

Franchising in Algeria: reality and prospects

الفرنشيز في الجزائر: واقع وآفاق

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Abstract:

Franchising is a form of cooperation between companies, which has appeared in Algeria since the 1980s. The first contracts were concluded with world-famous companies.

This very successful mode of collaboration has however, remained unrecognized for a long time, nevertheless, in recent years, the franchise has seen a major twist that suggests that it is on the rise. However, serious obstacles limit its benefits despite the fact that the consumer and the Algerian economy need this type of contract.

Keywords: franchise; contract; competition; obstacles; economical.

ملخص:

الفرنشيز نمط من أنماط التعاون بين المؤسسات، ظهر في الجزائر منذ الثمانينات، حيث أبرمت عقود الفرنشيز الأولى مع شركات مشهورة عالميا.

رغم نجاعة هذا العقد، بقي و لفترة طويلة غير متعارف عليه، إلا أنه في السنوات الأخيرة شهد قفزة هائلة، مما يدفع إلى التفكير إلى أنه يحظى أخيرا بالاهتمام الذي يستحقه، غير أن الواقع يظهر وجود معوقات جدية تحد من منافعه، رغم الحاجة الماسة لهذه العقود، بالنسبة للمستهلك و للاقتصاد الوطني.

الكلمات المفتاحية: فرنشيز، عقد، منافسة، معوقات، اقتصاد.

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Introduction:

Franchising is one of the most successful forms of cooperation in the field of network distribution, newly created companies choose to join a franchise network in order to save time and ensure the success of a new business project without having to bear the risks to which they could be exposed. By choosing this mode of collaboration with a well-known and successful franchisor, the company operates under its name and brand, thus taking advantage of its notoriety and its specificities.

The Algerian authorities began to conclude international franchise contracts in the 1980s⁽¹⁾ with the aim of obtaining quality or highly technical goods and services, in exchange, the franchisor is able to penetrate new markets, especially since domestic markets can be saturated.

At that time and until now, there was no legal framework for franchising; the contracts were concluded within the framework of the laws relating to the conditions governing commercial activities such as the commercial code.

In Europe, the franchise has experienced a real revolution thanks to the judgment of the Court of Justice of the European Communities of January 28, 1986 called "Pronuptia"⁽²⁾. In the United States of America, legal interest in franchising dates back to 1978 with the promulgation of the «*Disclosure requirements and prohibitions concerning franchising and business opportunity ventures*»⁽³⁾.

In Algeria, the Franchise has not experienced any legal development but practically, it seems to us that it is booming; more and more foreign brands are distributing goods and services in large cities that are experiencing the appearance of supermarkets. This suggests that the franchise is finally beginning its revolution, that the public authorities are finally giving it all the necessary interest for a real evolution, and that the consumer has been, well informed, about the products and services consumed.

The importance of this study lies in its objective which is to highlight the obstacles to the development of franchising in Algeria, as well as to propose solutions to make this contract an efficient and effective means for economic development.

Faced with this inventory, one wonders what is really the franchise in Algeria? Has it truly taken a new step by fully benefiting the economic sphere and consumers?

To answer this problem, we will mainly focus on the following points:

Section 1: Notion of Franchise

Section 2: The obstacles encountered within the framework of the franchise

If the franchise is booming, many consumers are unaware of the existence of this contract, which is, often, assimilated to other contracts that are close to it (**Section 1**), in addition, the Algerian economic policy advocated since the first franchise contracts until now, is still hesitant and imposes restrictions on various economic activities; this forces foreign franchisors to find solutions to overcome the obstacles imposed by law in order to enter the market, which really needs it, especially when local production remains insufficient and cannot compete with the products marketed within the framework of franchise. However, some franchisors often prefer to set up in neighbouring countries where the legislation in force does not impose any particular barriers to this type of contract (**Section 2**).

Section 1: Notion of Franchise

The franchise contract is one of the most popular modern contracts in the field of distribution economically; it is reputed to be a successful form of cooperation based on the duplication of know-how as part of a growth strategy⁽⁴⁾. From a legal point of view, it is a complex contract, which has

its own specificities (A) which distinguish it from other contracts, in particular those concluded within the framework of network distribution (B).

A- Franchise and its legal qualification

The franchise was born in the United States of America in the 1930s; it appeared in Europe at around the same time, but only experienced a real evolution during the 1970s⁽⁵⁾, since then, it has aroused the interest of the doctrine which has attempted, in the first place, to define this particular mode of collaboration (1) concluded between a franchisor and a franchisee in the form of a framework contract (2).

1- Definition of the franchise contract

Franchising can be defined as «*A system of marketing products and/or services and/or technologies, based on close and continuous collaboration between legally and financially distinct and independent companies. In this system, the franchisor grants its franchisees the right and imposes on them the obligation to operate a business in accordance with the concept of the franchisor*»⁽⁶⁾.

Thus, the franchise is a mode of collaboration, a partnership or a legal arrangement between a company (franchisor) and several small companies (franchisees) which diffuse, on a large territory, the same image of brand and reap the rewards, it is a complex marketing system⁽⁷⁾.

To join a franchise network, you must conclude a franchise contract, which is defined as: «*A contract, by which a company called "franchisor", confers on one or more other companies called "franchisees", the right to reiterate under the franchisor's sign, with the help of its rallying signs, customers and its ongoing assistance. The system experienced by the franchisor and which should, thanks to the competitive advantage it provides, reasonably allow a diligent franchisee to carry out profitable business*»⁽⁸⁾.

From this definition, we conclude that the franchise contract allows the franchisee to join a franchise network giving him the right to use an integrated set of intellectual and industrial rights such as trademarks, trade names, designs and models, patents, industrial secrets etc... in order to sell goods or services to customers in the manner followed by the franchisor.

As such, a franchise contract is only possible when the products or services that make the reputation of the franchisee have proven themselves to the consumer, which allows the franchisee to enter the market immediately and make profits.

As for the areas in which franchise contracts are concluded, they differ according to the economic activity as defined by the European Court of Justice in the "Pronuptia" judgment⁽⁹⁾; thus, franchise contracts can be concluded in the area of production, the distributor manufactures himself according to the indications and instructions of the supplier and using the latter, is brand, which he affixes to the goods produced, and then markets them.

Production franchises generally include the exploitation of an invention patent or an industrial property right. This type of contract is common in the soft drink industry such as the production of Coca-Cola and in restaurants such as Mc Donald or Pizza Hutt...

Due to the use of the franchisor's mark by the franchisee, the latter undertakes to strictly and rigorously comply with the manufacturing standards approved by the holder of the mark because any defect in the product harms the reputation of the brand and its products. Thus, the franchisor is required to control, strictly and meticulously and throughout the validity period of the contract, the activity of the franchisee.

Franchise contracts can, also, be concluded in the field of services where the franchisor allows the franchisee, according to the contract, to use his trade name and trademark in order to affix them to the services provided by the latter.

Under this contract, the franchisee is bound by all models and specifications provided by the franchisor; it is also subject to continuous control and monitoring throughout the duration of the contract concluded between the two parties.

We find this type of contract in particular, in hotel services such as “Sofitel” or “Hilton” hotels as well as in hairdressing salons such as Franck PROVOST or ADDICT Paris and others.

It is also possible to conclude franchise contracts in the field of distribution; when the franchisee undertakes to sell specific goods and services in a store bearing the brand or the distinctive signs of the franchisor, he in turn resells these goods to the customer or to the final consumer⁽¹⁰⁾.

Thus, it is not possible to envisage a franchise, in any field whatsoever, production, distribution or service, without the essential elements, namely the use of the franchisee's brand, the transmission of a know-how⁽¹¹⁾ and the continuous assistance of the franchisee in return for remuneration. For these reasons, the franchise is referred to as a reiteration contract⁽¹²⁾, when it makes it possible to reiterate the commercial success of the franchisor and to duplicate it with regard to other traders⁽¹³⁾.

2- The franchise: a framework contract

It's important to distinguish, first, the franchise itself from the franchise contract; if the franchise constitutes a marketing system based on a set of industrial property rights and know-how, the franchise contract is the agreement by which the franchisor grants the franchisee the right to operate a franchise in return for remuneration⁽¹⁴⁾.

The franchise contract is a cooperation contract that lasts over time; also, the parties establish for its execution, a framework contract to determine the rights and obligations of each of them. The Doubin law⁽¹⁵⁾ or the European regulation on franchising⁽¹⁶⁾ provide that this framework contract must include certain clauses such as the obligation of pre-contractual information in order to protect the franchisee and allow him to integrate a franchise network knowingly.

The framework franchise contract mainly includes the general clauses which appear in any synallagmatic contract such as the name of the consenting parties, the object and the cause of the contract, the place and the duration, then the clauses specific to the franchise such as the name of the brand, the exclusivity clause and the obligations of each party if the franchisee has the obligation to respect the standards of the franchisor, the obligation of confidentiality, the payment of entry fees to the franchise network and royalties, compliance with the non-competition clause during the term of the contract...

For his part, the franchisor has, mainly, the obligations to make available to the franchisee, his brand or his sign, to transfer to it imperatively, his know-how and to provide him with continuous technical assistance⁽¹⁷⁾.

The franchisor has the freedom to choose the franchisees who will integrate the franchise networks; the judgment of the European court Pronuptia grants the franchisor the right to choose, in complete freedom, the franchisees in order to preserve the reputation of the network; however, this freedom is relative and must meet certain requirements.

Thus, franchisees are selected according to objective and non-discriminatory criteria in order to respect the rules of free competition; otherwise, any company improperly excluded from the franchise network can refer to the Competition Council for restrictive practices of competition.

Under Algerian law, the franchise contract is subject to ordinance n° 03-03 on competition, as amended and supplemented, which provides, in its article 02, that this ordinance applies to the production, distribution, services and import⁽¹⁸⁾ and in general, to any economic activity; as such, any franchisor who refuses, in a discriminatory and unjustified manner, the integration of an economic operator into the franchise network, risks being sanctioned by the Competition Council⁽¹⁹⁾

for practices restricting competition namely, abuse of dominance or agreement restricting competition.

The freedom of trade and industry confers freedom of enterprise and contractual freedom to the franchisor but, within the limits of respect for economic public order, which has led to the formation of distribution contracts such as franchising and according to framework contracts that guarantee the protection of the weaker party in the contract.

Even if this mission did not work, the fact remains that competition law may also have the objective of ensuring the balance of contracts concluded between professionals.

B- Distinguish the franchise of certain contracts

The franchise contract is a very widespread contract in the various economic fields, this mode of collaboration has proven itself and it is for this reason that it is very popular with new investors, nevertheless, it is often confused with the commercial concession with which it shares several characteristics (1). In Algeria, the confusion is different because it is often wrongly qualified as a simple import contract (2).

1- Franchise and commercial concession

There is often confusion between the franchise, previously defined, and the commercial concession which is: «*The commercial contract by which an independent trader called "The dealer", obtains, from another trader, manufacturer or wholesaler called " The licensor", of the goods which he undertakes to market under the brand of the licensor, which confers on him exclusivity for a time and in a delimited geographical area*»⁽²⁰⁾.

It is also defined as: «*The contract by which a trader called "the dealer", puts his distribution company at the service of a trader or industrialist called "The licensor" to ensure, exclusively, on a determined territory and for a limited period and under the supervision of the licensor, the distribution of the products for which the resale monopoly is granted to him*»⁽²¹⁾.

By these definitions, we note, first, that the commercial concession is based on the principle of exclusivity granted to the licensor to market the products of the dealer; thus, one cannot envisage a commercial concession without this essential exclusivist clause. Nevertheless, it should be noted that this exclusivity is relative when it is limited, not only geographically but also in time⁽²²⁾, moreover, it is clear that the licensor markets the goods under the name of the licensee.

The terms of the dealership and more particularly the use of the dealership's sign or brand can lead to confusion and make people believe, wrongly, that it is a franchise. Nevertheless, the sole purpose of the concession is the marketing or resale of the licensor's products and does not necessarily provide for a trademark license; if the concession implies a territorial exclusivity determined in time, this clause can be inserted in the franchise contract but it is not essential.

If the very essence of franchising is the transfer of know-how and support for the franchisee by providing him with technical assistance enabling him to effectively reiterate the franchisor's concept, the licensor may provide for a knowledge license-make and technical assistance, obligations which are ancillary.

The franchisee and the licensor both have the obligation to pay the entry fees into the network, but also the royalties which are essential in any franchise contract (as they represent the cost of transferring know-how and assistance continuous technique) are not included in the commercial concession.

The commercial concession and the franchise are contracts that automatically place the franchisee and the licensor in a situation of economic dependence; in this respect, French legislation, namely the Doubin law, has imposed a pre-contractual obligation of information to protect the weaker party in the contract.

Unfortunately, Algerian legislation does not provide for this protection, ordinance n° 03-03 relating to competition, as amended and supplemented, prohibits any abuse of economic dependence by the party in a position of power in a contract, whether it is the supplier or the distributor.

Despite these similarities, the franchise and the commercial concession are two distinct contracts, admittedly both concluded within the framework of network distribution, but in no case provide the same advantages.

2- The franchise and the import contract

The franchise in Algeria in general and the distribution franchise in particular is often confused with an import contract, by "import", we mean all purchases of goods outside a country, whether goods intended for consumption (consumer goods) or goods intended for investment (capital goods) ⁽²³⁾.

The distribution franchise may give the impression that it is a simple import contract, since the products are marketed in the same state in which they were imported, so it is a purchase operation outside the national territory to resell locally; in addition, there may be confusion with a classic distribution contract for imported products.

The distribution franchise is, of course, an intermediation contract, but much more complex since it is a system by which «*A company which has established itself in a market as a distributor and which has, thus, been able to develop a set commercial methods, agreement for remuneration, to independent merchants, the possibility of establishing themselves in other markets, using its brand and the commercial methods that have made it successful. Rather than a mode of distribution, it is a way of exploiting financially, without committing equity, a body of knowledge. This system also gives merchants lacking the necessary experience access to methods that they could only have acquired after long research efforts and allows them to benefit from the reputation of the sign*»⁽²⁴⁾.

By this definition, it seems clear that the fundamental difference between the franchise of distribution and the importation resides in the fact that the distributor within the framework of the contract of importation of the goods, carries out the process of purchase with an aim of taking again only without having the obligation, to integrate a franchise network. Consequently, concluding a framework contract with a franchisor who is not content to supply goods and services to the franchisee in order to resell them to consumers but also undertakes to provide him with a skill allowing him to benefit from his experience, knowledge and brand awareness ⁽²⁵⁾.

When an individual wants to invest by creating his own business but taking moderate business risks, it is better for him to join a well-known and successful franchise network; this will allow him to save a lot of time and ensure almost immediate success because creating his own brand is not an easy task in a market where competition is fierce and, in any case, a new project requires considerable time and effort to make themselves known to consumers; the franchisor thus protects himself from several risks by integrating a franchise network.

If the franchise comes up against several obstacles, the import activity is not spared; the legislation imposes the system of licenses, very high taxes as well as banking procedures established since the constitution of 1996. However, according to the Minister of Commerce ⁽²⁶⁾, these obstacles ⁽²⁷⁾ aim to clean up foreign trade and above all to protect national production, especially in times of economic crisis that the world is experiencing.

In reality, even the founding countries of the market economy opt for protectionism and take care to protect national production in times of crisis, but on condition that it is sufficient and that it also meets the needs of consumers.

Internally, a franchise network can be established so that the franchisor and all the franchisees are from the same country but, with franchise networks that extend to different parts of the world.

Franchising in Algeria is mostly international, nevertheless, some national companies have successfully opted for this process, such as DARKOM, TECHNO and BKL aluminium; it is hoped that other companies will take the plunge and thus create momentum within the national market.

Although franchising has existed in Algeria since the 1980s, it was not until the 2000s that some consumers became acquainted with franchising, since the installation of major clothing and restaurant brands in large shopping centres such as Bab Ezzouar, City Centre in Algiers and Park Mall in Setif, among these brands, Adidas, Celio, Sergent Major, Orchestra, Zara Mango, Nike...nevertheless, most consumers are unaware that these brands are installed as part of a franchise.

Section 2: The obstacles encountered within the framework of the franchise

The Algerian economic policy in terms of franchising is contradictory, if on the one hand, the constitution enshrines freedom of trade and industry and therefore freedom of enterprise, free competition, encouragement of foreign investment and the like, on the other hand, franchisors foreigners encounter difficulties and obstacles to settle in Algeria and fully and effectively exploit the notoriety of their brands as well as their know-how.

These obstacles can be summed up mainly in the absence of a legal framework for franchising (A) or, conversely, obstacles linked to the presence of certain legal texts which are not in favour of franchising, an obstacle considered by many foreign investors much more restrictive (B).

A- Lack of legal Framework

Franchise contracts have been concluded in Algeria for more than thirty years, so the absence of a specific legal framework can in no way mean the absence of legal provisions allowing these contracts to be concluded (1). Nevertheless, these texts are insufficient and do not allow the development of the franchise in a country that really needs it (2).

1- Submission of franchise contracts to the general rules

The Algerian legislator has not regulated distribution contracts in general and franchising in particular, also, distribution contracts are innominate contracts; to conclude them, it is necessary to refer in the first place to the common law of contracts and to other legal texts that include specific provisions.

The Commercial Code ⁽²⁸⁾, which is considered common law in commercial matters, covers all economic activities, including distribution, franchising cannot be done without a brand license.

In this regard, reference should be made to ordinance n° 03-06 relating to the trademark, franchising may relate to layout designs ⁽²⁹⁾, or to invention patents⁽³⁰⁾, fortunately, Algerian legislation does not lack laws governing intellectual property, which constitutes an important part of franchise contracts.

The law on consumer protection⁽³¹⁾ is also important insofar as it requires that the goods and services, subject of the franchise, meet the necessary standards, guarantee the safety and health of the consumer; competition law is not outdone when its scope is vast, it applies to all economic activities, namely production, distribution, services and imports.

All these rules of law contribute directly to providing national or international franchisors and franchisees with the essential raw material for the development and execution of franchise contracts.

The Algerian authorities are well aware of the importance of these contracts and their benefits for the economy, for these reasons, the Minister of Commerce has appointed a specialized

commission to draw up a legislative text to regulate the franchise contract; this legal text was to be promulgated in 2008 but, in 2023, it is still awaited⁽³²⁾.

In January 2016, the Algerian Chamber of Commerce and Industry, in cooperation with the commercial law promotion program of the Department of Commerce of the United States of America and, in the presence of employers, Algerian and European financial experts, held a special forum to promote commercial franchising in Algeria, it was pointed out during this forum that one of the biggest obstacles facing the foreign investor in the field of franchising is the absence of a system and a regulatory framework for these contracts and that it has become necessary to remedy this.

If provisions specific to the franchise are so important, it is because they allow each party to the contract to know precisely their rights and obligations and to protect the weaker party. In Tunisia, for example, franchising is experiencing real expansion in the various economic fields, whether production, distribution or services; also, the law relating to the franchise has been promulgated since 2009⁽³³⁾, which gave franchisors confidence.

In reality, the absence of specific franchise provisions do not in themselves constitute a sufficient obstacle to keep foreign investors away from the Algerian economic sphere, just look at the number of franchises installed in recent years. Several brands and brands have sprung up in shopping centres or in certain upscale neighbourhoods such as SidiYahia, however, this remains insufficient, especially in comparison with neighbouring countries.

While the absence of specific franchise provisions has not deterred some brands from setting up in Algeria, others are not taking the plunge, but, what is more regrettable is that the majority of franchises in Algeria are distribution franchises.

Admittedly, these contracts are not devoid of interest, however, production or industrial franchises would have been more beneficial for the Algerian economy because production needs to be boosted. These contracts would have allowed the training of a skilled workforce and also the transfer of know-how and technology.

2- Insufficiency of the texts in force

The absence of a legal framework is an obstacle for franchising in the sense that franchisors must draw on several legal texts to draw up a contract, these texts are scattered but still exist except that they are unstable since Algeria has not yet finished redeveloping the various legal texts so that they comply with its new economic policy; worse still certain clauses necessary for the franchise have not yet aroused the interest of the legislator.

The absence of a legal framework in itself can be overcome provided that there are sufficient provisions in the various legal texts that govern the various aspects of franchising, even if this is not yet the case in Algeria where legal loopholes remain and constitute a major obstacle.

Among the provisions necessary for franchising, for which there is no prescription in Algerian law, is the obligation of pre-contractual information. Certain legislations such as French law, before concluding a franchise contract, it is the responsibility of the franchisor to inform the candidate for the franchise with precision and in good faith, of the importance of the brand, intellectual property, know-how and the distribution and marketing policy and, in general, the future franchisee must be provided with all information relating to the franchise network⁽³⁴⁾.

This obligation to inform is essential to protect the interests of the weakest party, namely the franchisee, because the franchise will automatically put him in a situation of economic dependence, hence the need to inform him precisely so that he can join the network, distribution knowingly.

Throughout the duration of the contract, the franchisor has the obligation to transmit know-how and technical assistance, otherwise it will be held liable. Algerian legislation has not yet addressed this issue and does not provide real protection to franchisees.

For his part, the franchisee undertakes not to disclose the knowledge acquired throughout the duration of the contract and also the payment of the costs of integration into the franchise network and royalties. These clauses constitute the very essence of the franchise. Nevertheless, the franchisee finds legal obstacles for the payment of his rights in currency.

Faced with this legal void, what will happen in Algeria in the event of non-compliance with these obligations? How to compel franchisors and franchisees to respect them in the absence of mandatory legal rules binding them? Are the contractual clauses concluded within the framework of freedom of contract sufficient to protect the weaker party in the contract?

These legal loopholes weaken franchise contracts and endanger the contractors, for these reasons, in member countries of the European Union, franchise contracts must comply with the requirements of the European Commission's regulations on vertical restraints and its guidelines ⁽³⁵⁾ and many other rules such as the European Franchise Code of Ethics ⁽³⁶⁾ which ensure that a balance is maintained in the contractual relations between franchisors and franchisees.

B- Legislative constraints

If franchisors and franchisees have been able to overcome the obstacle relating to the absence of a legal framework, another obstacle considered even more serious, puts the brakes on the expansion of the franchise. It mainly concerns the law governing the transfer of capital **(1)** but also the law relating to competition **(2)**.

1- Constraints linked to the transfer of capital

A franchise is a bilateral contract that confers rights and imposes obligations on both parties, the foreign franchisor who sets up in Algeria to conquer new markets, undertakes to provide products ready to be marketed when it comes to a distribution franchise. It provides certain raw materials when it comes to a production franchise but, in all contracts, it grants a brand license, transmits know-how, sales techniques and trains a workforce.... In return for these services, the franchisee must pay the entry fees into the franchise network and also the fees or royalties, that is to say, the deadlines agreed under the contract.

The major obstacle faced by the foreign franchisor in Algeria is mainly linked to the transfer of capital corresponding to entry fees as well as royalties when Bank of Algeria Regulation n° 07-01 of January 9, 2007 relating to the rules applicable to current transactions with foreign countries and to currency accounts ⁽³⁷⁾, does not include these funds among current international transactions.

The purpose of Bank of Algeria regulation n° 07-01 is to define the principle of convertibility of the national currency for current international transactions and the rules applicable to transfers from and to abroad related to these transactions as well as the rights and obligations of foreign trade operators and authorized intermediaries in this area.

It authorizes, by its article 4, the payment and the transfer of the capital towards the foreigner only when it is a question of the payments and transfers carried out under the operations of the foreign trade on the goods, the services in particular the technical assistance and current transactions linked to production as well as payments made in respect of interest on loans and net income from other investments and, lastly, repayments of loans.

Pursuant to this regulation, the Bank of Algeria does not recognize a franchise fee, especially since it includes several elements: remuneration for the right to use a brand, the costs relating to the provision of training, the cost of transferring the know-how and also the counterpart of the continuous assistance.

Faced with this situation, the franchisor and the franchisees are forced to find solutions to remedy it and allow each party to honour its commitments, thus, the following solutions were adopted:

- Include royalties in the purchase price of raw materials, which leads to an increase in the price of products placed on the national market. However, this solution can only be adopted for brands that distribute raw materials, which explains why the largest number of franchise contracts concluded in Algeria relate to distribution franchise.
- Technical assistance can be invoiced by integrating part of the royalties, since the regulations of the Bank of Algeria allow transfers related to technical assistance, in this way the royalties can be transferred abroad.
- Concerning the franchising of services, the contractors divide the contract into two parts; the first part concerns the invoicing of the services that are specified in the contract. As for the second part of the contract, it concerns technical assistance related to the performance of contract ⁽³⁸⁾.
- All these measures constitute a brake on the franchise and are binding for the foreign investor who is obliged to continually seek legal solutions for the execution of the contract. Many investors are not ready to make these additional efforts and prefer to establish themselves elsewhere where the legislation in force is more favourable to the establishment of foreign companies.

2- The exclusivity clause and competition law

Exclusivity is a key clause in commercial concessions, it is very important in the franchise, by exclusivity clause; we mean the right of the franchisee to be the sole economic operator to operate the supplier's brand in a specific territory.

This clause is essential, because it protects the franchisee from competition but it also responds to the need to protect know-how and to the imperative control and preservation of the reputation of the network. If a franchisee sets up freely without taking territorial exclusivity into consideration, the stability of the entire distribution network could be compromised ⁽³⁹⁾.

Under the terms of Article 10 of ordinance n° 03-03 on competition, as amended and supplemented, *«Is considered a practice having the effect of preventing, restricting or distorting free competition and prohibits any act and/or contract, whatever their nature and their object, conferring on a company exclusivity in the exercise of an activity which falls within the scope of this ordinance »*.

This very general provision applies both to production and distribution operations and to the provision of services. This condition is in contradiction with the fundamental principles of franchising and also those relating to the commercial concession, where the exclusivity clause is justified and necessary for the effective operation of the franchisor's brand, provided that certain requirements are met.

According to the words of the Minister of Commerce, the reasons why Article 10 of Algerian law totally prohibits exclusivity are in particular the following:

- Avoid the constitution of monopolistic positions that would be abused by economic operators;
- Provide the opportunity for companies that hold economic power in the market to strengthen and abuse it;
- The notion of exclusivity is not yet a necessary concept in relation to the configuration of the Algerian market in the sense that companies do not resort to modern marketing techniques, namely, marketing strategies and the organization of distribution circuits on the basis of professional criteria;
- The concept of exclusivity as conceived in countries with developed market economies refers to the idea of added value brought to the strategy of operators because exclusivity

implies the possession of know-how generally deriving from property of intellectual or industrial rights that also justify this exclusivity;

- Exclusivity must be acquired through the competence and competitiveness of the company and is not an acquired right conferred by opaque uses;
- Until companies are in a position to apply modern techniques for organizing their distribution circuit and to master contract law, it is preferable to let competition be the only rule that will decide between competitors ⁽⁴⁰⁾.

The reasons listed by the Minister would be entirely justified in the event of absolute exclusivity, which would certainly lead to the foreclosure of the market; however, the exclusivity necessary for a franchise contract is relative exclusivity, that is to say, exclusivity determined not only in duration, but also in a given geographical area.

Exclusivity must never be absolute, whatever the nature or field of the franchise contract and whatever its size, so as not to restrict competition in the relevant market or prevent other companies from accessing the market and fully benefit from the advantages of free and healthy competition. This exclusivity must be, territorially, relative and its duration, in accordance with the practices of the sector of activity concerned.

In the United States of America, a distinction is made between perfect or closed exclusivity contract and so-called imperfect or open exclusivity; in the first case, the exclusivity clause is absolute and will necessarily lead to the foreclosure of the market.

As for so-called open exclusivity, the economic operator does not have a real territorial monopoly and this is what is called "a territory with main profitability" which gives an advantage to an operator compared to other competitors but without putting up barriers to free competition, this advantage is justified by the links that unite the contracting parties.

Article 10 of ordinance n° 03-03 on competition prohibits exclusivity in all its forms, whether closed or open, something that is not allowed whatever the circumstances; for that, article 10 does not have to be because it is in total contradiction with the key principles of the franchise known and applied worldwide or at least modify it so that it is in conformity with the needs of the franchise

Conclusion:

Franchising is an opportunity for the Algerian economy and allows the creation of small and medium-sized enterprises, the diversification of the market structure, the creation of jobs, the transfer of technology, the development of technical knowledge, the formation of a skilled labour and also allows consumers to acquire quality products and services and protects them from counterfeiting.

The franchise has experienced a small expansion in recent years but this remains insufficient compared to its expansion, not only throughout the world but also compared to its evolution among our Maghreb neighbours where it remains very limited as long as it rarely exceeds, the borders of large shopping centres and some upscale neighbourhoods.

To promote franchising, it's necessary that we make the following proposals:

- Despite the advantages conferred by franchise contract, the public authorities must promulgate a specific legal text as the commercial code and the rules of intellectual property remain insufficient and can in no way fill the existing gaps, so it's necessary to have a specific and adequate framework that provides for all the clauses essential for the franchise.
- The major obstacle faced by the foreign franchisor in Algeria is the transfer of capital (entry fees and royalties), so it's essential to modify Bank of Algeria Regulation n° 07-01 relating to the rules applicable to current transactions with foreign countries and to currency accounts, and include these funds among current international transactions.

- Franchise contracts in Algeria are mainly concluded within the framework of distribution; even if these contracts were beneficial for the Algerian economy and for the consumer, it would have been preferable to encourage the franchise of production that would have enabled us to manufacture, ourselves, our products and to boost the Algerian industry that greatly needed.

The franchise should generate more interest from decision makers. It can be one of the remedies, not the only one, for small and medium-sized companies that are unable to make their way in the market.

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- 1 - As part of the distribution franchise, the franchisor Sofitel set up in Algeria in 1988, the hotel opened its doors in 1992, operated under a management contract, see: IDJER Yacine, «*Sofitel Algérie: repositionnement du label* », article published in Info Soir of March 25, 2008, <https://www.infosoir.com/>, consulted on 29/11/2022. As part of the production franchise, Coca Cola has been produced in Algeria by the franchise company Fruital since 1990, see MARCHE Emilie, "*Fruitall ou le Coca Cola made in Algeria*", article published in Liberté of June 21, 2009, <https://www.liberte-algerie.com/imp.php?id=116881>, consulted on 23/10/2022. As for the distribution franchise, the franchisor YVES ROCHER is one of the first franchisors to set up in Algeria.
 - 2 - The judgment of the Court of Justice of the European Communities of January 28, 1986, known as "Pronuptia" distinguished between three types of franchise contracts: production franchise, service franchise and distribution franchise, <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:61984CJ0161&from=GA>, consulted on 11/4/2021, see comment on the judgment of : GAST Olivier, « *L'affaire Pronuptia ou le monde de la franchise soulagé* », *les petites affiches*, n° 52, 1986, pp 20-24, STANLEY A. CROSSICK Belmont, «*The Pronuptia case and its effect on EEC franchising law*», <https://heinonline.org/HOL/LandingPage?handle=hein.journals/ib113&div=67&id=&page=>, consulted on 11/4/2021.
 - 3 - « *Disclosure requirements and prohibitions concerning franchising and business opportunity ventures*», <https://www.federalregister.gov/documents/2003/03/31/03-7610/disclosure-requirements-and-prohibitions-concerning-franchising-and-business-opportunity-vent>, consulted on 2022-11-20, see : GAST Olivier, «*Aperçu général de la loi américaine sur le franchising*», *revue trimestrielle de droit commercial et de droit économique*, n° 35, 1982, pp. 225 - 239, MRABET Zoubair, «*Les comportements opportunistes du franchiseur : étude du droit civil et du droit international uniforme* », <http://heinonline.org>, consulted on 26/9/2022.
 - 4 - NEGRE Claude, « *Evaluer un système de franchise* », *revue française de gestion*, n°181, 2008/01, pp. 41-62.
 - 5 - BOULAY Jacques, CHANUT Odile, *Les réseaux de franchise*, éditions la découverte, Paris, 2010, pp. 7-32.
 - 6 - Previously mentioned, p 10.
 - 7 - BRAS Générosa-Miranda, « *Le contenu obligationnel du contrat de franchise internationale en droit québécois* », *revue Thémis*, n° 32, 1998, pp.818-926.
 - 8 - LELOUP Jean-Marie, *La Franchise Droit et Pratique*, 4ème édition, Delmas, Paris, 2004, p.10.
 - 9 - The judgment of the Court of Justice of the European Communities of January 28, 1986 known as "Pronuptia", p.m, see : BESSIS Philippe et PLASSERAUD Yves, « *L'arrêt de la cour de justice des communautés européennes dans l'affaire Pronuptia* », *revue droit et pratique du commerce international*, n°3, 1986, pp.461-470.
 - 10 - SIMON François-Luc, *Théorie et pratique du droit de la franchise*, Joly éditions, Paris, 2009, pp. 66-76, SIMON François-Luc, « *Droit de la franchise* », *les petites affiches*, n° spécial, 15 novembre 2007, pp. 15-26, see p.19.

- 11 - «*Know-how is a set of non-patented practical information, resulting from the experience of the franchisor and tested by it. It is secret, substantial and identified*», European Franchise Code of Ethics, <http://www.franchise-ribambelle.fr>, consulted on 11/30/2022. On the importance of know-how, see: CAHEN Murielle, «*Le contrat de franchise, le savoir-faire et les clauses de nullité*», <http://www.legavox.fr>, consulted on 7/11/2022.
- 12 - GRAC Stéphane, Les relations juridiques entre franchiseur et franchisé : coopération et conflit, doctoral thesis in law, University of Nice Sophia Antipolis, 1998, pp 62-65.
- 13 - See: FERRIER Didier, Droit de la distribution, 5ème édition, Litec, Paris, 2008, p.76 ; MENDOZA-CAMINADE Alexandra, Droit de la distribution, Montchretien, Lextenso édition, 2011, Paris, p. 142.
- 14 - See: BLAISE Jean-Bernard, Droit des affaires : commerçants, concurrence, distribution, 5ème édition, LGDJ, Lextenso édition, Paris, 2009, p.620.
- 15 - Article 1 of Law n° 89-1008 of December 31, 1989 on the development of commercial and craft businesses and the improvement of their economic, legal and social environment, known as the “Doubin Law”, article 1 was repealed by ordinance 2000-912, art 4, see also its implementing decree of April 4, 1991 inserted in article R330-1 of the commercial code that establishes the obligation for the franchisor to submit a pre-contractual information document (DIP) to the franchise candidate at least 20 days before signing the franchise contract, <http://legifrance.gouv.fr/>, consulted on 30/12/2022.
- 16 - Commission Regulation EEC 4087-88 of 30 November 1988 concerning the application of Article 85 paragraph 3 of the treaty to categories of franchise agreements, Official Journal No. L359 of 28/12/1988, <https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:31988R4087&from=DE>, accessed 30.12.2022.
- 17 - BESSIS Philippe, Le contrat de franchisage, L.G.D.J, Paris, 1990, pp.36- 37, MATEJUN Marek, «*Franchising as a concept of entrepreneurship development in the SME sector*», file:///C:/Users/MMC/Downloads/2013_Grzalak_Matejun_Franchising_as_a_Concept_of_Entrepreneurship_Development_in_the_SME_Sector.pdf
- 18 - Ordinance n° 03-03 of 19 July 2003 relating to competition, JORA n° 43 of 20/7/2003 amended and supplemented by law n° 08-12 of 25 June 2008 JORA n°36 of 2 July 2008, amended and supplemented by law n° 10-05 of August 15, 2010, JORA n° 46 of August 18, 2010.
- 19- The Competition Council is an independent administrative authority that monitors compliance with competition rules.
- 20 - COLLART DUTILLEUL François et DELEBECQUE Philippe, Contrats civils et commerciaux, 9^{ème} édition, Dalloz, Paris 2011, p.832.
- 21 - See: CHAMPAUD Claude, «*La concession commerciale*», *RTD.Com*, n° 24, 1963, pp.451-470, SAMSON Claude, «*Le contrat de concession commerciale et le libre marché*», *les cahiers de droit*, volume 21, n° 3-4, 1980, pp. 787-823.
- 22 - RIEBEN Laurent, La validité des contrats de distribution sélective et exclusive en droit communautaire, américain et suisse de la concurrence, doctoral thesis in law, University of LAUSANNE, faculty of law, 2000, p.24.
- 23 - The dictionary of international trade, <https://www.glossaire-international.com/pages/tous-les-termes/importation.html>, consulted on 30/12/2022.
- 24 - The judgment of the Court of Justice of the European Communities of January 28, 1986, known as “Pronuptia”, p.m.
- 25 - ARCELIN-LECUYER Linda, Fiches de droit de la distribution, ellipses, Paris, 2012, pp. 111-114.
- 26 - See: HEDIR-CARE Mouloud, «*Algérie-UE: surmonter les blocages*», <https://care.dz/fr/espace-presse/algérie-ue-surmonter-les-blocages-art596>, consulted on November 20, 2022.

- 27 - See: ordinance n° 03-04 of July 19, 2003 relating to the general rules applicable to goods import and export operations, JORA n° 43 of July 20, 2003, amended and supplemented by law n° 15-15 of July 15, 2015; see also implementing decree n° 15-306 of December 6, 2015, setting the terms and conditions of application of import or export licensing regimes for products and goods, JORA n° 66 of December 09, 2015.
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- 29 - See ordinance n° 03-08 of July 19, 2003 relating to the protection of layout designs of integrated circuits, JORA n° 44 of July 23, 2003.
- 30 - See ordinance n° 03-06 of July 19, 2003, relating to trademarks, p.m, as well as ordinance n° 03-07 of July 19, 2003 relating to patents, JORA n° 44 of July 23, 2003.
- 31 - Law n° 09-03 of February 25, 2009 relating to consumer protection and the repression of fraud, JORA n° 15 of March 8, 2009, amended and supplemented.
- 32 - See: « *La franchise en Algérie, Etat des lieux* », PME magazine, <http://www.mincommerce.gov.dz/>, consulted on 12/10/202, ADIMI Kaouther, « *Implantation franchise : l'Algérie, un marché à construire* », <http://business.lesechos.fr/>, consulted on 12/10/2021.
- 33 - Law n° 2009-69 of August 12, 2009 relating to distribution trade, articles 14 to 17 are the basis of the law in force for franchising, decree n° 1501-2010 of June 21, 2010 sets the minimum clauses requirements of franchise contracts as well as the minimum data of the pre-contractual information document, see RESPAUD Jean-Louis, MELLOULI.C, « *Le droit tunisien de la distribution, à travers la loi n° 2009-69 du 12 août 2009 relative au commerce de distribution* », https://www.researchgate.net/publication/336676039_Le_droit_tunisien_de_la_distribution_a_travers_la_loi_n_2009-69_du_12_aout_2009_relative_au_commerce_de_distribution, consulted on 22/11/2022.
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- 38 - See: Algérie Presse Service, « *Franchise en Algérie: un groupe de réflexion mis en place pour réglementer l'activité* », <http://www.aps.dz/economie/>, consulted on December 20, 2017, OURAMDANE Mhenni, SAMPER Jean, « *La franchise en Algérie, état des lieux!* », consulté le 03/01/2023, <https://dz.ac-franchise.com/>, D. Akila, « *La franchise en Algérie : une réglementation s'impose* », newspaper El Moudjahid of 26 January 2018, <https://www.elmoudjahid.dz/>, consulted on 18/5/2023; « *Les contraintes de la franchise en Algérie* », <https://www.algerie-eco.com/2017/04/16/contraintes-de-franchise-algerie/>, consulted on 3/1/2023.
- 39 - See: ZOUAIMIA Rachid, *Le droit de la concurrence*, éditions Belkeise, Alger, 2012.
- 40 - Ministry of Commerce, <https://www.commerce.gov.dz/fr/l-exclusivite>