



B&I INAUGURAL GREY MATTER DIALOGUE TRIGGERS CALL FOR LAW AND POLICY REFORMS

The fundamentals of innovation, proactive stance, uniqueness, professionalism and inherent capability for developing business solutions which, for nearly 25 years, have been the philosophy underpinning the founding as well as the practice of **Banwo & Ighodalo (B&I)**. These values instigated another pace-setting idea - the B&I Grey Matter Dialogue - a special one day summit, structured as a mini town-hall meeting where papers containing experts' views on topical issues facing businesses in Nigeria, are delivered by carefully selected speakers from key sectors of the Nigerian economy.

The breakfast meeting, marking the maiden edition of the **Grey Matter Dialogue**, which held at The Wheatbaker, Ikoyi, Lagos on Thursday 23 April 2015, was attended by a most distinguished audience comprised of corporate and commercial lawyers; investments, securities and finance experts; capital market operators; representatives of shareholders' associations; institutional investors; officials of key market regulators; blue-chip companies; analysts and other stakeholders in the organized private sector.

The seminar afforded representatives of different interest groups in the corporate sector to air their views and perspectives regarding the role of shareholders in the administration of companies. For instance, minority shareholder groups often raise alarms and protests against perceived "oppressive or fraudulent conducts" of majority shareholders and/or board of directors while such actions of the minority shareholder groups are usually viewed by majority shareholders as acts of crying wolf; and regulators are often perceived to be sympathetic to the concerns of minority shareholder groups in the spirit of minority protection. However, regulators often maintain that they are fair to all concerned and that their actions are within the confines of the laws and undertaken for overall public interest.

Who then is right? And who is wrong – the retail activist-investor groups, the majority shareholders, the regulators or transactions-intermediaries, such as solicitors? Or are the laws not clear enough - do their provisions leave lacunae? Do we need new laws? What usually informs differing positions of stakeholders regarding the interpretation of the same sets of rules and laws?

Again, can we say, given the prevalent ownership structure of Nigerian companies as compared with what obtains in other advanced economies around the world; that shareholder activism is really effective in Nigeria? To what degree are the occasional activisms, by Nigerian shareholder associations, in the recent past shaping corporate decisions? Are activist-investors a necessary promoter of good corporate governance or are their agitations always ill-conceived, frivolous and inimical to the overall company and national interests? Are Nigeria's minority protection rules and codes of corporate governance encouraging or discouraging to the activist investors? These questions, among others, comprised issues which discussants at the B&I breakfast dialogue deliberated upon and attempted to resolve.

A listing of all the lawyers in the firm can be found at www.banwo-ighodalo.com

98 Awolowo Road, South-West Ikoyi, Lagos, Nigeria

Afri-Investment House, Plot 2669, Aguiyi-Ironsi Street, Maitama, Abuja, Nigeria

T +234(0) 700LAWYERS F +234(1) 4615205 E banwigho@banwo-ighodalo.com W www.banwo-ighodalo.com



The panelists were representative of various (and sometimes) competing interest groups in the market. The Keynote Speaker, Ms. Yewande Sadiku, CEO of Stanbic IBTC Capital Limited, delivered a presentation on the theme of the inaugural Grey Matter Dialogue: ***"Whither the Nigerian Activist Investor – How Nigerian Minority Protection and Corporate Governance Rules engender or inhibit shareholder activism"***.

Other panelists included Ms. Genevieve Sangudi, Managing Director, the Carlyle Group; Ms. Mary Uduk, Director, Fund Management & Collective Investment Schemes, Securities and Exchange Commission ("**SEC**"); Mr. Uaboi Agbebaku, Company Secretary/Legal Adviser, Nigerian Breweries Plc; and Mr. Nornah Awoh, Chief Equity Analyst, Palesa Capital Markets Associates Limited.

What is Grey Matter?

What, perhaps, wasn't initially clear to some of the attendees was, the nexus between the various issues for deliberation and the phrase, "The Grey Matter."

The Oxford Advanced Learner's Dictionary (6th Edition) defines "Grey Matter" as "a person's intelligence". For practitioners in the medical and allied professions, Grey Matter is one of the two parts of the Central Nervous System which "serves to process information" in the brain. Structures within the grey matter process signals generated in the sensory organs or other areas of the grey matter. This tissue directs sensory (motor) stimuli to nerve cells in the central nervous system where synapses induce a response to the stimuli [See: Sally Robertson, *NEWS MEDICAL online*, November 2014]. There is a third perspective to the concept of Grey Matter that is popular among experts in the film and entertainment industry. A 2014 short film written and directed by The McCoubrey Brothers of America and titled "The Grey Matter" tells the story of an office staff who wakes up in the street covered in blood with a massive open wound at the back of his head. He had no idea of how he sustained this deep injury and never bothered about the cause but, rather, how he can manage his present situation and avoid further damage. So, he employed his innate intelligence and applied bandage that looked like another style of dress to cover the wound, and then carried on with his work in the best way he could to avoid suspicion from his fellow workers. Intuitively suppressing the pain below the bandage, he began to draw the attention of his co-workers and eventually attracted some benefits to himself instead of fear and withdrawal.

The audience at the B&I inaugural Grey Matter Dialogue was neither artistic nor medical in character. It was from all its trappings, a pool of technocrats in law, economics, investment, finance and corporate management. But they would eventually understand the analogy between personal intelligence, central nervous system and a beneficial head injury on the one hand, and B&I's own description of the concept as influenced by the Firm's vision and mission on the other hand.

In his Welcome & Opening Remark at the breakfast meeting, Mr. Asue Ighodalo, a founding partner at B&I posited that ***"when we say Grey Matter, we refer to our preparedness as a Firm, to apply***



innate intelligence, working within the ambits of the Law, to solving real-life problems for, and achieving the objectives of, our Clients and friends in a professional, effective, friendly and trust-enhancing way."

Majority Rule in Corporate Democracy

The nature of a company's ownership and corporate politics determine, to a large extent in a capitalist setting, if and when shareholder activists in a company can influence decisions of the board of directors, initiate or prevent certain transactions and determine the continuing existence or liquidation of a company.

However, as Ms. Sadiku pointed out in her keynote address, political democracy and corporate democracy are not always one and the same thing. In the former, it is 1 man 1 vote while in the latter; it is 1 share 1 vote. So, while 1 man has right to exercise only 1 vote in a political democracy, 1 man who is a majority shareholder has right to cast as many number of votes as the number of his shareholding under corporate democracy. In effect, where the perceived wrong is alleged by the minority shareholders, it is often and at best what Mr. Ighodalo described as "limited to sometimes feeble, occasionally strong objections expressed at general meetings, which ultimately do not impact the results of votes, typically cast by poll, in respect of the relevant transactions".

Are our legal and regulatory frameworks actually engendering shareholder-activism?

Ms. Sadiku stirred-up a controversial yet interesting view to the discourse while she asserted that not only minority shareholders complain of oppression in companies but majority shareholders also do so. She stated that "it is not usually true that minority shareholders are always oppressed, because when they speak, they often get a disproportionate attention from the regulators". This means that majority shareholders too, at times, complain of being unfairly treated by the regulators in a bid to protect minority shareholders. There were, expectedly, both supporting and dissenting arguments from the participants to this position.

The keynote speaker adumbrated her view-point with a chart showing the Nigerian typical shareholding structure in which a core shareholder/shareholder group holds up to half of the companies paid-up capital with the other half typically held by a very fragmented base of institutional and retail investors; in sharp contrast to what obtains in other advanced economies such as Britain, USA and even South Africa. To worsen matters for shareholder activism in Nigeria, most of the institutional investors commit "lazy capital" into companies. Though more organized, sophisticated, informed and a lot influential, they usually show apathy to activism living it all too weak, highly fragmented and unstructured shareholder groups. If these feeble groups of activists still get the regulators, in most cases, to intervene and stop certain transactions proposed by companies, are they not getting attention not proportional and unfair at the expense of core investors? What then is the place of corporate democracy? And what about the principle of majority rule?



A fair-to-all approach to market regulation would have been one in which regulators' powers are evoked through democratic activism engineered by collaborative participation of retail and institutional investors alike, rather than a mere forcing of tiny voices over big ones in corporate democracies. Ms. Sadiku cited example of the 2012 proposed transactions by the management of Oando PLC to restructure the company's balance sheet by raising funds through a Rights Issue of ₦35 billion and Convertible Note of ₦16 billion to the largest shareholder. These transactions were perceived to constitute related party transactions by institutional investors who threatened to vote collectively against the proposal, thereby constraining the company to jettison the proposals at the general meeting of the company. Another similar occurrence was a transaction proposed by GSK UK, the majority shareholder of GlaxoSmithKline Nigeria Plc, to increase its stake in the company from 46.4% to 80% by purchasing shares for other shareholders vide a scheme of arrangement pursuant to section 539 of the Companies and Allied Matters Act ("**CAMA**"). Protests by institutional investors against the transaction forced the SEC to intervene and suspend the transaction after an initial approval had been granted.

Speaking from the regulators' perspective, Ms. Mary Uduk of SEC believes that market regulators are fair to all stakeholders within the purview of applicable laws and any shortcomings observed are likely not deliberate on their part, but are largely due to either lacunae or contradictions in the laws or lack of due diligence on the part of operators and applicants. Section 131(2) of the Investments and Securities Act 2007 states that where there is a proposed take-over bid, the offeror company shall treat all shareholders of the same class in the offeree company similarly. Ms. Uduk maintained that S.131 of the ISA has been a thorn in the flesh of regulators and operators alike as to proper interpretation where take-over bids are proposed from within the membership of a group of companies.

Similarly, in her view, arrangements or compromises proposed to be implemented pursuant to section 539 of CAMA, when referred to the SEC for approval may offend the spirit and letter of S. 118 of the ISA which prohibits a situation of monopoly of voting power by any group of shareholders within a company; except if it be proven that such restructuring is done solely for the purpose of investment - See S. 118(3), ISA. Assur Africa Holdings' divestment from Mansard Insurance in 2014 is a case in point. Additionally, The Nigerian Stock Exchange ("**NSE**") Rules on Related Party Transactions and the proposed SEC Rules on similar issue both work to prevent related core investor groups within a company from voting in support of resolutions at any General Meeting, where it is clear that any of them will be the eventual beneficiary.

Apart from the SEC and NSE corporate governance codes that strongly protect the interest of minority shareholder groups; there are other copious provisions in the laws as alluded to by both Ms. Sadiku and Mr. Ighodalo which encourage investor-activism. Power of the General Meeting to act in any matter where the Board of Directors fail to act; Right of shareholders to be notified of meetings, attend and vote; Obligation of disclosure of interest by core shareholders; Power of approval or disapproval



of appointments of Directors and Audit Committee of companies; Right of legal action against the company in respect of conducts adjudged illegal, oppressive or prejudicial to the interest of minority shareholders and; Power of the General Meeting to initiate corporate restructuring are provided in **Sections 63, 81, 95, 211-243, 246-249, 259, 261-262, 300-313 and 359 of the CAMA as well as; in relevant sections of the ISA.**

Panacea for effective shareholder participation and market regulation

Why then is investor-activism still at a low ebb in Nigeria unlike in advanced climes such as America and Europe where it has led to removal and replacement of entire boards or initiated arrangements on sale, mergers, take-overs and/or acquisitions? Ms. Genevieve Sangudi and Mr. Nornah Awoh agreed with the view of Ms. Sadiku and Mr. Ighodalo that the answer lies in change in the apathy shown by institutional investors in Nigeria to activism.

Ms. Tinuade Awe, Head of Legal & Regulation Division and Secretary to Council of the NSE, stressed that shareholder activism can only be enhanced within our present legal frameworks if institutional investors participate actively in the affairs of companies where their capital are staked. According to her, the NSE operates "a robust rule-making process that is open to the public for commenting and making inputs, but whenever any proposed rules on corporate governance are posted on the NSE website, the Exchange hardly receives any input or comment from the investing public. She also posited a common view that our companies' laws and rules are long due for amendments, as other jurisdictions like the England, where most of the provisions of our companies' laws and rules were borrowed have since undergone several amendments. She summed up by saying that "we cannot continue to use a 1990 law to regulate a 2015 business transaction without expecting hiccups."

The Grey in the Matter

One of the participants from the audience asked the big question, towards the end of the breakfast dialogue: "What are we to do with all that have been said or identified here today?" The question aptly captures the very essence of the initiation of the dialogue by B&I.

Yes, the market and its frameworks have been analyzed by the stakeholders themselves and problems outlined. Then, we must all move on to correct the anomalies, in the interest of engendering economic development. Like that office staff with a mysterious injury at the back of his head who uses innate intelligence to turn it to **a beneficial head injury**, without allowing it to cause any damage to his duties at work; we must not allow the contradictions and lacuna in our laws to stifle businesses in Africa's largest economy and investments frontier of choice. We must use our intuition coupled with patriotism to carry on with businesses while call for law and policy reforms gather momentum.

From B&I's standpoint, stakeholders should be at the forefront of the call for overhauling of business and investment frameworks. **Like the Central Nervous System which coordinates all sensory**



stimuli within the body of man, and directs them to nerve cells so as to induce the right responses to the stimuli; B&I is poised to stay at the center of initiating talks among relevant parties in the investments market to foster growth-triggered reforms.

Essentially, identifying crucial parts of our laws and policies that need overhauling to engender development, through a system that will be just and fair to all, remains the central focus of our "***innate intelligence***" as a Firm. Issues like these are the grey areas in our business and economic lives, which The Grey Matter Dialogue seeks to espouse.

Contact: banwigho@banwo-ighodalo.com