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**ADDIS ABABA UNIVERSITY**  
**COLLEGE OF LAW AND GOVERNANCE STUDIES**  
**SCHOOL OF LAW**

**REGULATION OF FRANCHISE AGREEMENTS IN ETHIOPIA**

**A THESIS SUBMITTED TO THE SCHOOL OF LAW, ADDIS ABABA  
UNIVERSITY, IN PARTIAL FULFILLMENT OF MASTER OF LAWS  
DEGREE (LL.M) IN BUSINESS LAW**

**BY**  
**REDIET YILMA (GSE/6530/10)**

**DECEMBER 2020**  
**ADDIS ABABA**

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**Declaration**

I, Rediet Yilma, hereby declare that this work is original and has not been presented in any other institution before. This thesis represents my own work and contains no material which has been previously submitted for a degree or diploma at Addis Ababa University or any other institution, except where due acknowledgement is made.

Name: Rediet Yilma

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**Verification**

I, Biruk Haile (PhD), have read this thesis and approved it for examination.

Advisor: Biruk Haile (PhD)

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**Acknowledgement**

First and foremost, I would like to kneel to the source of life, knowledge and wisdom, God the almighty, who allowed me to start and accomplish my study.

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## Table of Contents

Acknowledgement .....	v
Table of Contents .....	vi
List of Acronyms .....	ix
Abstract .....	x
CHAPTER ONE - INTRODUCTION.....	1
1.1. Background of the Study .....	1
1.2. Statement of the Problem.....	3
1.3. Research Objectives and Its Significance .....	4
1.4. Research Questions .....	5
1.5. Research Methodology .....	5
1.6. Literature Review.....	7
1.7. Limitation of the Study .....	9
1.8. Organization of the Study .....	9
CHAPTER TWO - CONCEPTUALIZING THE REGULATION OF FRANCHISE AGREEMENTS AND EXPERIENCES OF SELECTED COUNTRIES IN ITS REGULATION .....	10
2.1. Conceptualizing the Regulation of Franchise Agreements.....	10
2.1.1. Meaning of Franchise Agreement.....	10
2.1.2. Types of Franchise Agreements.....	12
2.1.3. Approaches to Regulate Franchise Agreements .....	14
2.2. Experiences of Selected Countries in Regulation of Franchise Agreements.....	16
2.2.1. USA.....	16

2.2.1.1.	Pre-contractual Disclosure Requirement .....	17
2.2.1.2.	Registration.....	19
2.2.1.3.	Relationship Laws .....	19
2.2.2.	South Africa .....	20
2.2.2.1.	Disclosure and Cooling-off Period .....	20
2.2.2.2.	Relationship Regulation .....	21
CHAPTER THREE - REGULATION OF FRANCHISE AGREEMENTS IN ETHIOPIA .....		23
3.1.	Overview of Franchise Business in Ethiopia .....	23
3.2.	Policy Environment for Regulation of Franchise Agreements in Ethiopia .....	25
3.2.1.	The Place of Franchise Agreements in GTP II .....	25
3.2.2.	Science, Technology, and Innovation Policy .....	26
3.2.3.	IPRs Protection Policy /Draft/ .....	27
3.3.	The Legal Regime for Regulation of Franchise Agreements in Ethiopia.....	28
3.3.1.	Regulation of Franchise Agreements Under the Commercial Registration and Business Licensing Proclamation No. 980/2016 and Its Subsidiary Legislations.....	29
3.3.1.1.	Pre-contractual Disclosure Requirement .....	30
3.3.1.2.	Relationship Regulation .....	30
3.3.1.3.	Registration Requirement .....	31
3.3.2.	Regulation of Franchise Agreements Under Other Relevant Laws .....	35
3.3.2.1.	Investment Law .....	36
3.3.2.2.	IPRs Protection Laws .....	39
I.	<i>Trademark Law</i> .....	40
II.	<i>Copyright Law</i> .....	43
III.	<i>Trade Secrets Law</i> .....	44

3.3.2.3.	Trade Competition Law .....	45
3.3.2.4.	Consumer Protection Law .....	48
3.3.2.5.	Labor Law.....	49
CHAPTER FOUR - CONCLUSION AND RECOMMENDATIONS .....		51
4.1.	Concluding Remarks.....	51
4.2.	Recommendations.....	52
Bibliography .....		55



## **List of Acronyms**

BFF	Business Format Franchise
CPA	Consumer Protection Act 2008 of South Africa
CRBLP	Commercial Registration and Business Licensing Proclamation No. 980/2016
EFF	European Franchise Federation
EIPO	Ethiopian Intellectual Property Office
FDD	Franchise Disclosure Document
FDI	Foreign Direct Investment
FTC	Federal Trade Commission of USA
FTC Rule/Franchise Rule	The U.S. FTC Rule on Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures
GDP	Gross Domestic Product
IFA	International Franchise Association
IP	Intellectual Property
IPRs	Intellectual Property Rights
MoTI	Ministry of Trade and Industry
NBE	National Bank of Ethiopia
NCC	National Consumer Commission of South Africa
OECD	Organization for Economic Cooperation and Development
TCCPP	Trade Competition and Consumers Protection Proclamation
TOT	Transfer of Technology
TRIPS Agreement Rights	Agreement on Trade Related Aspects of Intellectual Property Rights
TRPP	Trademark Registration and Protection Proclamation
TT	Technology Transfer
UK	United Kingdom
UNIDROIT	International Institute for the Unification of Private Law
USA or US	United States of America
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

## **Abstract**

*Franchising is one of the fastest growing strategies for business expansion. A franchise is a binding contract between the franchisor and franchisee, in which the franchisor grants the franchisee the right to implement the former's business system in exchange for the franchisee's payment of fees and royalties. The complex interplay of numerous areas of law in the regulation of franchise agreements on one hand and the prevalent imbalance of information and bargaining power between franchisors and franchisees on the other necessitated separate regulation of franchise agreements in many legal systems. In general, regulation of franchise agreements can be done through franchise-specific laws (or regulation-based model), general rules of commercial law (or private law-based model), industry self-regulation, or any combination of the three models. This research work intends to examine the regulation of franchise agreements in Ethiopia. After needful analysis, the researcher concludes that the regulation of franchise agreements in Ethiopia is inadequate, unthoughtful of the unique features of franchise business relationship and ineffective to give remedy to practical and potential problems. Thus, the researcher mainly recommends the enactment of comprehensive franchise-specific law.*

## CHAPTER ONE - INTRODUCTION

### 1.1. Background of the Study

Franchising is one of the fastest growing strategies for business expansion.<sup>1</sup> In the contemporary business environment throughout the world, it is becoming one of the best strategies to grow a business at both national and international levels.<sup>2</sup> The modernization, expansion and globalization of commerce has led to a multitude of types commercial relationships involving an association of independent business entities banded together to get benefits from the pooling together of resources.<sup>3</sup> A franchise is a contractual business relationship between a franchise owner called a franchisee and a franchise seller called a franchisor whereby the franchisor grants the franchisee, for a defined period of time, the right to use the franchisor's business model and intellectual property, such as trademarks and service marks, business plans and operations manuals, that are necessary to operate the business.<sup>4</sup> Franchising serves as a method of distribution of goods and services to consumers.<sup>5</sup> It is also a method of expanding an existing business through capital formation in lieu of the traditional ways of gaining capital, among others, venture capital, bank loans and securities investment.<sup>6</sup> Franchising may also serve as a business form to avoid managerial responsibility that can be burdensome for some companies, particularly with respect to products and services that are subject to strict consumer safety or public regulatory requirements.<sup>7</sup> On the other side, many individuals interested in starting

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<sup>1</sup> 'Module 13: IP Issues in Franchising' (WIPO official website) <[https://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip\\_panorama\\_13\\_learning\\_points.pdf](https://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip_panorama_13_learning_points.pdf)> accessed 30 February 2020.

<sup>2</sup> Howard Yale Lederman, 'Franchising and Franchise Law: An Introduction' (2015) The Michigan Business Law Journal 46 <<https://www.thewriteattorney.com/wp-content/uploads/2016/08/Business-Law-Section-Michigan-Business-Law-Journal-Fall-2015.pdf>> accessed 6 March 2020.

<sup>3</sup> 'What Franchising is Not?' (EFF official website) <<http://www.eff-franchise.com/105/what-franchising-is-not.html>> accessed 2 February 2020.

<sup>4</sup> *ibid.*

<sup>5</sup> Andrew C. Seldon, Robin C. Gipson and Amanda B. Parker, *An Introduction to Franchising* (3<sup>rd</sup> edn, Minnesota Department of Employment and Economic Development 2008) 1.

<sup>6</sup> *ibid* 3.

<sup>7</sup> *ibid.*

business choose franchising over other independent alternatives considering that franchisors often offer proven successful business models.

Despite the complex nature of franchise agreements, the general legal rules which are applicable on general contracts have been in use in many parts of the world to date. All forms of franchise agreements involve different areas of law such as contract law, agency law, IP law, competition and consumer protection law, corporate law, taxation law, labor law and other areas which are regulated at both national and international levels. However, these numerous legal aspects of franchising agreements characterize it as one of the most difficult endeavors for regulation. On the other hand, the prevalent imbalance of information and bargaining power between franchisors and franchisees on account of the former's relative superiority in capital, business expertise and experience, as well as market influence has necessitated the regulation of franchise agreements in many legal systems. For instance, the main areas of franchise disputes, especially in the U.S., Canada and Australia, relate to the information and power imbalance between franchisors and franchisees.<sup>8</sup>

Historically, and within the context of modern commerce, franchising is considered to have originated in the USA around 1860 by Singer Sewing Machine Company, and gained popularity in the early 1900s among gasoline stations, automobile and tire manufacturers.<sup>9</sup> Being the pioneer in introducing modern franchise, the USA has been the first jurisdiction which resorted to a franchise specific legislation as a means of reducing or eliminating the problems associated with the franchise business relationship.<sup>10</sup> The USA federal law on franchising was promulgated in 1978 as Federal Trade Commission /FTC/ Rule on Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures.<sup>11</sup> The USA franchising law aspires

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<sup>8</sup> *ibid.*

<sup>9</sup> Francine Lafontaine and Roger D. Blair, 'The Evolution of Franchising and Franchise Contracts: Evidence from the United States' (2008) *Entrepreneurial Business Law Journal* 381.

<sup>10</sup> *ibid.*

<sup>11</sup> Honey V. Gandhi, 'Franchising in the United States' (2014) 20:1 *Law and Business Review of the Americas* 6 <<file:///C:/Users/test/Desktop/Franchising/USA/Franchising%20in%20the%20United%20States.pdf>> accessed 2 February 2020.

to regulate franchise agreements mainly through franchisors' legal obligation to disclose certain information to franchisees prior to the sale of the franchise business.

In Ethiopia, there is no specific legislation to regulate franchise business relationship. Both the Commercial Code 1960 and Civil Code 1960, encyclopedic legislations of Ethiopia which have been serving to regulate the overall commercial activities for long years, do not mention the term 'franchise' at all. For the first time, inceptive definition is given to 'franchise agreement' under the Commercial Registration and Business Licensing Proclamation No. 980/2016. In addition, Commercial Registration and Business Licensing Council of Ministers Regulation No. 392/2016 has provided detailed procedures as to the registration, renewal and cancellation of special business license for franchising.

This paper aims to examine the adequacy of Ethiopia's regulation of franchise agreements. Particularly, the study will have significant importance at this point of time whereby the inflation of franchise business partnerships is being witnessed. Renowned international hospitality brands, restaurant chains and alcoholic beverage companies are showing great interest to join the Ethiopian market. The extreme asymmetry of bargaining power and information between franchisors and franchisees, especially in Ethiopia where domestic commercial activities lack robust business practice, warrants scholarly scrutiny.

## **1.2. Statement of the Problem**

In Ethiopia, franchise expansion seems inevitable. Renowned international business brands like McDonald's, Donuts World, Pizza Hut, bottling companies and multiple hospitality brands are showing great interest to join the local market. The current government's private business friendly measures as demonstrated by some of the flexible provisions of the recently enacted Investment Proclamation No. 1180/2020 also plays significant role in attracting, among other sorts of investments, more franchise businesses into the country. Likewise, domestic investors are also diversifying their business modalities among which franchising will certainly be one of the alternatives on account of its convenience to easily expand and grow business.

Nevertheless, the franchisor-franchisee relationship has not been adequately regulated in Ethiopia. Franchisor-franchisee relationship is uniquely characterized by imbalance of bargaining power; the franchisor often being a large business organization with significant previous franchising experience and control over the terms of the franchise agreement, while the franchisee is of little business experience who will be subjected to adhesive type of franchise agreement. This situation is exacerbated in Ethiopia since most domestic business entities lack robust business experience and corporatization culture. Furthermore, the domestic business has been away from international trade competition due to the past successive governments' strong protectionist measures, not to mention the previous rule under a command economy for significant period. On the other hand, Ethiopia's loose protection of IPRs is not compatible with the intended attraction of FDI, including foreign franchise investments, to ensure the envisaged rapid and sustainable economic and social development.

Even though franchise agreement is recognized and defined under the CRBLP, as well as its detailed registration process is furnished under the CRBLP's subsidiary legislations, its regulation lacks the two basic legal rules: disclosure law and relationship law. Save for corporate and other relevant laws which require, as part of the general corporate duty of disclosure such as audit report, franchisors are at liberty whether to provide certain information to franchisees prior to the conclusion of a franchise agreement. Besides, the franchisor's relative stronger bargaining power over the franchisee is not adequately regulated under the Ethiopian legal regime.

### **1.3. Research Objectives and Its Significance**

The general objective of this research paper is to examine the current regulation of franchise agreements in Ethiopia and identify potential areas for the betterment of its efficacy. In particular, the research paper has the following specific objectives:

- Understanding the meaning and unique features of franchise agreements under the Ethiopian legal regime.
- Analyzing the current policy environment and legal regime concerning the regulation of franchise agreements in Ethiopia.
- Indicating to the concerned government organs to understand and rectify legislative loopholes relating to regulation of franchise agreements.

- Providing recommendations towards the adequate regulation of franchise agreements in Ethiopia.

## **1.4. Research Questions**

### **General Research Question**

This research paper attempts to give answer to the general question: does Ethiopia has the needed legislative scheme to adequately regulate franchise agreements?

### **Specific Research Questions**

The following specific research questions are also addressed in this research paper:

- What differs franchise agreements from other modes of business relationships under the commercial laws of Ethiopia?
- Does the CRBLP and its subsidiary legislations adequately regulate franchise agreements in Ethiopia?
- Does the registration requirement set forth under the CRBLP and its subsidiary legislations adequately protect prospective franchisees from potential abusive practices of franchisors?
- Which regulation model is adopted to regulate franchise agreements in Ethiopia: regulation-based model, private law-based model, industry self-regulation model, or any combination of the three models?
- How does the Investment Proclamation No. 1180/2020 impact the regulation of franchise agreements in Ethiopia?
- What are the implications of domestic IP protection regime on regulation of franchise agreements in Ethiopia?
- Does the Trade Competition and Consumers Protection Proclamation No. 813/2013 validate or sanction franchise agreements in Ethiopia?
- Do the Labor Proclamation No. 1156/2019 grant franchisors the ability to prescribe labor standards and make them liable for violation of labor standards by franchisees?

## **1.5. Research Methodology**

Doctrinal research methodology is applied in this research work. This research attempts to make a critical legal analysis of Ethiopia's legal regime regarding the regulation of franchise

agreements. Relevant domestic laws and selected countries' relevant legislations will be analyzed as a primary source of data to the research work. Especial emphasis is given to the Commercial Registration and Business Licensing Proclamation No. 980/016 and its subsidiary legislations since it explicitly recognizes a franchise agreement as one form of business partnership for the first time. In addition, the relevant provisions of Investment Proclamation No. 1180/2020, selected IPRs protection laws, Trade Competition and Consumer Protection Proclamation No. 813/2013 and Labor Proclamation No. 1156/2019 will be scrutinized. Experiences of other selected countries including USA and South Africa is also examined. USA is selected in consideration of its pioneering and relative well-developed jurisprudence on regulation of franchise agreements through franchise specific legislations while South Africa is chosen on account of its different approach wherein franchisees are included within the ambit of 'consumers'.<sup>12</sup>

Furthermore, interview with pertinent government officials have been conducted to gather firsthand information relating to their respective direct and indirect responsibilities towards regulation of franchise agreements. At first, interview with Jirata Nemera (Mr.), Head Trade Registration and Licensing Branch Office at MoTI, has been made to gather firsthand information on how registration of franchise agreements is being conducted at the Ministry and the associated practical gaps to supplement the legal analysis. Then, interview with Bogale Tumdedo (Mr.), Director Investment Treaties and Legal Affairs Directorate at the EIC have been made to get practical insights on how the recently promulgated Investment Proclamation No. 1180/2020 impact the regulation of franchise agreements. As importantly, interview with Ermias Yemanebirhan (Mr.), Director-General EIPO, is made to grasp better understanding of the practical interface between Ethiopia's IP protection regime and franchise agreements, as well as associated loopholes on ground.

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<sup>12</sup> Robert W. Emerson, 'South African Franchisees as Consumers: The South African Example' (2014) 37 Fordham International Law Journal 462 <<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2332&context=ilj>> accessed 2 March 2020.



Evaluation of some provisions from selected and registered franchise agreements at the MoTI has also been made to identify the implications of inadequate regulation of franchise agreements in Ethiopia.

Lastly, as secondary data to the research work, analysis of relevant scholarly books, journal articles, reports and trustable online resources is made.

## **1.6. Literature Review**

There are enormous scholarly works on regulation of franchise agreements in different legal jurisdictions. In contrast, there is no comprehensive literature on regulation of franchise agreements in Ethiopia. There is no well-developed literature and jurisprudence on the matter in hand. Eshetu Yadeta on his '*Note on Laws Regulating Franchise Business in Different Jurisdictions*'<sup>13</sup> has attempted to assess regulation of franchise agreements in selected legal jurisdictions in the world. Nonetheless, his article did not embrace regulation of franchise agreements in Ethiopia. In his article, he simply indicated lack of specific law that regulate franchise business in Ethiopia.<sup>14</sup> He further denoted that franchise business in Ethiopia is technically regulated by general contract law, commercial law, competition law, investment law, IP law, and commercial registration and business license laws.<sup>15</sup>

Yohannes Hailu, on the other hand, in his LLM thesis titled '*Legal and Institutional Framework for Transfer of Technology in Ethiopia*'<sup>16</sup> has slightly touched the issue at hands with very narrow sub-topic covering less than three pages. In like manner with Eshetu Yadeta's conclusion, Yohannes Hailu has also remarked the non-existence of specific legislation which

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<sup>13</sup> Eshetu Yadeta Temesgen, 'Note: Laws Regulating Franchise Business in Different Jurisdictions' (2016) 5:1 Haramaya Law Review.

<sup>14</sup> *ibid* 146.

<sup>15</sup> *ibid*.

<sup>16</sup> Yohannes Hailu, 'Legal and Institutional Framework for Transfer of Technology in Ethiopia' (LLM Thesis, Addis Ababa University, 2015) <http://etd.aau.edu.et/bitstream/handle/123456789/16750/final%20paper%20PDF.pdf?sequence=1&isAllowed=y> accessed 19 February 2020.

regulates franchise agreements in Ethiopia.<sup>17</sup> Even though there is no specific legislation, Yohannes Hailu demonstrated the existence of scattered rules in different pieces of legislations which contribute to the regulation of franchise agreements.<sup>18</sup> In the first place, he discussed the relevant provisions of the Investment Proclamation No. 769/2012 that may help to regulate franchise agreements. Accordingly, he indicated that any franchise business relationship resulting in the TOT is required to be registered at the EIC in accordance with art. 21 /1/ and /2/ of the Investment Proclamation. The other cited piece of legislation that may help to regulate franchise agreements is TRPP. As per art. 26 of the Trademark Law, it is only owners of a registered trademark (including foreign franchisors) who shall have the right to, inter alia, license the use of a trademark.<sup>19</sup> In addition, as per art. 29 /2/ of the same law, a license contract on a registered trademark (which can be franchise agreement) or an application for registration of a trademark, as well as modification or termination of the license contract shall be submitted to the EIPO and it shall have no effect against third parties until so registered. Yohannes Hailu, finally, asserted the need to enact comprehensive legal and regulatory framework to regulate the operation of franchise business in the country.<sup>20</sup>

The writer of this research found the above discussed two works beneficial towards the accumulation of knowledge on the subject matter. However, both works were done before the promulgation of the CRBLP and its subsidiary legislations wherein franchise agreements are legally recognized for the first time in the Ethiopian legal history. And thus, both studies might not be up to date and holistic sources at this point of time. Furthermore, the main theme of both works is not to study the regulation of franchise agreements in Ethiopia. Rather, they touched up on this topic alongside their respective main studies.

Unlike the literatures which have been reviewed above, this research work primarily aims at examining the regulation of franchise agreements in Ethiopia. Especially, at this point of time when we are witnessing the blossom of domestic and foreign franchise business in the country,

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<sup>17</sup> *ibid* 122.

<sup>18</sup> *ibid* 125.

<sup>19</sup> *ibid* 123.

<sup>20</sup> *ibid* 125.

as well as the coming into effect of CRBLP and its subsidiary legislations which encompass provisions concerning franchise agreements, this research work will have great significance towards the scholarly scrutiny of the matter in hand. It also contributes for further studies on the issue.

### **1.7. Limitation of the Study**

Basically, this research is limited to the study of regulation of franchise agreements in Ethiopia through the analysis of the relevant provisions of the CRBLP and its subsidiary legislations, as well as other selected areas of law including investment law, selected IP protection laws, trademark law, trade competition and consumers protection law and labor law. During the research work, lack of adequate domestic literature on the subject matter has challenged the researcher. As a result, great reliance is made on foreign literatures and jurisprudences. In addition, the recent legal recognition of franchise agreements in the country and its early stage has adversely impacted the accessibility of actual franchise cases.

### **1.8. Organization of the Study**

The paper is organized into four chapters. Chapter one offers introductory statements embodying the research proposal while chapter two is dedicated to conceptualizing the regulation of franchise agreements including meaning and types of franchise agreements, and the various regulatory approaches. It also examines the experiences of selected countries in regulating franchise agreements. Chapter three, the central theme of the paper, mainly examines the regulation of franchise agreements in Ethiopia. At the end, chapter four summarizes the study with concluding remarks and recommendations.

## CHAPTER TWO - CONCEPTUALIZING THE REGULATION OF FRANCHISE AGREEMENTS AND EXPERIENCES OF SELECTED COUNTRIES IN ITS REGULATION

### 2.1. Conceptualizing the Regulation of Franchise Agreements

#### 2.1.1. Meaning of Franchise Agreement

The word ‘franchise’ comes from the French word ‘*Fraanchise*’, which itself derives from the original French word ‘*frank*’ meaning a free person or a person who is free to do or not do something.<sup>21</sup> The FTC Rule in general puts three elements that compose a franchise: ‘*an offer of the use of a trademark, the extension of significant control but also assistance and a required payment*’.<sup>22</sup> The IFA, on its part, defines a ‘franchise’ (or ‘franchising’) as ‘*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*’.<sup>23</sup> Besides, the UNIDROIT’s Model Franchise Disclosure Law (2002) gives more elaborated definition to the term ‘franchise’ as stated below:

*the rights granted by a party (the franchisor) authorizing 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 logotype designated by the franchisor.*<sup>24</sup>

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<sup>21</sup> Imed Eddine Bekhouche and Soheyb Salah Kahlessenane, ‘An Overview of Franchising Law: Why is it Important?’ (2018) 1 International Journal of Law and Public Administration 41 <[https://www.researchgate.net/publication/325927871\\_An\\_Overview\\_of\\_Franchising\\_Law\\_Why\\_is\\_it\\_Important](https://www.researchgate.net/publication/325927871_An_Overview_of_Franchising_Law_Why_is_it_Important)> accessed 2 March 2020.

<sup>22</sup> FTC Rule, 16 C.F.R. Sec.436.1(h)(1) to (3) (rev 2007).

<sup>23</sup> IFA official website, <<https://www.franchise.org/faqs/basics/what-is-a-franchise>> accessed 3 February 2020.

<sup>24</sup> UNIDROIT Model Franchise Disclosure Law (rev 2002), art. 2.

Under the Ethiopian legal regime, ‘franchise agreement’ is defined for the first time under the Commercial Registration and Business Licensing Proclamation No. 980/2016. Accordingly, ‘franchise agreement’ is defined as:

*an agreement concluded for consideration between the franchis[o]r and the franchisee in order to undertake business activities by using the trade name of the known product or service in order to share the nature and experience of the work under the leadership of the owner of the products and the service that have got recognition.*<sup>25</sup>

The definition furnished to the term ‘franchise agreement’ under the CRBLP signifies its designation within the scope of contracts in general. ‘A contract [in general] is an agreement whereby two or more persons as between themselves create, vary or extinguish obligations of a proprietary nature.’<sup>26</sup> For this reason, the general contract law provisions of the Civil Code, inter alia, formation, effect and extinction of contracts, as well as a general duty of good faith shall apply on franchise agreements save for matters differently governed by special and latest laws such as the CRBLP, investment law, IPRs protection laws, etc. The other notable aspect of the definition relates to the franchise parties’ joint obligation to engage in a ‘business activity’ in order to constitute franchise business relationship by and between themselves. Reading of art. 2(2) and (3) of the CRBLP along with art. 5 of the Commercial Code 1960 provide clarification on who should be regarded as a ‘business-person’ or ‘trader’. It also furnishes exhaustive list of activities that are regarded as business (or commercial) activities. As a result, franchise parties are necessarily required to undertake business activities as defined under both the CRBLP and the Commercial Code 1960, as well as shall carry on such business activities professionally and for gain.<sup>27</sup> Strangely enough, the other noteworthy element under the definition pertains to the exclusive association of ‘tradenname’ with franchise agreements. Accordingly, a franchise agreement is concluded between franchise parties to undertake a business activity by using the ‘tradenname’ of the known product or service of franchisors. The definition utterly excludes the independent association of other types of IPRs such as trademark, service mark, trade secret,

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<sup>25</sup> art. 2(33), *Commercial Registration and Business Licensing Proclamation No.980/2016*.

<sup>26</sup> art. 1675, *Civil Code of Ethiopia Proclamation No. 165/1960*.

<sup>27</sup> art. 5, *Commercial Code of Ethiopia Proclamation No. 166/1960*.

copyright and related rights, patent, etc. in franchise business relationships. Such a tapered scope furnished to franchise agreements under the CRBLP certainly limits the expansion of franchise business in the country. The other mentionable issue on the definition relates to the generic leadership authority that the CRBLP grants to franchisors over the franchise business. Pursuant to art. 2 (33) of the CRBLP, the franchise business relationship shall proceed under the leadership of the owner of the products and the service that have got recognition, i.e., the franchisor. The word ‘leadership’ lacks clarity as compared to the elaborated definitions given under both the FTC Rule and UNIDROIT’s Model Franchise Disclosure Law (2002). The latter instruments give specific rights and responsibilities to franchisors such as transfer know-how and extend assistance, decide in substantial part the manner in which the franchised business is to be operated, and significant and continuing operational control. The last point relates to the phrases *‘the known product or service . . . that have got recognition’* included under the definition. Accordingly, the franchised products and/or services shall be well-known and well-recognized. It would be imperative if the definition does not have such restrictive qualifications as it tampers franchise parties to contract only on well-known products and services. In addition, neither the CRBLP nor the MoTI have furnished parameters that are helpful of objectively assessing the recognition level of potential franchise products or services.<sup>28</sup>

### **2.1.2. Types of Franchise Agreements**

There are different types of franchise agreements which can be found in various literatures internationally. According to the most common and widely accepted classification, franchising is divided into two main categories: product franchising and business format franchising /BFF/.<sup>29</sup> A product franchise (or interchangeably known as traditional franchise) exists when a franchisor grants a franchisee the right to manufacture and/or sell a product bearing the franchisor’s trademarks.<sup>30</sup> Most of the times, examples of product franchising can be found in the bottling,

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<sup>28</sup> Interview with Jirata Nemera, Trade Registration and Licensing Branch Office Head, FDRE MoTI (Addis Ababa, Ethiopia, 3 March 2020).

<sup>29</sup> Tamara Milenkovic Kerkovic, ‘The Main Directions in Comparative Franchising Regulation – UNIDROIT Initiative and Its Influence’ (2010) XIII European Research Studies 106.

<sup>30</sup> *ibid* 105.

gasoline, automotive and other manufacturing industries.<sup>31</sup> On the other hand, in BFF, the franchisor provides to the franchisee not just its trademark/tradename and products and services, but an entire system for operating the business.<sup>32</sup> The franchisee generally receives site selection and development support, operating manuals, training, brand standards, quality control, a marketing strategy and business advisory support from the franchisor.<sup>33</sup> Furthermore, BFF can emanate from various legal relationships that can be categorized under two main forms: direct franchise agreements and master franchise agreements.<sup>34</sup> In ‘direct franchise agreements’, there is no intermediary between the franchisor and franchisee.<sup>35</sup> In the ‘master franchise agreement’, the franchisor grants to a business partner in another country the exclusive right within the specified territory to open franchise outlets itself or to recruit other partners to grant franchises.<sup>36</sup>

Notwithstanding to the foregoing discussion on classification of franchise agreements, it is essential to shed a little light on the peculiarities of franchise agreements as compared to IPRs license agreements, as well as TOT agreements. IPRs license agreement involves the licensor’s sale of the right to use of any of his or her protected IPRs, among others, trademark, tradename, patent, copyright, industrial design, trade secret, manufacturing process or any other IP to an independent licensee who in return pays a fee or royalty. Accordingly, all franchise agreements necessarily have IPRs license component, but BFF offers, in addition to simple licensing, the right to operate a whole business format along with an ongoing support and guidance. On the other hand, most often, it is not an easy task to draw a distinction between franchise and TOT agreements. Looking into the definition given to TOT under the Investment Proclamation No. 1180/2020 is helpful to understand the said difficulty. Accordingly, TOT is defined as:

*the transfer of systematic knowledge for the manufacture of a product, the application or improvement of a process or for rendering service, including management and technical*

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<sup>31</sup> IFA official website, <<https://www.franchise.org/faqs/basics/what-is-a-franchise>> accessed 3 February 2020.

<sup>32</sup> *ibid* (n 29) 106.

<sup>33</sup> *ibid*.

<sup>34</sup> *ibid*.

<sup>35</sup> *ibid* 107.

<sup>36</sup> *ibid*.

*know-how as well as marketing technologies, but may not extend to transactions involving mere sale or lease of goods.*<sup>37</sup>

The Transfer of Technology Council of Ministers Regulations No. 121/1993 (hereinafter referred to as ‘the TOT Regulation’) has also furnished similar definition to the term ‘TOT’. According to the definition given to TOT under both the investment law and the TOT Regulation, franchise agreements do not always contain TOT. For instance, a product franchise may exist without transfer of systemic knowledge. It can simply be formed by granting the right to manufacture and/or sell a product bearing the trademarks of a franchisor. Contrastingly, in BFF, an entire system for operating a business, inter alia, operating manuals, training, brand standards, quality control and a marketing strategy could be awarded resulting in the integration of TOT with such franchises. Likewise, TOT agreements can be formed outside the ambit of franchising. Unlike franchise agreements, TOT agreements do not necessarily involve IPRs. Basically, transfer of systemic knowledge suffices to constitute TOT agreements irrespective of whether the systemic knowledge is a protected IP. In conclusion, franchise agreements and TOT agreements are not coexistent though there is a possibility to integrate both in the same agreement.

### **2.1.3. Approaches to Regulate Franchise Agreements**

In this sub-topic, we will analyze the reason for regulating franchise agreements, as well as the general approaches to regulate it under various legal systems. In most cases, the main reason for regulation of franchise agreements relates to the abuses on the side of franchisors given the gross disparity in the contractual balance of the parties in the franchise contracts.<sup>38</sup> The most common of those abuses include, inter alia, misrepresentation of franchisors during conclusion of franchise agreements, too stringent provisions related to the control exercised by the franchisor or as regards the rights retained by the franchisor to arbitrarily terminate the agreement, inadequate assistance or training which the franchisor is obliged to offer to the franchisee or

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<sup>37</sup> art. 2(9), *Investment Proclamation No. 1180/2020*.

<sup>38</sup> Danica Petrovic, ‘Regulation and the Case Law on Business Format Franchise in the United States and Europe- Lessons for Serbia’ (LLM Thesis, Central European University 2019) 3-6.  
<[file:///C:/Users/test/Downloads/petrovic\\_danica%20\(4\).pdf](file:///C:/Users/test/Downloads/petrovic_danica%20(4).pdf)> accessed 18 January 2020.



extremely high prices of those services offered by the franchisor or its related companies.<sup>39</sup> Against this background, the U.S. FTC, while promulgating the Franchise Rule on December 21, 1978, evidently provided that the Commission has promulgated the Rule to combat the widespread deception in the sale of franchises through both material misrepresentations and nondisclosures of material facts.<sup>40</sup> However, this does not mean that franchisees always act innocently in their endeavor with franchisors, though in rare cases.

In general, regulation of franchise agreements can be done through franchise-specific laws (or regulation-based model), general rules of commercial law (or private law-based model), the conduct of the industry itself, or any combination of the three models.<sup>41</sup> In most legal systems, franchise-specific laws (or regulation-based model) typically address pre-contractual disclosure, franchisor/franchisee relationship and registration requirements.<sup>42</sup> Pre-contractual disclosure may include basic information about the franchisor, financial information including required payments, IP registration and use rights information, real property requirements, details about the term of the franchise agreement, and information about termination and renewal. Franchisor-franchisee relationship laws, on its part, give especial emphasis to regulation of the respective rights and obligations of both parties during the tenure of the relationship including matters such as prohibition against discrimination, possibility of franchisees of one franchisor to associate with one another, matter of competition, etc.<sup>43</sup> Under the registration requirement, franchisors are compelled to register franchise agreements at the concerned register authorities so that the authorities will have the chance to verify the fulfillment of minimum disclosure requirements under the relevant laws.

The second approach is private law-based model of regulation. In some jurisdictions, private law-based model of regulation is adopted whereby franchise relationship is regulated based on rules and remedies of the general contract law. Hungary is a good example of a jurisdiction that

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<sup>39</sup> *ibid.*

<sup>40</sup> FTC Rule, 16 C.F.R. s I (A).

<sup>41</sup> *ibid* (n 38) 7.

<sup>42</sup> *ibid* (n 29) 110.

<sup>43</sup> *ibid* 114.

treats franchise as an innominate contract.<sup>44</sup> In industry self-regulation model, franchise relationships are regulated by franchise trade associations basically through voluntary codes of conduct/ethics which state guiding principles for the relationship between the franchisors and franchisees. Lastly, hybrid regulation model shares some elements from the private law-based model, industrial self-regulation model and to some extent from regulation-based model.<sup>45</sup> The UK is a good example to demonstrate the hybrid regulation model.<sup>46</sup>

Regardless of the type of model which could be deployed to regulate franchise agreements, there are other impactful legal issues that must be examined in order to comprehensively apprehend the regulation of franchise agreements, inter alia, law of contract, corporate laws, IP laws, antitrust and consumer protection laws, investment laws, law of taxation, labor laws, exchange control regulations and industry specific regulations. Brief analysis of such Ethiopia's laws having significant impact on regulation of franchise agreements will be made in chapter three.

## **2.2. Experiences of Selected Countries in Regulation of Franchise Agreements**

There is no homogenous approach to regulate franchise business relationships across the world. In strictest terms, there are no two or more countries who regulate franchise agreements identically.<sup>47</sup> Different jurisdictions have adopted different ways of franchise regulation though some of the jurisdictions share major commonalities and thus can be categorized under the same approach. In this section, we will examine the regulation of franchise agreements in two selected jurisdictions including USA and South Africa.

### **2.2.1. USA**

The U.S. regulate franchise agreements both at federal and state levels. The FTC, the chief federal administrative agency of the U.S. which is responsible to ensure consumer protection and

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<sup>44</sup> Stefan Messmann and Tibor Tajti (eds), *The Case Law of Central & Eastern Europe: Enforcement of Contracts*, vol I (1<sup>st</sup> edn, European University Press 2009) 288.

<sup>45</sup> *ibid* (n 38) 16.

<sup>46</sup> Graeme Payne, 'United Kingdom Franchise Law Review' in Mark Abell (ed), *The Franchise Law Review* (7<sup>th</sup> edn, Law Business Research Ltd 2020) 479.

<sup>47</sup> Mark Abell (ed), *The Franchise Law Review* (7<sup>th</sup> edn, Law Business Research Ltd 2020) vii.

promote trade competition nationwide, has promulgated the FTC Rule or Franchise Rule in 1978 (as amended). The original Franchise Rule was enacted due to the widespread deception in the sale of franchises through both material misrepresentations and non-disclosures of material facts.<sup>48</sup> At the end of 1960s, there were several lawsuits and class actions in the U.S. against franchisors which triggered the immediate promulgation of the Franchise Rule.<sup>49</sup> Mostly, the law suits relate to, inter alia, the then franchisors' pre-contractual misrepresentation of material facts, undefined business relationships between franchisors and franchisees that had been exhibited by the former's exploitive practices and arbitrary termination or cancelation of franchise contracts by franchisors.<sup>50</sup>

Under the FTC Rule (as amended in 2007), any continuing commercial relationship or arrangement is treated as franchise up on the fulfillment of three key elements: a franchisee operates a business that is identified or associated with the trademark of a franchisor, a franchisor retains the authority to control or provide significant assistance in a franchisee's method of business operation and a franchisee makes or promises to make payment to a franchisor or its affiliate.<sup>51</sup> Next, the fundamental characteristic features of the U.S. franchise laws both at federal and state levels will be succinctly examined.

#### **2.2.1.1. Pre-contractual Disclosure Requirement**

The Franchise Rule, as amended in 2007, is purely a disclosure law.<sup>52</sup> The rule requires franchisors to disclose certain material facts to prospective franchisees under a disclosure document called the 'Franchise Disclosure Document /FDD/'.<sup>53</sup> The rationale behind the

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<sup>48</sup> Original Statement of Basis and Purpose /SBP/, 43 Franchise Rule at 59625.

<sup>49</sup> Honey V. Gandhi, 'Franchising in the United States' (2014) 20:1 Law and Business Review of the Americas 6.

<sup>50</sup> *ibid.*

<sup>51</sup> 16 CFR Part 436 Disclosure Requirements and Prohibitions Concerning Franchising (USA), s436.1(h).

<sup>52</sup> Mark Abell, 'What is Franchising' in Mark Abell (ed), *The Franchise Law Review* (7<sup>th</sup> edn, Law Business Research Ltd 2020) 500.

<sup>53</sup> Steven Feirman, Daniel Deane, Wesley Gangi, Keri McWilliams, Kendal Tyre and Nathan Warecki, 'United States Franchise Law Review' in Mark Abell (ed), *The Franchise Law Review* (7<sup>th</sup> edn, Law Business Research Ltd 2020) 8.

disclosure law is to help and guide franchisees in their judgment while entering into a franchising relationship through franchisors' pre-contractual disclosure of certain material facts. Accordingly, any franchisor is required to furnish a prospective franchisee with a copy of its FDD at least fourteen calendar days before the conclusion of the franchising agreement or before the prospective franchisee makes any payment to the franchisor or its affiliate.<sup>54</sup> The FDD shall contain twenty-three mandatory items, inter alia, the name and principal business address of the franchisor or its predecessors or affiliates, the franchisor's business experience, the prospective franchisee's expected initial and other fees, renewal, termination, transfer and dispute resolution clauses, financial performance representations and all proposed contracts including the franchising agreement itself.<sup>55</sup> Out of these mandatory FDD items, franchisors' overstated financial performance representation is the most common disclosure violation in the U.S. which mostly cause dispute between franchisors and prospective franchisees.<sup>56</sup>

Even though the FTC Rule is applicable in the USA or its territories<sup>57</sup>, it is noteworthy that the U.S. states are at liberty to enact their own franchise rules to the extent that it is not inconsistent with the FTC Rule. States' franchise law is considered as 'not inconsistent' with the FTC Rule if it grants prospective franchisees equal or greater protection.<sup>58</sup> In line with this, some states' franchise laws go further and provide registration requirement in addition to the pre-contractual disclosure rule.

U.S.'s disclosure law requirement is a worthy point of reference for developing countries like Ethiopia whereby the franchise business is characterized by greater asymmetry of information, business experience and expertise and bargaining power between the franchise parties. Especially, domestic traders who are interested to take part in franchise business with foreign franchise networks warrant adequate protection through such disclosure laws.

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<sup>54</sup> Franchise Rule, s436.2(a).

<sup>55</sup> Franchise Rule, s436.4.

<sup>56</sup> *ibid* (n 52) 502.

<sup>57</sup> Franchise Rule, s436.2.

<sup>58</sup> Franchise Rule, s436.10(b).

### 2.2.1.2. Registration

The FTC Rule does not require registration of the FDD or franchise agreement. However, there are fifteen U.S. states that require registration of the offer and sale of a franchise with the concerned government authorities.<sup>59</sup> Each of these states has its own detailed registration process subject to regular renewal, mostly annually or in the event that substantial change is made on the FDD.<sup>60</sup> Registration of the offer and sale of a franchise does not have similar effect in all the states. States which require registration can be divided into two: ‘notice’ states and ‘review’ states.<sup>61</sup> In the ‘notice’ states, the franchise offer will automatically be effective up on the completion of the required application form while in the ‘review’ states, it will be effective after verification of the filed franchise offer and its approval thereof.<sup>62</sup> In the later scheme, if states diagnose defect on the FDD, the franchise offer will be suspended until the diagnosed flaws are rectified by the franchisor. In requiring registration, the states are seeking to extend greater protection to prospective franchisees. However, it is obscure how the ‘notice’ states provide greater protection to prospective franchisees by simply registering franchise offers.

### 2.2.1.3. Relationship Laws

The FTC Rule does not have franchise relationship regulation clauses.<sup>63</sup> At federal level, legislative efforts to adopt franchise relationship laws with a general applicability have failed repeatedly.<sup>64</sup> In contrast, eighteen U.S. states have franchise relationship laws of general applicability with primary concern on outlawing the prevalent abusive practices of franchisors including unfair termination or non-renewal of franchise agreement without good cause and prohibition of franchisees from transferring all or part of their interest in the franchise.<sup>65</sup>

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<sup>59</sup> *ibid* (n 52) 502.

<sup>60</sup> *ibid*.

<sup>61</sup> *ibid*.

<sup>62</sup> *ibid*.

<sup>63</sup> Thomas M. Pitegoff, ‘Franchise Relationship Laws: A Minefield for Franchisors’ (1989) 45 *Business Lawyer Journal* 289, in Andrew C Selden, Joseph J Fittante Jr, Ronald Kenton Gardner Jr and Rupert Mitchell Barkoff (eds), *Fundamentals of Franchising* (4<sup>th</sup> ed, ABA Book Publishing 2016) 185.

<sup>64</sup> *ibid* 185, 186.

<sup>65</sup> *ibid*.

### **2.2.2. South Africa**

The Consumer Protection Act 2008 (hereinafter referred to as the ‘CPA’ or the ‘Act’) is the first franchise-specific legislation in South Africa. Of particular interest is the Act included a franchisee under the definition of ‘consumer’.<sup>66</sup> s5(b)-(e) of the Act provides the particular arrangements which shall be regarded as a transaction between a supplier and consumer and it includes *‘a solicitation of offers to enter into a franchise agreement, an offer by a potential franchisor to enter into a franchise agreement with a potential franchisee, a franchise agreement or an agreement supplementary to [it] and the supply of any goods or services to a franchisee in terms of a franchise agreement’*. The CPA is characterized by disclosure and cooling-off period requirements, absence of registration requirement, extensive relationship regulation and stiff civil penalties.

#### **2.2.2.1. Disclosure and Cooling-off Period**

The franchise law of South Africa requires a franchisor to provide a prospective franchisee both a disclosure document and cooling-off period. In accordance with Regulation 3 of the Consumer Protection Act Regulations, a franchisor is required to provide a prospective franchisee with a disclosure document, dated and signed by an authorized officer of the franchisor, at least fourteen days prior to the signing of a franchise agreement.<sup>67</sup> The Regulation further stipulates the minimum items that shall be included in the disclosure document including, among other things, the number of individual outlets franchised by the franchisor, the actual financial performance of the franchisor and its individual franchisee outlets in the preceding financial fiscal year, confirmation of the sound financial standing of the franchisor and financial projections of the prospective franchise business or franchises of a similar nature along with particulars of the assumption.<sup>68</sup> On top of the disclosure requirement, s7.2 of the CPA go further step and grants a franchisee a cooling-off period of ten business days after the signing of a franchise agreement without entailing any cost or penalty.

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<sup>66</sup> Consumer Protection Act 2008 (South Africa), s1.

<sup>67</sup> No. 34180 Consumer Protection Act Regulations (South Africa), R3.1.

<sup>68</sup> CPA Regulations, R3.1(a)-(d).

The rationale behind both disclosure and cooling-off period requirements seems to give as much information as possible to prospective franchisees about the franchisor's business with the view to help the former to make informed business decision. While these two-fold and overlapping requirements greatly protect franchisees from potential deceptive practices and misrepresentations, it may also have a counterproductive effect on the growth of South Africa's franchise market as franchisors might be discouraged on such stiff regulations.

#### **2.2.2.2. Relationship Regulation**

In most legal jurisdictions, the respective rights and obligations of franchise parties are left to the discretion of the contracting parties. In contrast, both the CPA and its Regulations contain in-depth and extensive relationship provisions that are mostly favorable to franchisees. In line with this, a franchise agreement shall contain specific information, inter alia, the name and detail description of the franchisor and franchise business, the obligations of the franchisor and franchisee, the direct or indirect consideration payable to the franchisor, territorial rights (if any), franchisee right to wholly or partly assign or transfer his or her interest in the franchise, franchisor's initial and ongoing training and assistance to the franchisee, and termination or renewal or extension clauses of the franchise agreement.<sup>69</sup> As the CPA considers franchisees as consumers in their transaction with their respective franchisors, it grants analogous protection with other classes of consumers.

The other notable and unique business relationship regulation pertains to Chapter 2 of the CPA wherein fundamental consumer rights are laid down that are also equally applicable on franchisees. Some of these comprehensive fundamental rights include, among others, franchisee's right to equality in franchise market or protection against illegitimate discrimination, choosing franchisors or goods or services for the franchise business, fair and responsible marketing, fair and honest dealing, fair, just and reasonable terms and conditions and fair value, good quality and safety. Under each of these rights, there are diverse range of provisions that provide broad entitlements to franchisees to the extent where the law puts no space for the

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<sup>69</sup> CPA Regulations, R2.3(a)-(y).

contracting parties' negotiation and agreement. In the strictest sense, franchisors are highly expected to thoroughly review these relationship regulation provisions of both the CPA and its Regulations and carefully formulate franchise agreements to avoid any contradiction to these extremely extensive and mandatory relationship rules.



## CHAPTER THREE - REGULATION OF FRANCHISE AGREEMENTS IN ETHIOPIA

### 3.1. Overview of Franchise Business in Ethiopia

It is after the promulgation of the Commercial Registering and Business Licensing Proclamation No.980/2016 that the first franchise business arrangements have been registered and licensed in Ethiopia. However, this does not mean that there was no franchise like business set-ups in the country before the enactment of the CRBLP. Examples of such businesses include the most prominent brands like Coca-Cola, Hilton Addis and Sheraton Addis which started operation in the 1959, 1960s and 1998, respectively. Since there was no legal framework to recognize such types of business arrangements as ‘franchise’, these and other similar businesses have not been registered and licensed as franchise business at the concerned government organs. However, such arrangements were considered as innominate contractual relationship subject to the applicability of general law of contract and other relevant general commercial laws.<sup>70</sup>

In recent years, after the recognition of franchise business model under the CRBLP, the number of registered franchise business set-ups is increasing.<sup>71</sup> Especially, renowned international hospitality brands, restaurant chains and alcoholic beverage companies have showed great interest to join the Ethiopian market.<sup>72</sup> For instance, on the 10<sup>th</sup> of April 2018, Pizza Hut, a prominent American restaurant chain and subsidiary of ‘Yum!’ Brands, became the first major international food franchise to open in Addis Ababa in a registered and licensed development franchise business partnership<sup>73</sup> with Belayab Foods and Production PLC, the franchisee.<sup>74</sup> Likewise, Cold Stone Creamery, an American ice cream parlor chain with Kahala Brands, which is owned by MTY Food Group Inc., has partnered with Belayab Foods and Production PLC and

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<sup>70</sup> Interview with Mr. Jirata Nemera, Trade Registration and Licensing Branch Office Head, FDRE MoTI Industry (Addis Ababa, Ethiopia, 3 March 2020).

<sup>71</sup> *ibid.*

<sup>72</sup> *ibid.*

<sup>73</sup> The franchise agreement is registered under file no. 030/1/37/01 at the MoTI.

<sup>74</sup> ‘Pizza Hut Officially Opens in Ethiopia’ *Addis Standard* (Addis Ababa, 10 April 2018) <<http://addisstandard.com/news-pizza-hut-officially-opens-in-ethiopia/>> accessed 29 April 2020.

opened its first outlet on the 1<sup>st</sup> of March 2020 in Addis Ababa.<sup>75</sup> In addition, renowned Chinese hospitality brands are also expanding their market to Ethiopia in particular and the African continent in general including the newly developed IVY and Rizti hospitality brands by the Chinese company, Sunmei International, which is a joint venture subsidiary of Sunmei Group.<sup>76</sup> Despite the recent increase in the number of franchise business in the country, it is dominated by food and beverage industry while there are various alternative industries that are highly beneficial to the development of the economy such as education, health, and wholesale and retail services.

Statistical information relating to the contribution of franchise business to Ethiopia's GDP and job opportunity is not readily available. Yet, it plays positive role in stimulating Ethiopia's economy through job creation, acquisition of new skills and technology, development of small and medium entrepreneurship, modernization of business, increase of tax base and standardized and quality customer services.

In the Ethiopian context, imbalance of power in the franchisor-franchisee relationship, especially in the case of international franchise, is extremely exacerbated due to the underdeveloped stage of private businesses. Expansion of franchise business, especially the recently observed international renowned brands' interest to join the Ethiopian market, on one hand, and the underdeveloped stage of domestic private business on the other, calls for prudent regulation of franchise agreements in Ethiopia. In addition, Ethiopia's loose protection of IPRs seems incompatible with the intended attraction of FDI (includes foreign franchise investment), as demonstrated by the various policy documents of the government. In view of the foregoing, analysis of both the policy and legal regulatory environment for the regulation of franchise agreements in Ethiopia will be made in the subsequent sections.

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<sup>75</sup> Seble Wondemagegn, 'Belayab Foods Sweeten Addis with Franchised Ice Cream Shop' *Addis fortune* (Addis Ababa, 29 February 2020) <<https://addisfortune.news/belayab-foods-sweeten-addis-with-franchised-ice-cream-shop/>> accessed 30 April 2020.

<sup>76</sup> Ruth Brook, 'Chinese hotel franchising giant to open a five star hotel in Ethiopia' *Capital* (Addis Ababa, 27 January 2020) <<https://www.capitalethiopia.com/featured/chinese-hotel-franchising-giant-to-open-a-five-star-hotel-in-ethiopia/>> accessed 30 April 2020.

### **3.2. Policy Environment for Regulation of Franchise Agreements in Ethiopia**

The Ethiopian government has adopted various policies and strategies to serve as a springboard towards the realization of fast, sustainable, and broad-based economic growth within a short period of time.<sup>77</sup> It is important to shed some light on the implications of selected policy documents before directly analyzing the legal regulatory regime. In line with this, succinct analysis is made hereinunder on implications of GTP II, Science, Technology, and Innovation /STI/ Policy and IPRs Protection Draft Policy on franchise agreements.

#### **3.2.1. The Place of Franchise Agreements in GTP II**

The Second Growth and Transformation Plan (GTP II) has been serving as the economic development roadmap of the country since the 2015/2016 budget year and is expected to be in force until the end of 2019/2020 budget year. GTP II is mainly developed based on the country's vision to become a lower middle-income country by 2025.<sup>78</sup> GTP II recognizes the private sector's leading and indispensable role towards economic development.<sup>79</sup> It further acknowledges the need for coordinated and concerted efforts to address the constraints that hinder the development of domestic private sector, particularly problems related to business management and leadership skills, absence of the required technology and inadequate financing.<sup>80</sup> In this regard, one of the primary remedies provided under the GTP II relates to enhancement of TOT and knowledge transfer between foreign and domestic investors.<sup>81</sup> Furthermore, the document utterly states the ultimate goal of elevating the capabilities of domestic investors through attracting quality foreign investments.<sup>82</sup>

As aspired in GTP II, to enhance the capacity of domestic investment through TOT and knowledge transfer, the needful legal and institutional frameworks shall be put in place first. Franchise agreements, being one of the main vehicles for TOT, its prudent regulation will have a

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<sup>77</sup> *GTP II*, at xi.

<sup>78</sup> *ibid* 76.

<sup>79</sup> *ibid* 84.

<sup>80</sup> *ibid*.

<sup>81</sup> *ibid* 19,22,29,30,31,141,142.

<sup>82</sup> *ibid* 141.

paramount importance to achieve the desired economic development through knowledge transfer. Otherwise, the outcome might not be as planned in the GTP II.

### **3.2.2. Science, Technology, and Innovation Policy**

The 2012 Ethiopian Science, Technology, and Innovation /STI/ Policy is formulated with the view to create *'national framework that will define and support how Ethiopia will in future search for, select, adapt, and utilize appropriate and effective foreign technologies as well as addressing the establishment of national innovation system'*.<sup>83</sup> It envisages to *'see Ethiopia entrench the capabilities which enable rapid learning, adaptation and utilization of effective foreign technologies by the year 2022/23'*.<sup>84</sup> It also aspires to create a conducive environment to strengthen the role of the private sector in TOT.<sup>85</sup> Rapid technology transfer and adaptation is given great emphasis under the policy towards the achievement of the envisaged goal.

Accordingly, TOT is included as one of the eleven critical policy directions under the STI Policy.<sup>86</sup> Furthermore, among others, expansion of the flow of technology through FDI and acceleration of inter-firm dissemination of technological information and know-how are stipulated as key strategies to ensure TOT.<sup>87</sup> It is apparent that franchise agreements, being one of the main vehicles for dissemination of technological information and know-how among firms, play significant role to realize TOT in Ethiopia. In the STI Policy, the other notable critical policy direction with respect to franchise agreements is IP system. The Policy indicates the importance of IPRs protection for the development of domestic technological capabilities through, among others, diffusion of knowledge, TOT, FDI, and technology licensing.<sup>88</sup> It also acknowledges Ethiopia's IP regime minimal role in facilitating TOT to Ethiopia and the development of domestic innovative activities.<sup>89</sup> As a result, the Policy recommends that the

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<sup>83</sup> *The FDRE Science, Technology, and Innovation Policy (2012)*, at 2.

<sup>84</sup> *ibid* 3.

<sup>85</sup> *ibid* 4.

<sup>86</sup> *ibid* 5.

<sup>87</sup> *ibid* 6.

<sup>88</sup> *ibid* 14.

<sup>89</sup> *ibid*.

national IP regime shall create a conducive environment for imitative learning, the protection of new knowledge, and the development of indigenous knowledge.<sup>90</sup>

In a nutshell, the STI Policy aspires to create an enabling environment to facilitate the flow of foreign technologies into the country and the development of domestic knowledge mainly through imitation and adaptation. Obviously, franchise agreements serve as principal vehicle for the flow of technologies within the private sector. It thus necessitates a heedful regulation of franchise agreements to attain the desired advancement in STI.

### **3.2.3. IPRs Protection Policy /Draft/**

Ethiopia does not have consolidated national IPRs protection policy. However, draft IPRs Protection Policy is prepared by the EIPO and submitted to the Council of Ministers for review and approval.<sup>91</sup> The draft IPRs Protection Policy envisages to properly use the IPRs protection system towards rapid and sustainable economic, social, and cultural development, as well as improve the overall living standard of citizens.<sup>92</sup> The draft policy considers IPRs protection as one of the strategic tools for sustainable economic development.<sup>93</sup> Thereby, the draft policy aspires to establish apt legal and institutional framework to ensure IPRs protection and administration.<sup>94</sup>

In addition, the draft policy acknowledges and lists key issues that have been hindrance for the IP to serve as an engine for the country's economic development. Among others, the inferior role that the IPRs protection system plays for TOT is cited in the policy document.<sup>95</sup> Hence, the draft policy mainly aims to ensure TOT, especially from foreign sources, through the efficient protection of IPRs.<sup>96</sup> As explained while discussing the STI Policy, franchise agreements involve

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<sup>90</sup> *ibid* 15.

<sup>91</sup> Interview with Mr. Ermias Yemanebirhan, Director-General, EIPO, (Addis Ababa, Ethiopia, 7 December 2020).

<sup>92</sup> *Draft National Intellectual Property Rights Protection Policy*, at 4.

<sup>93</sup> *ibid* 5.

<sup>94</sup> *ibid*.

<sup>95</sup> *ibid* 7.

<sup>96</sup> *ibid* 11.

IPRs and are one form of TT. Increased inflow of FDI, including expansion of foreign franchise agreements, could boost technology and knowledge transfer and thereby positively contribute to the economic development of the country. Accordingly, as envisaged in the IPRs protection draft policy, efficient protection of IPRs will certainly create a conducive environment for the advancement of franchise agreements.

However, the reality on ground is different from the aspirations of the draft policy document. Ethiopia did not ratify major international IPRs protection agreements including the TRIPS Agreement, Paris Convention, and the Madrid Protocol, even though there is an ongoing effort by the EIPO to ratify the Paris Convention and the Madrid Protocol.<sup>97</sup> As a result, the efforts made so far to interrelate IPRs protection and attraction of investment did not bring adequate results. Inevitably, foreign investors require the protection of their IPRs to the possible maximum level before they decide to license it in whatsoever way and commence investment. In line with the aspirations of the draft IPRs protection policy, relevant international IPRs protection agreements need to be ratified, as well as needful amendments shall be made on domestic IPRs protection laws to make it compatible with the former ones.

### **3.3. The Legal Regime for Regulation of Franchise Agreements in Ethiopia**

The term ‘franchise’ has not been mentioned in the two encyclopedic legislations of Ethiopia - Civil Code 1960 and Commercial Code 1960. Nonetheless, this does not mean that franchise business relationship has been unlawful commercial activity in the country. Though the encyclopedic legislations of the country do not mention the terms ‘franchise’ or ‘franchise agreement’, the general law of contract and the commercial law have been applicable on such agreements.<sup>98</sup> Case in point is the general law of contract under the Civil Code 1960. The general law of contract assumes the fact that contracting parties to an agreement have equal information and bargaining power. Contrastingly, a franchise agreement is usually undertaken by and between contracting parties wherein asymmetry of information and bargaining power is prevalent – the franchisor has relatively better advantage with respect to business experience and expertise, financial capacity, marketing skills, and so on. It is because of this asymmetry that

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<sup>97</sup> *ibid* (n 91).

<sup>98</sup> *ibid* (n 70).

some jurisdictions resort to address the imbalance through regulatory intervention, particularly with franchise-specific laws. Yet, the general law of contract under the Civil Code 1960 leaves contracting parties to freely determine the object of their contract as long as the obligations of the parties or one of them is not absolutely impossible or not unlawful or not immoral.<sup>99</sup> Except on certain types of contracts whereupon the special provisions of the Civil Code 1960 and Commercial Code 1960 apply, the Civil Code's general law of contract are applicable on all contractual relationships, including on franchise agreements, regardless of the nature of the contracts and the parties thereto.<sup>100</sup> Thereby, the Civil Code treats a franchise agreement as an innominate contract. It does not provide specific regulation for franchise agreements in consideration of its unique features.

For the first time in Ethiopia, the term 'franchise agreement' is legally recognized and defined under CRBLP. Accordingly, the subsequent section is designed to analyze the franchise-related provisions of the CRBLP and its subsidiary legislations. Following that, other laws relevant to franchise agreements, inter alia, investment law, selected IPRs protection laws, trade competition and consumer protection law and labor law will be analyzed.

### **3.3.1. Regulation of Franchise Agreements Under the Commercial Registration and Business Licensing Proclamation No. 980/2016 and Its Subsidiary Legislations**

Prior to the promulgation of the CRBLP, there was pressure to adopt a separate and comprehensive law that governs franchise agreements in Ethiopia instead of reliance on scattered and remote provisions in various legislations, among others, general law of contract, IPRs protection laws, investment law, trade competition and consumer protection law and the Commercial Code 1960.<sup>101</sup> For the first time, the term 'franchise agreement' is legally recognized and defined under the CRBLP.<sup>102</sup> Furthermore, based on the CRBLP, Commercial Registration and Licensing Council of Ministers Regulation No. 392/2016 (hereinafter referred

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<sup>99</sup> art. 1711-1716, *Civil Code*.

<sup>100</sup> art. 1676 (1) (2), *Civil Code*.

<sup>101</sup> Tagel Getahun, 'Franchise Influx Requires Legislative Demand' *Addis fortune* (Addis Ababa, 10 February 2013) <<https://addisfortune.net/columns/franchise-influx-requires-legislative-demand/>> accessed 30 April 2020.

<sup>102</sup> 'See s**Error! Reference source not found.** above'.

to as the ‘Regulation’) and Commercial Registration, Licensing and Post-Licensing Inspection Directive No. 010/2017 (hereinafter referred to as the ‘Directive’) have been issued by Council of Ministers and MoTI, respectively. Analysis of franchise-related provisions of the CRBLP and its subsidiary legislations will be made hereinunder in line with the three commonly known legal regulation tools: pre-contractual disclosure, relationship regulation and registration requirement.

#### **3.3.1.1. Pre-contractual Disclosure Requirement**

The CRBLP, as well as the Regulation and Directive make no mention of the pre-contractual disclosure requirement to protect prospective franchisees from franchisors’ potential misrepresentations and use of false or unsubstantiated claims. In fact, as the preamble of the CRBLP clearly states, the aim of the proclamation is not to regulate franchise agreements; rather, it is to put in place a fair, modern, fast and accessible system of commercial registration and business licensing services. Absence of pre-contractual disclosure requirement under the CRBLP compels franchise parties to rely on the requirements of the general law of contract relating to formation of contracts: consent, object and form of contracts.<sup>103</sup> Such vacuum under the CRBLP coupled with the country’s very infant and unstructured business practice certainly expose prospective franchisees to potential unfair or deceptive practices, or at least, compel them to contract without having full knowledge of relevant facts about the franchise. While countries with developed economies including USA, Canada, Australia, France and Sweden compel franchisors to disclose certain information to prospective franchisees, set number of days before a franchise agreement is signed or certain payment is made by a franchisee,<sup>104</sup> it is mind blowing to find out that franchisees in Ethiopia, who mostly have inferior business experience, are not benefited from such common legal technique of protection.

#### **3.3.1.2. Relationship Regulation**

Again, the CRBLP and its subsidiary legislations do not contain franchise relationship regulation. Franchise parties are free to define their respective rights and obligations. However,

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<sup>103</sup> art. 1678-1730, Civil Code.

<sup>104</sup> Mark Abell, ‘The Regulation of Franchising Around the World’ in Mark Abell (ed), *The Franchise Law Review* (7<sup>th</sup> edn, Law Business Research Ltd 2020) 8.



there are two paragraphs under art. 37 of the CRBLP that provide the non-shared and exclusive obligations of a franchisee to maintain the franchisor's product and/or service quality standards. Obviously, franchisors require their franchised products and/or services to meet certain specifications and standards. In line with this, art. 37 /2/ of the CRBLP stipulates that *'the franchisee shall function on the same standard as the franchisor'*. Reinforcing art. 37 /2/, art. 37 /3/ of same law reads *'clients shall obtain the same product and service from the franchisee as they would have gotten from the franchisor'*. These provisions of the CRBLP did not consider the indispensable role of franchisors towards the achievement of quality standards. The franchisor normally sets standards for the franchised products or services quality and provides continuous support and training to the franchisee to maintain the standards. Thereby, the law would be more logical and reasonable if it pronounces franchise parties' joint responsibility towards the maintenance of franchised products or services quality standards. By contrast, in accordance with art. 18 of the TOT Regulation, in cases where a franchise agreement involves TT, the agreement shall provide with the duties of the franchise parties to observe the agreed quality standards.

It is also noteworthy that the MoTI or regional organs administering commercial activities are given the power and duty to regularly supervise franchised products and/or services quality standards.<sup>105</sup> Failure to maintain quality standards entails a penalty from ten thousand birr up to thirty thousand birr cumulative with simple imprisonment from one year to three years.<sup>106</sup> Yet, Mr. Jirata Nemera explained the fact that the MoTI still did not develop a workable scheme to ensure the quality of franchised products and/or services.<sup>107</sup>

### **3.3.1.3. Registration Requirement**

Different legal jurisdictions have various ways of registration procedures in light of, inter alia, its purpose, what and when to register, the effect of registration, as well as the respective responsibilities of the franchisor and franchisee regarding the registration requirement. It is

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<sup>105</sup> art. 4(14), *CRBLP*.

<sup>106</sup> art. 49(8), *CRBLP*.

<sup>107</sup> *ibid* (n 70).

imperative to begin the discussion from the place where franchise agreements are registered in Ethiopia's context. The CRBLP and its subsidiary legislations require franchise agreements to be registered at the central commercial register, which is established and administered by MoTI.<sup>108</sup> The regional organs administering commercial activities and the EIC may also undertake commercial registration as delegated by MoTI while they are duty bound to transfer the data to the central database.<sup>109</sup> Commercial registration of franchise agreements accord legal personality to franchise businesses.<sup>110</sup> Failure to register a franchise agreement at the commercial register would make it void. Therefore, from the very beginning, the existence of franchise agreements absolutely depends on its registration at the commercial register.

In contrast to most legal jurisdictions, the registration requirement set forth under the CRBLP and its subsidiary legislations has nothing to do with protection of prospective franchisees. Extraordinarily, the CRBLP and its subsidiary legislations require registration to be conducted after franchise agreements are signed, notarized and authenticated.<sup>111</sup> In the Ethiopian context, registration of franchise agreements is post-facto in terms of protecting prospective franchisees. Contextual reading of the CRBLP and its subsidiary legislations demonstrates that the laws aspire to achieve other goals through the registration requirement, instead of protecting prospective franchisees. Among others, these laws' registration requirement aims at proper collection of income taxes from the franchise business,<sup>112</sup> assessment of franchise agreements' impact on trade competition and consumer protection,<sup>113</sup> and ensuring compliance to the investment law of the country.<sup>114</sup>

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<sup>108</sup> art. 4(1)(2), *CRBLP*.

<sup>109</sup> art. 4(3)(4), *CRBLP*.

<sup>110</sup> art. 7(1), *CRBLP*.

<sup>111</sup> art. 48(1), *Commercial Registration and Business Licensing Council of Ministers Regulation No. 392/2016 (the Regulation)*.

<sup>112</sup> art. 25(2), *Commercial Registration, Licensing and Post-Licensing Inspection Directive No. 010/2017 (the Directive)*.

<sup>113</sup> art. 28(2)(b), 51(2), *the Directive*.

<sup>114</sup> art. 51(4), *the Directive*.

Apart from the timing of registration, there is also dissimilarity regarding the entrusted franchise party for registration. Most jurisdictions including USA and Spain require franchisors to register the proposed franchising agreement and other relevant details with the concerned organ.<sup>115</sup> Unusually, in the Ethiopian context, both the Regulation and the Directive do not explicitly and exclusively give the responsibility to register franchise agreements to franchisors or franchisees or franchise managers. Examination of art. 48(5) of the Directive implies that application for commercial registration of franchise agreements cannot be made in the absence of a designated franchise manager by the franchise parties and the attachment of the former's original and copies of valid identification card or passport. It appears that the law particularly required attachment of original and necessary photocopies of valid identification card or passport of the franchise manager as he or she is the one who presents himself or herself in front of the register office.

The other notable issue relates to the effect of registration. Registration accords 'special certificate of commercial registration of franchising' to the franchise business.<sup>116</sup> Commercial registration of a franchise agreement creates independent legal personality to the franchise business apart from the preceding legal status of the franchise parties.

As compared to the pre-contractual disclosure and relationship regulations, the CRBLP and its subsidiary legislations relatively give more emphasis to the registration requirement. Despite this fact, the most prevalent franchise related disputes arise in connection with the registration requirement. In recent years, it is becoming normal to see internationally renowned tradenames being used by domestic businesspersons without the knowledge and permission of the rightful holders of such tradenames. Noted are the local businesses using the renowned international tradenames such as 'Intercontinental Addis Hotel', 'Crown Hotel', 'the In & Out Burger', 'Burger King' and 'ZARA'.<sup>117</sup> Strikingly, the CRBLP and its subsidiary legislations provide relevant provisions capable of averting such unfair and deceptive business practices. In the first place, the rationale for the establishment of central commercial register and tradename register

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<sup>115</sup> *ibid* (n 104) 21,22,23.

<sup>116</sup> art. 48, *the Regulation*.

<sup>117</sup> Samuel Getachew, 'Burger King to join Ethiopian market' *The Reporter* (Addis Ababa, 8 February 2020) <<https://www.thereporterethiopia.com/article/burger-king-join-ethiopian-market>> accessed 30 April 2020.

with nationwide application, as well as making same to be open and accessible to the public at large<sup>118</sup> is to ensure uniform and well-organized system of registration at the country level. Obviously, fragmented commercial and tradename register would make the administration function extremely challenging, not to say impossible. By resorting to the establishment of central register or database, the law is aiming at the establishment of systematized and well-organized administration process that enables, among others, to prevent deceptive practices in relation to the illicit use of local and international renowned tradenames or brands.<sup>119</sup> Most importantly, the register office is given the power to refuse registration of a tradename ‘*where the tradename requested for registration is renowned in Ethiopia or around the world even though it is not registered in Ethiopia and no written permission issued to use the name*’.<sup>120</sup> Along the same lines, art. 57(2) of the Directive unequivocally extends legal protection to national and international renowned tradenames that are not registered at the commercial register. Accordingly, in the event when such renowned tradenames have been erroneously registered and up on verification of same fact, the businessperson who registered and is unjustly using such a tradename will be required to change the name within one month time, the failure of which entails cancellation of the commercial tradename from the register.<sup>121</sup> Against this background, it is vague why the MoTI or its delegates continue to register the tradenames of internationally renowned brands and induce unnecessary and avoidable tradename disputes. Mr. Jirata Nemera explained the fact that such flaws pertain to the individual trade registration and licensing officers who are assigned to handle commercial registration and licensing activities at the MoTI or its delegate offices.<sup>122</sup> The erroneous registration of such renowned international tradenames is dependent up on whether the assigned commercial registration and licensing officers get the chance to know it earlier.<sup>123</sup> Therefore, the MoTI shall devise viable mechanisms to standardize and modernize the detailed commercial registration and licensing processes in

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<sup>118</sup> art. 4(1)(4), *CRBLP*.

<sup>119</sup> *ibid* (n 70).

<sup>120</sup> art. 16(1)(e), *CRBLP*.

<sup>121</sup> art. 57(2), *the Directive*.

<sup>122</sup> *ibid* (n 70).

<sup>123</sup> *ibid*.

such a way to avoid or minimize the unlawful registration of such internationally renowned tradenames.

Moreover, after the coming into effect of the CRBLP and its subsidiary legislations, nothing has been done to re-register already operating franchise businesses based on the requirements of such laws. Unless such entities are commercially registered as franchise businesses, they do not acquire legal personality as franchise.<sup>124</sup> For instance, ‘*Kaldis Coffee*’ seems one of the franchise-like local business set-ups that has not been registered as franchise though there exists a great deal of information as to its franchise arrangement. The MoTI has similar information in this regard albeit absence of administrative action on it thus far.<sup>125</sup>

In a nutshell, the CRBLP and its subsidiary legislations explicitly recognize franchise agreements. The sole intention of the legislators seems to recognize franchise as one of the lawful business activities due for commercial registration and business licensing. The legislators did not heedfully regulate franchise agreements in consideration of the relevant regulatory policy frameworks of the country, its unique contractual features, as well as other countries’ best experiences.

### **3.3.2. Regulation of Franchise Agreements Under Other Relevant Laws**

As stated in the preceding section, the CRBLP and its subsidiary legislations contain some franchise registration requirements and somewhat few passing by relationship provisions. It is inconceivable to rely on such marginal provisions of the stated laws and seek for adequate regulation of franchise agreements. Even in those legal jurisdictions with comprehensive franchise-specific laws, franchise agreements cannot be entirely regulated by such single laws. Franchise relationships involve multiple areas of law, inter alia, general law of contract, antitrust law, IPRs protection laws, trade competition and consumer protection law, tax law and investment law, as well as industry-specific regulations of a given jurisdiction.<sup>126</sup> In Ethiopia’s

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<sup>124</sup> art. 7(1)(4), *CRBLP*.

<sup>125</sup> *ibid*.

<sup>126</sup> UNIDROIT Franchising Guide (2<sup>nd</sup> edn, 2007) 276-81.

context, various laws with more general scope are relevant to franchise agreements. In this section, scholarly examination will be made on how some of these different areas of law affect a franchise relationship in Ethiopia and the potential issues that can be raised thereupon.

### **3.3.2.1. Investment Law**

The Investment Proclamation No. 1180/2020 (hereinafter referred to as the ‘investment law’) is recently promulgated with the view to further increase and diversify foreign investment inflow. It envisages to accelerate inward transfer and diffusion of knowledge, skill and technology, as well as create an integrated economy by strengthening inter-sectoral and foreign-domestic investment linkages.<sup>127</sup> The Investment law defines the term ‘capital’ in a way inclusive of IPRs or any other tangible or intangible business assets.<sup>128</sup> Clear definition is also provided to the term ‘investment’ under the same law. Accordingly, investment means ‘*expenditure of capital in cash or in kind or in both by an investor to establish a new enterprise, or to acquire, in whole or in part, or to expand or upgrade an existing enterprise*’.<sup>129</sup> Such clear definitions given to the terms ‘capital’ and ‘investment’ help us to safely conclude franchise business relationship on one hand, and franchise parties on the other, to be deemed as an investment and investors, respectively, up on fulfillment of other prescribed terms and conditions under the Investment law.<sup>130</sup>

Foreign investors, including foreign franchisors, before deciding to invest in Ethiopia, have to consider and comply with particular requirements of the Investment law which are exceptionally provided to regulate their business endeavor including permissible investment areas, minimum capital requirements, attainability of investment permits and remittance of funds. In principle, all areas of investment are open to foreign investors (or foreign franchisors) unless provided otherwise by regulation or subsequent revisions of the Ethiopian Investment Board.<sup>131</sup> However, a foreign franchisor may not engage on investments which are contrary to law, moral, public

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<sup>127</sup> Preamble, para 3, art. 5(7), *Investment Proclamation No. 1180/2020 (Investment Law)*.

<sup>128</sup> art. 2(3), *Investment Law*.

<sup>129</sup> art. 2(1), *Investment Law*.

<sup>130</sup> art. 2(1)(4), *Investment Law*.

<sup>131</sup> art. 6(1)-(4), *Investment Law*.

health or security,<sup>132</sup> as well as on areas of investment exclusively reserved for joint investment with the government or for domestic investors.<sup>133</sup> The previous investment law used to explicitly list areas of investment exclusively reserved for the government and joint investment with the government. Accordingly, transmission and distribution of electricity energy, postal services apart from courier services and air transport services using aircraft with a seating capacity of more than fifty passengers had been exclusively reserved for government investment.<sup>134</sup> In addition, manufacturing of weapons and ammunitions and telecom services were also reserved for joint investment with government.<sup>135</sup> The newly promulgated investment law has the intent of widening the investment areas for foreign investors. On areas wherein foreign investment is permissible, the foreign investor is free to choose the form of the business organization in accordance with the provisions of the Commercial Code 1960 and CRBLP.<sup>136</sup>

The other most important thing that foreign franchisors need to consider before investing in Ethiopia relates to investment permit and minimum capital requirement. Once foreign franchisors can secure the required investment permits, they are required to invest a minimum capital of one hundred fifty thousand US dollars<sup>137</sup> save franchise investments relating to architectural or engineering works or related technical consultancy services, or publishing works whereby a minimum investment capital of fifty thousand US dollars is required<sup>138</sup>. Foreign franchisors are also required to register their initial capital at the EIC or the relevant regional government body within one-year time and obtain certificate of registration thereof.<sup>139</sup> Such registration and acknowledgement by the EIC or the relevant regional government body is decisive for future voluntary or involuntary repatriation of capital. The other noteworthy provision of the Investment law refers to remittance of funds. In this regard, the law allows

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<sup>132</sup> art. 6(1), *Investment Law*.

<sup>133</sup> art. 6(2), *Investment Law*.

<sup>134</sup> art. 6(1)(a)-(c), *Investment Proclamation No. 769/2012*.

<sup>135</sup> art. 6(2)(a)(b), *Investment Proclamation No. 769/2012*.

<sup>136</sup> art. 8, *Investment Law*.

<sup>137</sup> art. 9(2), *Investment Law*.

<sup>138</sup> art. 9(3)(b), *Investment Law*.

<sup>139</sup> art. 9(5), *Investment Law*.

foreign franchisors to remit their funds in a great deal of items including profits and dividends, payment on external loans, payment related to TT and collaboration agreements, proceeds from the sale, capital reduction or liquidation of an enterprise and compensation in case of expropriation.<sup>140</sup> On the other hand, a foreign franchisor who involves in a franchise agreement outside of the Investment law context is eligible to remit funds only relating to royalty and license fees,<sup>141</sup> sale of shares and liquidation payment<sup>142</sup> and external debt payments<sup>143</sup>.

A possibility is there for franchising to be considered as TT agreement under the Investment law. TOT is defined as *'the transfer of systematic knowledge for the manufacture of a product, the application or improvement of a process or for rendering service, including management and technical know-how as well as marketing technologies, but may not extend to transactions involving mere sale or lease of goods'*.<sup>144</sup> In light of the definition given to TOT, present-day BFF agreements almost always contain TT clauses that subject it to comply with additional registration requirement at the EIC apart from the MoTI.<sup>145</sup> Reading of art. 15(2) and (3) along with art. 20(1)(c) of the Investment law implies that the registration of TOT agreements (or franchise agreements containing TT clauses) at the EIC allows the franchisor to remit the particular payments relating to the TT in addition to the normal franchise royalty fees.

Last but important, Ethiopia does not have investment policy. A task force team is recently established by the EIC to study and propose investment policy for the country.<sup>146</sup> Up on its completion and implementation, it will also have a positive contribution to the regulation of those franchise agreements having an investment nature.

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<sup>140</sup> art. 20(1), *Investment Law*.

<sup>141</sup> art. 6(1.1)(x), *National Bank of Ethiopia Directive No. FXD/46/2017 (NBE Directive)*.

<sup>142</sup> art. 6(1.1)(xii), *NBE Directive*.

<sup>143</sup> art.6(2)(iv)(a), *NBE Directive*.

<sup>144</sup> art. 2(9), *Investment Law*.

<sup>145</sup> art. 15(1), *Investment Law*.

<sup>146</sup> Interview with Mr. Bogale Tumdedo, Director Investment Treaties and Legal Affairs Directorate, EIC (Addis Ababa, Ethiopia, 3 December 2020).



### 3.3.2.2. IPRs Protection Laws

Franchise agreements represent the most effective means of exploiting IPRs.<sup>147</sup> The presence of an infrastructure that enables successful protection and enforcement of IPRs plays indispensable role for the expansion of franchising. The status of a given jurisdiction's IPRs protection is extremely essential to the franchise parties as IP lies at the heart of their franchise business relationship. In most jurisdictions, the IPRs that could be licensed in a franchise agreement include trademarks, tradenames, copyright, trade secrets, industrial designs, and patents, as appropriate.<sup>148</sup>

Contrastingly, the CRBLP, while providing definition to the term 'franchise agreement', stipulates the sole association of 'tradename' with a franchise agreement.<sup>149</sup> The definition utterly excludes the independent association of other types of IPRs such as trademark, service mark, trade secret, copyright and related rights and patent in a franchise business relationship. In fact, such other IPRs can be included along with the tradename of a known product or service of a franchisor. For instance, sVIII.2, sIX.4 and sIX.5 of the franchise agreement made between DONUTS WORLD LIMITED (franchisor) and Nurhussien Yassin Omer (franchisee), imply the association of trade secret, trademark and copyright along with the franchised 'DONUTS WORLD' tradename in the commercially registered and licensed franchise agreement at the MoTI.<sup>150</sup> But, what about if a franchise agreement is concluded with the exclusive association of trade secret or copyright or any other IPRs without the involvement of tradename? In accordance with the definition given to the term 'franchise agreement' under art. 2(33) of the CRBLP, such an agreement will not fall under the ambit of a franchise agreement. Thereby, the tapered definition given to the term 'franchise agreement' contradicts with the envisaged dissemination of technological information and know-how among firms through the licensing various IPRs.

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<sup>147</sup> Allan Poulter and Robert Williams, 'Intellectual Property' in Mark Abell (ed), *The Franchise Law Review* (7<sup>th</sup> edn, Law Business Research Ltd 2020) 28.

<sup>148</sup> WIPO, 'In Good Company: Managing Intellectual Property Issues in Franchising' (2019) No.5 Intellectual Property for Business Series 10.

<sup>149</sup> 'See s2.1.1. above'.

<sup>150</sup> DONUTS WORLD Franchise Agreement made on the 19<sup>th</sup> day of April 2019 between DONUTS WORLD LIMITED and Nurhussien Yassin Omer which is registered at the MoTI under file no. 030/1/37/01.

Most importantly, Ethiopia did not ratify major international IPRs protection instruments, inter alia, the Paris Convention, the Madrid Protocol, and the TRIPS Agreement though there are ongoing efforts to ratify the aforesaid international instruments. EIPO has recently submitted its proposals to the Council of Ministers to ratify the Paris Convention and Madrid Protocol.<sup>151</sup> Inevitably, the TRIPS Agreement will also be in effect up on Ethiopia's accession to the WTO.<sup>152</sup> As explained earlier while discussing selected policy documents relevant to franchise agreements, attraction of FDI is given top priority to ensure rapid and sustainable economic and social development. Obviously, one of the critical factors to attract FDI is the provision of legal guarantee to protect and enforce such foreign investors' IPRs. Accordingly, ratifying the aforesaid international instruments will have significant impact to increase the inflow of FDI which includes, among others, foreign franchise investment. In addition, as IPRs lies at the heart of franchise agreements, its stronger protection and enforcement certainly contributes to the regulation of franchise agreements. Next, in consideration of their preponderance in most franchise agreements cumulative with the associated practical problems, the trademark law, copyright law and trade secrets law of Ethiopia will be analyzed briefly.

### ***I. Trademark Law***

One of the most valuable assets of any business, particularly franchised business, relies on the goodwill and image associated with the trademark.<sup>153</sup> Trademark protection laws provide monopoly right to use trademarks in relation to the goods and services covered by the protection.<sup>154</sup> At national level, in view of protecting the goodwill and reputation of business brands and avoid confusion between similar goods and services,<sup>155</sup> as well as in consideration of trademark's role in guiding consumers' choice and protect their interest,<sup>156</sup> Ethiopia has proclaimed the Trademark Registration and Protection Proclamation No. 501/2006 (hereinafter

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<sup>151</sup> *ibid* (n 91).

<sup>152</sup> *GTP II*, at 77.

<sup>153</sup> *ibid* (n 147).

<sup>154</sup> *ibid*.

<sup>155</sup> Preamble, para 1, *Trademark Registration and Protection Proclamation No. 501/2006 (TRPP)*.

<sup>156</sup> Preamble, para 2, *TRPP*.

referred to as the ‘TRPP’) in 2006. Under the TRPP, the protectable subject matter of trademark is provided and it is ‘*any visible sign capable of distinguishing goods or services of one person from those of other persons; it includes words, designs, letters, numerals, colours or the shape of goods or their packaging or the combinations thereof*’.<sup>157</sup> In addition, the TRPP provides absolutely inadmissible trademarks for registration,<sup>158</sup> inter alia, a trademark which consists of sound or smell, a trademark which is incapable of distinguishing the goods or services of one person from those of other persons, and a trademark that is contrary to public order or morality.<sup>159</sup> In addition, the TRPP provides numerous relative grounds for inadmissibility of trademark registration and it includes ‘*when it [the trademark] is identical with or confusingly similar to, or contains a translation of a trademark, that is well known or established by use in Ethiopia for identical or similar goods or services of another person*’<sup>160</sup>. It is thus essential for franchisors to thoroughly examine both the absolute and relative grounds of trademark registration restrictions under the TRPP before applying for registration at the EIPO.

Despite the territoriality nature of trademark rights, globalization of economic activities has resulted in global protection of well-known trademarks without the need for domestic registration and use thereof.<sup>161</sup> In Ethiopia, protection of well-known foreign trademarks is predicated up on the protection of such marks under international convention to which Ethiopia is a party and belong to persons who are the nationals or domiciliary of a state party to the convention.<sup>162</sup> In addition, such well-known foreign marks need to be well-known in the relevant sector of the public in Ethiopia. In this regard, the parameters to measure the awareness level of the public is not clearly provided under the law. In general, the TRPP does not grant automatic protection to well-known trademarks unless Ethiopia is obliged to do so through taking part in international conventions. As indicated in the preceding section, Ethiopia did not ratify major

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<sup>157</sup> art. 2(12), *TRPP*.

<sup>158</sup> art. 6(1) (a)-(k), *TRPP*.

<sup>159</sup> art. 6(1)(b)(c)(d), *TRPP*.

<sup>160</sup> art. 7(2), *TRPP*.

<sup>161</sup> Tilahun E. Kassahun, ‘Protection of Well-Known Trademarks in Ethiopia’ (2012) 1:2 *Haramaya Law Review* 97 <<file:///C:/Users/test/Downloads/98580-Article%20Text-258713-1-10-20131211.pdf>> accessed 5 December 2020.

<sup>162</sup> art. 23, *TRPP*.

international IPRs instruments that extend protection to well-known trademarks, particularly the Paris Convention and the TRIPS Agreement, which oblige it to grant protection to well-known trademarks. Such loose protection of well-known trademarks is paradox to the envisaged attraction of FDI, which includes foreign franchise investments. Adequate protection of well-known trademarks would attract more investments into the country.

Once a trademark is registered at the EIPO or other authorized regional organs, its owner has the right to use or authorize any other person to use the registered trademark.<sup>163</sup> It is then inferable that a franchise agreement containing authorization to use a trademark has an element of trademark license contract and shall comply with the requirements set forth under the TRPP. The TRPP requires the license contract to be made in writing.<sup>164</sup> The law does have further form requirement than making the license contract in writing. It is thus possible to include a trademark license contract in a franchise agreement or conclude same in a separate agreement. A franchise agreement involving license contract on a registered trademark, or its amendment or termination shall have no effect on third parties unless registered at the EIPO or other entrusted regional government organs.<sup>165</sup> Thus, to get protection under the TRPP, franchisors need to register their franchise agreements at the EIPO or other entrusted regional government organs in the events where the franchise agreements involve trademark license. As such, the TRPP provides for additional registration requirement other than that of the CRBLP's franchise registration requirement at the MoTI.

A franchise agreement containing licensing of a trademark shall also contain a provision regarding the franchisor's responsibilities, particularly his duty to regularly control and ensure the quality of the franchised goods and services.<sup>166</sup> In the absence of such a provision in the license contract, the law considers the contract as null and void. These mandatory provisions of the TRPP on trademark licensing contracts indirectly provide franchise registration and relationship regulatory rules in cases where a franchise agreement involves a trademark.

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<sup>163</sup> art. 26(1), *TRPP*.

<sup>164</sup> art. 29(1), *TRPP*.

<sup>165</sup> art. 29(2), *TRPP*, art. 44, the Regulation.

<sup>166</sup> art. 30, *TRPP*.

## ***II. Copyright Law***

Copyright law provides legal protection to exclusive rights of authors (or owners of copyrights), as well as their corresponding limitations and exceptions to safeguard the public's interest to access new information and knowledge.<sup>167</sup> In Ethiopia, consolidated copyright law was promulgated in 2004. Accordingly, an economic right<sup>168</sup> subsisting in literary, scientific, and artistic works are protected under the Copyright and Neighboring Rights Protection Proclamation No. 410/2004 (hereinafter referred to as 'the copyright law').<sup>169</sup> Where appropriate, the copyright protection also includes moral rights<sup>170</sup> of an author.<sup>171</sup> Pursuant to art. 2(30) of the copyright law, protectable works includes, inter alia, books, booklets, newsletter, computer programs, speeches, lectures, dramatic works, musical compositions, audiovisual works and photographic works. Originality and fixation requirements are also stipulated as mandatory prerequisites for protection.<sup>172</sup> As long as the protectable works are original and fixed, there is no registration requirement under the law to get copyright protection.<sup>173</sup>

In the context of franchising, one of the thorny issues under the copyright law relates to the scope of protection granted to copyrights. Pursuant to art. 3(1)(a) of the copyright law, copyright protection is given to works of authors who are nationals of Ethiopia or have their principal residence in Ethiopia. Thereby, the copyright law has territorial application. It does not give protection to foreign works except such works are protected by virtue of and in accordance with any international convention or other international agreement to which Ethiopia is a party.<sup>174</sup> As indicated while discussing the trademark law, Ethiopia did not take part in major international

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<sup>167</sup> Theodros Woudneh, 'TRIPS Compatibility of Copyright Law' (2020) 25:6 IOSR Journal Of Humanities And Social Science (IOSR-JHSS) 1 <<http://www.iosrjournals.org/iosr-jhss/papers/Vol.%2025%20Issue6/Series-4/A2506040107.pdf>> accessed 8 December 2020.

<sup>168</sup> art. 7(1) (a)-(i), *Copyright and Neighboring Rights Protection Proclamation No. 410/2004 (Copyright Law)*

<sup>169</sup> art. 2(8)(30), *Copyright Law*.

<sup>170</sup> art. 8(1) (a)-(d), *Copyright Law*.

<sup>171</sup> art. 2(8), *Copyright Law*.

<sup>172</sup> art. 6(1)(a)(b), *Copyright Law*.

<sup>173</sup> art 6(1), *Copyright Law*.

<sup>174</sup> art. 3(2), *Copyright Law*.

IPRs protection instruments. On the other hand, most foreign franchise agreements involve licensing of copyright works.<sup>175</sup> Therefore, Ethiopia's copyright law does not provide adequate, for not saying none, protection to foreign works causing unsuitable business climate for foreign franchise. It is also incompatible with the various economic development policies of the country that envisage for attraction of FDI which includes foreign franchise agreements.

### **III. Trade Secrets Law**

In accordance with s7 art. 39 of the TRIPS Agreement, confidential know-how and trade secrets are given protection so long as such information: 1) is not generally known among or readily accessible to the public; 2) has commercial value; and 3) has been subject to a reasonable care by its lawful holder to keep its secrecy.<sup>176</sup> Franchise agreements almost always involve disclosure of certain trade secrets by franchisors to franchisees that are necessary to run the franchised business successfully.<sup>177</sup> It is very important for the franchise agreement to clearly outline the details of the trade secrets that is being disclosed and the obligations of the franchisee thereof to keep the confidentiality of the trade secrets.<sup>178</sup> Trade secrets, unlike other IPRs, do not have to be registered to enjoy legal protection and as such it is arguable whether trade secrets are IP rights.<sup>179</sup>

Ethiopia does not have a consolidated trade secrets protection law. However, it is considered as a dishonest business practice under the TCCPP. Accordingly, art. 8(2)(b) of the TCCPP outlaws '*any act of disclosure, possession or use of information of another businessperson, without the consent of the rightful owner, in a manner contrary to honest commercial practice*'. What amounts to a 'honest commercial practice' is open for subjective interpretation. In consideration of such loose protection of trade secrets in Ethiopia, it is imperative for the franchise parties to complement the law by entering into a non-disclosure agreement concerning trade secrets.

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<sup>175</sup> *ibid* (n 147) 32.

<sup>176</sup> TRIPS Agreement, s7art.39(2)(a)-(c).

<sup>177</sup> *ibid* (n 147) 31.

<sup>178</sup> *ibid* 32.

<sup>179</sup> *ibid*.

Parties to a franchise agreement shall also note that trade secrets violation entails administrative, civil, and criminal liabilities in accordance with the TCCPP<sup>180</sup>, tort law<sup>181</sup> and contract law<sup>182</sup>.

### **3.3.2.3. Trade Competition Law**

In this section, the application of Ethiopia's trade competition law on franchise agreements will be briefly analyzed. In general, there are two approaches in determining the application of trade competition laws on franchise agreements under different legal jurisdictions around the world.<sup>183</sup> Some legal jurisdictions including the USA follow the view of the OECD and adopt a 'rule of reason' approach whereby the application of certain antitrust restrictions on franchise agreements will be determined case by case.<sup>184</sup> The practical impact of a franchise agreement on trade competition in particular and economic efficiency in general is determinant factor to decide whether certain antitrust restrictions apply on the franchise agreement. Others including the European Union and its members take a less flexible 'per se' approach and apply certain antitrust restrictions, such as retail price maintenance, regardless of its practical impact on competition.<sup>185</sup>

In the Ethiopian context, the Trade Competition and Consumers Protection Proclamation No. 813/2013 (hereinafter referred to as the 'TCCPP') was promulgated in 2013 with the view, among others, to protect the business community from anti-competitive and unfair business practices on one hand and protect consumers from misleading market conducts on the other.<sup>186</sup> Pursuant to art. 4(1) of the TCCPP, the competition law is applicable on any commercial activity or transaction in goods or services conducted or having effect within Ethiopia. As such, certain antitrust restrictions included under the TCCPP are applicable on franchise agreements. Besides, the Council of Ministers is given power to specify by regulation those trade activities it deems

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<sup>180</sup> art. 42,43, *Trade Competition and Consumers Protection Proclamation No. 813/2013 (TCCPP)*.

<sup>181</sup> art. 2027, *Civil Code*.

<sup>182</sup> art. 1771(2), *Civil Code*.

<sup>183</sup> Mark Abell, 'The Competition Law of the European Union' in Mark Abell (ed), *The Franchise Law Review* (7<sup>th</sup> edn, Law Business Research Ltd 2020) 128.

<sup>184</sup> *ibid*.

<sup>185</sup> *ibid*.

<sup>186</sup> Preamble, para 2, *TCCPP*.

vital in facilitating economic development to be exempted from the application of the TCCPP's antitrust restrictions.<sup>187</sup> Nonetheless, the Council of Ministers did not issue competition regulation specifically applicable to franchise agreements. It is thus helpful to see the antitrust provisions of the TCCPP against its impacts on franchise agreements.

As such, art. 5, 7 and 8 of the TCCPP prohibit certain anti-competitive trade practices including abuse of market dominance, anti-competitive agreements, concerted practices and decisions, and unfair competition, respectively. In principle, these 'ex ante' restrictions are applicable on any commercial activity including franchise agreements. However, franchise agreements, as defined under art. 2(33) of the CRBLP, may mandatorily require the use of one or more of the prohibited anti-competitive trade practices. The first anti-competitive trade practice relates to abuse of market dominance.<sup>188</sup> Accordingly, *'no businessperson is, either by himself or acting together with others, may carry on commercial activity by openly or dubiously abusing the dominant position he [she] has in the market'*.<sup>189</sup> Case in point is art. 5(2)(h) of the TCCPP which stipulates that an act of abuse of market dominance includes, among others, *'without justifiable economic reasons and in connection with the supply of goods or services, imposing such restrictions as to where or to whom or in what conditions or quantities or at what prices the goods or services shall be resold or exported'*. Such a restrictive antitrust clause poses substantial risk on the legality of franchise agreements since the latter mostly contain contract terms that affect the prices or quantities or qualities at which franchise parties offer their products or service to consumers. Even though, this 'ex ante' provision of the TCCPP risks franchise agreements, it is not absolute restrictive. The law provides for exception up on the presence of justifiable economic reasons attributable to 'maintenance of quality and safety of goods and services, leveling with prices and benefits offered by a competitor, achieving efficiency and competitiveness or other similar reasons specified by regulation'.<sup>190</sup> It is thus inferable that art. 5(2)(h) of the TCCPP adopts a 'rule of reason' approach whereby the application of the provision on franchise agreements will be determined on a case-by-case basis.

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<sup>187</sup> art. 4(2), TCCP.

<sup>188</sup> art. 5, TCCPP.

<sup>189</sup> art. 5(1), TCCPP.

<sup>190</sup> art. 5(3)(a)-(d), TCCPP.



However, it should be noted that some acts of abuse of market dominance listed under art. 5(2) (a)-(d) of the TCCPP including, inter alia, acts relating to limiting or preventing supply of goods, engaging into harmful acts which aimed at competitors like selling at a price below cost of production and imposing unfair selling or purchasing price are absolutely prohibited acts in all commercial activities without any exception.

The TCCPP provides similar restrictive provisions regarding anti-competitive agreements, concerted practices and decisions. Pursuant to art. 7(2) of the TCCPP, *‘an agreement between businesspersons in a vertical relationship shall be prohibited if it has the effect of preventing or significantly lessening competition; or if it involves the setting of minimum resale price’*. Again, art. 7(2)(a) of the TCCPP provides for exception to the prohibition on ground of *‘any technological, efficiency or other pro-competitive gain resulting from such anti-competitive practice’*. Most importantly, a party to such an agreement is expected to demonstrate public benefits outweigh than the adverse effect on trade competition. In similar manner with art. 5(2)(h), art. 7(2)(a) of the TCCPP adopts a ‘rule of reason’ approach and thus its application on franchise agreements is determined on a case-by-case basis. However, agreements involving minimum resale price maintenance do not benefit from the exemption provided under art. 7(2)(a) of the TCCPP. A franchise agreement involving minimum resale price maintenance is absolutely prohibited under the TCCPP. Thereby, a ‘per se’ approach is also adopted under the TCCPP for some of the anti-competitive trade practices.

Thirdly, the TCCPP provides absolute restrictive provisions relating to unfair competition. Accordingly, *‘no businessperson may, [irrespective of the nature the business], . . . carry out any act which is dishonest, misleading or deceptive, and harms or is likely to harm the business interest of a competitor’*<sup>191</sup> Thus, a ‘per se’ approach is adopted against unfair competition practices.

In general, a franchise agreement may evade the rigor of the antitrust prohibitive rules provided under the TCCPP benefiting from the exemptions provided under art. 5(2)(h) and art. 7(2)(a) of

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<sup>191</sup> art. 8(1), TCCPP.

the TCCPP, provided that the franchise agreement satisfies the conditions required by these two provisions. In addition, it appears that the TCCPP adopts both a ‘per se’ and a ‘rule of reason’ approaches in determining the application of its antitrust provisions on franchise agreements.

Last yet important, additional trade competition regulation specifically applicable to franchise agreements contributes to the growth of franchising, particularly foreign franchise investment.

#### **3.3.2.4. Consumer Protection Law**

There are three types of legal jurisdictions regarding the scope of application of consumer protection laws on franchise agreements: jurisdictions that do not regard franchisees as consumers, jurisdictions that apply consumer protection laws to protect franchisees and jurisdictions that consider franchisees as consumers.<sup>192</sup> In the Ethiopian context, the definition given to the term ‘consumer’ under art. 2(4) of the TCCPP gives clear answer to the issue at hands. It defines ‘consumer’ as ‘*a natural person who buys goods and services for his personal or family consumption, . . . and not for manufacturing activity or resale*’. It is thus apt to conclude that the TCCPP do not regard franchisees as consumers and the statutory protection granted to consumers may not be applied on franchisees.

The other noteworthy issue under the consumer protection rules of the TCCPP relates to the extent to which participants in a supply of defective franchised goods or services are liable towards consumers of such goods or services. Again, art. 14(5) of the TCCPP provides clear answer and it states that consumers have the right to ‘*claim compensation or related rights thereof either jointly or severally from persons who have participated in the supply of goods or services as manufacturer, importer, wholesaler, retailer or in any other way for damages he[she] has suffered because of purchase or use of the goods or services*’. Accordingly, consumers, who sustained damage because of consumption of defective franchised goods or services, without prejudice to warranties or contractual remedies more advantageous to them, retain the right to claim payment of compensation or related rights thereof either jointly or

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<sup>192</sup> Jiri Jaeger and Frederik Born, ‘Franchisees As Consumers’ in Mark Abell (ed), *The Franchise Law Review* (7<sup>th</sup> edn, Law Business Research Ltd 2020) 100.

severally from franchisees or franchisors.<sup>193</sup> Such a broader liability for defective franchised goods or services alarms franchisors to be more careful about the quality and safety of their franchised products or services, which in turn assures better protection to consumers of franchised goods or services in Ethiopia.

### 3.3.2.5. Labor Law

Determining whether a franchisee is an employee of the franchisor on one hand, and whether a franchisor is considered as a joint employer to the franchisee's employees on the other, are two of the most debatable issues in a franchise business relationship under various legal jurisdictions.<sup>194</sup> In the Ethiopian context, in accordance with art. 4(1) of the Labour Proclamation No. 1156/2019 (hereinafter referred to as the 'labor law'), *'a contract of employment is deemed formed when a natural person [emphasis added] agrees directly or indirectly to perform work for and under the authority of an employer'*. From this precept, it is inferable that employment relationship is formed in Ethiopia given the worker is a natural person. Besides, the CRBLP and its subsidiary legislations require both the franchisor and franchisee to possess valid trade registration licenses from the appropriate government organs to enter into a franchise agreement. Even though a franchisee performs work under the leadership and authority of a franchisor, the parties' rights and obligations arise from commercial agreement, not from employment agreement. Hence, franchisees cannot be regarded as employees under the labor law. On the other hand, the question whether the franchisor is a joint employer to the franchisee's employees is not directly addressed under the labor law. However, art. 2(2) paragraph 2 of the labor law indicates the independent organization of the franchisee or sub-franchisor from that of the franchisor with respect to labor issues. The full provision reads *'any branch carrying on the activities of an undertaking which is designated separately and which enjoys operational or organizational autonomy shall be deemed to be a separate undertaking'*.<sup>195</sup> As compared to branch offices of an undertaking, franchisees have their own legal personalities and are more

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<sup>193</sup> art. 14(5), 20(3), *TCCPP*.

<sup>194</sup> Raymond G. McGuire, 'The Labor Law Aspects of Franchising' (1971) 13:2:2 *Boston College Law Review* 226,230 <<file:///C:/Users/test/Desktop/Franchising/The%20Labor%20Law%20Aspects%20of%20Franchising.pdf>> accessed 2 May 2020.

<sup>195</sup> art. 2(2) para 2, *Labour Proclamation No. 1156/2019*.

independent and autonomous entities. It appears that this provision of the labor law does not consider a franchisor as joint employer of the franchisor's employees. In doing so, it excludes franchisors from potential joint employment liability.

However, franchisors' exemption from potential employment liability is paradox to their common exercise of significant control over franchisees' employees' labor standards, working conditions, working manuals, code of conduct, behavioral attributes, etc.

## **CHAPTER FOUR - CONCLUSION AND RECOMMENDATIONS**

### **4.1. Concluding Remarks**

For the first time in Ethiopia, franchise business is legally recognized and defined under the CRBLP. However, the definition given to the term ‘franchise agreement’ under art. 2(33) of the CRBLP fails to give legal recognition to those franchise agreements involving an independent association of the IPRs such as trademark, service mark, trade secret, copyright, patent, etc. It only gives legal recognition to a franchise agreement which is associated with a tradename. While IPRs lies at the heart of any franchise agreement, such a tapered scope furnished to franchise agreements under the CRBLP certainly limits the expansion of franchise business in the country.

Furthermore, absence of the two main ‘regulation-based model’ tools of regulation, i.e., pre-contractual hygiene and relationship regulations cumulative with the absence of industry-self regulation places the CRBLP far away from adequately regulating franchise agreements. Amongst the three ‘regulation-based model’ tools of regulation, the CRBLP and its subsidiary legislations contain mandatory franchise business registration requirement. However, some local businesspersons, due to the imprudence practice of both MoTI and EIPO, are registering and using renowned international business tradenames and trademarks without the knowledge and permission of the rightful holders of such properties. At worst, such renowned international businesses are facing difficulties to franchise their businesses in Ethiopia due to illegitimate use of their tradenames and trademarks by local businesspersons. In conclusion, the aim of the CRBLP and its subsidiary legislations is not to regulate franchise agreements. Instead, as indicated at the preamble of the CRBLP, it is to set a fair, modern, fast and accessible system of commercial registration and business licensing services in the country.

On the other hand, even though there are scattered provisions under various laws, inter alia, the investment law, various IPRs protection laws, TCCPP and labor law that can marginally aid the regulation of franchise agreements at times and restrain its operation, otherwise, it is inadequate, inconsiderate of the unique features of franchise business relationship and ineffective to give remedy to the practical problems on ground. To begin with, the scope of application of domestic IPRs protection laws is territorial. Though the TRPP attempted to provide protection to well-

known foreign trademarks, it is dependent up on whether such trademarks are protected under an international convention to which Ethiopia is a party. Such a requirement, coupled with other additional requirements of the TRPP, makes the protection inadequate. Ethiopia also does not have a consolidated legislation to protect trade secrets. In general, the inadequate protection of IPRs, especially foreign IPRs, contradicts with the envisaged attraction of FDI (including foreign franchise investment), as demonstrated by the various policy documents of the government.

The competition law which is incorporated under the TCCPP is the other law that significantly impacts the regulation of franchise agreements. Accordingly, art. 5(1) and 7(2) of the TCCPP contain some restrictive provisions that can restrain the free operation of franchise businesses.

Last but important, it appears that the labor law exempts franchisors from the potential joint employment liability (along with their franchisees) in paradox to their common exercise of significant control over franchisees' employees' labor standards, working conditions, working manuals, code of conduct, behavioral attributes, etc.

#### **4.2. Recommendations**

In view of the foregoing findings of the research work, the following recommendations are forwarded to ensure the adequate regulation of franchise agreements in Ethiopia:

- MoTI is recommended to ensure the enactment of a comprehensive franchise-specific law inclusive of all the three legal tools including pre-contractual disclosure requirement, relationship regulation and registration requirement to adequately regulate franchise agreements in Ethiopia. Unlike the CRBLP, the franchise-specific law is recommended to give great emphasis to pre-contractual hygiene and relationship regulations to guarantee adequate protection to prospective franchisees from the potential deceptive practices of franchisors.
- The definition given to the term 'franchise agreement' under art. 2(33) of the CRBLP utterly excludes the independent association of other types of IPRs such as trademark, service mark, trade secret, copyright and related rights, patent, etc. in a franchise.

Therefore, the MoTI is recommended to amend the CRBLP's 'franchise agreement' definition in a way inclusive of the independent association of other IPRs in addition to tradename.

- The MoTI, as explicitly mandated under the CRBLP and its subsidiary legislations, is recommended to issue implementation guideline to its trade registration and business licensing officers to enable them to easily identify some of the renowned local or international commercial brands. In doing so, it will assist the officers to avoid the registration and business licensing of renowned local or international business brands without the latter's knowledge and consent.
- The MoTI is recommended to assess the nature of the organizational set up of doubtful business partnerships, especially in the restaurant, café and hospitality industry, that have been in operation before the coming into force of the CRBLP. Up on validation of the franchise nature of such businesses, the MoTI is recommended to re-register such business partnerships as franchise business. This will have impact on, inter alia, tax, competition and consumer protection administrations.
- While each economic policy of the country craves for attraction of investment, Ethiopia does not have a national investment policy. Hence, the EIC is recommended to propose and implement a national investment policy.
- Adequate legal guarantee to the protection and enforcement of IPRs plays significant role to attract FDI, particularly foreign franchise investment. Therefore, the ongoing efforts to ratify the major international IPRs protection instruments, inter alia, the Paris Convention, the Madrid Protocol, and the TRIPS Agreement shall be pursued by the EIPO, MoTI and the Council of Ministers, as applicable.
- The scope of application of most domestic IPRs protection laws is territorial. The TRPP does not also provide adequate protection to well-known foreign trademarks. In addition, Ethiopia does not have a consolidated legislation to protect trade secrets. Such inadequate

protection of IPRs, especially foreign IPRs, contradicts with the envisaged attraction of FDI (including foreign franchise investment). Thus, the EIPO is recommended to work towards the amendment of these domestic IPRs laws (including drafting of trade secrets law) to ensure the provision of adequate IPRs protection, especially to foreign IPRs. In doing so, the EIPO also makes the laws ready for the ongoing endorsement process of major international IPRs treaties.

- The TCCPP contains some restrictive competition provisions that can restrain the free operation of franchise businesses in the market. Hence, the Council of Ministers, as entrusted under art. 4(2) of the TCCPP, is recommended to issue additional trade competition regulation which will be specifically applicable on franchise agreements.
- Since franchisors retain significant control in defining the employment relationship that exist between their franchisees and the franchisees' employees, they should be made jointly responsible (along with the franchisees) for the potential employment liabilities. Thereby, Ministry of Labor and Social Affairs is recommended to conduct further study on it and issue regulation or directive by clearly stating the potential employment liabilities of franchisors for their franchisees' employees.



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\_\_ IFA official website, <<https://www.franchise.org/faqs/basics/what-is-a-franchise>> accessed 3 February 2020

Hailu Y, ‘Legal and Institutional Framework for Transfer of Technology in Ethiopia’ (LLM Thesis, Addis Ababa University, 2015) <<http://etd.aau.edu.et/bitstream/handle/123456789/16750/final%20paper%20PDF.pdf?sequence=1&isAllowed=y>> accessed 19 February 2020

Petrovic D, ‘Regulation and the Case Law on Business Format Franchise in the United States and Europe-Lessons for Serbia’ (LLM Thesis, Central European University 2019) <[file:///C:/Users/test/Downloads/petrovic\\_danica%20\(4\).pdf](file:///C:/Users/test/Downloads/petrovic_danica%20(4).pdf)> accessed 18 January 2020

## **V. FDRE Government Policy Documents**

*The Federal Democratic Republic of Ethiopia Growth and Transformation Plan II (2015/16-2019/20)*

*The Federal Democratic Republic of Ethiopia National Intellectual Property Rights Protection Final Draft Policy (2020)*

*The Federal Democratic Republic of Ethiopia Science, Technology, and Innovation Policy (2012)*

## **VI. Agreement**

DONUTS WORLD Franchise Agreement made on the 19<sup>th</sup> day of April 2019 between *DONUTS WORLD LIMITED* and *Nurhussien Yassin Omer* which is registered under the file no. 030/1/37/01 at the Ministry of Trade and Industry.

## **VII. Interviews**

Interview with Mr. Bogale Turmedo, Director Investment Treaties and Legal Affairs Directorate, Ethiopian Investment Commission (Addis Ababa, Ethiopia, 3 December 2020)

Interview with Mr. Ermias Yemanebirhan, Director-General, EIPO (Addis Ababa, Ethiopia, 7 December 2020)

Interview with Mr. Jirata Nemera, Trade Registration and Licensing Branch Office Head, FDRE  
Ministry of Trade and Industry (Addis Ababa, Ethiopia, 3 March 2020)