

Corporate Social Responsibility In Nigeria: Legal Frame Work And Nature Of Obligation Owed By Companies To Undertake

Omengala Kingsley Adeyi

Lecturer Nigerian Law School, Yenagoa Campus,
P.M.B 60, Yenagoa, Bayelsa State, Nigeria. +2348036127635
omengalakingasley@gmail.com

ABSTRACT: The company is one of the most ingenious inventions of humanity. The company is an all- important vehicle for allocating and efficiently employing capital in our societies, providing goods, services, jobs- and revenue. In short, the company is a vehicle for economic efficiency. However, the activities of companies, no doubt, can have enormously detrimental effects on the environment. Oil spills are some of the most visible examples, but industries as varied as chemical manufacturing, mining, agriculture and fishing can do permanent damage to the local ecosystem of their host environment. Many corporations profit from this devastating deterioration of the global environment. Corporate social responsibility is one means by which corporate bodies integrate social, environmental, and economic concerns into their values and operations in a transparent and accountable manner with a view to adding socio- economic and cultural value to the lives of individual members of, and or the entire community within which they operate. The interventions of these corporate bodies in the form of corporate social responsibility is certainly one way by which the socio-economic well being of the benefitting communities or individuals can be enhanced and the burden on government, with respect to provision of social infrastructures and environmental safety may be lessened. In Nigeria not many corporate bodies, outside some Non Governmental Organizations and some multi-national companies, undertake these corporate social responsibility activities. This attitude of companies not taking seriously the issue of CSR is not unconnected with the popular view that CSR is nothing more than voluntary corporate engagement in philanthropy or charity. This paper seeks to examine the legal framework for corporate social responsibility in Nigeria. The extent, if any, to which corporate bodies operating in Nigeria are obliged to undertake these corporate social responsibility activities. The paper will argue that there exist sufficient statutory provisions that may be explored to make it imperative for corporate bodies operating within the Nigeria economic climate to undertake some form of corporate social responsibility activity notwithstanding the seeming absence of any specific provision of any enactment stipulating or imposing obligation on corporate bodies to undertake or embark on corporate social responsibility activities.

KEYWORDS: corporate, directors, duties, social responsibility, obligation.

INTRODUCTION:

Maximizing returns on investments is one of the major attractions of investors who deploy capital into investment schemes. Therefore the primary focus of companies and other business outfits is how to structure their operations or activities with a view to satisfying the desires of investors to maximize returns on their investments. Operating business organizations to maximize their profit potentials, by companies, must require the positive interface of several factors. On the one hand the Government must be looked upon for the provision of good enabling environment as well as investment friendly Rules and Regulations for the business organizations to operate smoothly. The citizens patronize the goods or services rendered by the organizations from which activities profits are made, while the communities provide space required for setting up the companies. It is this inevitable interface that makes it very necessary for companies and other corporate bodies to imbibe the positive attitude of undertaking some form of corporate social responsibility activity, to all or any of the above mentioned stakeholders without losing sight of their cardinal goal of maximizing profit for the investors. After all, Corporations are granted operational licenses by the state not only as an economic entity or vehicle for a commercial purpose, but more importantly, as a social entity for general community needs. Furthermore, the standard of a corporation's usefulness is not whether it creates individual wealth but whether it helps society gain greater sense of the meaning of community by honoring individual dignity and promoting overall welfare. Clearly,

our governments, even if they were brave and progressive enough, cannot single-handedly engender societal, financial, social and environmental sustainability. The contribution of companies or businesses and individuals are needed. The most fundamental legal frame work regulating the formation, operation, management and winding up of companies in Nigeria is the Companies and Allied Matters Act. In this paper, we shall closely examine the provisions of the Act with a view to situating the obligations on companies and other corporate bodies to undertake some form of corporate social responsibility activities.

WHAT IS CORPORATE SOCIAL RESPONSIBILITY?

Corporate social responsibility, often abbreviated "CSR", is a corporation's initiatives to assess and take responsibility for the company's effects on the environment and social wellbeing. The term generally applies to efforts that go beyond what may be required by regulators or environmental protection groups. According to **Efosa Oseghale**, Social Responsibility has been described and tended to be accepted as an ethical ideology or theory that an entity, be it an organization or individual, has an obligation to act to benefit society at large. CSR also called corporate conscience, corporate citizenship, social performance, or sustainable responsible business, is a form of corporate self regulation integrated into business model. CSR must keep in focus the integration of environmental and social concerns in the decision making and implementation of the company with a view to

internalization of externalities for the good of not only the company but the entire stakeholders within the sphere of operations of the company.

LEGAL FRAME WORK FOR CSR IN NIGERIA:

Generally the powers of a company, registered under CAMA, is equated to that of a natural person of full capacity, in relation to and in furtherance of its authorized business or objects, except that the company's memorandum or any other enactment can qualify or limit such powers. By necessary implication the powers of a company to engage in CSR, like any other power, can only be regulated by its memorandum or other enactments. While no enactment, presently, in Nigeria imposes any specific or direct, enforceable obligation on corporations to engage in CSR, the omnibus clauses in the memorandum of association can be a sufficient foundation for companies to engage in CSR. Thus, like the natural person, the company can engage in philanthropy of any kind or nature in the name of CSR. But unlike the natural person, the decision of the company to engage in philanthropy or any other form of CSR can only be taken on behalf of the company by human agents because the company is an artificial entity without a hand and mind of its own. By the provisions S.63 the powers of the company are divided between the general meeting and the board of directors. The section provides:

- (1) A company shall act through its members in general meeting or its board of directors or through officers or agents, appointed by, or under authority derived from, the members in general meeting or the board of directors.
- (2) Subject to the provisions of this Act, the respective powers of the members in general meeting and the board of directors shall be determined by the company's articles.
- (3) Except as otherwise provided in the company's articles, the business of the company shall be managed by the board of directors who may exercise all such powers of the company as are not by this Act or the articles required to be exercised by the members in general meeting.
- (4) Unless the articles shall otherwise provide, the board of directors, when acting within the powers conferred upon them by this Act or articles, shall not be bound to obey the directions or instructions of the members in general meeting:
Provided that the directors acted in good faith and with due diligence.
- (5) Notwithstanding the provisions of subsection (3) of this section, the members in general meeting may –
 - (a) Act in any matter if the members of the board of directors are disqualified or are unable to act because of a deadlock on the board or otherwise;
 - (b) Institute legal proceedings in the name and on behalf of the company, if the board of directors refuse or neglect to do so;
 - (c) Ratify or confirm any action taken by the board of directors; or
 - (d) Make recommendations to the board of directors regarding action to be taken by the board.
- (6) No alteration of the articles shall invalidate any prior act of the board of directors which would have been

valid if that alteration had not been made.

The prominent place of the board of directors in the affairs of a company is obvious from the provisions, reproduced above. The board can without recourse to the general meeting take decisions on matters it considers to be in the overall interest of the company, provided the motive for those actions are not *mala fide*. Even where those actions are beyond the powers of the board, the general meeting can ratify or confirm them, if they are not *ultra vires* the company. But where the articles expressly confer powers on the board to take decisions in respect of CSR, or any other matter, or CSR is a specific object of the company, the board can disregard contrary directions or instructions of the general meeting. This may, however, on the principle of the shareholder primacy, expose the directors to the risk of removal by ordinary resolution of the members at a general meeting. Furthermore such provisions in the articles of association of the company can be altered by special resolution passed by the members at a general meeting. However the subsequent alterations of the articles to deny the board of directors such powers on CSR cannot have any retrospective effect on the actions already taken by the board. In a shareholder primacy orientation, the business judgment rule still allows but does not mandate that the directors take actions which will benefit the company's stakeholders as long as these are reasonably incidental to the company's business or if this is a specific object of the company. The margin of discretion is based upon a presumption that in making a business decision the directors of a company acted on an informed basis, in good faith and in the honest belief that their actions are taken in the best interest of the company. It must, however, be pointed out that the fact that CSR forms a specific item in the objects clause in the memorandum of association of a company is no conclusive pointer that the company must indulge in same. This is because the position of the law is that the specifications in the objects clause are merely indicative of a strong desire by the company to pursue those objects and does not make it compulsory for the company to carry into effect all the prescriptions in the objects clause. However the inclusion of CSR in the objects clause gives the directors the latitude to actively engage in it. The manner and the motive for which the powers of the company vested in the board can be exercised are dictated by section 279(3) and (4), as follows: (3) A director shall act at all times in what he believes to be the best interest of the company as a whole so as to preserve its assets, further its business, and promote the purpose for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skilful director would act in the circumstances. (4) The matters to which the director of a company is to have regard in the performance of his functions **include** the interest of the company's employees in general, as well as the interests of its members. Two issues stand out from the above provisions. Firstly enormous but objective standards are imposed on the directors to be faithful, diligent, careful and ordinarily skilful in the performance of his duties as the circumstances of each case may dictate. Secondly the interest that the directors may keep in focus in the determination of what is in the overall interest of the company is not circumscribed by the provisions to only

the interest of the employees and its members. This is because the company is an entity with its own interest intermediating with other interests such as management, shareholders, employees, unions, contractors, clients and public interest. The second issue is quite obvious from the qualifying word employed in the provisions of subsection (4) above which is “include”. The Supreme Court of Nigeria in construing the provisions of section 63 gave a lucid view of the import “include” used in similar context, in the words of **Nnaemeka-Agu JSC** in the case of **UHUNMWANGHO-V- OKOJIE & ANOR** as follows:

Now the opening clause of section 63(supra) deals with an order made against a person. What is the meaning given by the statute to the word ‘order’. Order is defined in section 2 of the Law to include an ‘injunction, an order for the payment of costs by any party and an order for the payment of a counter-claim by a plaintiff’. The word includes is of course used in order to enlarge the meaning of the words and phrases occurring in the body of the statute. It means that the types of orders contemplated must be construed as comprehending not only the three types of orders enumerated in the definition but also other similar orders... clearly within the meaning of the above definition, the following orders are among the types of orders contemplated, namely: orders

1. For injunction;
2. For payment of costs by any party;
3. For the payment of a counter-claim.

It is of material significance that the definition does not attempt to limit the type of injunction which is intended by the section. It has not been seriously disputed that applying this definition to the word ‘order’, it covers all types of injunction.

From this position of the Supreme court it stands to reason that the exercise of the powers of the directors must at all times not be narrowly examined in the light of the interests of the company’s employees and members alone, but must be extended to include and project the interest of the other stake holders, like the host communities, contractors, creditors, the general public, the environment and suppliers. Therefore in the exercise of the powers of the company, with a view to further its cause and maximize its potentials, CSR must not only be given a place of prominence, but must be integrated into its scheme of operations. This is particularly so as CSR in whatever form or nature must advance the interest of one or more of the stakeholders. Taking our bearing from the above it is our argument in this paper that the concept of CSR can perfectly be aggregated in the very elastic provisions of S.279 (4) of CAMA discussed above. Therefore, the absence of the express mention of the concept in that section does not render it alien to the CAMA. The code of corporate governance, is another set of regulation guiding the operations of companies, especially public companies, in Nigeria. The code, in a more elaborate manner, enumerated the expected responsibilities of the board of directors as follows:

- 2.1. The Board is accountable and responsible for the performance of the affairs of the company. It should define the company’s strategic goals and ensure that its human and financial resources are effectively deployed towards attaining those goals.
- 2.2. The principal objective of the Board is to ensure that the company is properly managed. It is the responsibility of the Board to oversee the effective performance of the management in order to protect and enhance shareholder value and to meet the company’s obligations to its employees and other stakeholders.
- 2.3. The primary responsibility for ensuring good corporate governance in the company lies with the Board. Accordingly the Board should ensure that the company carries its business in accordance with its Articles and Memorandum of Association and in conformity with the laws of the country, observing the highest ethical standards and on an environmentally sustainable basis.

The code enjoins companies to apply the following guidelines in their relationship with other stakeholders:

28.1 Companies should pay adequate attention to the interest of their stakeholders such as employees, host community, the consumers and the general public. Public companies should demonstrate sensitivity to Nigeria’s social and cultural diversity and should as much as possible promote strategic interest as well as national ethos and values without compromising global aspirations where applicable. 28.3. The Board should report annually on the nature and extent of its social, ethical, safety, health and environmental policies and practices. Issues should be categorized into the following levels of reporting:

- (a) Disclosures of the company’s business principles and codes of practices and efforts towards implementation of same;
- (b) Description of workplace accidents, fatalities and occupational and safety incidents against objectives and targets and a suitable explanation where appropriate;
- (c) Disclose the company’s policies, plans and strategy for addressing and managing the impact of HIV/AIDS, malaria and other serious diseases on the company’s employees and their families;
- (d) Adoption, in the company’s operations, of options with the most benefit or least damage to the environment, particularly for companies operating in disadvantaged regions or in regions with delicate ecology in order to minimize environmental impact of the company’s operations;
- (e) The nature and extent of employment equity and gender policies and practices, especially as they relate to the executive level opportunities;
- (f) Information on number and diversity of staff, training initiatives, employee development and the associated financial investment;
- (g) Disclosure on the conditions and opportunities created for physically challenged persons or disadvantaged individuals;
- (h) The nature and extent of the company’s social

- investment policy; and
- (i) Disclosure on the company's policies on corruption and related issues and the extent of compliance with the policies and company's code of ethics.

The scope of interest that the code has set out, as reproduced above, as target to direct the operations of a public company can be accommodated within the elastic provisions of section 279(4) reproduced above. Thus while the application of the code is limited to public companies, the provisions of section 279(4) has uniform application to all companies including private companies, so the light of the section can illuminate the path of private companies to adopt the provisions of the code to the same measure and extent as the public companies.

NATURE OF THE OBLIGATION OWED BY COMPANIES TO UNDERTAKE CSR IN NIGERIA

Promotion of CSR, in Nigeria, certainly encompasses both the level of legal compliance to imposed obligations on the companies as well actions beyond mere compliance. The prominent place of the directors in relation to CSR has already been emphasized earlier on in this paper. A clarification of the concept of duty may be useful for purposes of clearly situating the nature of the obligation of companies to engage in CSR. Duty may be understood in at least three different ways. The first and presumably the strongest is the legal duty that is enforceable in a court of law. It appears untenable, however, to draw the conclusion that a legal obligation can only be found to exist where, and to the degree that, it is enforceable in a court of law. This is because there are numerous reasons that may account for cases not being brought before a court of law for adjudication and even where they are, there may be general or case-specific issues regarding procedure or competence that may prevent the court from enforcing a duty that rests on a party. Therefore the lack of legal remedy does not in itself constitute a non-legality of a duty. The second understanding of duty, from our discussion above, is the legal duty that, for various reasons, may not be enforceable in a court of law. The third understanding of duty is the ethical duty that comes within the frame work of the law, covering both the situation where ethical arguments may act as support for an uncertain or fragile basis for stipulating a legal obligation, and the situation where ethical arguments provide a basis for deciding between legally acceptable alternatives. Taking the directors core duty of acting at all times towards promoting the interest of the company as a basis, we can set out the CSR duties of the Board in the following manner, moving from the clear legal duty to the dynamic area of legal-cum-ethical obligations: first, there is the clear-cut duty of compliance with the abundance of CSR promoting regulations in Nigeria. By these regulations companies are enjoined to undertake a wide range of CSR centered activities. Second, the business case for CSR entails that the board has a legal duty to go beyond legal compliance in all cases where integrating CSR will be most profitable for the company. With the ethical aspect of CSR in mind, the argument could be made that a National minimum level of CSR standard be

fashioned out, in the structure of the very elaborate provisions of the Code of Conduct for Public Companies in Nigeria, beneath which it would be contrary to the legal duty of the company to go. It is ethically advantageous for companies to think CSR, because if the host community, for instance, is not at peace with the company, its operations will definitely be below its potentials which will in the long run affect its profitability. Again as we have tried to show in this paper, the fact that the failure to undertake CSR by a company operating in Nigeria may not attract any legal sanction does not obviate the fact that a legal duty is imposed on the board of directors to capture CSR in the operations of companies in Nigeria. This is owing to the fact that, it is just the shareholders that can enforce their interest through personal actions or derivative actions on behalf of the company, leaving the other stakeholders empty handed. Accordingly shareholders seem to maintain their position as primary interest, whereas the discretion granted the directors to take accounts of other interests than the shareholders and employees in S. 279(4) CAMA will only be given effect in so far as these other interests will promote the success of the company for the benefit of shareholders. This does not, in any way, defeat the argument, made earlier in this paper, that the directors must encompass the interest of other stakeholders in the pursuit of the primary interests listed out in S.279 (4) of CAMA. Moreover, there are reported incidences of youths of communities In Nigeria demanding CSR projects from companies operating within their communities. Their demands, though incapable of judicial enforcement, no doubt can have a very devastating effect on the smooth operations of the company. The major reason for these agitations is that, to them, it was unfortunate for the companies to pay taxes to the states and federal government but abandon the host communities. This brings to focus the need for CSR to go beyond mere compliance with regulations to integrated external engagements. The positive intervention of some companies in the social-cultural activities of some communities in Nigeria has been publicly acknowledged by Government. For instance the intervention of Global com in the Calabar Carnival was hailed by the Governor of Cross River State in 2015. In a similar manner MTN Nigeria has, over the years, showed great commitment by supporting the Osun-Osogbo Festival. According to the Regional Sales Manager, South-West, MTN Nigeria Communications Ltd, identifying and supporting such a festival will help in promoting MTN as a global brand. Generally CSR programs have no uniform standards for companies in Nigeria. They are quite apart from the commercial activities of the companies; they survive on the whims of senior executives rather than the value they deliver. These CSR programs are therefore vulnerable when management changes. The board of directors has a core role to play in any serious efforts to integrate issues of social responsibility into the business of the company. The board of directors, as a matter of law, is the highest permanent organ of the company, with responsibilities of policy-making, strategy-setting and supervision. The board of directors is undoubtedly the key to unlocking companies' potentials to contribute to sustainable development through integrating CSR into core businesses of the companies. The decision of the board of directors of any company must be anchored on the general duties of

the directors. These duties may be compressed into the basic duty of care and the duty of loyalty. The duty of care address the managerial agency problem and ensure that directors and managers devote sufficient time, care, and diligence to manage the company, establish information and monitoring systems, supervise business operations, and possess the necessary skills and experience to discharge their functions effectively. The duty of loyalty is, in the main, a requirement imposed on directors to subordinate their personal interest to those of the company and it applies, more, in cases where the director has a material (financial) interest in a transaction at odds with the interest of the company.

CSR: THE CURRENT TREND.

CSR in retrospect is spoken of as a voluntary concept, but for the now and the foreseeable future CSR is seen as a responsibility. CSR in this new look is seen as an integrated part of business responsibility towards society and not something that companies can elect to do when convenient. This new CSR approach can potentially be of great importance, as it appears to extend the recognition of CSR as a societal responsibility and not just a voluntary concept which is in line several internationally recognized principles and guidelines.

CONCLUSION:

We have tried to show in this paper that CSR is not alien to the regulatory frame work for corporate bodies in Nigeria, but the current state of affairs is clearly insufficient. The companies are not to an adequate extent using the room they have today to integrate CSR into their core business decisions, and are not realizing the enormous business potentials of contributing to sustainable development. Regulatory intervention, by way of constant engagement with corporate managers, to spark a business move away from'' business as usual'' and onto a more sustainable path is required. Any further postponement of this radical regulatory intervention may turn out to be highly detrimental to our chances of achieving a measurable sustainable global society; financially, socially and environmentally.