BANWO & IGHODALO

REGULATORY REGIMES AND THE EASE OF DOING BUSINESS IN NIGERIA

Globally, regulations are a veritable tool of economic reform and their roles as drivers and stabilizers of growth came to the fore of global debate in the aftermath of the collapse of giant corporations such as Enron in 2001 and Lehman Brothers in 2008. Before these institutions filed for bankruptcy, they were among such giant entities popularly tagged as "too big to fail". The global economic meltdown and financial crises which followed these corporate failures had necessitated the onslaught of various forms of policy and system reforms across the globe, and helped elevate regulations and corporate governance to universal norms.

Coming home, Nigeria's need for functional regulatory frameworks that would safeguard the economy against systemic failure became imperative in the midst of widespread distress in the banking sector, financial reporting irregularities in corporate entities as well as corruption witnessed in government agencies in the past and contemporary times.

But regulations too have been found to be capable of constituting a clog to economic progress, where they are not well-thought-out or when wrongly applied. In these cases, they strangulate rather than support growth of the economy.

This article makes a strong case for effective regulatory regimes in Nigeria and analyses some of the instances where the policies and rules laid down by regulators are impeding the day to day ease of doing business in the country. In order not to kill the economic geese laying the golden eggs for Nigeria, regulations, in addition to safeguarding the economy, should incentivize investments and boost investors' confidence. In this article, we will seek to examine a few practical challenges and also make recommendations on the policy reforms needed to assuage some of the pains which investors and business owners are facing as a result of inconsistent and overlapping rules, imposed by regulators.

REGISTERING BUSINESS ENTITIES

One of the policy reforms that have often been recommended to government from various quarters, on how to drive healthy economic competitiveness, is the streamlining of the processes for registering or incorporating business entities in Nigeria. Currently, the inconsistency and opaqueness of some of the rules and practices regulating the setting up of businesses, diminish the quality of legal and regulatory advice being proffered by professionals who represent both Nigerian and foreign investors in the formation of such businesses; thereby leading to the unintended and quite disheartening consequence of a decline in the volume of private sector participation in the economy.

The principal law governing the registration of companies and other business entities in Nigeria is the **Companies and Allied Matters Act ("CAMA"), (Cap. C20, Laws of the Federation of Nigeria ("LFN"), 2004).** Where a lacuna or any substantial insufficiency in the law is occasioned by contingencies or the prevailing circumstances in the business sector of the economy, the Minister of Trade is empowered to make regulations filling the gap; and this informed **The Companies Regulation 2012** which was made pursuant to sections 16, 585 and 609 of the CAMA. The Corporate Affairs Commission ("CAC") is established under section 1 of the CAMA and empowered under section 7 thereof to, among other functions, regulate and supervise the formation, incorporation, registration, management, and winding up of companies under, or in pursuance of, the CAMA and to undertake such other activities as are necessary or expedient for giving full effect to the provisions therein.

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

Curiously, professionals such as solicitors who work within the legal regime for establishing business entities in Nigeria are still, undeservedly, faced with difficulties while representing their clients at the CAC. This is so because new, sometimes unpublicised regulations and/or conditions which are outside the extant laws, are imposed with little or no prior notice.

Two recent examples of undocumented rules that slow down the registration/incorporation of business entities at the CAC are; (i) the new rule on the composition of the board of directors of engineering and architectural companies in formation and (ii) the nationality of the person who is the Secretary of a company (under incorporation) in Nigeria.

Applications for the incorporation of engineering companies in recent times have been turned down by the CAC, for the mere fact that none of the directors of the companies in formation are "COREN-registered" i.e. licensed by the Council for the Regulation of Engineering in Nigeria. Similarly, applications for the registration of architectural firms have been refused for not having any of the pre-incorporation directors as "ARCON-registered" i.e. licensed by the Architects Registration Council of Nigeria. Before now, the CAC only required certificates of training or proficiency in the various fields of engineering or architecture from persons who are the first directors of these types of companies.

Clearly the CAC, by the additional requirement of professional registration for engineers and architects, is enforcing compliance with the relevant provisions of the **Engineers (Registration, etc.) Act, Cap E11, LFN 2004** (**"ERA"**) and the **Architects (Registration, etc.) Act, Cap A19, LFN 2004** (**"ARCON Act"**); which respectively provide that engineers and architects must be registered with COREN and ARCON to practise in Nigeria. However, while the ERA in section 6 makes provision for the registration of all qualified engineering firms and personnel wishing to practise in Nigeria, the ARCON Act in section 1 provides only for the registration of qualified persons who are Nigerian citizens. So, while the statutory restriction of registration only to Nigerian citizens (in the case of ARCON) is a challenge to open participation by foreigners in the economy, the CAC's approach to enforcing compliance without prior notice or documentation further worsens the business climate for investors.

Also, the CAC has recently demanded that a person who is the Secretary of a company under incorporation in Nigeria must be a Nigerian. This new rule (which, to the best of our knowledge remains undocumented) is discouraging, particularly to foreign private companies operating or looking to operate in Nigeria, and who may prefer to have their expatriate personnel with the prescribed qualifications and statutory permits serve as company secretaries. Section 295 of the CAMA specifies the qualifications of a company secretary in Nigeria and these do not include nationality. This rule on the nationality of the company secretary is in a way, a disincentive to foreign participation in the economy and is not in sync with the principle of trade liberalisation that is driving competitiveness and growth, in other emerging economies.

At the very least, whatever the intendments of these new pre-incorporation rules administered by the CAC are, they ought to be legitimately made, properly documented and well publicised to reduce cases of administrative impediments and frustrations confronting the setting up of businesses in Nigeria. The CAC may advocate a review of the Companies Regulation 2012 to contain its new incorporation requirements, so as to ensure certainty and uniformity of rules.

Another thorny issue affecting business registration is the lack of harmonization between the data banks of the CAC and other agencies with similar functions; particularly the Commercial Law

Department of the Federal Ministry of Industry, Trade & Investment ("trademark registry"). While the CAC registers business/company names, the trademark registry registers trademarks and patents such as names, logos, slogans, domain names, shapes and colours etc. Interestingly, sections 30(1)(a)&(d), 579(1)(d)&(e) and 593(a) of the CAMA prohibit the registration of any name that is similar to the name of an existing business, company or any entity that is duly registered under the CAMA; or of any existing trade mark or sign duly registered in Nigeria. In practice, implementing this law has become a very arduous task. Often, business owners/entities with names that are duly registered at the CAC, subsequently discover at the trademark registry that trademarks similar to their existing business names have been registered by other persons; thereby making it impossible for them to register their own trademarks.

To end the confusion that these overlapping regimes administered by the CAC and trademark registry create, and consequently curb the pain and frustration experienced by investors and business entities, these two registering authorities must streamline their processes. *(To be continued next week)*

TRANSFER OF FOREIGN CAPITAL

In the process of doing business in Nigeria, foreign investors who incorporate Nigerian companies, or make equity investments into Nigerian companies, or advance loans to local associates/subsidiaries, have had to transfer investment capital into the country.

Foreign Capital, under the provisions of section 31 of the **Nigerian Investment Promotion Commission ("NIPC") Act, (Cap. 117 LFN 2004);**

> *"means convertible currency, plant, machinery, equipment, spare parts, raw materials and other business assets, other than goodwill, that are brought into Nigeria with no initial disbursement of Nigerian foreign exchange and are intended for the production of goods and services related to an enterprise to which this Act applies."*

However, it is worrisome to see Solicitors often facing difficulties from administrative rules being implemented by relevant agencies of government in connection with the importation of foreign capital into Nigeria.

Where the capital transferred is a foreign technology i.e. technical expertise, plant, machinery, engineering supply, training facilities, trade mark & patent rights etc., the commercial contract or agreement in respect of such a foreign technology is required under section 5(2) of the **National Office for Technology Acquisition and Promotion ("NOTAP") Act, (Cap. N62, LFN 2004)** to be registered with NOTAP – the regulatory agency – not later than sixty days from the execution or conclusion of the contract.

One of the NOTAP regulations, which discourages inflow of foreign technology, states that all matters relating to foreign technologies transferred into the country shall be governed by either the Nigerian law or the law of any other country that is neutral to both the transferor (the foreign party) and the transferee (the Nigerian party). In practice, where the transfer relates to a federal government project, NOTAP always insists that the governing law shall be Nigeria's but where it involves two parties none of which is a government agency (two companies/organisations), the required governing law is either Nigeria's or that of a neutral jurisdiction.

The rationale behind this regulation is that the transferee is always in a weaker bargaining position than the transferor while negotiating such contract for the transfer of technology, and as such should be protected. This practice has the effect of forcing, instead of encouraging, the transferors of foreign technologies into submitting to the Nigerian jurisdiction (governing statutes and the courts). This may actually be counter-productive for a developing country like Nigeria that is in dire need of technological advancement and the regulatory authority must thus find a balance.

A better practice will be one that allows the two contracting parties to a contract for the transfer of foreign technologies, to freely and in the spirit of *consensus ad idem*, agree on the law that will govern their relationship. NOTAP is commissioned under its enabling law (see section 4(b), NOTAP Act) to facilitate "the development of the negotiation skills of Nigerians with a view to ensuring the acquirement of the best contractual terms and conditions by Nigerian parties entering into any contract or agreement for the transfer of foreign technology". It is instructive to note that only a free atmosphere of constant mutual relations (supervised to avoid only unduly onerous terms), rather than a protectionist-policy, can help improve the negotiation skills of Nigerian parties.

Equally worthy of mention is the challenge facing foreign investments in Nigeria. A foreign investor desirous of doing business in Nigeria is expected to procure a business permit from the Federal Ministry of Interior and also procure expatriate quota approvals, where such foreign investor intends to hire expatriate staff. One of the current requirements for the issuance of a business permit and/or expatriate quota approvals is the provision of evidence of importation of machinery and equipment for investment as equity or loan, for which a Certificate of Capital Importation ("CCI") in the amount of $300,000 (Three Hundred Thousand US Dollars), must be obtained by the investor.

Respectfully, the $300,000 investment requirement amounts to a form of trade barrier and a disincentive to foreign investments in Nigeria. In an era of globalisation in which free trade among nations of the world is consciously being promoted, it becomes a burden for a nation like Nigeria that is a signatory to the World Trade Organisation's Free Trade Agreements to place such a high "tariff" on international commercial transactions in its economy. Again, this works to defeat the original purpose of the NIPC, which is to facilitate foreign direct investments and foreign portfolio investments into the country through the means of attractive incentives. This requirement would also not be realistic in relation to investments which are not so capital intensive at commencement and which would only need to import such significant amounts of foreign capital into Nigeria over a longer period of time. A substantial reduction in the value of the required CCI is recommended or in the alternative, a process whereby such investments are staggered over a definite period, so as to enhance the ease with which foreign participation takes place in the Nigerian economy.

Whilst not specifically pertaining to transfer of capital, it is also a notable challenge that business entities applying for pioneer status (a tax incentive available to highly technical industries and those established in economically disadvantaged locations, as well as investments made in sectors that are designated as priority areas of the economy) in Nigeria face difficulties in processing their applications at the NIPC. Many of the qualifications quoted for this incentive lack clarity and the list of criteria and/or eligibility requirements are amended from time to time; thus posing impediments to the enjoyment of the incentive by domestic and foreign investors alike.

Again, the NIPC's **Pioneer Status Incentive Regulations 2014** levy a "service charge" to be paid by a company applying for this incentive. The charge is to be determined by the NIPC at 2% of the company's estimated tax savings derived from the five-year financial projections. This charge is also compulsory regardless of profitability such that, where a company records losses in its financial projections, it will be calculated based on either its net assets at 0.5% or the turnover at 0.25%. In effect, applying for pioneer status in many instances actually results in additional costs to companies and undermines the benefit of tax holiday that is sought in the first place.

In order not to defeat the primary purpose for instituting pioneer status as an investment incentive, it is imperative for the NIPC to streamline its eligibility criteria and develop a stable, workable and well publicized body of rules that will guide investors and the business community as a whole.

THE NIPC ONE-STOP-INVESTMENT-CENTER

The One-Stop-Investment-Center (***"OSIC"***) is an initiative of the government to enhance the ease of doing business and facilitate investments in Nigeria, by bringing relevant government agencies/regulators to one location; where all statutory approvals and documents required to set up enterprises or invest in the Nigerian economy can be processed and obtained seamlessly without having to visit the agencies/regulators separately. The OSIC is located at the NIPC, which is established under section 1 of the NIPC Act and empowered under section 4 thereof to encourage, promote and coordinate both domestic and foreign investments in the Nigerian economy.

In theory, the OSIC is to enhance the ease of doing business in Nigeria but in practice has failed, more often than not, to add any value to the investment-chain. Over the years, the OSIC too has relapsed into the typical public service bureaucracy and inefficiency.

Ostensibly, in order to achieve the objective of setting up the OSIC, each of the government agencies relevant to doing business in Nigeria maintains a desk at the center; such as the CAC, NIPC, NOTAP, Central Bank of Nigeria ("CBN"), Federal Inland Revenue Service ("FIRS"), Nigeria Immigration Service ("NIS"), Nigeria Customs Service ("NCS"), and National Agency For Food and Drug Administration and Control ("NAFDAC") etc. Therefore, a foreign company seeking to operate in Nigeria, for example, should ordinarily visit the OSIC to incorporate a Nigerian associate company at the CAC desk; register the Nigerian company with the NIPC; and obtain the statutory and immigration documents such as business permit, residence permits and expatriate quota at the Ministry of Interior (NIS desk). But poor service delivery and lack of proper coordination among the agencies render the OSIC inefficient. So, while investors who visit the OSIC should ordinarily take the advantage of localisation of services, they are still forced to visit the agencies separately after leaving the NIPC-OSIC.

In other to salvage the OSIC initiative from becoming a disincentive to investments, the various regulatory agencies operating from the center must invest more time and effort in training their personnel, automate and upgrade their services to provide online-real-time access, prioritize the applications filed at their OSIC desks slightly over the ones at their regular offices, and embark on appropriate synergy among their various operating systems. Furthermore, all sector-specific regulators that have the duty of licensing registered business entities before they can commence operations in the specific sectors in Nigeria should be directed by their supervising ministries or authorities to maintain offices/desks at the OSIC; if they do not operate one currently.

BANWO & IGHODALO

CONCLUSIONS

Regulators have a pivotal role to play in improving Nigeria's business climate and scaling up the country's growth trajectory through stimulated economic competitiveness. This vital role can be effectively played without necessarily compromising standards, if the right balance is struck between growth and ethics. In other climes where regulators have successfully acted as catalysts for growth, a seamless, non-overlapping and non-conflicting legal framework has always been a striking feature.

In the advanced OECD economies, workable and streamlined corporate governance structures, that are preventive rather than just punitive, have helped regulators achieve high level of regulatory compliance by economic actors – business entities – without causing much pain (Nigerian regulators such as the Nigerian Stock Exchange, Securities and Exchange Commission, Financial Reporting Council of Nigeria, Standard Organisation of Nigeria, CBN, Nigerian Deposit Insurance Corporation, National Pension Commission, National Insurance Commission, Nigerian Communications Commission, NAFDAC, Department of Petroleum Resources, etc. should take a cue from this). This is why these countries continue to maintain high positions yearly on both the World Bank's Doing Business Report and the World Economic Forum's Global Competitiveness Index.

When asked how Ghana, a comparatively smaller economy but with a better rating than Nigeria on the 2015 Ease of Doing Business Index ("EODBI"), has been able to get things done efficiently and by so doing, drive its economic competitiveness significantly upward, Dr. Ekwow Spio-Garbrah, Ghana's Minister for Trade and Industry repeatedly emphasized that the government has constantly provided support and created a mutually benefiting regime in which the trio of regulators, investors and the State jointly take ownership of the enterprise system and become partners in progress. Undoubtedly, Nigeria would also do well to adopt such an inclusive and collaborative model.

The Grey Matter Concept is an initiative of the law firm, Banwo & Ighodalo