

## TERRITORIAL EXCLUSIVITY CLAUSE IN FRANCHISE AGREEMENT



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*Submission date: 03/12/2023 Acceptance date: 08/03/2024 Publication date: 30/06/2024*



**Abstract:** Territorial Exclusivity Clause is one of the conditions that have been included in Franchise Agreements. This clause is important for the success of the franchise activity because the Franchisee is the exclusive representative of the brand in a specific area; it enables him to guarantee the customers of the exploited - usually well known- brand, and therefore, parts him from competition, which results in achieving a high turnover.

However, the Algerian Competition Law prohibits all explicit or implicit practices and agreements that aim to impede, limit, or violate the freedom of competition in the market or part of it. Exclusive practices are among the practices prohibited by Article 10 of Order 03-03, amended and supplemented. On the other hand, the legislator points out some exceptions for some agreements that can be approved by the Competition Council despite the violation of the provisions of the free competition's rules given their benefits to the public interest.

**Key Words:** Franchise Agreement; Exclusivity Clause; Exclusive Practices; Free Competition; Trademark.

### شرط الاستثناء الإقليمي في عقد الفرانشيز

**ملخص:** يعد شرط الاستثناء الإقليمي من الشروط التي جرى العمل على إدراجها في عقود الفرانشيز، ويعتبر هذا الشرط مهما لنجاح نشاط الفرانشيز كون المتلقي يكون الممثل الوحيد والحصري لتلك العلامة في تلك المنطقة المحددة وهو ما يمكنه من ضمان زبائن تلك العلامة المستغلة والتي عادة ما تكون علامة مشهورة فيكون بمنأى عن منافسة الغير، وهو ما يساعده على تحقيق رقم أعمال مرتفع. غير أن قانون المنافسة الجزائري يحظر جميع الممارسات والاتفاقات الصريحة أو الضمنية عندما تهدف إلى عرقلة حرية المنافسة أو الحد منها أو الإخلال بها في السوق أو جزء منه ومن ضمن هذه الممارسات نجد الممارسات الاستثنائية التي حظرتها المادة 10 من الأمر 03-03 المعدل والمتمم. إلا أن المشرع أورد بعض الاستثناءات على بعض الاتفاقات التي يمكن اجازتها بموافقة مجلس المنافسة رغم أنها تخالف أحكام قواعد المنافسة الحرة نظرا لما تحققه من فوائد للمصلحة العامة.

**الكلمات المفتاحية:** عقد الفرانشيز، شرط الاستثناء، الممارسات الاستثنائية، المنافسة الحرة، العلامة التجارية



## Clause d'Exclusivité Territoriale dans le Contrat de Franchise

**Résumé:** La clause d'exclusivité territoriale est l'une des conditions qui ont été intégrées dans les contrats de franchise. Cette clause est importante pour la réussite de l'activité de franchise dans la mesure où le franchisé est le représentant exclusif de la marque dans une région spécifique ; ceci lui permet de garantir la clientèle de la marque exploitée - généralement réputée - et, par conséquent, le met à l'abri de la concurrence, ce qui lui assure de réaliser un chiffre d'affaires important.

Cependant, la loi algérienne sur la concurrence interdit toutes les pratiques et accords explicites ou implicites qui visent à entraver, limiter ou violer la liberté de concurrence sur le marché ou une partie de celui-ci. Les pratiques exclusives font partie des pratiques interdites par l'article 10 de l'Ordonnance 03-03 modifiée et complétée. En revanche, le législateur prévoit des exceptions pour certains accords qui peuvent être approuvés par le Conseil de la concurrence malgré la violation des dispositions des règles de la libre concurrence en raison de leur utilité publique.

**Mots Clés :** Contrat de franchise ; clause d'exclusivité ; pratiques exclusives ; libre concurrence ; marque ;



## Introduction:

Territorial Exclusivity Clause is one of the terms that has been applied in Franchise Agreements. This clause is important in achieving franchise activity for it guarantees the Franchisee to be the sole and exclusive representative of the trademark in a specific area. This process enables him to guarantee the – usually well known-exploited trademark’s customers, therefore, distinguishing him from competition, which results in achieving a high turnover. The exclusivity element is crucial in the Franchise Agreement as the optimal exploitation of the granted trademark’s contents requires the acquisition of the trademark’s exclusive right.

However, controversy has arisen over the classification of this term as both prohibited and restrictive to competition. The exclusivity granted to institutions in specific market areas increases their profitability by allowing them to operate without competition from other economic operators. On the other hand, this exclusivity restricts market competition, leading to negative effects such as market control and price increases, without a corresponding improvement in quality and variety. These outcomes directly affect consumers.

It is known that Algerian competition law fights against institutions aiming to restrict competition through market sharing, controlling sources of supply, setting prices, and other prohibited methods. A specific question arises:

**How did the Algerian legislator address the inclusion of the Territorial Exclusivity Clause in Franchise Agreements? This inclusion is necessary to encourage competitiveness within such agreements, yet it must balance with the principle of protecting freedom of competition.**

To examine this issue, we have chosen a descriptive and analytical approach to study the rules and provisions of competition law and the Franchise Agreement.

To address this question, the article will unfold in two main sections: the first examines the nature of the exclusivity clause and its impact on Franchise Agreements, and the second analyzes the impact of the exclusivity clause on the freedom of competition.



## THE FIRST TOPIC: THE DEFINITION OF THE EXCLUSIVITY CLAUSE AND ITS IMPACT ON FRANCHISE AGREEMENTS

The Territorial Exclusivity Clause is one of the essential conditions in a Franchise Agreement. It has long been recognized and has become a commonly included condition in licensing for trademark exploitation and, in particular, distribution contracts. Through this discussion, we will highlight the definition of the Territorial Exclusivity Clause (the first requirement) and then discuss the necessity of including this clause in the Franchise Agreement (the second requirement)

### **The first requirement: the nature of the Territorial Exclusivity Clause**

The legislator has not provided a specific definition for the Territorial Exclusivity Clause, prompting us to attempt its definition in the First Section. Following that, in the Second Section, we will explore the differences between this clause and the Exclusive Purchase Clause to clarify any similarities and distinctions.

#### **First Section: Definition of the Territorial Exclusivity Clause**

The Arabic term « *Isti'ssār* » which is the equivalent of “Exclusivity” is defined as the quality of appropriation of the thing, wherein said “He takes exclusively the thing” which mean « he takes hold of the thing, keeps it for himself and possesses it alone »<sup>1</sup>. The Algerian legislator used the term “*Exclusivité*” to express the above-mentioned meaning within the provision of Article 10 of the competition Law, in its French version<sup>2</sup>.

In the economic field, it refers to the company's ability to exclusively engage in a specific economic activity in the market, regardless of its nature and subject matter, whether in production, service provision, or distribution, without facing any competition.<sup>3</sup>

Therefore, the Territorial Exclusivity Clause -It is also referred to as the exclusivity clause or the restriction clause- represents an agreement between the Franchisor and the Franchisee, stipulating that the Franchisee becomes the sole exploiter of the Franchisor trademark within a specific geographic region and for a defined period. This agreement ensures that the franchisee is the franchisor's sole and exclusive representative in that area for the duration of the agreement.<sup>4</sup>

This area could be a street, neighbourhood, city, province, country, or even a group of countries, such as the North African region or the Arab Gulf.

<sup>1</sup> Arabic Language Academy, *al-Mu'jam al-Wasit*, 4<sup>th</sup> ed., Shorouk International Bookshop, Cairo, 2003, p 5.

<sup>2</sup> Voir : Art. 10 de l'ordonnance n° 03-03 du 19 juillet 2003 relative à la concurrence, modifié et complété par la loi n° 08-12 du 25 juin 2008, J.O.R.A du 02 juillet 2008, n° 36.

<sup>3</sup> Fadhila Souillem, Exclusive distribution contracts restricting competition, *Legal Studies Revue*, No.8, 2017, p 147. (Arabic Reference)

<sup>4</sup> Collart Dutilleul François & Delebeque Philippe, *Contrats civils et commerciaux*, 3 éd., Dalloz, Paris, 1996, p 815.



Under this contractual clause, the Franchisor shall grant the right to distribute products or services exclusively to one Franchisee within the specified geographic area agreed upon in the concluded Franchise Agreements. In return, the Franchisee commits to confine the distribution activity of the product or service within the same designated geographical scope established in the agreement without extending it to another area. As an example, "*Fructal Rouiba*," a company, exclusively holds the possibility of distributing products of the trademark of the global company "Coca-Cola" in Algeria.

The right to exploit industrial ownership -in the case that the clause is incorporated in the agreement an exclusive - is limited to the Franchisee has the right to use the trademark and all related signs, such as trade names, logos, or symbols within the designated region specified in the agreement only.<sup>1</sup> The licensor is prohibited, in this case, from granting licenses to other individuals to exploit the trademark within the boundaries of the specified region in the agreement. The condition that the Egyptian legislator has admitted it under Article 84 of the Egyptian Commercial Law, stated that:

*“An agreement may be reached that the technology importer shall alone have the right to use it and trade in the production, provided that this right is limited to a specified geographical area and to a determined period of time agreed upon by both parties.”*<sup>2</sup>

Moreover, the Territorial Exclusivity Clause entails a negative commitment on the Franchisor, which consists of abstaining from granting other licenses to others to exploit these rights within the same agreed territory.<sup>3</sup> The trademark owner is also restricted from exploiting it itself or opening competing points of sale within the same region where the licensee operates. Consequently, the licensee has the exclusive right to exploit the trademark in that specific area and market its products or services without competition from others.<sup>4</sup> In this case, if the Franchisor breaches this obligation, his contractual responsibility shall be established, and the Franchisee shall have the right to order him to perform his obligation if possible, and he also has the

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<sup>1</sup> In the context of Article 02 of the Order No.06-06 related to trademarks, the term trademark refers to “all signs subject to graphical representation, in particular words, including personal names, letters, numbers, drawings or images, distinctive shapes of products or their packaging, colors, alone or in combination, which are intended and capable of distinguishing the products or services of a natural or legal person from those of others.” See: Order No.03-06 dated on July 19, 2003, related to trademarks, *JORA No.44*, dated on July 23, 2003.

<sup>2</sup> See: Law No. 17/1999 to promulgate Commercial Code. In: World Intellectual Property Organization. *Egypt: Commercial Code (promulgated by Law No. 17 of 1999)*. Retrieved from: <https://www.wipo.int/wipolex/en/legislation/details/13558> (January 15<sup>th</sup>, 2024, at: 10.00 p.m).

<sup>3</sup> Blaise Carron & Christophe Muller, *Droit de la consommation et de la distribution : les nouveaux défis*, Helbing lichtenham verlag, bale, suisse, 2013, p 84.

<sup>4</sup> Walid Ali Maher, *Franchise Agreements – A comparative study-*, Markaz al-Dirāsāt al-‘Arabiyya, Egypt, 2018, p.61. (Arabic Reference)



right to terminate the agreement and request compensation for all the damages that have occurred, if it consists of serious prejudice.<sup>1</sup>

The Exclusivity Clause is not a required term to be mentioned in the Franchise Agreements. If it is not mentioned in the agreement, the Franchise Agreement remains valid. However, the dispute arose about the legal nature of the territorial exclusivity clause about whether this condition must be mentioned in the Agreement expressly so that it can be invoked or it is a condition imposed by the nature of the agreement, it does not need to be stipulated within the terms of the contract. The first view was that this clause is not assumed and in order to be invoked, it must be stated in the contract expressly and cannot be assumed, as writing plays an important role in the field of proof. Thus, if the contract does not contain an express clause of territorial exclusivity, it shall not be binding on the parties.<sup>2</sup>

While the second view believes that this clause is imposed by the nature of the contract, as the Franchisor is obliged to apply the principle of good faith, which is taken into account in the implementation of contracts in general, so as not to cause damage to the other contractor and does not prejudice his legitimate expectations of the contract, by dealing with another Franchisee within a close geographical range, which does not allow the Franchisee to achieve the expected benefits of his investment.<sup>3</sup>

### **Second section: the distinction between the Territorial Exclusivity Clause & the Exclusive Purchase Clause**

The Exclusive Purchase Clause, also called the exclusive supply clause, means “the condition under which a distributor is obliged to buy the goods he trades from a specific supplier, without having the right to buy from other suppliers competing with him”<sup>4</sup>. It is also known that it is the condition under which the seller is obliged to buy only the goods under his distribution from the supplier and not from other competitors. This means that he will refrain from buying a good from any other competing supplier or distributor, which constitutes a restriction on his freedom to practice the distribution activity.<sup>5</sup> Furthermore, it was stipulated in Article 10 of the Competition Law 03/03 before amending it in 2008 with the term “Exclusive

<sup>1</sup> Safwat Naji Bahnasi, *Selective Distribution Agreements*, Dar Al-Nahda Al-Arabiyya, Cairo, 1995, p. 14. (Arabic Reference)

<sup>2</sup> Mohsen Shafik, *Technology Transfer from a Legal Perspective*, Center for Legal Research and Studies, Faculty of Law, Cairo University, 1985, p 204. (Arabic Reference)

<sup>3</sup> Lubna Omar Mesqaoui, *Franchise Contract: A Study in the Light of Jurisprudence and Ijtihad and the Model Contract Adopted at the International Chamber of Commerce*, Modern Book Foundation, Lebanon, 2012, p 95.

<sup>4</sup> Hamad Naṣr Muḥammad, *International and criminal protection from unfair commercial competition and monopoly*, Markaz al-Dirāsāt al-‘Arabīyah, Egypt, 2016, p. 109. (Arabic Reference)

<sup>5</sup> Mohamed Chérif Kettou, *Competition Law & Commercial Practices in accordance with Order 03-03 & Law No. 04-02*, Manshūrāt Baghdādī, 2010, p.34. (Arabic Reference)



Purchase Contract”, and considered it a prohibited practice, as will be explained in the second section.

The Exclusive Purchase Clause is often mentioned as a separate clause in the contract, imposed by the supplier, under the label “*Clause d’achat exclusive*”. It is a clause that restricts the buyer’s freedom to seek alternative source of supply.

The Exclusive Purchase Clause may be included in the Franchise Agreement along with the Territorial Exclusivity Clause. In this case, both parties to the contract become bound by an exclusive obligation towards the other. The supplier is committed to grant the recipient the exclusive right to distribute his products in a specific area. In return, the recipient is obliged to supply exclusively from the supplier and not buy goods from another supplier.

It should be noted that this provision falls short of the concept of exclusive practice resulting from the inclusion of a Territorial Exclusivity Clause in a Franchise Agreement. The Exclusive Supply Clause is different from the Exclusive Distribution Clause. In an Exclusive Supply Clause, a distributor is obliged to deal with a specific supplier only, or an institution specified by him, to distribute its products, while the Territorial Exclusivity Clause is linked to an exclusive sales agreement. Moreover, Franchise agreements do not necessarily include an Exclusive Supply Clause.<sup>1</sup> The recipient may be free to buy other products from other suppliers, but they are exclusively distributed in a specific geographical area.

### **Second requirement: the necessity to include the Territorial Exclusivity Clause in the Franchise Agreement:**

The Territorial Exclusivity Clause reflects the willingness of franchisors to include several franchisees within their franchise network, achieved by dividing the distribution areas among network members and accurately determining each franchisee's regional scope of activity. Thus, the franchisor commits to controlling the activity system within the network to prevent overlap between the competencies of each member and ensure none exceed their regional scope. In return, the franchisee agrees not to distribute products or services bearing the trademark outside the agreed scope. This mutual agreement ensures that no competing shops bearing the same trademark are licensed to operate within the same geographical area.<sup>2</sup>

The division of distribution areas entails several competitive advantages, some of which are positive for the Franchisee himself (the first section) and at the same time, offer positive returns to the entire franchise network (the second section).

<sup>1</sup> Jack Bussy, *droit des affaires*, presses de sciences poet dalloz,1998,p 375

<sup>2</sup> Hassan Ali Kazem, *Restricted Conditions in the License Contract "A Comparative Study"*, Al-Wafa Legal Library, Alexandria, 2016, p 123. (Arabic Reference)



## **First section: Benefits of including Territorial Exclusive Clause on the Franchisee**

the Territorial Exclusivity Clause became an inherent term to be included in the agreement until it became one of its features. Consequently, the name of the Franchise Agreement was associated with commercial franchise as considered as a kind of privilege for one of the dealers. The nature of this contract requires the inclusion of this condition due to its complexity and the significant resources required for its implementation. The primary objective of the franchise system is to establish a branch representing the main brand with the same formal and substantive specifications upon which the original institution was founded. The Franchisee hopes to replicate the same successful experience achieved by the Franchisor through its brand. This entails the Franchisee's commitment to strict and precise standards under the Franchisor's supervision and continuous monitoring.

Furthermore, to maintain the reputation of its brand, the Franchisor cannot tolerate any member of the network offering a product or service of lesser quality than that offered to customers in the original institution. Therefore, the supplier contracts with the Franchisee according to strict standards and conditions that must be met by the Franchisor, including financial and managerial capabilities, professional competence, dedication to hard work, and readiness to comply with the Franchisor's instructions. Additionally, the Franchisor exercises regular and stringent monitoring of the Franchisee's activities post-contract to ensure that the goods and services provided to the public conform to the specifications and quality standards associated with the brand.

Consequently, the recipient commits to investing significant material and human resources to fulfill the requirements of this contract, especially in acquiring technical knowledge and training the workforce to utilize it.<sup>1</sup> Moreover, promoting any brand is costly, even if it is well-known. The Franchisor exerts considerable effort and incurs considerable financial expenses to promote this brand and introduce it to a new market, by providing facilities, decoration, and advertising through various media channels. For these reasons, it is within the Franchisee's rights to request a degree of protection by stipulating exclusivity in exploiting this brand in their area of activity, to prevent other competing operators from benefiting from the revenues of this advertising.

Territorial exclusivity is considered a crucial condition for the success of franchise activity. This condition ensures protection from competitors promoting the same brand in the same area. No other entity can engage in the same activity using the same brand and elements in that specific area, even if the Franchisor is the same, except in some special cases. This guarantee ensures that all efforts made for

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<sup>1</sup> Wafia Bouach, The Place of Technical Knowledge in Business Contracts (The Franchise Contract as a Model), *Critical Journal of Law and Political Science*, Volume 16, Issue 02, Year 2021, p. 476. (Arabic Reference)



advertising and promoting the exploited brand will yield results, without competition from others. Without the exclusivity condition, there would be other competitors operating in the same geographical area and benefiting from the efforts made by the franchisee in promoting the exploited brand.

It is unreasonable for a local investor to venture into a project requiring significant financial assets without the guarantee of being able to exclusively exploit that brand and distribute its products in at least a specific region. Therefore, the element of exclusivity is a basic pillar in the Franchise Agreement for the optimal exploitation of the granted trademark's elements requires obtaining an exclusive right over it. In addition, the trademark is an element of belonging to the network and an insurance of its reputation, which can only be achieved in the presence of the exclusivity clause, so practically; it is not possible to imagine the establishment of a franchise network in the absence of exclusivity.<sup>1</sup>

### **First section: Benefits of including Territorial Exclusive Clause on the Franchise network**

The Franchise Agreement emerged as a mechanism resorted to, for invading new markets and exploiting the economic and commercial potentials of these markets. The franchise system relies on the desire of the Franchisor who possesses a successful productive or service activity backed by a well-known brand to expand into foreign markets by offering the exploitation of this activity to the recipient who obtains the right to use the trademark in addition to technical knowledge and technical assistance for a financial consideration agreed upon to join the franchise network, which includes other Franchisees who exploit the same brand and under the same standards and specifications. In this way, the Franchisor achieves expansion without the need for a direct investment process that requires managing new branches costing him substantial amounts of money<sup>2</sup>.

The franchise aims to achieve the maximum distribution while considering the standards set by the Franchisor. Therefore, the geographical scope for each Franchisee is determined, such as dividing the market among them in order to maximize customer benefits without dispersing them among multiple Franchisee within the same geographical area, which diminishes their effectiveness and negatively impacts the network's image.

The overall appearance unit of the network constitutes one of the pillars and features of franchise contracts. Each project appears as a link in a chain, and each project offers services or goods that are similar in terms of forms, types, and specifications. Despite each project's legal independence from the network, all

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<sup>1</sup> Zouina Benzidene, *Distribution Agreements in the scope of Competition Law*, Ph.D. thesis, Faculty of Law, University of Algiers, 2017, p.34. (Arabic Reference)

<sup>2</sup> Walid Ali Maher, *op.cit.*, p.10.



projects appear as one network to the public because they use the same Franchisor's name and brand.<sup>1</sup>

Implementing the Territorial Exclusivity Clause aids in structuring the franchise network, achieved through delineating distribution territories among network participants to define the geographical boundaries of their operations. The Franchisor undertakes to manage the exclusivity arrangement within the network, ensuring non-interference and safeguarding the rights of all parties involved, thereby preventing any encroachment beyond their designated regions. In reciprocation, each network member pledges to confine their operations strictly within their allocated territory, refraining from encroaching upon others' designated areas is crucial to avoid intra-network competition.<sup>2</sup>

Based on the above, we conclude that it is not possible to establish an effective franchise network without dividing the areas of activity of network members, which can only be achieved by including the Territorial Exclusivity Clause that determines the geographic scope for each member.

Moreover, the Franchisor may include a condition prohibiting export to foreign markets, thereby restricting the Franchisee to distributing its products only within the local market. This limits the Franchisee's international competitiveness in global markets. The export prohibition clause may be absolute, while some contracts may include a clause that relatively restricts export to certain regions over others.

Some research conducted to establish the prevalence of these conditions in technology transfer agreements has shown that out of 451 agreements in Latin American countries, 317 agreements included a clause that expressly prohibits the Franchisor from exporting products made using the technology subject to the agreement, i.e. an estimated 68 percent of the total of these agreements.<sup>3</sup>

It turns out that the Territorial Exclusivity Clause serves the interests of the Franchisee in terms of ensuring the absence of competition within his territory, which contributes increasing profits. At the same time, it has positive effects on the organization of the franchise network. Therefore, the inclusion of this clause is an indispensable necessity. In case of the absence of the exclusivity clause, the Franchise Agreement will lose many of its advantages.

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<sup>1</sup> Du'a Tareq Baker Al-Bishtawi, *The Franchise Contract and its Consequences*, Master Dissertation, An-Najah National University, Nablus, Palestine, 2008, p.49. (Arabic Reference)

<sup>2</sup> Hassan Ali Kazem, *op.cit.*, p.123.

<sup>3</sup> Ahmed Mahmoud Al-Msa'da, *The Impact of Restricted Conditions for Technology Transfer Agreements on Commercial Competition in Developing Countries, A Comparative Study*, *Helwan Law Journal for Legal and Economic Studies*, No. 25, 2011, p. 541. (Arabic Reference)



## THE SECOND TOPIC: THE IMPACT OF THE TERRITORIAL EXCLUSIVITY CLAUSE ON COMPETITION FREEDOM

The principle of competition freedom is a means to achieve economic development. This principle aims to encourage competition, improve the competitive position of enterprises, improve services, and achieve consumer welfare. The Algerian legislator worked to maintain the principle of competition freedom through the issuance of Order 03-03, amended and supplemented, which prohibited practices that restrict competition.<sup>1</sup>

A jurisprudential debate arose about the extent to which the exclusivity agreement is a legally prohibited competition practice, given that the franchise agreement is one of the vertical agreements. Each contracting party is at a different level from the other, and these agreements are concluded between institutions that are not located at the same level of economic activity. Therefore, reaching an agreement between them to restrict competition seems less effective in the market compared to the horizontal agreements that result from the parties' agreement at one level in the market, which prompted some to say that exclusive distribution agreements are beyond the scope of application of competition law..<sup>2</sup> However, this opinion was criticized on the grounds that this type of agreement could constitute an obstruction to the freedom of competition, and this was evident through several manifestations that made the legislator arbitrate to prohibit these agreements and consider them as violating the principle of free competition (the first requirement). In addition, this restriction was subject to some exceptions due to the positive impact these contracts have on the national economy (the second requirement).

### **The first requirement: Manifestations of the Territorial Exclusivity Clause's violation by the rules of free competition:**

It is agreed upon that the competition law prohibits all practices and agreements, express or implied, when they aim to impede, limit, or violate the freedom of competition in the market or part of it.<sup>3</sup> By analysing the articles of the Competition Law, the manifestations of the Territorial Exclusivity Clause's violation by free competition can be identified in two aspects. The Franchise Agreement can be considered one of the prohibited exclusive practices (First section), in addition to the possibility of considering it as a restrictive competition practice within the sense of Article 06 of the same order (Second section).

<sup>1</sup> The Algerian Legislator did not mention the exclusive practices within Order No.06-95 related to the competition, canceled by virtue of Order 03-03.

<sup>2</sup> Mohamed Djaoued Mandhur Al-Mussawi, *Exclusive Distribution Agreement "A Comparative Study"*, Modern Office Publisher, 2019, p.144. (Arabic Reference)

<sup>3</sup> Order No.03-03 dated on 19 Jumada Al-Ula 1424 corresponding to 19 July 2003, related to Competition, JORA No.43, p.25.



### **First section: The Territorial Exclusivity Clause is an exclusive practice:**

As a matter of fact, the Algerian legislator did not elaborate much on exclusive practices, as he did not address their definition in the provision of Article 10 thereof, nor did he mention their types and elements. For reference, the Algerian legislator dedicated a specific provision to the exclusive practices as distinct from the prohibited practices. In contrast, the French legislator, who include the exclusive practices within the same provision related to the prohibited practices.

The Algerian legislator prohibited exclusive practices that restrict competition according to the provision of Article 10 of the Order 03-03 relating to competition, which provided that: *“Any exclusive purchase agreement that allows its owner to monopolize distribution in the market is considered an obstruction, limitation or violation of the freedom of competition.”*

It is noted that the legislator limited the exclusive practices upon the issuance of the Order 03-03 in the exclusivity purchase agreement in the field of distribution, so called: exclusivity of supply. It should be noted that this provision is considered deficient in understanding the concept of exclusive practice that results from the inclusion of Territorial Exclusivity Clause in the Franchise Agreement. On the one hand, it is restricted to the exclusive purchase process, and franchising contracts do not all necessarily include the condition of exclusive purchase, as established in the first topic.

On the other hand, the article was limited to mentioning the exclusivity of “distribution activity in the market” and did not include the rest of the activities represented in production and services, despite their importance in the commercial market. The legislator has corrected this shortcoming after amending Article 10 of the Order 03-03 by the provision of Article 06 of Law 08-12, which states:

*“Any act or contract, regardless of its nature and subject, that allows an institution to monopolize a business activity falling under the scope of this provision, is considered an obstruction to competition freedom, or a limitation thereof, and is prohibited.”*

According to this amendment, it is noted that the Algerian legislator has remedied the deficiencies that afflicted this article, and expanded the concept of exclusive practices to include every agreement or work that has the element of exclusivity, whatever its nature or subject. After it belonged to one activity, which is distribution, it included all sectors that fall within the field of application of Article 02 of Law 08-12, and the restriction is no longer limited to the exclusive purchase agreement as was the case under Order 03-03.

### **Second section: The Territorial Exclusivity Clause as prohibited agreements**

The Algerian legislator did not address the definition of prohibited agreements, but rather enumerated the cases in which the practice is prohibited and included them in the provisions of Article 06 of the Order 03-03 amended by Law 08-12, and they



were mentioned as an example but not exclusively, due to the impossibility of limiting them to specific points. Giving that he followed a similar approach of the French legislator in this matter. Moreover, analysing the text of this article and applying it on the Territorial Exclusivity Clause, it becomes evident that this clause may constitute several violations within the scope of this article, as follows:

1. **The limitation of market entry:** As previously mentioned, the Territorial Exclusivity Clause is based on granting one of the dealers the monopoly of selling and distributing a commodity or service exclusively within a specific geographical area in order to ensure that others do not compete with him. This means preventing any other dealer from entering the same market to provide the same product or service that bears that - licensed to be exploited - trademark. This is one of the agreements prohibited by Article 06, Paragraph 01, of the Competition Law.

2. **Sharing markets and sources of supply:** Paragraph of Article 06 of the amended and supplemented Algerian Competition Law provided that any agreements aimed at sharing markets and sources of supply are prohibited as they lead to restricting competition and expelling competitors from the market. The aforementioned paragraph prohibits agreements and practices that involve dividing markets for goods and services into specific geographical areas or distribution centres.

It is obvious that the intended objective of the inclusion of the Territorial Exclusivity Clause in the Franchise Agreement is to divide the markets among the members of the network, which leads to a significant reduction of competition in the market, especially if the products or services subject of the agreement are basic products with high demand. The significance of this agreement effects on the freedom of competition appears in the fact that price and quality determination are in the hands of one company. This will lead to a rise in the prices of these goods and services, so consumers are forced to buy them because they are not available with another trader. This behaviour could be considered a violation of the principle of free competition.

3. **Refusal to sell:** The refusal to sell is defined as the actual and final refusal to sell a commodity or perform a service that the seller has financially and legally. This refusal is not based on a legitimate reason, and the act of refusing to sell is considered a prohibited act according to Article 11, paragraph 2, of the Order 03-03, as well as Article 15 of the Order 04-02.

The presence of the Territorial Exclusivity Clause in the Franchise Agreement entails the Franchisee commitment to refrain from carrying out any sale or providing a service outside the specified geographical area. Therefore, if he receives any order to deliver his products outside his area, he is obliged to refuse the sale or refuse to provide the service, out of respect for the exclusivity clause contained in the agreement that binds him with the Franchisor. Failure to comply may lead to contractual liability, which necessitates compensation that can potentially influence the legal interpretation of the act of refusing sales. The same applies to the Franchisor



who is committed to refuse to supply any customer within the territorial area of the Franchisee, as he is obligated to direct these consumers to buy from the Franchisee who has exclusive rights within their territory in respect of the agreement concluded between them, which is also considered a refusal to sell.

**4. fixing selling prices:** The term “price-fixing” refers to a contract of a mutual agreement between a group of institutions, which aims to disrupt the forces of supply and demand. In this arrangement, the traders waive their independence and discretion in setting appropriate prices.<sup>1</sup> It is possible to agree, raise, reduce, or fix prices, which are prohibited practices in the scope of Article 06 of the Algerian Competition Law in its fifth paragraph, which stipulates “*The restriction of agreements that aim at ... obstructing the prices fixing according to market rules by artificially encouraging prices to rise and fall ....*”

The exclusivity clause in the Franchise Agreement is often associated with the term that the price of the product is determined by the Franchisor, which is the price that is reviewed periodically, by preparing price-fixing tables distributed to the members of the franchise network.<sup>2</sup> The danger of this behaviour lies in the Franchisor's exploitation of his dominance and monopoly over the Franchisee in a way that limits his freedom and imposes a resale price on him. This may lead to the imposition of high prices on products with wide use, and that product or service is necessary for consumers and there is no substitute for it in the market,<sup>3</sup> which is contrary to the provisions of the Article 06 of the Competition Law, which prevents institutions from agreeing with each other in order to set prices.

It is worth noting that the Algerian legislator has imposed criminal penalties on those who engage prohibited practices. These penalties consist of imposing a financial fine by the Competition Council that should not exceed 12% of the total amount of the turnover generated from the fees achieved during the closed fiscal year. If the violator has a specific turnover, he will be subject to a fine not exceeding DZD 6.000,000. Pursuant to the provisions of the Article 56 of the Competition Law amended by Law 08-12 relating to competition. The financial penalty is defined based on the turnover in view of the significance of the committed acts by the economic institution that has been proven to engage in an exclusive practice resulting from the Franchise Agreement.

The Competition Council may also, according to the third paragraph of the Article 45 of the Competition Law, order the publication of its decisions or its copies and distribute them in any media or in the official bulletin of the competition.

<sup>1</sup> Djellal Messaad Mahtout, *The Impact of Commercial Practices on Free Competition*, Ph. D Thesis, University Mouloud Mameri of Tizi Ouzou 2012, p89. (Arabic Reference)

<sup>2</sup> Didier Ferrier, Les apports au droit commun des obligations, in : *La détermination du prix : nouveaux enjeux, un an après les arrêts d'Assemblée plénière*, RTD corn., 1997, p.49.

<sup>3</sup> Meslem Tahar, “The Fighting of the Franchise Monopoly, Between Islamic Sharia & the Law”, *Academic Journal of Legal Research*, Vol. 11, No. 01, 2020, p. 216. (Arabic Reference)



### **The second requirement: Excluding the Territorial Exclusivity Clause from the restriction:**

It is known that competition rules are not absolute but are relative in line with the development of the economic sector. The competition law aims to limit exclusive practices that harm the national market. On the other hand, it aims to improve the competitive position of institutions, and encourages cooperation between them in order to improve production. Therefore, the legislator made some exceptions to some of the agreements he approved, although they violated the provisions of the rules of free competition.

The agreement may restrict competition, but in return, it may achieve benefits for the public interest greater than those achieved by freedom of competition. These agreements are known as amicable agreements « *Les bonnes ententes* ». <sup>1</sup>Although it includes a restriction of competition in the market, the competition protection legislation excludes it of the restriction area as an exception due to the benefits it achieves for the public interest, as provided by in Article 09 of the Algerian Competition Law:

*“Agreements and practices whose owners can prove that they lead to economic or technical development or contribute to employment improvement or allow small and medium enterprises to enhance their competitive position in the market are authorized. Only agreements and practices that have been licensed by the Competition Council benefit from the provision.”*<sup>2</sup>

By analysing this article provisions, we note that the legislator provided exceptions to the application of Article 6 of the Competition Law. The Franchise Agreement that includes the exclusivity clause can evade being a prohibited practice if the stakeholder can prove that he seeks to achieve economic, technical, or social development (First section), or establish an effective distribution network in order to promote the national economy (Second section).

### **First section: Contribution of the Franchise Agreement to the economic, technical, or social development:**

According to the above-mentioned Article, agreements and practices aimed to restricting competition are considered legitimate if it is certain that they serve the public's economic interest. Thus, parties involved in Franchise Agreement that restricts competition can benefit from this exception, provided that the contracting parties prove the positive impact of the contracted activity on the national economy or its contribution to economic, technical, or social development.

<sup>1</sup> Djellal Messaad Mahtout, *op.cit.*, p.103.

<sup>2</sup> The provision of this Article is taken from the French Order dated on 1 December 1986, related to Pricing and Competition Freedom, which are included in provisions of Article L420-4 of French Commercial Law.



The assessment of this development is up to the Competition Council, where the parties seeking to benefit from this exception in the scope of Article 09 of the Order 03-03, shall notify the Competition Council through a petition that includes sufficiently convincing elements proving the impact of this agreement on economic, technical, or social development. This petition may be complemented by any relevant diagrams or statistics supporting their situation.

Subsequently, if the Competition Council finds that the Territorial Exclusivity Clause included in the agreement is necessary to increase productivity and support the local enterprise in a way that allows them to acquire and control technology. Franchise can be considered one of the contracts that can be included in this exemption when it fulfils the necessary conditions, including the transfer of technical knowledge. This transfer of technical knowledge would allow national institutions to improve their competitive position in the market by improving the quality of their product or service, advancing the national economy.<sup>1</sup> It also includes the employment of workforce and their skills development through the training it includes. In any case, the results related to the implementation of the agreement must be tangible, and the positive outcomes resulting from it should prevail over the negative effects associated with hindering freedom of competition in the market.<sup>2</sup>

We note that the legislator expanded in defining the scope of this development, without restricting it to the mandatory meeting of all aspects of this economic, technical, and social development. Rather, it is sufficient that the implementation of this agreement results in one of these aspects.<sup>3</sup>

The agreement stipulates that in order to benefit from this exception and lift the restriction, everyone should benefit from it and achieve economic development in the market generally, we can mention as an example:

- ❖ Projects that develop infrastructure in the field of tourism, such as hotels and tourist resorts,
- ❖ Investments that bring new technology to the country in the field of agriculture, or investments that eliminate the scarcity of a product in the national market and reduce the process of importing it from abroad, such as medicines, infant formula, or spare parts,
- ❖ Investments that increase the proportion of exports.

Undoubtedly, developing countries, including Algeria, suffer from attracting investments that transfer technology, especially since classic technology transfer agreements -such as key-in-hand or product-in-hand agreements- have proven useless

<sup>1</sup> Rabia Benazzouz, "The Problematic of Business Contracts Legalization in Algeria", *Human rights & Civil Liberties*, Mostaghanem, No.05, January 2018, p.41. (Arabic Reference)

<sup>2</sup> Zouina Benzidene, *op.cit.*, p.75.

<sup>3</sup> Sacia Arroussi, "Franchise and restrictive practices", *Research in Contracts and Business Law Review*, Vol.05, No.03, 2020, p.53. (Arabic Reference)



due to their high value of exploitation, also, their incompatibility with small and medium projects. In addition, one of the main reasons is the lack of effective mechanisms to accompany institutions in acquiring technology.<sup>1</sup>

As previously explained, Franchise Agreements, which have a large economic, financial and investment value, require encouraging the local investor by offering some incentives. The success of franchise projects is largely due to the strength and reputation of the exploited trademark. It is not reasonable for the local investor to venture into investing in a project that requires large material assets without ensuring that he can monopolize the exploitation of that trademark and distribute its products in at least a specific area. For example, no investor would be willing to invest in the creation of an amusement park such as Disneyland if he knew that the Franchisor could grant the same trademark license to another Franchisee to practice the same activity and compete in the same region at any moment.

Moreover, it is essential to note that this exception could be applied only if it benefits the national economy. Therefore, the agreement whose beneficial effects are limited to its parties alone does not fall under this exception.

This development is estimated according to material norms such as the extent to which consumers in the local market benefit from the goods and services provided by the project and its role in improving the efficiency of the local workforce, creating new job positions, and raising the quality of the offered goods and services.<sup>2</sup>

Algeria has recently sought in particular to attract investments focused on the transfer of technology and technical knowledge, and this was evident through the issuance of Law No.22-18

### **Second section: Achieving an effective distribution network:**

The Territorial Exclusivity Clause in the Franchise Agreement can be justified even if it impedes or limits competition if it is proven that this clause was intended to improve the distribution network to authorize the local institutions. In order to obtain this exception, it is the responsibility of both parties to inform the Competition Council that this agreement is necessary in order to achieve the desired economic goals,<sup>3</sup> especially for the local institution, and to emphasize the importance of establishing a network for the distribution of products or services in a well-studied and controlled manner.

Therefore, the territorial exclusivity agreement is necessary in order to promote a strong network to achieve economic development, but with limiting the commercial

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<sup>1</sup> Abdelaziz Badlis & Samia Hassaine, "The Role of Industrial Franchise Contracts in Technology Transfer", *Voice of Law*, Vol.07, No. 23, 2021, p.727. (Arabic Reference)

<sup>2</sup> Sacia Arroussi, *op.cit.*, p.55.

<sup>3</sup> Amel Taouet, *Franchise and Competition Law in Algeria*, Master Dissertation, Faculty of Law, University of Algiers, 2008, p.129. (Arabic Reference)



freedom for the two parties so that it is not used as a weapon to eliminate small dealers and impose an actual monopoly.

Article 9 does not provide clear procedures for obtaining a license to carry out such transactions, nor does not define the criteria that assessing or evaluating whether these practices ensure economic or technical development. The discretionary power to evaluate this matter remains with the Competition Council, which will conduct a thorough examination and necessary investigations. If it is found that the positive impact of such an agreement is greater than the negative effects, the applicant will be granted a license. Conversely, if the opposite is found, his inquiry will be rejected.<sup>1</sup>

### **Conclusion:**

Through this study, the importance of the Territorial Exclusivity Clause becomes evident as a necessary condition for the success of the franchise activities. and the enhancement of the competitiveness of its network members. However, even with privileges granted by this clause to the Franchisee, it may have negative effects on hindering market competition. Such practices fall under restrictive practices of competition prohibited by Algerian Competition Law. Companies engaging in market exclusivity may lead to several prohibited practices, such as market allocation, price fixing, and refusal to sell.

Nevertheless, the Algerian legislator has attempted to strike a balance between these considerations by lifting the restriction on such agreements when it serves the public interest and achieves economic, technological, and social development. This includes contributing to the employment of the workforce in order to reduce unemployment rates, refining their skills, and training them to master technology, as well as increasing investments in small and medium projects, supporting local companies, resulting in improved quality of products or services provided to consumers.

For such practices to be legally permissible, the owner must credibly demonstrate their positive impact on the national, technological, or social economy, after obtaining approval from the Competition Council as competent authority to review such requests.

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<sup>1</sup> Amel Taouet, *op.cit.*, p.129.



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