CORPORATE GOVERNANCE: ANALYZING THE CODE OF ETHICS[1]

Companies upon incorporation are statutorily clothed with legal personality making them distinct and separate from their promoters, shareholders, and directors- Section 42 of Companies and Allied Matters Act 2020[2]. Legal personality simply means that companies are persons in law having the unfettered capacity to acquire and dispose properties in their names, enter contractual obligations, be liable for their debts/obligations and are capable of perpetual succession. The consequence of companies' legal personality and the implication of investment mismanagement demands that proper structure and accountability system are positioned to ensure accountability of persons entrusted with management roles.

Corporate governance (CG) is the instrument engaged for effective management and control of the company, risk exposure, insider dealing and other acts that impacts the company's internal and external stake holding. This article seeks to examine corporate governance and how it influences board composition, roles and responsibilities, risk management, and performance index of companies.

CORPORATE GOVERNANCE (CG) DEFINED

Corporate governance (CG) refers to a set of processes, customs, policies, and laws by which a corporation is directed, administered, or controlled. It is a generic term which describes the ways in which rights and responsibilities are shared between the various corporate participants, especially the management and the shareholders. It is based upon the principles of responsibility, transparency, and accountability[3].The principle of CG is established on the tripod pillar of accountability, transparency, and shareholders rights[4]. Shareholders are consequently expected to assert their rights using this mechanism

Companies are impacted greatly by their internal and external stake holding. Internal stakeholders are people that pilot the affairs of the company from within but are not necessarily members of the company, they are the board of directors, staff, and employees, while the external stakeholders are persons who are not part of the internal workings of the company but are affected by the decisions and policies made by the internal stakeholders, they are the shareholders, creditors, investors, customers, clients,

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[2] As from the date of incorporation mentioned in the certificate of incorporation, the subscriber of the memorandum together with such other persons as may become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the powers and performing all functions of an incorporated company including the power to hold land, and having perpetual succession, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act.

[3]https://definitions.uslegal.com/c/corporate-governance/

[4]Olayiwola, Khafilat Temitope - European Journal of Accounting, Auditing and Finance Research Vol.6, No.9, pp.85-98, December 2018

government agencies and communities. Corporate governance focuses on protecting the interest of the external stakeholders by ensuring that those who are integral part of administering the company's investments do not mismanage these investments. The Organization for Economic Co-operation and Development (OECD)[5] recommends that the corporate governance framework must ensure the strategic guidance of the company by the board and its accountability to the company and its shareholders. For companies trading on the stock market (Public limited liability companies) compliance with corporate governance rules are mandatory and this was strongly influenced by the wave of the economic scandals in the 90s[6] that crumbled many notable companies, giving rise to the advent of financial reporting and corporate governance codes.

LEGAL FRAMEWORK FOR CORPORATE GOVERNANCE

Corporate governance is administered through primary and subsidiary legislations. Primary legislations are the enabling laws from which subsidiary legislations derive their powers to issue codes.

Some of the primary legislations are:

1. The Companies and Allied Matters Act (CAMA)
2. The Investment and Securities Act (ISA)
3. The Financial Reporting Council of Nigeria Act (FRCN ACT)
4. The Bank and Other Institution Act (BOFIA)

CAMA is the principal legislation that governs pre-incorporation, incorporation, and post-incorporation activity of companies, companies are birthed and dissolved only in accordance with the provisions of CAMA. Pursuant to the power conferred on the Director General of the Commission, the Company Regulation 2021 was issued to provide procedural steps for the attainment of the provisions of CAMA.

The **ISA** regulates the operations of the security and exchange market. Pursuant to the power conferred by the Act on the Security and Exchange Commission,[7] corporate governance guidelines (SCGG)) were issued to ensure that all public companies and issuing houses comply with the set down corporate governance guidelines.

FRCN Act established the Financial Reporting Council of Nigeria, the institution charged with the responsibility of developing and publishing the accounting and financial reporting standards to be observed in the preparation of financial statement of public entities in Nigeria and for related matters among other things[8]. Pursuant to this power

[5] G20/OECD (OECD Corporate Governance Factbook 2021)

[6] Enron Scandal; Arthur Andersen scandal - https://time.com/6125253/enron-scandal-changed-american-business-forever/ July 19, 2022

[7] The body that administers the ISA

[8] Enacting clause of the FRCN ACT

conferred on the council, the Nigerian Code of Corporate Governance 2018 (NCCG) was issued[9].

BOFIA is industry specific, it relates only to banks and financial institutions. Pursuant to the power derived from the Act, there exist a separate code of corporate governance for banks known as the Code of Corporate Governance for Banks and other Financial Institutions in Nigeria which is now known as the **CBN Code**. The Code is explicit in its recommendations on best practice including constituting an effective board and identifying the principal responsibilities of the board, remuneration of directors, board performance assessment and risk management functions by the audit committee. The Code also considers factors relevant to depositor and investor confidence, given the importance of these stakeholders to the stability of the financial sector[10].

BOARD COMPOSITION AND RESPONSIBILITIES

Although companies have legal personality, they still require human beings to act and how they can accurately function is primarily through directors[11]. The directors are saddled with the responsibility of overseeing the effective and smooth running of companies;[12] to effectively discharge their duties may necessitate the formulation and implementation of policies that can impact positively or negatively on the investment of the external stakeholders. Since the directors control the resources of the company, it is pertinent that they are held accountable in the discharge of their duties[13].

The composition of the board of director is determined by the memorandum and article of association of the company, CAMA only stipulates a minimum requirement to be complied with.[14] The NCCG recommends that the structure of directorship in companies must comprise of an appropriate mix of executive, non-executive, and independent directors. The non-executive members should constitute most of the Board and it is desirable that most of the non-executive directors are independent directors.

The emphasis on having more independent directors is necessary to ensure that the board is not unduly influenced which is the reason the code recommends that the office of the CEO of the company should be separated or unconnected from the office of the Chairman of the Board. Consequently, a director sitting on the board cannot serve as the CEO of the company and the chairman of the board, this is evident in clause 3.2 which is in tandem

[9]Sections 11c and 51c

[10]Code Of Corporate Governance for Banks and Other Financial Institutions In Nigeria.

[11] A company can also function through its members at general meetings

[12] Section 87 of CAMA 2020

[13] See Clause 2.2 to 2.3 of the NCCG - The directors must possess knowledge, skills and experience, including the business, commercial and industry experience needed to govern the Company

[14] Public companies- A minimum of 2 directors and 3 independent directors; Small companies – minimum of 1 director.

with Section 265 (6) of CAMA[15] which provides that the day-to-day operation of the company shall be vested in the CEO and the management team, the chairman of the board shall not be involved with this task, he must be a non-executive director. The positions of the Chairman of the Board and the Managing Director/Chief Executive Officer (MD/CEO) of the Company should be separate such that no person can combine the two positions[16]

The CBN code offers a wholistic explanation

There should be a clear division of responsibilities at the head of the institution- the running of the Board and the management of the institution's business - which will ensure a balance of power and authority, such that no one individual has unfettered powers of decision making.

Separation of the office of the chairman and the CEO guarantees transparency and accountability. Duality of office can make the holder too powerful which can result in monopoly and recklessness, a recipe for mismanagement of shareholder's funds capable of resulting in a collapse of the company which was witnessed in the Nigerian banking sector between the periods of 2008 and 2009.[17] During this period, many banks were restructured by way of merger and acquisition to save them from liquidation due to fraud and financial malpractices perpetrated by their then Chairmen doubling as CEOs of the banks. The crisis prompted the now intervention of the Central Bank of Nigeria in the internal affairs of banks so that customers and shareholders' funds are preserved[18].

RISK MANAGEMENT AND SUSTAINABILTY

On risk management the CBN Code recommends that:

The Board must identify key risk areas and key performance indicators of the business enterprise and monitor these factors.

To effectively manage risk exposure of companies, CAMA stipulates that the members at the annual general meeting (AGM) shall appoint auditors for their companies[19]. Auditors generally comprises of the external and internal auditors; external auditors are independent and accredited audit firms/individuals while members of the board and management team make-up the internal audit team of companies, this is achieved through an audit committee within the company. The NCCG recommends that

[15] It provides that the chairman of a public company shall not act as the chief executive officer of such company.

[16] See 2.7 of the NCCG

[17] Affected banks were Afribank Nig. PLC; Finbank PLC; Intercontinental Bank PLC; Oceanic Bank PLC; Union Bank Nigeria PLC; Bank PHB PLC; Spring Bank PLC; Equatorial Trust Bank PLC; Wema Bank PLC; and Unity Bank PLC.

[18] CBN now requires a minimum capital deposit of 25 billion Naira for issuance banking license so that in the event of liquidation, funds are available to meet certain obligations to customers and investors.

[19] See Section 401-404

appointment of a committee for risk management and for audit can either be combined or separated, whatever the case, members of the board of director are mandated to be members of both committees. The code also recommends an internal and external audit system, the internal audit system is to comprise of members of the company via its board while the external auditors are independent of the company, whose report must reflect a true and fair view of the financial statements of the company to give assurance to stakeholders on the reliability of the financial statements. Khafilat[20] refers to the internal and external structures as the internal control system (ICS) of the company which is a system, method and measure established by an organization for its operating unit to promote efficiency, encourage acceptance of managerial procedures and policies, check line validity of managerial data and protect assets. The ultimate purpose of ICS is to exercise overall control, operations and risks to enable the management at all levels obtain reasonable assurance that its objectives are met.

The ICS of the company ensures proper auditing of the financials of the company and identifying loopholes and imbalance in the account records such that an erring director or member of the company is properly exposed to the requisite disciplinary actions as may be prescribed by members at the general meeting. To this end Khafilat stated that the real bosses are the shareholders as they are rightful owners of the company.

As part of its oversight function on the banks, the CBN via the CBN code very succinctly stated that the appointment of external auditors of banks and other financial institutions must be approved by the CBN, and an annual report by the auditors shall be submitted to the CBN reflecting the extent of banks' compliance with the provisions of the code. The board must ensure that a committee tasked with monitoring the risk exposure of the company is set up, the committee is charged with scrutinizing the management's activities in credit, market, liquidity, operational, legal, and other forms of risks, they are also tasked with the responsibility of reviewing the work of the internal auditors.

The NCCG further provides for a whistleblowing framework for reporting illegal or unethical behavior thereby minimizing companies' exposure as well as preventing recurrences.[21] CBN code on whistle blowing mandates banks to have whistle blowing policy, including assurance of confidentiality, that encourage all stakeholders to report any unethical activity to the bank and/or the CBN.

CONCLUSION

The goal of corporate governance is the protection of the interest of shareholders, creditors, and other persons whose interest are directly or indirectly tied to the viability of the company. To encourage monopoly and recklessness in the affairs of a company is

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[20] Supra
[21]clause 19

tantamount to experimenting and administering the resources of the company without an accountability system, such ventures can destroy the company. Effective checks and balances on the duties of the directors and the management team against their powers is the bedrock of corporate governance. When the interest of shareholders and creditors are protected, the corporate existence of the company is assured, and the performance index of the company is increased because these structures guard against recklessness and imprudence.