[26]

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[16] Ibid

[17] Imed Eddine Bekhouche, Soheyb Salah Kahessenane, An Overview of Franchising Law: Why is it Important?, International Journal of Law and Public Administration Vol.1 No.2, 2018, https://www.researchgate.net/publication/325927871_An_Overview_of_Franchising_Law_Why_is_it_Important/fulltext/5b2d168d4585150d23c355c7/An-Overview-of-Franchising-Law-Why-is-it-Important.pdf accessed 29 April 2022

[18] Illan Ibid note 6

[19]Mishra, C.S. (2017). The Theory of Franchising. In: Creating and Sustaining Competitive Advantage. Palgrave Macmillan, Cham. https://doi.org/10.1007/978-3-319-54540-0_7, https://link.springer.com/chapter/10.1007/978-3-319-54540-0_7#citeas accessed 18th April 2022

[20] Ibid

[21] Ibid

[22] Varotto, L. F. e Aureliano-Silva, L. (2017) "Evolution in franchising: Trends and new perspectives", *Internext*, 12(3), p. 31–42. doi: 10.18568/1980-4865.12331-42., https://internext.espm.br/internext/article/view/374/319 accessed 18th April 2022 P.32

[23] Ibid p.33

[24] Ibid p.32

[25] Ibid p.32 - 33

[26] Ibid; Mistra note 21

it has been observed that empirical evidence suggests that retail companies franchise even where they do not suffer any constraints,[27] and mature franchisors continue to franchise in the same proportion as the firms' owned outlets which makes it an unsuitable explanation for why firms franchise.[28]

2) Agency Theory:

Agency theory has its foundation in neoclassical economics firm theory,[29] and is predicated on geographic dispersion.[30] It explains franchising from the perspective of decision-making on resource allocation using the pricing system and principle of firm hierarchy as the organising structures.[31] Its focus is on how to control agency problems that may arise as a result of the owner of a firm not being the one managing it, to cover costs, reduce prices and ensure efficient product delivery in a way that safeguards the survival of the firm.[32] It is theoretically assumed that the problem can be resolved by separating management from control through decision systems, and the cooperation of both parties can be secured through strategic monitoring and incentivising agents.[33]

3) Transaction Cost Analysis/ Theory:

This is built on firm governance theory and focuses on transaction and its associated costs.[34] Under this theory, three forms of firm governance have been identified they include market, hybrid, and hierarchy, with the most ideal of it being the one that allows for the lowest possible transaction costs.[35] It is asset-specific and could have implications for franchising where a franchisor engages in opportunistic behaviour towards outlet ownership governance structures in respect of specific transactions.[36]

4) Property Right Theory:

[27] Mistra Ibid p.3
[28] Ibid p.3
[29] Varotto Ibid note 25 p.33
[30] Mistra note 21 p.3
[31] Varotto note 25 p.33
[32] Ibid p.33
[33] Ibid p.33
[34] Ibid p.34
[35] Ibid p.34
[36] Ibid p.34

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This theory reflects on a firm's property rights structure as a set of contracts and the rights defined ownership and use of scarce resources.[37] Assignment of these rights is said to be the determinant of efficient resource allocation by the firm.[38] Under this theory, the rights which are not assigned through contract amount to residual rights that generate residual income through intangible assets such as knowledge, name, skills, know-how, etc., in franchising.[39] Income from such intangible assets is usually allocated to those who own the residual rights, which could result in a larger share of ownership for the franchisor. Depending on how critical the system-specific intangible asset is to the franchisor [40]

5) Signalling Theory:

This theory differs from the previously discussed ones in that instead of focusing on the firm; it focuses on externalities such as market imperfection and information asymmetry to provide information about themselves and their products.[41] This is ultimately expected to grow the business to the point where it has options on how to own outlets strategically.[42] This also includes options that allow them to explore choices regarding royalties and fees.[43]

Although economic theories have informed the above perspectives, non-economics-based perspectives such as institutional and resource-based perspectives have emerged that explore cooperation through partnerships.[44] Ultimately, the franchising theories provide perspective on, and insight into how decisions are made by businesses to adopt franchising and what informs the geographical locations of such franchise business outlets.

From a theoretical perspective, the signalling theory offers a suitable explanation for franchising for this paper. Being an economic theory, the theory accommodates externalities such as market failure, information asymmetries and

[37] Ibid p. 34
[38] Ibid p.34
[39] Ibid p.34
[40] Ibid p.34 - 35
[41] Ibid p.35
[42] Ibid p.35
[43] Ibid p.35
[44] Ibid p35

other imperfections.[45]It analysis how the franchisee utilises the quality of, and intention behind the information provided by the franchisor in making business decisions.[46] It indicates the factors involved in attracting investment in franchising. On the part of the franchisor, it the information it provides to the prospective franchisee indicates the quality of the franchise being offered, while the same information will enable the franchisee determine if the quality of the franchise on offer is worth investing in. In using this theory to understand the regulatory framework for franchising in Nigeria, the legal and regulatory framework for international franchising in Nigeria is is part of the information asymmetry, and it also creates some externalities which the franchisee might need to internalise. It could increase the transaction cost for international franchising in Nigeria. By improving the legal and regulatory framework, the transaction cost of international franchising business in Nigeria will be reduced, thereby making it more attractive for investors.

ADVANTAGES AND DISADVANTAGES OF INTERNATIONAL FRANCHISING

International franchising as a form of business is about the quality of a system.[47] It has its advantages and disadvantages. Its advantages include:

1. Reducing transaction cost by reducing the decline in employee motivation.[48]
2. Resolve equity cost and balance agency incentive by working for own profit and contributing to parent business profit.[49]
3. Provide an opportunity to scale up growth and opportunity to set up firm.[50]

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[45]Lucia, Laura & Bordonaba-Juste, Victoria & Madanoglu, Melih & Alon, Ilan. (2014). Franchising and Value Signaling. Journal of Services Marketing. 28. 10.1108/JSM-09-2013-0253. P.8

[46] Ibid p.8 - 9

[47] Kolesova Anastasia A., Advantages of franchising as a form of business, https://core.ac.uk/reader/53079322
accessed 30 April 2022 p.478

[48] Illan Ibid note 6p.44

[49] Ibid p.44

[50] Adams Adeiza, Noor Azizi Ismail, and Marlin Marissa Malek, An Empirical Examination of the Major Relationship Factors Affecting Franchisees' Overall Satisfaction and Intention to Stay, Iranian Journal of Management Studies (IJMS), Vol. 10, No. 1, Winter 2017, pp. 31-62, https://www.researchgate.net/publication/315656977_An_Empirical_Examination_of_the_Major_Relationship_Factors_Affecting_Franchisees'_Overall_Satisfaction_and_Intention_to_Stay/link/58eef671a6fdcc61cc127967/download accessed 29 April 2022

4. It leads to job creation.[51]
5. Source of tax revenue for government.[52]
6. Increasing competitiveness by creating and sustaining common interest.[53]
7. It is an effective tool for the distribution of goods and services.[54]
8. Enhance national competitiveness.[55]
9. Contributes positively to overall national economic development due to its ability to stimulate entrepreneurship.[56]
10. The provision of trained and motivated management.[57]
11. There is room for rapid expansion.

The disadvantages of international franchising include the following:

1. Abuse by franchisor due to contractual imbalance resulting from unequal bargaining power.[58]

LEGAL FRAMEWORK FOR BUSINESS FRANCHISE IN NIGERIA

Franchising in Nigeria is governed by several legal instruments that range from those with general application such as those that apply to the Nigerian business environment, to those that specifically apply to franchising business.

General Laws Governing the Nigerian Business Environment:

The laws applicable to the Nigerian business environment which could impact franchising include Companies and Allied Matters Act 2020 which applies to set up the business through which the franchise will operate,[59] Trade Mark Act to protect the business brand, the recently passed Copy Rights Act 2022 which repeals and re-enacts the Copy Rights Act 2004 is designed to protect proprietary software as literary works,[60] the Immigration Act 2015 which regulated entry of

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[51] Ibid p.8
[52] Imed Ibid note 19
[53] Ibid note 49 p.480
[54] Kolesova p.481
[55] Ibid note 52 p.8
[56] Adeiza Ibid; p.8; Imed Eddine Ibid
[57] Olufemi Oloto note 13 p.164
[58] Imed note 19
[59] Herein referred to as CAMA 2020, CAC, CAMA 2020, https://www.cac.gov.ng/wp-content/uploads/2020/12/CAMA-NOTE-BOOK-FULL-VERSION.pdf accessed 26 April 2022
[60] PLAC NG, Senate Passes Bill to Repeal and Re – Enact the Copyright Act, 2004, https://placng.org/i/senate-passes-bill-to-repeal-and-re-enact-the-copyright-act-2004/?utm_source=rss&utm_medium=rss&utm_campaign=senate-passes-bill-to-repeal-and-re-enact-the-copyright-act-2004 accessed 26 April 2022

persons int the country and ensures border protection,[61] the NIPC Act which is designed to encourage investment in the Nigerian economy and which allows for foreign participation in the operation of any enterprise in accordance with the provisions of the Act which includes incorporating the company, obtaining and obtaining the appropriate licences,[62] Federal Inland Revenue Service (FIRS) Act for regulatory enforcement to ensure tax compliance,[63]Finance Act 2022 for taxation and tax incentives,[64] Banks and other Financial Institutions Act (BOFIA) 2020 for corporate banking and capital import/ export,[65] Small and Medium Enterprise Development Agency of Nigeria (SMEDAN) Act 2003 which seeks to develop small and medium industries, where the business involves MSMEs,[66] Federal Competition and Consumer Protection Act (FCCPA) 2019 on prohibition of restriction on competition, Price Control Act, and other competition and consumer protection compliance,[67] in the event of a dispute – the Arbitration and Conciliation Act and other international agreement which Nigeria is a party to where applicable, the Land Use Acts of various states and the Federal Capital Territory in respect of property acquisition and ownership, NITDA Act applicable to digital business,[68] Central Banks of Nigeria's regulations on foreign exchange, payment systems and currency repatriation,[69] Standard Organisation

[61] ILO, Immigration Act 2015: Nigeria, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/104155/126945/F-956386412/NGA104155.pdf accessed 26 April 2022
[62] See S.18 – 20, NIPC Act, Cap N117, LFN 2004, https://www.nipc.gov.ng/wp-content/uploads/2021/10/NIPC-ACT.pdf accessed 26 April 2022
[63] FIRS, FIRS Act 2007, https://firs.gov.ng/wp-content/uploads/2021/01/FIRS_ESTABLISHMENT_ACT.pdf accessed 26 April 2022
[64] Budget Office of the Federation, Finance Act 2021, https://www.budgetoffice.gov.ng/index.php/finance-act-2021?task=document.viewdoc&id=962 accessed 26 April 2022
[65] Central Bank of Nigeria, https://www.cbn.gov.ng/out/2021/ccd/bofia%202020.pdf accessed 26 April 2022
[66] SMEDAN Act, https://smedan.gov.ng/images/PDF/SMEDAN-ACT.pdf accessed 26 April 2022
[67] FCCPA, https://www.fccpc.gov.ng/uploads/FCCPA.pdf accessed 26 April 2022
[68] NITDA, NITDA Act 2007, https://nitda.gov.ng/wp-content/uploads/2020/11/NITDA-ACT-2007-2019-Edition1.pdf accessed 27 April 2022; Ngozi Aderibigbe, Collins Mbakwe and Kodichnma Anigbogu Jackson, Thomson Reuters: Practical Laws, Digital Business in Nigeria: Overview, https://uk.practicallaw.thomsonreuters.com/w-020-0579?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a822594 accessed 27 April 2022
[69] Ngozi Aderibigbe Ibid note 70

of Nigeria Act 2015,[70] Evidence Act 2011[71] and (Cybercrimes Prohibition, Prevention, etc) Act 2015[72] in respect of electronic signature – it is however worthy to note that Nigeria does not have an Electronic Transaction Act yet, although there is a Bill before the National Assembly.

Specific Laws Applicable to Franchising in Nigeria:
International business franchising in Nigeria is governed by the National Office for Technology Acquisition and Promotion (NOTAP) Act, which governs transfer and acquisition of technology, [73] and the Trademarks Act Cap T13 LFN 2004, which governs the registration of trademarks in Nigeria, which mandates the registration of goods or services and obtaining of certificate of registration for same to be recognised as a registered trademark in Nigeria and protected by law. Such registration is done to distinguish the registered good or service from others.[74] By registering a trademark, the registered trademark owner known as the proprietor gives the registered user exclusive rights to use the registered good or service.[75]

Once a trademark is registered, its operation is regulated by the NOTAP Act through the NOTAP as the regulatory agency.[76] The Act recognises the use of a

[70] SON Act 2015, https://son.gov.ng/wp-content/uploads/2021/02/SON-ACT-2015.pdf accessed 27 April 2022
[71]Evidence Act 2011, https://gazettes.africa/archive/ng/2011/ng-government-gazette-dated-2011-06-21-no-80.pdf accessed 27 April 2022
[72] Cybercrimes Act 2015, https://www.cert.gov.ng/ngcert/resources/CyberCrime__Prohibition_Prevention_etc__Act__2015.pdf accessed 27 April 2022
[73] NOTAP Act Cap N68, LFN 2004, https://notap.gov.ng/new_dev/our-charter/ ; Ifeanyi E. Okonkwo and Munirah Yaquob Ibid, note 12, https://jee.africa/wp-content/uploads/2022/02/World-Trademark-Review-Trademark-franchising-in-Nigeria_-the-impact-of-the-NOTAP-Act-and-what-brands-need-to-know.pdf accessed 27 April 2022 (See note 12)
[74] Ifeyinwa Ufondu, A Guide to Trademark Registration in Nigeria, Mondaq, 2018, https://www.mondaq.com/nigeria/trademark/757232/a-guide-to-trademark-registration-in-nigeria#:~:text=The%20laws%20governing%20trademark%20in,numeral%2C%20or%20any%20combination%20thereof accessed 29 April 2022
[75] Trademarks Act Cap T13, LFN 2004; Ifeyinwa Ufondu, Ibid; Similoluwa Oyelude and Japhet Eneh, Trademarks Laws and Regulations in Nigeria, ICLG, 2022, https://iclg.com/practice-areas/trade-marks-laws-and-regulations/nigeria accessed 29 April 2022

[76] NOTAP Act, Cap N , https://placng.org/lawsofnigeria/view2.php?sn=324 accessed 29 April 2022A

trademark as transfer of technology, and S.4(d) of the Act empowers the NOTAP to register all contracts or agreements in that respect, as well as those of patented inventions, supply of technical expertise and its associated documents, supply of engineering, supply of machinery and plants, provision of operating staff or managerial assistance and training of personnel, and monitoring of execution of any contract or agreement which was registered in compliance with the Act.[77] The Act expects any agreement entered into pursuant to S.4(d) to be registered with the NOTAP within sixty days from execution or conclusion.[78] The Act provides several grounds upon which registration can be denied. Of direct impact to international franchising is S. 6 (l) where registration can be denied where the contract or agreement exceeds ten years or other unreasonable term where it is less than ten years.[79] Once an agreement under S. 4 (d) is registered, a certificate of registration will be issued, allowing payments outside Nigeria to be made by or on the authority of the Federal Ministry of Finance, the CBN, or any licensed bank in Nigeria.[80] The Agency also has the power to cancel registration where modifications are made in contravention of the provisions of the Act.[81]

CHALLENGES FACING FRANCHISE BUSINESS IN NIGERIA

The Nigerian franchise sector recorded a decade of growth between 2001 to 2010, with around $28.5 million being invested in quick-service restaurants, including Food Concept Plc and Tantalizers.[82] It was also thought to have the potential to generate $100 billion annually.The sector is also said to have been on a decline afterward as demonstrated by a high rate of outlet closure, drop in profits, and overall decline in revenue as demonstrated by the Mr. Biggs Franchise in 2016.[83] Furthermore, it has been observed for instance that some franchising fast food businesses from developed countries such as MacDonalds, KFC, and Pizza Hut, had at some point expressed lack of willingness to invest in franchising in Nigeria despite being wooed by potential franchisees.[84] Their reluctance was attributed to several factors, including knowledge gap, high cost, failed contracts, legislation and retraction network being in infancy stage,[85] and

[77] See S.4(d) (i) – vi, and S. 4(e) NOTAP Act
[78] S. 5 (2) NOTAP Act
[79] NOTAP Act
[80] S. 7 NOTAP Act
[81] S.8 NOTAP Act
[82] Adeiza Ibid note 52
[83] Ibid note 52
[84] Olufemi Olotu Obid note 13
[85] Ibid

lack of specific legal and regulatory framework for franchising in Nigeria.[86] Other factors hampering franchising especially in developing countries include quality control difficulties as was the case in China, [87]weak legal system, regulatory uncertainty, and intellectual property (IP) risks,[88] associated with high rate of violation of IP rights,[89] procedural bottlenecks,[90] delays in the legal system,[91] lack of enforcement mechanism,[92] poor infrastructure,[93] absence of an enabling environment,[94] inadequate transportation and communication networks,[95] insufficient support structure,[96] delays at the ports,[97] and access to funds.[98]

Out of the myriad of challenges facing international franchising in Nigeria, of most interest to this article is the legal and regulatory framework for regulating and enforcing international franchising. The expectation of parties seeking to enter into a franchising agreement is that the legal framework will enable both parties to freely exercise their contractual rights and discharge their obligations without obstacles from the legal and regulatory instruments. However, when it comes to international franchising, the impact of some provisions of the NOTAP Act which is the regulatory law could have a chilling effect on investing in franchising business in Nigeria. The Act makes it mandatory for all franchising agreements to be registered as a condition precedent to the payment of fees and royalties.[99] This will make it difficult or nearly impossible for a franchisor to repatriate its income from a franchise agreement where the agreement is not registered.[100] Some of the factors attributed to reluctance of foreign businesses to franchise in Nigeria included high rate of violation of intellectual property rights

[86]Olumide Ale Ibid note 13
[87] Ibid note 13 p.165
[88] Ibidp.165
[89]Ibid note 13
[90]Ibid
[91]Ibid
[92]Ibid
[93]Ibid
[94]Ibid
[95]Ibid
[96]Ibid
[97]Ibid
[98]Ibid
[99] NOTAP Act S. 4(d); Ifeanyi and Yaquob
[100] Ifeanyi and Yaquob Ibid note 12

and weak enforcement. The need to explore the nexus between mandatory registration as required by S. 4(d) and reluctance to invest is important although it is beyond the scope of this paper. This is because weak protection of IP rights could foster reluctance to register a franchise agreement.

The Act pegs the validity of a franchise registration certificate at ten years, or a reasonable period where the agreement is for less than ten years. Anything contrary to this could result in denial of registration.[101] However, the validity can be extended beyond the stipulated period on national interest grounds.[102] This makes the extension discretionary, which could create uncertainty for potential investors. The registration is subject to renewal for a further period of 10 years. The Act provides the regulatory with the power to renew registration; this makes renewal subject to the discretion of the regulator within the scope of the Act. It has been observed that where renewal is denied, it could have enormous implications for the franchisor's right to perpetual transfer of the trademark and its goodwill which could contravene the Trademarks Act and Nigeria's obligations under the Trade-Related Intellectual Property Rights (TRIPS),[103] including the need to protect well – known marks, and the need to align domestic instruments with the treaty provisions.[104] Other potential problems with the provision of the Act relating to franchising includes, the inability of the franchisor to compel the franchisee to pay royalties and other feed should there be a default in payment resulting from non-registration of the franchise agreement;[105] the inclusion of trademark in technology transfer which fails to take into account the distinction between trademark and technology whereby the former refers to the quality of a system whereas the latter refers to a product this has implication in the long run as trademark depends on the existence of a business;[106] Overall, the NOTAP Act which is the primary regulatory instrument of international franchising in Nigeria has some inconsistencies and gaps that has some profound implications for the country's ability to attract international franchising that can support its development goals.

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[101] S. 6 NOTAP Act

[102] S.8 NOTAP Act

[103] Ifeanyi and Yaquob Ibid note 12

[104]Oloko, T. O. (2016). Legal Implication of the Effect of the TRIPS Agreement on the Trade Marks Law in Nigeria. *European Scientific Journal, ESJ*, *12*(10), 140, https://eujournal.org/index.php/esj/article/view/7317 accessed 30 April 2022

[105] Ibid note 12

[106] Ibid

OBSERVATIONS AND RECOMMENDATIONS

Observations:

Although the legal framework for international franchising in Nigeria is fraught with gaps and uncertainty, several options exist that can help Nigeria develop an international franchising-friendly legal and regulatory framework. The following are some observations that can help drive the necessary changes:

1. When it comes to international franchising, legal frameworks are categorised as those that directly such as Argentina, regulate franchising, those whose laws directly or indirectly impact franchising such as Nigeria, those who regulate at state and not national level such as Canada, and those who regulate at both federal and states levels such as the United States.[107] Countries such as Vietnam that did not have franchise laws went on to develop one.[108] This creates a pool of countries to learn from. This will help Nigeria to develop an efficient framework. The National Assembly is currently in the process of passing a Franchise Bill which seeks to regulate franchising in Nigeria.[109] The publicly available version indicates the intention of the law to protect all parties and the relationship. This can be a step towards enhancing the legal framework.
2. The possibility that fears of infringement of IP and other proprietary rights could result in reluctance to invest in franchising in Nigeria. The question becomes how effective are existing legal instruments in protecting franchisors from infringement of their IP rights, and how capable is the legal system in enforcing their rights in the situation where such agreement is registered under the NOTAP Act, and the IP rights get infringed subsequently. In April, the Senate passed repealed and re-enacted the Copyright Act; it is expected to improve the protection of IP and other rights.

Recommendations

1. To further enhance the legal and regulatory framework, Nigeria's franchising-related domestic and international instruments should be reviewed to effectively align them and provide an effective and sustainable framework.

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[107] Imed Ibid note 19 p. 42; Nigerian International Franchising Association, Franchising Law in Nigeria—Part II FRANCHISING LAW: Does Nigeria Need One? Do other countries have them? 2014, http://www.nigerianfranchise.org/images/NiFA_Newsletter_03_05_14.pdf accessed 30 April 2022

[108] Imed Ibid note 19

[109] HB138 Franchise Bill, similar Bill is also going through readings at the Senate.

2. There is a need to analyse the Act to determine the extent to which it protects IP rights. Furthermore, there is a need to conduct research into the impact of the requirement to register a franchise agreement with NOTAP and the willingness to do business in Nigeria given the sensitive nature of some information, and businesses need to protect their trade secrets.[110]
3. To leverage franchising, Nigeria needs to embed the NEMs that support franchising into industrialization on a policy level.[111] It also needs to ensure that it has laws that will incorporate the policy into the legal and regulatory framework governing franchising business in Nigeria. This is crucial given that Micro, Small, and Medium Enterprises (MSMEs) are expected to play a significant role in Nigeria's industrialization drive.[112]

CONCLUSION

The legal and regulatory framework for international franchising in Nigeria as it stands today does not support a favourable legal and regulatory framework that can facilitate entrepreneurship, industrialisation and increase Nigeria's participation in trade in goods and services across the GVC. However, the NDP and the SDGs provide it with the opportunity to improve its legal and regulatory framework in an all-encompassing manner that can harness the benefits of international franchising, including job creation, increased access to the GVC, and economic growth and development.

[110] S. 6 (3) NOTAP Act
[111] Ibid
[112] National Development Plan (NDP) 2021 – 2025,Vol. 1 https://nationalplanning.gov.ng/wp-content/uploads/2021/12/NDP-2021-2025_AA_FINAL_PRINTING.pdf accessed 30 April 2022