

Freedom of Information and the Effect on Corporate Governance in Nigeria

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Abstract

With the passing into law of the Freedom of Information Act (FOIA) by President Goodluck Ebele Jonathan in the year 2011, access to accurate information has become available. Anyone in Nigeria interested in any information from any public officer, agency or institution which not only has dealings with the public but also private companies has access to such information under the FOIA. The major setback with the Introduction of the Freedom of Information Act is that because of the Novelty of the law in Nigeria, majority of Nigerians do not know the power the Act has granted them in accessing information and being well informed about agencies and corporations of interest. One of the major constraints of corporate governance is the lack of transparency, disclosure and access to information which would help shareholders and investors make more informed decision as regards the companies they have dealings with. This paper will examine the effects of proper use of the Freedom of Information Act as regards corporate governance while also giving a comparative analysis of its use in countries with more advanced systems of similar Act.

Keywords: Corporate Governance, Freedom of Information, Transparency, Disclosure obligations, whistleblower and Monitoring.

1. Introduction:

Corporate governance borders on the system by which corporations are directed and governed. Corporate governance encompasses the processes through which corporations' objectives are set and pursued in the context of the regulatory, social and market environments. The fundamentals of corporate governance is built upon the principal-agent relationship (owners and management), however, corporate governance procedures are affected by attempts to align their interest with the interests of other stakeholders. Companies enjoy an independent legal personality albeit they need individuals to carry out the day to day activities of the company in order to keep it a going concern. On account of companies being fulfilled by individuals in management, there is always the probability that human idiosyncrasy of greed, deceit, risk-taking/gambling and other vile behaviours of these individuals are exhibited in the running of the company.

The rule in *Foss v. Harbottle*¹ cannot be overlooked in dealing with corporate governance. The exception to the rule puts consideration on the interest of the minority shareholders and grants 'derivative action', which permits a minority shareholder to bring a claim on behalf of the company. This is particularly crucial in situations where the foul play is being committed by the majority shareholders with voting rights to the detriment of the company and the minority shareholders.

Transparency in the boardroom and amongst management staff is of vital importance to the effective running of the business. The results of dearth disclosure and effective implementation of proper accountability measures to the Nigerian corporate governance regime in large corporations with dispersed ownership would leave loopholes for managers of corporations to carry on their managerial duties with the likelihood of enriching themselves to the detriment of the shareholder and investors who most of the time do not have the proper knowledge of how the corporation operates but have the finances to invest.

2. Access to Information

In business, information is vital (especially in today's challenging business climate) as it allows interested parties/investors to make more informed decisions which would affect their interest in the companies they deal with. Steve Mitchell rightly put it thus "The management information produced must be fit for the Directors/Business owners to enable them to manage the business effectively and make informed decisions"².

In May 2011, Nigeria became only the second country in West Africa to have a Freedom of Information law. This law in place gives interested Nigerians the right to unearth facts, tackle corruption and hold officials and institutions accountable. This law being in place gives information an ubiquitous nature thereby granting individuals (in this case shareholders/investors) the right to access accurate information in public agencies and give them the opportunity to carry out their own private investigations to the authenticity of

¹ (1843) 67 ER 189

² Steven Mitchell, Head of Accounting Services at AndersonAnderson & Brown LLP, Chartered Accountants. Article titled "Quality of Management Information is Key to Success".

the data which managers of their companies file, for example the annual returns filed with the Corporate Affairs Commission (CAC), the tax paid to the Federal Inland Revenue Service (FIRS) etc. The United Kingdom and United States of America both have similar Acts.¹

With the Result of the just concluded general elections in Nigeria declaring General Muhammadu Buhari (retired) as president-elect, one can hope that the promises made prior the election be fulfilled granting the passing of the Whistleblower Act² which would guarantee protection to whistleblowers who disclose foul play within industries and agencies thereby further strengthening the FOIA.

3. Importance of Good Corporate Governance

As stated earlier, the concept of corporate governance is built around the principal and agent relationship. In large corporations with widely dispersed shareholdings there is the distinction between ownership and control and the owners would rely on the board of directors to protect their interest (Berle and Means 1932) they also believe that there is the tendency that the managers would inevitably get an influencing power over the board thus rendering their supervisory role moot. The question “why?” beckons because of the confusion of whom should be the major beneficiary of corporations (i.e., should the corporation be run for the benefit of the Shareholder who are the financiers/owners of the corporation, the managers who are the sole engine-room of the corporation, the employees who do most of the handy work of the company, the general public who are the purchasers of the goods and services of the corporation, or the economy of the country where the corporation is situate as the activities of the corporations affect the economic wellbeing of the nation).

In tackling the issue of governance in Nigeria it is first important to identify the system operating in Nigeria i.e., is it firm specific, is there shareholder primacy, is it like the pre-1979 UK system which sought to constrain management discretion by increasing the power and participation in the firm of the employees (Dignam and Lowrey 2010)...etc. Dissimilar to other jurisdictions, Nigerian laws particularly Companies and Allied Matters Act Cap. C20 LFN 2004 (CAMA) divest the ultimate power of the company in the company solely. However, the company cannot function on its own without having individuals as agents of the company to maintain the day-to-day activities of the company. The idea of the company being supreme is flawed in relation to large corporations as many shareholders who invest in companies are being paid dividends as a way to secure investors confidence. In effect companies in Nigeria seem to be adopting a Jensen and Meckling (1976) model where discretionary surplus cash flow is doled out immediately to the shareholders. However, if the company is most supreme as the Act seems to portray, these excess cash-flow should be channeled back into the productivity of the company to increase its capital base and scope of business as the neglect of same reduces the financial cushion which the company should have in situations of economic downturn.

There has been renewed interest in the corporate governance practices of modern corporations, particularly in relation to accountability, since the high-profile collapses of a number of large corporations during 2001–2008, most of which involved accounting fraud; and then again after the recent financial crisis in 2008. Corporate scandals of various forms have maintained public and political interest in the regulation of corporate governance. In the United Kingdom, there was the crisis faced by Barings Bank which was an English merchant bank based in London, and one of the world's oldest merchant banks. The bank collapsed in 1995 after suffering losses of £827 million (\$1.3 billion) resulting from poor speculative investments, primarily in future contracts, conducted by an employee named Nick Leeson working at its office in Singapore. Here we see the issue of failed corporate governance and accountability measures leading to one man's lack of disclosure of losses, bad investment and decision making techniques collapsing a very big and reputable bank. The crisis amongst other things led to the U.K. government establishing a committee headed by Adrian Cadbury to address the issue of Corporate Governance which resulted in the Cadbury Report, titled “Financial Aspects of Corporate Governance” which sets out recommendations on the arrangement of Company Boards and Accounting systems to mitigate corporate governance risks and failures.

In the United States, which is known to be one of the supreme economies of the world, events have shown that failed corporate governance mechanisms lead to the failure of Enron and MCI Inc. (formerly WorldCom) which consequentially propelled the U.S. government to pass into law the Sarbanes-Oxley Act in 2002, aimed at restoring public confidence in Corporate Governance. Comparable failures in Australia (HIH, One.Tel) are linked with the passage of the CLERP 9 reforms.

In Nigeria, the scandals surrounding Savannah Bank Plc. was a wakeup call that even in smaller and developing economies, large corporations are also vulnerable to corporate crisis. This event and also those of international finance prompted the Securities and Exchange Commission in September 2008 to inaugurate a National Committee chaired by Mr. M. B. Mahmoud for the Review of the 2003 Code of Corporate Governance

¹ Freedom of Information Act 2000 (UK) and Freedom of Information Act (FOIA), 5 U.S.C. § 552 (US)

² Available from: < <https://newsbytesnow.wordpress.com/2015/01/17/a-must-read-my-100-days-covenant-with-nigerians-fish-starts-to-rot-from-the-head-buhari/> > [Accessed 15 April 2015]

for Public Companies in Nigeria to address its weaknesses and to improve the mechanism for its enforceability. In particular, the Committee was given the mandate to identify weaknesses and constraints to good corporate governance. It was also to examine and recommend ways of effecting greater compliance and to give advice on other issues that are relevant in promoting good corporate governance practices by public companies in Nigeria aligning it with international best practices.

4. Corporate Governance Mechanics and the effect of Access to Information

Principal-Agent relationship breeds tendency of moral hazard and adverse selection. Checkmating this increases agency cost which in the writer's opinion is of critical importance. The agency costs this write up would focus on are monitoring and access to information. There are both internal and external monitoring techniques which should be employed by Owners to secure their interest. Adding to agency cost, incentives such as stock options and bonuses for meeting targets and increased productivity could serve as a deterrent to shirking by the managers and employees albeit these options could be detrimental as bonuses could lead to increased risk taking while stock options could entice the managers to alter the accounts and audit books to show their stocks to be worth a lot more than that it is in order to sell them off at a higher price.

In combating the trend, the Central Bank of Nigeria (CBN) under Sanusi Lamido Sanusi orchestrated a corporate governance policy whereby no Managing Director or Chief Executive of a commercial bank with Ten (10) years or more in that capacity should head the bank. Likewise, no accounting or auditing firm that has audited or consulted for the financial institution for a period of ten years should be allowed to audit the financial status of these commercial banks. This encourages transparency and accountability. It also provides for rotation and open-endedness of the accounts against the tendency of a caucus been formed which could lead to falsification of data.

With the introduction of the FOIA, access would be available to public records thereby faltering the common practice of these financial advisers or chartered accountants registering new business names and carrying out operations as a different entity. With the FOIA, records could be accessed from the Corporate Affairs Commission (CAC), Institute of Chartered Accountants of Nigeria (ICAN), Chartered Institute of Taxation of Nigeria (CITN) etc., thereby increasing disclosure and access to information.

5. The Challenges of FOIA

The major challenge of the FOIA in the opinion of this writer is the ignorance of the power of the Act as it is new to the Nigerian Legal system. It is however believed that as time goes by, the use and effectiveness of the Act would improve transparency not only in corporate governance but also in the Nigerian legal and political system.

Poor record keeping facilities in Nigeria could also be seen as a challenge to the application of the FOIA. It is a known fact that Nigerian public offices do not have the up-to-date technological facilities to guarantee good record keeping. There are a lot of off the record/backdoor transactions which never find their way into the records books. This could also be discouraging in the pursuit of information access.

Inefficient Fire Department response, fire service equipment and training of the use of such equipment could also be a major challenge as with the advent fire could destroy so many records which are usually in paper form with no supporting soft copy secured.

Another challenge would be the length of time taken for transmission and compilation of the information requested. Most of this information would have to pass through so many channels and authorization before it can be made available. This could however be discouraging to investigators and shareholders who are interested in such information. The inefficiency of the staffs of public offices could also be seen as a challenge to the proper implementation of the FOIA.

6. Conclusion

This write up has analyzed the importance of disclosure in the boardroom amongst management and shareholders and the effects of the FOIA in relation to corporate governance. One can hope for a developmental progress in the effectiveness of the law. However, with the law being in place, management of corporations could intensify their efforts to leaving no trace of their decision making process in corporate governance. More resources could be set aside in order to cover up bad decision making and hiding of losses amongst the auditors and the public agencies which would be to the detriment of the company and its shareholders. To further investigate such dealing would be leading to increased agency costs which are not necessarily beneficial.

Day in day out, the courts get saddled with incessant amount of litigation going on particularly in corporate matters, one can assume that there are going to be numerous cases involving the use of the Act which would in reciprocity bring about a stronger legal system filled with transparency and access. It is now up to the courts and every department of the legal system to encourage the use of the FOIA in order to promote its quick growth while identifying loopholes that need to be filled.

References

- Statutes:** Companies and Allied Matters Act, Lfn 2004; Freedom of Information Act 2011; Sarbanes-Oxley Act 2002 (US), Freedom of Information Act 2000 (UK); Freedom of Information Act (FOIA), 5 U.S.C. § 552 (US)
- Armour, J., Gordon, J., “The Berle-Means Corporation in the 21st Century”, Working title (Online) available at http://www.law.yale.edu/documents/pdf/Intellectual_Life/Armour_BerleMeansCorp091021.pdf (January 26, 2015)
- Berle, A., Means, G., (1932), “*The Mordern Corporation and Private Property*”, Transaction Publishers
- Bhadmus, Y., (2009), “Bhadmus on Corporate Law Practice”,
- Cadbury, A., (1992), “Report of the Committee on the Financial Aspects of Corporate Governance and Gee and Co. Ltd”, London, December, p.15 ISBN 0 85258 913 1 (Online) available at: <http://www.ecgi.org/codes/documents/cadbury.pdf> (February 2, 2015)
- Dignam, A., Lowry, J., (2012), “Company Law (Core Text)”, (7th ed.) OUP Oxford (Chapter 16)
- HeinOnline, (1995), “Rethinking Self-Regulation”, 15 Oxford J. Legal Stud. 97
- Herring, R., (2002), “International Financial Conglomerates: Implications for Bank Insolvency Regimes”, Wharton School University of Pennsylvania
- Ihenyen, S., (2013), “Roles and Liabilities of Auditors in the Safeguard of Nigerian Stakeholders”, Seminar paper presented to Members of ICAN Lagos Mainland District Society
- Jensen, M., Meckling, W., (1976) “Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure”, *Journal of financial economics* vol 3, No. 4, 1976
- Ogbuanya, N., (2010) “Essentials of Corporate Law Practice in Nigeria”, Novena Publishers Ltd (Chapter 10)
- Securities and Exchange Commission website – www.sec.gov.ng (November 7, 2014)

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