ROUNDTABLE ON SHAREHOLDERS POWERS IN THE BANKING INDUSTRY

24th JANUARY 2012

INTRODUCTION

Banking Institutions occupy a central position in the financial system of any economy. Banks act as intermediaries for efficient transfer of resources from surplus to deficit units. For banks to be able to perform efficiently and contribute meaningfully to the development of the economy, the industry must be safe and sound. One of the foundations of this is strong and vibrant ownership and shareholding structure of banks. Historically, shareholding in the Nigerian banking sector is relatively recent.

Although banking commenced in 1894 with the establishment of the first banking institution which was foreign, (now known as First Bank Plc) indigenous banking in Nigeria commenced in the 1940s. The culture of shareholding by Nigerians became popular after the indigenization Decrees of the 1970s; Privatization policy of the 1980s and 90s and the CBN banking reforms of 2004.

A shareholder is a person, (individual or corporation) that legally owns any part of a share of stock in a public or private corporation. Shareholders own the stock, but not the corporation itself.

Shareholders are granted special rights and privileges depending on the class of shares owned. These rights may include but are not limited to:

- The right to sell their shares.
- The right to vote on the directors nominated by the board.
- The right to nominate directors (although this is very difficult in practice because of minority protections) and propose shareholders resolutions
- The right to dividends if they are declared.
- The right to purchase new shares issued by the company.
- The right to what assets remain after liquidation.
- The right to request and inspect copies of various statutory books and records.
- The right to inspect directors' contract for the company or any of its subsidiaries.
- The right to receive notice of all general meetings.
- The right to attend general meetings and vote on any resolution; and
- The right to apply for the winding up of the company if it is unable to pay its debts.

Shareholders are ordinarily expected to be in control of their banks. However the experience of failures of banks in Nigeria in the 1940s, 1990s and more recently 2010 reveal that the general powers of shareholders are not adequately protective of shareholders in the banking sector.

In furtherance of its role as the apex legal research Institution and the importance of the issue the Nigerian Institute of Advanced Legal Studies held a one day roundtable on SHAREHOLDERS POWERS IN THE BANKING INDUSTRY on Tuesday 24th January 2012.

PERSPECTIVES for the roundtable included:

- Remuneration, compensation and independence of shareholders
- Legal and regulatory framework of the powers of shareholders in the Banking industry
- The rights of shareholders in amalgamation of banks
- The role of shareholders in corporate governance
- The oversight functions of the CBN over shareholders powers

AT the end of deliberations the following observations were made:

1. Under our law a person can become a shareholder through three mechanisms: subscription to the memorandum and articles of association of a company at formation; purchase of shares directly from an issuer company; and purchase of shares from an existing shareholder.
2. A company is either private or public company. Private companies are closely held with limited membership usually amongst family and friends. Public companies on the other hand are large usually with diffused membership. Banks in Nigeria are public companies.
3. Conceptually, investment in shares is driven by annual profit returns and short term price appreciations.
4. Corporate governance broadly embraces the rules, processes, or laws by which businesses are operated, regulated and controlled. It is a system by which companies are directed, administered and controlled by way of processes, customs, policies and laws.
5. Corporate governance encompasses the relationship among various participants (members in general meeting, board of directors and managing director) to determine the direction and performance of the corporation.
6. The CAMA recognises two principal organs of corporate administration; the members in a general meeting and the board of directors.
7. The most significant power of shareholders is their voting power in general meetings.
8. Shareholders hold themselves bound to monitor and secure the observance of all corporate rules affecting the enterprise including its memorandum, articles of association and statutory provisions in that behalf.
9. CAMA has expanded the power of shareholders however minute their interest, to challenge corporate governance issues and seek redress. Consequently, shareholder rights under company law are robust and adequate to protect investors.
10. The numbers of high-profile cases of corporate failure involving financial reporting irregularities and grave breaches of corporate governance standards have raised concerns globally and nationally about how companies are organized and controlled.
11. An unspoken route for corporate exploitation by directors is in the quantum of pecks and associated perquisites of office.
12. Shareholders are in most cases ill equipped due to lack of relevant information to address cases of abuse of the remuneration process and self dealing transactions of directors.

13. Shareholders may never be able to exercise their rights effectively because majority shareholders are the directors or the nominees of the directors.
14. The lack of activism of shareholders is most noticeable in their failure to protect the company's capital.
15. The role of government in ensuring the observance of corporate governance through its regulatory bodies cannot be over-emphasised.
16. Banks are unique and different from other companies in the economy. Whereas company law does not impose a rule of capital adequacy on companies, banking law does through the BOFIA and CBN Act. This is because banks play a key role in distributing financial resources to the rest of the economy, and in so doing they act as repositories for the public savings. Their stability is thus a matter of considerable political concern; yet banks are particularly susceptible to instability and collapse.
17. Unlike other companies, banks in addition to shareholders have depositors. The deposits provide a bank with its general funds. The continuing confidence of depositors is thus necessary for the viability of banks.
18. In the event of a disturbance of confidence, depositors will be alert to the need to withdraw their funds ahead of a "run" on deposits and shareholders may resort to dumping their shares to avoid loss of investments.
19. CAMA (Companies and Allied Matters Act 2004 section 267) makes provisions for the remuneration of a company's directors (*with the exception of the Managing director*) to be fixed by its shareholders in a general meeting. Alternatively directors' remuneration may also be fixed by the company's Articles of Association and alterable only by special resolution. In practice, this useful tool seems not to receive the deserved attention.
20. Frightening reports revealed that the financial statements of many corporate entities were mere cosmetics and far from showing a true and fair view of the real state of things and this was more true in the Banking Sector than in other sectors of the economy
21. Before the recapitalization of banks pre 2006, all the banks, with no exception, had huge non-performing portfolios with significant amounts lent to insiders. Most banks did not disclose their true financial condition neither in Audited Accounts nor in Returns to the regulators. Indeed, certain aspects of the limitations of the 25 post-consolidation banks may have been reduced if the lacuna in regulatory skills and competencies to engage in post-consolidation due diligence had been dealt with expeditiously.
22. The new leadership of the CBN administered a "Stress Tests" on the post-consolidation banks and declared 8 of them insolvent. In exercise of its statutory powers, the CBN dissolved the management teams of these banks and in their place appointed new managers with the mandate to re-capitalize the banks on or before September 2011.
23. Continued absence of capacity and inability to meet the deadline; prompted the CBN on August 5, 2011, to revoke the licenses of three of these 8 banks namely Afribank, Bank, PHB and Spring Bank and handed them to the Nigerian Deposit Insurance Corporation (NDIC), which, in exercise of its statutory powers, created three bridge banks called Mainstreet Bank, Keystone Bank and Enterprise Bank, respectively, to assume their assets and liabilities. Thereafter the Assets Management Company of Nigeria (AMCON) acquired the new banks via a Subscription Agreement which enabled it to inject a ₦ 679 billion Stimulus Package into them. This sum aided the three banks to raise their capital adequacy ratio and also put them in a position to pay back the sums injected into them.

24. Though due process was not duly observed in the creation of the “bridge” banks by CBN, it was necessary and a viable option given the loss of confidence and probable collapse which the banking system would have suffered with dire consequences to the entire economy
25. Non-observance of corporate governance principles by management and contributory negligence of shareholders was responsible for the depletion of these banks capital.
26. There is an obvious absence of legal activism and therefore lack of judicial authorities in the Court of Appeal and Supreme Court on the enforcement of the rights of (minority) shareholders against directors of banks.

RECOMMENDATIONS

The Roundtable recommended as follows:

1. There are already codes of corporate governance in Nigeria. These are designed to ensure highest standards of transparency, accountability and good corporate governance. The provisions of the codes must be strictly observed.
2. It must be ensured that auditors are independent, since a lot depends on certification of financial statements by auditors. Therefore auditors must be obliged to inform the Nigerian Stock Exchange and regulatory authorities of transactions that negatively affect shareholders and investors.
3. Companies should adopt a policy to guide the Board and individual directors on conflict of interest situations.
4. All directors should be required to disclose their shareholding whether proprietary or fiduciary basis in the public company in which they are proposed to be appointed as directors, prior to their appointment.
5. Shareholders must be better equipped with the requisite information which can empower them to act.
6. AGMs must be held at accessible locations to shareholders with full disclosure of AGM agenda accompanied by explanatory notes to guide them.
7. Shareholders holding a stated percentage of public company shares should be empowered to request external auditors to investigate suspicious business activities in addition to present statutory remedies.
8. Shareholders should utilise the means of extra-ordinary general meetings in order to be abreast of activities of its company.
9. The pedigree of holders of sensitive public offices that affect monetary and capital market should be properly screened prior to appointment
10. Lawyers and experts in the field should be encouraged to be more proactive by instituting actions in court just to test the law and possibly set precedents. This would encourage judicial activism.
11. Non observance of corporate governance should be taken more seriously by stipulating stiff penalties.
12. Depositors should also be encouraged to take legal actions against banks when they have been aggrieved. This could be achieved through the assistance of the Securities and Exchange Commission.
13. Legislative activism through prompt reactions to lacunae in the laws and following up by new or amending legislations
14. Rigorous enforcement of shareholder’s rights must be pursued through Non-Governmental Organisations and Civil Society groups. Government agencies such as SEC and CBN should not be left out.

15. Active use should be made of social networks to create awareness and get stakeholders committed to rules of corporate governance.

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