Necessity of Franchising Law In Namibia

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The Namibian Competition Commission (NaCC), like most other established competition authorities, anticipates facing problems in dealing with franchise agreements under its competition legislation. This is particularly so in dealing with applications that are anti competitive restricting franchising activities for those with licenses and inherently keeping out those that would want to partake into Franchising to sell a product, service or activity.

Franchising is is an arrangement where one party (the franchiser) grants another party (the franchisee) the right to use its trademark or trade-name as well as certain business systems and processes, to produce and market a good or service according to certain specifications.

The franchisee usually pays a one-time franchise fee plus a percentage of sales revenue as royalty, and gains through the franchising contract (1) an immediate name recognition, (2) tried and tested products, (3) standard building design and décor, (4) detailed techniques in running and promoting the business, (5) training of employees, and (6) ongoing help in promoting and upgrading of the products. The franchiser gains rapid expansion of business and earnings at minimum capital outlay.

The acceptable world wide definition defines franchising as a "special type of relationship between two firms usually referred to as the 'franchisor' and 'franchisee'. The two firms generally establish a contractual relationship where the franchisor sells a proven product, trademark or business method and ancillary services to the individual franchisee in return for a stream of royalties and other payments. The contractual relationship may cover such matters as product prices, advertising, location, type of distribution outlets, geographic area, etc". The well known examples are Kentucky Fried Chicken (KFC), Nandos, Wimpy, Mercedes Benz Dealership and Virgin Gym Facility in Namibia.

The Competition Commission recognises the role and contribution of franchising to the Namibian economy. The Commission is similarly cognizant of the benefits of franchising agreements with respect to employment creation, participation of historically disadvantaged persons in the mainstream economy and other benefits that accrue to the parties to the agreement such as facilitating entry of new firms and/or products, and other efficiency enhancing benefits.

Franchising may however also be anti-competitive in that they can restrict competition. Such agreements therefore fall under the purview of competition law under provisions dealing with agreements between undertakings, decisions by associations of undertakings or concerted practices by undertakings, and are usually considered using the ‘rule of reason’ approach, i.e., “where an attempt is made to evaluate the pro-competitive features of a restrictive business practice against its anti-competitive effects in order to decide whether or not the practice should be prohibited”.

It has therefore come to the attention of the Commission that there are franchisors in Namibia who are restricting other Namibians from partaking into the franchising activities in Namibia. Such conducts are viewed with concern by the Commission as it restricts facilitation of new firms, companies or business for products and service that should be available for wider choice for consumers which is good for economic development especially for small business to partake widely in the mainstream of the economy.

The fact therefore remains that franchise agreements can have anti-competitive effects, some of which of a very serious nature. One serous drawback is that franchisors are not required by law to register as approval their licenses to the Ministry of Trade and Industry, thus creating a anomaly where master licenses franchisors from the head quarter businesses are in control to grant licenses to others within a geographical area such as Namibia. This restricts others of getting licenses as the master license franchisor is a competitor to those wanting to enter the similar market to sell a competing product or service.

It is also empirically proven that the master franchisors often has incentive to decrease the level of price and product competition among franchised locations because decreasing competition allows them to extract greater fees from the franchisees. Hence this deprives the consumers from enjoying greater product or service choice and competitive pricing on such products and services within a geographical area.

Franchising agreements are as such not necessarily anticompetitive. They are used to establish a global and national distribution network and this creates opportunities and benefits to both parties. The franchisor exploits expertise in other markets without substantial capital investment in setting up a retail network. The franchisee, on the other hand, also gets access to trading methods, which have been tried and tested. Therefore, the Commission is of the view that any agreement that is necessary to support the essential features of the franchise relationship should not raise competition concerns, for example, the protection of the know-how, protection of network reputation, or selective distribution clauses which are normally introduced for efficiency reasons.

The franchise agreements under competition law stems from the fact that such agreements also involve intellectual property rights (IPRs) as regulated by the Business Intellectual Property Authority (BIPA) in Namibia since both share the same fundamental goals of promoting innovation and enhancing consumer welfare. IPR law creates exclusive rights that provide incentives for innovation by establishing enforceable property rights for the creators of new and useful products and more efficient processes. These property rights promote innovation by allowing the IP owners to prevent others from appropriating much of the value derived from their inventions or original expressions. Competition law, in turn, ensures that new proprietary technologies, products, and services are bought, sold, traded, and licensed in a competitive environment.

Despite such pro competitive benefits, the structure of franchising in any given economy has a potential of creating collusion among competitors (franchisees) on price and market allocation and may also substantially lessen competition and cause harm to consumers. There may therefore be anti-competitive practices that are as a result of franchising agreements, which the competition Commission is seriously concerned about.

The Commission is a competition advisor to the Ministry of Trade and Industry and has submitted as directed by the Ministry a study that would serve as input to the drafting of a franchising law in Namibia, which is currently not in place. It is the considered view of the Commission that such a law once effected would be useful to level the playing field between franchisors and franchisees in terms of according the proper Ministerial authority of according licensing and registration to the approving authority to allow enterprises to operate legally, justly and fairly within the confines of the franchising and competition laws towards greater enterprise development in Namibia.