

EARLY INTERVENTION REGIME UNDER THE BANK RESOLUTION FRAMEWORK IN NIGERIA: RESOLVING THE DIVERGING INTERESTS

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ABSTRACT

The legal frameworks in most jurisdictions make provision for early intervention in bank resolution as an exception to the general corporate formal insolvency regime. The exercise of the early intervention powers however contravenes well established shareholder rights and gives rise to legal acrimony as seen in the deluge of litigation that trailed the exercise of these powers in Nigeria in the aftermath of the global financial crisis of 2007-2009. This article examines the justification for early intervention regime in bank resolutions and considers the nature of the framework in Nigeria. Drawing examples from the framework in the United Kingdom and the United States, it considers the strengths and weaknesses of the Nigerian framework. While arguing in favour of its continued operation, it considers the ways of bolstering the extant framework in Nigeria.

Key Words: Early Intervention, Bank Resolution, Shareholder Rights, Companies and Insolvency

1. INTRODUCTION

While commenting on the special nature of banks, Corrigan identified three essential characteristics that distinguish them from all other classes of institutions.¹ They include: the fact that they offer transaction accounts, are the backup source of liquidity for all other institutions and are the transmission belt for monetary policy.² In addition, they also provide the valuable service of maturity transformation and operate as financial intermediaries that are central to the efficiency of the financial system of any economy. They have therefore been described as basic market infrastructure and public utility deserving of special attention.³ Expounding on the role of banks in this regard, the HM-Treasury in one of its reports notes that banks in the financial system “perform a crucial role in securing the efficiency of the economy by providing firms and individuals with a secure means by which to make and receive timely payments; monitoring the performance of borrowers on behalf of savers to ensure that funds are appropriately channelled and loans are repaid in a

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¹ The word ‘bank’ as used in this article is confined to institutions that offer transaction accounts that are connected to the payment system and provide liquidity. This definition therefore excludes merchant banks where they are prohibited from accepting deposits that can be withdrawn by cheques.

² E G Corrigan, ‘Are Banks Special?’ Federal Reserve Bank of Minneapolis Annual Report (1982) <http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=684> accessed 8 December 2012; E Kelley, ‘Are Banks Still Special’ (1997) 13 BIS Review <<http://www.bis.org/review/r970214d.pdf>> accessed 8 December 2012; E G Corrigan, ‘Are Banks Special? A Revisitation’ (1 March 2000) <http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=3527> accessed 8 December 2012

³ BCBS, Report and Recommendations of the Cross-Border Bank Resolution Group (September 2009) 3.

timely manner; allowing credit-worthy borrowers to have access to funds with which to tide-over temporary income shocks, thereby avoiding costly disruptions to consumption and investment plans; allocating the savings of households and businesses to opportunities expected to yield the highest risk adjusted return, raising the sustainable rate of economic growth and employment; and orchestrating the distribution of risks to those most willing and able to hold them”.⁴

Recognising the special attention required by banks in this regard, most global and regional initiatives dealing with resolution and insolvency expressly exclude banks from the scope of their operation.⁵ At the national level, although a number of countries had long established special regimes for bank resolution, the global financial crisis of 2007-2009 (GFC) generated the political momentum required for the adoption of special regime by many others that did not deem it necessary to have special regimes for bank resolution before then.⁶ These special legislations for bank resolution essentially establish a framework that enable applicable regulatory authorities intervene in the affairs of banks before they are adjudged insolvent on the basis of inability to pay their debt as they fall due (cash flow test of insolvency) or of their liabilities exceeding assets (balance sheet test of insolvency).

It is argued that in view of the importance of the services provided by banks and their interaction with members of the public, they need to be subjected to special framework in order to protect depositors and safeguard the economy.⁷ The point is

⁴ HM-Treasury, Pre-Budget Report 2008: Facing Global Challenges: Supporting People through Difficult Times, (2008) 43, available at http://www.hm-treasury.gov.uk/d/pbr08_chapter3_190.pdf accessed 12 December 2012.

⁵ Examples of the international initiatives excluding banks from their scope of operation include the World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, IMF’s Orderly and Effective Insolvency Procedures: Key Issues, the UNCITRAL Model Law on Cross Border Insolvency with Guide to Enactment (Model Law), the UNCITRAL Legislative Guide on Insolvency Law (Legislative Guide), the Practice Guide on Cross-Border Insolvency Cooperation (Practice Guide), the Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency (Legislative Guide II and together with the Legislative Guide, the Legislative Guides), the European Council Regulation on Insolvency Proceedings, the Cross-Border Insolvency Concordat adopted by the Council of the International Bar Association Section on Business Law in Paris on 17 September 1995 and by the Council of the International Bar Association in Madrid on 31 May 1996, the Cross-Border Insolvency Guide to Recognition and Enforcement⁵ and the Statement of Principles for a Global Approach to Multi-Creditor Workouts developed by the International Association of Restructuring, Insolvency & Bankruptcy Professionals (INSOL). See generally, UNCITRAL Legislative Guide on Insolvency Law Part three: Treatment of Enterprise Groups in Insolvency (2010) 4; UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009); UNCITRAL Legislative Guide on Insolvency Law (2004) part 2, I (c); World Bank, Principles and Guidelines for Effective Insolvency and Creditor Rights Systems (2001) para. 85; International Monetary Fund (IMF), Orderly & Effective Insolvency Procedures – Key Issues (1999) <<http://www.imf.org/external/pubs/ft/orderly/index.htm>> accessed 21 December 2012; UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment (1997) Ch. 1, Art.1 (2); European Council Regulation (EC) No. 1346/2000 on insolvency proceedings, Art. 1(2).

⁶ For example, in the United Kingdom the Banking Act 2009 which received royal assent on 12 February 2009 addressed the immediate need for a special bank resolution regime following the global financial crisis of 2008-2009. Similarly, on 1 January 2011, the German Act on the Orderly Restructuring and Liquidation of Banks (“Bank Reorganization Act”), the German Act on the Establishment of a Bank Restructuring Fund, and the German Act for the Extension of Time Limitations Barring Management Liability (collectively, the “Bank Restructuring Act”) came into effect. See also Financial Stability Board, Report of the Financial Stability Board to G20 Finance Ministers and Governors, (2010) 128.

⁷ See C England, Are Banks Special? Available at <http://www.cato.org/pubs/regulation/regv14n2/v14n2-3.pdf> accessed 21 December 2012.

also made that in view of the fact that a bank is worth more when alive than when dead,⁸ applicable regulatory authorities must be able to intervene early enough in the affairs of a bank in order to contain the potential losses that could accrue should it be considered necessary to ‘bailout’ the bank. Expatiating on the nature of an effective early intervention regime for banks, the International Monetary Fund (IMF) in a recent paper noted that for competent authorities to be able to intervene rapidly in a manner that preserves the critical functions of banking institutions, they would require powers to: (a) take action well before balance sheet insolvency, (b) unilaterally restructure the various claims of an institution, (c) conclude mergers and acquisitions without shareholder consent, (d) provide bridge financing without shareholder consent, (e) assume public ownership of the institution on a temporary basis once shareholders and unsecured creditors have absorbed the necessary losses and (f) power to temporarily suspend termination provisions contained in some financial contracts in order to limit contagion and preserve certain critical functions.⁹ The Financial Stability Board (FSB) in its Key Attributes of Effective Resolution Regimes for Financial Institutions also makes recommendations along the same lines as those of the IMF.¹⁰

Attempts to exercise these early intervention powers in the Nigerian banking sector in the aftermath of the GFC was however greeted by protests and a litany of litigious suits challenging the validity of regulatory responses and seeking to upturn regulatory actions.¹¹ Restructuring plans and arrangements also had to be subjected to shareholder and judicial approval at court ordered meetings which led to extensive delays as these were held up by pending suits before the courts on the matter.¹² Shareholder rights in the UK and the US also resulted in similar challenges highlighted by the failed attempt of the Barclays Group to take over the operations of Lehman Brothers due to the requirement to convene a shareholder meeting within the available time to approve the proposed restructuring plan at the time.¹³ Also, the delays and frustrations that resulted from the shareholder litigation that encumbered the resolution plan proposed for Fortis Bank by the Dutch, Belgian and Luxembourgish regulatory authorities together with BNP Paribas presents another

⁸ G G Kaufman, *Market Discipline in Banking: Theory and Evidence* (Emerald Group Publishing 2003) 193.

⁹ IMF, *Resolution of Cross-Border Banks – A Proposed Enhanced Coordination* (2010) 20 – 21. Similar recommendations were also made by Institute of International Finance, *A Global Approach to Resolving Failing Financial Firms: An Industry Perspective* (2010) 25 – 29.

¹⁰ See FSB, *Key Attributes of Effective Resolution Regimes for Financial Institutions* (2011) 7-8. Similar recommendations were also made by Institute of International Finance, *A Global Approach to Resolving Failing Financial Firms: An Industry Perspective* (2010) 25 – 29.

¹¹ See D Iriekpen, ‘High Court Halts Operations of Nationalised Banks’ (*Thisday* Lagos 6 November 2011) <<http://www.thisdaylive.com/articles/high-court-halts-operations-of-nationalised-banks/102925/>> accessed 21 December 2012; D Iriekpen, ‘FG Moves to Defend Keystone Bank’ (*Thisday* Lagos 21 November 2011) <<http://www.thisdaylive.com/articles/fg-moves-to-defend-keystone-bank/103300/>> accessed 21 December 2012, D Iriekpen, ‘Nationalised Banks: Shareholders Flay CBN’ (*Thisday* Lagos 16 December 2011) <<http://www.thisdaylive.com/articles/nationalised-banks-shareholders-flay-cbn/105181/>> accessed 21 December 2012; E Otaru, ‘FG Challenges Suit in Nationalised Banks Case’ (*Thisday* Lagos 18 March 2012) <<http://www.thisdaylive.com/articles/fg-challenges-suit-in-nationalised-banks-case/111689/>> accessed 21 December 2012

¹² Central Bank of Nigeria, *Public Statement on the Recapitalisation of Eight Nigerian Banks* (9 June 2011) 5

¹³ See A R Valukas, ‘Report of Examiner to the United States Bankruptcy Court, Southern District of New York’ (2010) 12 <<http://lehmanreport.jenner.com/VOLUME%205.pdf>> accessed 15 December 2011

example of the challenges posed to early intervention powers by provisions that seek to guard shareholder rights.

This situation therefore creates the tale of two diverging interests and presents the familiar challenge in policy development where a balance has to be struck between two competing positive objectives. In this case, it is the need to strike a balance between the objective of protecting the interest of shareholders as guaranteed constitutionally and under corporate law provisions in a country like Nigeria and achieving the objective of safeguarding financial stability through the establishment of effective bank resolution regimes. The article explores this issue and examines the efficacy of the extant framework for early intervention in Nigeria.

The rest of the article is arranged as follows. The second section considers the justifications for early intervention by examining the special nature of banks. It does this by considering the nature of banking assets and banking business. It explores the nature of banks as public utilities, their fragility and interconnection as arguments in favour of the early intervention regime in bank resolution frameworks. The third section considers the extant legal framework for early intervention in Nigeria and compares this with the position in the United Kingdom and the United States in order to highlight the strengths and weaknesses of the framework for early intervention in Nigeria. The fourth section considers the manner in which shareholder rights could hinder the effective operation of the early intervention regime in Nigeria and the final section presents the conclusion and discusses the ways of bolstering the extant framework for effective operation of the early intervention regime in Nigeria.

Banking Assets and Businesses

The central business of a bank is to accept deposits from members of the public and provide loans and credit from the deposits received and borrowings from other banks known as inter-bank loans/deposits. Banks therefore typically hold highly liquid liabilities which can be withdrawn at any time against long term lending in the form of loans to individuals and companies which may not be repaid by borrowers. Thus, although the bank would in virtually all cases have to make the deposit made by depositors available to them as at and when they are needed, there is no guarantee that those to whom the bank provides loans would honour their obligations and repay the loans. Even if borrowers repay their loans, there would still be a problem because of the mismatch between the term of the loans granted to lenders and the term of transaction accounts issued by banks to depositors. These accounts allow depositors to incur liabilities that are payable on demand and to transfer the entire sum standing to the credit of the depositor to a third party.¹⁴ This creates a major risk known as credit risk which would have to be managed effectively for the bank to be continuously viable.¹⁵ Generally, this risk is curtailed by requiring the bank to hold a certain level of capital depending on the level of risk to which the bank is exposed and the bank would also usually price expected credit risks into the cost of lending along with its margin for profit.¹⁶ The fragile nature of the banking industry however means that it is possible in exceptional situations that a large number of depositors may demand immediate repayment of their savings at the first

¹⁴ Corrigan, 'Are Banks Special?' (n 2) 3

¹⁵ Credit risk refers to the risk that a counterparty of the bank would not fulfill its financial obligations to the bank in accordance with agreed terms. See BCBS, Principles for the Management of Credit Risk (September 2000) 1.

¹⁶ J G Caprio and D Klingebiel, 'Bank Insolvency: Bad Luck, Bad Policy, or Bad Banking' (Annual World Bank Conference on Development Economics 1996) 3-4.

indication of any form of trouble in the industry.¹⁷ In this circumstance, the deposit taking bank would be forced to call in outstanding loans at short notice or sell its illiquid assets to meet the withdrawal requests in the absence of alternative sources of funds. Where the deposit taking bank is forced to sell a significant portion of its assets quickly in order to raise cash to pay depositors, it is likely not to realise the full value of its assets as a result of another form of risk known as market risk and it could be forced into a distress through the losses resulting from the ‘fire sale’ of those assets.¹⁸ Where this has happened, the bank could continue to run down its assets in the form of deposits in order to pay off immediate liabilities and postpone the evil day of the declaration of formal insolvency in the hope that things might get better. Given the circumstances, the management of the bank may become incentivised to engage in more risky activities in an effort to return to profitability when its assets are depleted.¹⁹

Also, due to the nature of some of the products and services offered by banks which involves promises to pay or settle in the future, it may be difficult to ascertain the exact time when a bank becomes unable to perform its obligations and fulfill its contracts.²⁰ This situation is compounded by the fact that banks may be capable of concealing and disguising their credit risks by rolling over bad loans or raising more deposits from the public by promising higher interest rates and increasing the size of their balance sheets to conceal the mismatch between their assets and liabilities and their inability to honour their obligations to depositors and other creditors.²¹ It is therefore likely that before a bank reaches the point where it is actually unable to pay its debts as they fall due or when its assets and investments would have been depleted to an extent that they become lesser than its liabilities, its attempt to forge a recovery could make depositors and other creditors incur substantial losses on the declaration of formal insolvency on the basis of the cash flow test or balance sheet tests of insolvency.²²

In order to reduce the potential losses that may be borne by bank depositors as a result of the depletion of bank asset and the taxpayer as a result of government intervention in a failing bank, it has been considered necessary to establish a framework which creates a seamless link between supervision and resolution by making regulatory intervention in the affairs of a bank possible before it becomes insolvent on the basis of the balance sheet or cash flow test of insolvency. Noting this point, Hüpkes states that ‘...the concept of insolvency, under general bankruptcy law, as a trigger for the initiation of insolvency proceedings appears inappropriate to apply to banks. Given the need to minimise, if not avoid, credit

¹⁷ R J Herring and A M Santomero, ‘The Role of the Financial Sector in Economic Performance’ Wharton Working Paper 95-08, 19 <<http://fic.wharton.upenn.edu/fic/papers/95/9508.pdf>> accessed 8 December 2012

¹⁸ Sale of assets at a price lower than they would normally command given a normal search time for the highest bidder or adequate time to convey sufficient information about an asset’s real quality.

¹⁹ M H Krimminger and R M Lastra, ‘Early Intervention’ in R M Lastra (ed), *Cross-Border Bank Insolvency* (OUP 2011) 70; E Hupkes, *The Legal Aspects of Bank Insolvency: A Comparative Analysis of Western Europe, the United States and Canada* (Kluwer Law International 2000) 13.

²⁰ Examples of such products include guarantees and letters of credit given by a bank to its customers which may be called up at future dates.

²¹ Caprio and Klingebiel, ‘Bank Insolvency: Bad Luck, Bad Policy, or Bad Banking’ (n 16) 3.

²² D G Mayes, ‘Early Intervention and Prompt Corrective Action’ (2009) 9 Bank of Finland Discussion Papers 12-13.

losses, and the wider economic implications of a bank failure, bank insolvency must commence earlier and therefore precede general bankruptcy proceedings.²³

Banks as Public Utilities

While explaining the nature of banks as public utilities in his evidence before the Joint Committee on the Draft Financial Bill in the UK, Goodhart compared banks to electricity, gas or train companies that cannot be scrapped even when they fail in view of the importance of the services they offer and he noted that if these companies become insolvent, the worst the government could do would be to restructure them, change their management and get them to work again.²⁴ Making a similar point and showing that it might even be more important to keep banks alive than the above listed utility companies, Gleeson notes that ‘in reality, government has little choice but to act to keep these operating come what may, since the maintenance of these services is part of the irreducible minimum services which electors regard government as created and elected to ensure.’²⁵ He goes on to say that ‘if an electricity company fails, there is no obvious reason why government should support its ordinary commercial creditors...to allow one bank to fail would create a knock-on impact for other banks, which would be likely to result in further failures and the necessity for further intervention’.²⁶

In other words, since banks usually have substantial exposure to each other through the payment system and unsecured instruments, the disruption in one bank may affect other banks and because bank runs tend to be self-reinforcing,²⁷ an indication of trouble in one bank may be taken by members of the public (reasonably or otherwise) as evidence that other banks in the system are likely to face the same problem because banks are volatile institutions that are vulnerable to public confidence.²⁸ This means that a single bank failure has an indirect and potentially large effect on the economy to the extent that one bank failure could possibly lead to or be the catalyst to other bank failures.²⁹ The possibility of such a contagion which is often described as ‘systemic risk’ highlights the risk that bank failures pose for the wider economy.³⁰ The magnitude of the potential crisis that may result from the failure of a single bank is likely to be further amplified to other countries as a result of the cross-border operations and linkages of banks.³¹

²³ Hüpkes, *The Legal Aspects of Bank Insolvency: A Comparative Analysis of Western Europe, the United States and Canada* (n 18) 12

²⁴ C Goodhart, Evidence before the Joint Committee on the Draft Financial Services Bill (Tuesday 11 October 2011) <http://www.parliament.uk/documents/joint-committees/Draft-Financial-Services-Bill/HC1447iv_11October2011_uncorrected.pdf> accessed 2 January 2013.

²⁵ S Gleeson, *International Regulation of Banking - Basel II: Capital and Risk Requirements* (OUP 2010) 21.

²⁶ *Ibid*

²⁷ See Herring and Santomero (n 16) 20

²⁸ E Hüpkes, ‘Insolvency- Why a Special Regime for Banks?’ Current Developments in Monetary and Financial Law (2003) 3, 4-5 <www.imf.org/external/np/leg/sem/2002/cdmfl/eng/Hupkes.pdf> accessed 8 December 2012.

²⁹ See R Levine, ‘Finance and Growth: Theory and Evidence’ in P Aghion and S Surlaf (eds), *Handbook of Economic Growth* (1st edn, Elsevier 2005) Chapter 12. Where the authors discuss the potential cost a systemic banking crisis can have on an economy in terms of bail-outs or loss of output and employment.

³⁰ See F Mishkin, ‘Comment on Systemic Risk’ in G Kaufman (ed), *Banking, Financial Markets and Systemic Risk; Research in Financial Services, Private and Public Policy* (vol. 7, JAI Press 1995) 31

³¹ It is however possible to argue that the knock on effect of the failure of one bank on other banks will be reduced by mechanisms such the deposit insurance and the lender of last resort function of central banks, the real time gross settlement systems (RTGS), netting arrangements and arrangements for the management of inter-bank contracts in the event of failure. It must however still be noted that

In view of these considerations, legislators in various jurisdictions have considered it necessary to step in specially to regulate the business of deposit-taking conducted by banking institutions in order to protect members of the public who make deposits, preserve the vital economic functions the deposit-taking banking institutions provide and maintain financial stability by introducing special regulatory mechanisms such as minimum capital and liquidity requirements to provide cushion for loss absorption and reduction in the possibility of insolvency, supervisory inspection to monitor adherence to stipulated principles for soundness, deposit insurance to avoid a rush for the exit and a run which could result in a contagion, lender of last resort function to ease out cases of temporary illiquidity, and special mechanisms to require early intervention by regulators in cases of disruption, distress or impending insolvency in a bank in order to prevent a spill over to other institutions and the potential costs that may be incurred where it is considered necessary for the government to rescue the failing banks.

The exercise of the early intervention powers however infringes on some of the safeguards aimed at protecting shareholder interests under corporate law in general. These therefore inhibit the effective exercise of the early intervention powers of regulators under the special regulatory regime for banks. Before a consideration of these corporate safeguards and the ways in which they could inhibit the early intervention regime, the next section considers the extant early intervention framework in Nigeria and compares this with the position in the UK and the US in order to highlight the strengths and weaknesses of the Nigerian framework.

2. THE EARLY INTERVENTION FRAMEWORK IN NIGERIA

In Nigeria, the need for a special regime for bank resolution was recognised long before the GFC through the *Nigerian Deposit Insurance Corporation Decree of 1988*, which was replaced by the *Nigerian Deposit Insurance Act* of the same year. The 1988 Act was subsequently repealed and replaced by the *Nigerian Deposit Insurance Corporation Act of 2006* (NDIC Act) which establishes the Nigerian Deposit Insurance Corporation (NDIC) as the liquidator and receiver of failing banks. This piece of legislation is complemented by the *Banks and other Financial Institutions Act* (BOFIA),³² which is the central piece of legislation for the regulation of the business of banking in Nigeria, the *Failed Bank (Recovery of Debts) and Financial Malpractices in Bank Act* which seeks to punish bank directors, staff and customers who may have contributed in any way to the failure of a bank,³³ and following the GFC, the *Asset Management Company of Nigeria Act of 2010* (AMCON Act) which establishes the Asset Management Company of Nigeria (AMCON).

By section 35 of BOFIA, the CBN is authorised to intervene in the affairs of a bank in four major circumstances. These are where the bank is (a) is likely to become unable to meet its obligations; (b) is about to suspend payment to any extent; (c) is insolvent; and (d) is in a grave situation. Section 32 of the NDIC Act further extends the conditions for intervention in the affairs of an insured bank in the country to include cases where the directors or other staff of the bank have (e) engaged, are engaging or about to engage in unsafe and unsound practices in the conduct of the bank's business (f) violated, are violating any provisions of the law.

risk taking, fraud, mismanagement and adverse market conditions are still inseparable bedfellows of banking. See Hüpkes, 'Insolvency- Why a Special Regime for Banks?' (n 27) 3-5.

³² Bank and Other Financial Institutions Act, Cap B3 Laws of the Federation of Nigeria, 2004 (BOFIA)

³³ Failed Bank (Recovery of Debts) and Financial Malpractices in Bank Act, Cap F2 Laws of the Federation of Nigeria 2004

These provisions essentially comply with the early trigger recommendations made by the IMF and the FSB. It would appear that the early intervention framework is dependent on a bank informing the CBN of its inability to meet the conditions listed in section 35 of BOFIA because the first three conditions for the early intervention under the BOFIA are dependent on the affected bank *informing* the CBN of its inability to meet the conditions listed in the Act.³⁴ However, the fact that the CBN and the NDIC may unilaterally intervene following the exercise of their powers of routine and special examination of banks,³⁵ is covered under the fourth condition for intervention under the BOFIA and the NDIC Act.³⁶

Clearly, the exercise of these extensive powers can be prone to abuse if not properly circumscribed. In this regard, Gleeson has noted that intervention in banks must be rapid leaving no room for uncertainty, transparent with creditors and counterparties being clear on their positions during and after the intervention.³⁷ Thus, an effective early intervention regime must be characterized by clarity, certainty and speed. In order to spell out the details of the early intervention framework in Nigeria, the CBN developed the Contingency Planning for Banking Systemic Distresses and Crises (Contingency Framework), which was modeled after the Toronto Leadership Forum's Framework on Contingency Planning for Banking System Distress and Crises in 2002.³⁸ Following the GFC, this intervention framework was updated through the CBN Intervention Guideline (Intervention Guideline or Guideline).³⁹ Realising the possibility of the manipulation of capital adequacy ratios (CAR) and likely inefficiency of CAR as indicator of viability and measure for intervention in unviable banks,⁴⁰ the Guideline complements the conventional gradated capital adequacy intervention trigger with other indicators. Taking cognisance of the overall risk management profile of banking institutions, the Intervention Guideline incorporates additional triggers for intervention in the form of liquidity, asset quality, risk management, internal control, earnings and systems failure complaints.⁴¹

Thus, although the Intervention Guideline retains the gradated CAR trigger approach which divides the capitalisation levels of banks into the four categories of under-capitalised banks, significantly under-capitalised banks, critically under-capitalised and insolvent banks with progressively harsher menu of sanctions to be imposed as the capital ratio of a bank decreases, it also adopts a gradated liquidity intervention trigger which divides a bank's level of liquidity into the three classes of slightly illiquid, significantly illiquid and critically illiquid and it prescribes the actions to be taken by the CBN under each classification. In adopting asset quality as a trigger for intervention, the Guideline divides the asset quality of banks into two broad categories of weak asset quality and critically weak asset quality on the basis of credit administration practice, credit concentration and exposure and provides a menu of intervention actions that may be taken by the CBN under each classification. For earnings, the regulator is empowered to intervene in a bank when

³⁴ BOFIA, ss 35(1) (a)-(c)

³⁵ BOFIA, ss 32 & 33; NDIC Act, s 30

³⁶ BOFIA, s 35(1)(d); NDIC Act, ss 29-32

³⁷ Gleeson, *International Regulation of Banking - Basel II: Capital and Risk Requirements* (n 24) 29.

³⁸ CBN, Framework for Contingency Planning For Banking Systemic Distresses and Crises (2002) (CBN Contingency Framework)

³⁹ CBN, CBN Supervisory Intervention Guideline (2011) (CBN Supervisory Intervention Guideline)

⁴⁰ D G Mayes, 'Early Intervention and Prompt Corrective Action' (2009) 9 Bank of Finland Discussion Papers 8.

⁴¹ CBN Supervisory Intervention Guideline, 7-15.

it identifies one of three forms of variations in earnings in the form of declining earnings, inconsistent earnings and excessive increase in earnings which could be caused by non-compliance with operational guidelines issued by the CBN,⁴² increase in cases of forgeries and fraud, refusal to implement the recommendations of internal or other auditors and deliberately misleading the CBN through false accounting and reporting.⁴³ The CBN is also empowered to intervene in a bank where it considers that the deficiencies in a bank's risk management practices are capable of affecting its viability,⁴⁴ and where the information technology systems and operations of a bank is disrupted for up to five working days and/or such disruption prevents the bank from rendering statutory returns to the CBN and the NDIC.⁴⁵

The menu of sanctions that may be exercised by the CBN under each head of trigger ranges from letters of compliance to the board of the affected bank requesting a remedy of the breach in question, spot or special examination of the affected bank, a direction to develop an action plan to restore the liquidity, asset quality, credit administration and operations of the bank to removing officers or directors of the bank regardless of limitations contained in the memorandum or articles of association of the bank and appointing replacements and advisers in their stead who would be remunerated by the affected bank.⁴⁶ The CBN in conjunction with the NDIC and AMCON could also consider restructuring or liquidating the affected bank.⁴⁷

The multiple trigger approach adopted under the early intervention framework in Nigeria establishes a framework that would enable regulators to promptly identify brewing problems in a bank or the banking system and direct the focus of regulatory actions by the CBN and the NDIC.⁴⁸ In view of the importance of indicators like liquidity and asset quality to the viability of banking institutions, adopting them as triggers for intervention provides the CBN with a potent tool for identifying troubled banks well in advance in a way that will help prevent losses to depositors and the taxpayer. Given that it may be possible for banks to manipulate the accounting treatment of capital, a reliance on a market influenced indicator like liquidity presents an indicator that is able to pierce through the opaque nature of the accounting books of banks and reflect the true state of affairs through the level of confidence market participants repose in a bank, which will affect its liquidity. Also, although adequate capital may help reinforce the confidence of the market in a bank, the possibility of the loss of this confidence will be dependent on the quality of and position of the bank's assets. The use of the asset quality trigger is therefore particularly important in view of the high level of non-performing loans to total assets of banks in Africa which is stated to be about three times as high as the level in more advanced economies.⁴⁹ Making asset quality a basis for the trigger of

⁴² Such as the CBN Know Your Customer (KYC) Manual setting out the checks to be conducted by a bank before opening an account or engaging in any business transaction with a depositor or customer of the bank. See CBN, Know Your Customer Manual for Banks and other Financial Institutions in Nigeria <http://cenbank.org/OUT/PUBLICATIONS/BS/2003/KYCM.PDF> accessed 9 June 2012.

⁴³ CBN Supervisory Intervention Guideline, 14

⁴⁴ *Ibid* 15

⁴⁵ *Ibid*

⁴⁶ BOFIA, s 35(2); NDIC Act, ss 32(1) (c) & 32(2)

⁴⁷ BOFIA, s 34; NDIC Act, s 32(2)

⁴⁸ CBN Supervisory Intervention Guideline, 2

⁴⁹ See L Kasekende, J Bagyenda, M Brownbridge, 'Basel III and the Global Reform of Financial Regulation: How Should Africa Respond? A Bank Regulator's Perspective' (2011) 14 <http://fsbwatch.org/pdf/Basel_III_2011_kasakende.pdf> accessed 21 December 2012

regulatory intervention therefore addresses a major concern of the African banking system in Nigeria.

The Intervention Guidelines introduces a measure of certainty and clarity to the operation of the early intervention regime in Nigeria and the CBN even goes further to clarify the regulatory intervention regime in the case of a system wide crisis.⁵⁰ This reduces the potential abuse of administrative powers by the CBN and the NDIC. It is however, important to consider how this regime compares with the framework in other more advanced economies.

3. COMPARISON WITH OTHER JURISDICTIONS

Like the CAR trigger system in Nigeria, the Federal Deposit Insurance Improvement Act of the United States, specifies a graduated early warning trigger system which divides the capitalisation levels of deposit taking banks into the five categories of well capitalised banks, adequately capitalised banks, undercapitalised banks, significantly undercapitalised banks and critically undercapitalised banks with progressively harsher mandatory and optional sanctions to be imposed as the capital ratio decreases and a minimum regulatory threshold when a bank should be declared insolvent in order to reduce potential losses on insolvency.⁵¹ Additionally, section 11(c)(5)(H) of the Federal Deposit Insurance Act lists a number of other mandatory and discretionary conditions that may trigger the appointment of the FDIC as a conservator to a depository bank as where there is a substantial dissipation of the institution's assets or earnings due to a violation of any statute or any unsafe or unsound practice, where the institution is in an unsafe and unsound condition to transact business and where the institution has incurred or is likely to incur losses that will deplete all or substantially all of its capital. Although the regime in the United States was intended to 'limit supervisory forbearance, delay or failure to take appropriate action at financially troubled banks', in view of the nature capital adequacy as a lagging indicator of the viability of a bank, the point has been made that supervisory authorities in the US have had to adopt other formal and informal measures in determining the triggers for intervention which introduces a substantial level of discretion into the early intervention regime.⁵² While this approach allows a measure of qualitative complement to the quantitative assessment provided under the regime, it has the potential to allow for more forbearance in intervention.

In the United Kingdom, the triggers for intervention are not as prescriptive as those in the United States or Nigeria. The Banking Act of 2009 enables the Financial Services Authority (FSA) acting in conjunction with the Treasury and the Bank of England to intervene and exercise its stabilising powers in relation to banks before the point of insolvency.⁵³ The conditions for intervention in this regard are listed to include when a bank is failing, likely to fail or unable to satisfy the conditions to permit it to carry on regulated activities.⁵⁴ Although the conditions have been qualified and complemented by the 'heightened supervision' approach which suggests a measure of increased supervisory oversight over a bank before the

⁵⁰ CBN Supervisory Intervention Guideline, 20-21.

⁵¹ Federal Deposit Insurance Improvement Act 1991, s 38

⁵² J Peek and E S Rosengren, 'The Use of Capital Ratios to Trigger Intervention in Problem Banks: Too Little, Too Late' (1996) *New England Economic Review* 53.

⁵³ The stabilisation powers in this regard refer to the stabilisation options provided in Sections, 11, 12 and 13 of the Banking Act of 2009 which make provision for private sector purchase, bridge bank and temporary public ownership tools respectively.

⁵⁴ Banking Act 2009, s 7; M Čihák and E Nier, 'The Need for Special Resolution Regimes for Financial Institutions - The Case of the European Union' (2009) IMF Working Paper 1, 14

adoption of the special resolution regime for failing bank,⁵⁵ the approach in the United Kingdom has been noted to create a regime that gives the authorities unfettered powers which could make it difficult to predict regulatory response to breaches.⁵⁶

Singh in comparing the relative strengths of the early intervention regime in the United States, Canada and the UK notes that the success of an early intervention regime is not dependent on whether or not the framework is prescriptive or vague but on the fact that relevant authorities are in fact able to intervene early enough to prevent losses to depositors and ensure continuity in the provision of the essential banking services.⁵⁷ While this assertion may be true in some ways, the prescriptive approach must be preferred in an African country like Nigeria. In view of the heightened possibility of political interference in the exercise of regulatory functions,⁵⁸ a framework which provides a benchmark against which the actions of regulators like the CBN and the NDIC can be assessed for the purpose of accountability is more likely to reduce the potential for political interference. Also, the possibility that regulators could have conflicting interest which may lead them to forbear would also be reduced by a more prescriptive approach to early intervention.⁵⁹ Finally, the need to maximise available skilled regulators in Nigeria makes a prescriptive approach that reduces the application of discretion and the potential for forbearance a better approach as inexperienced regulators may be unable to efficiently balance conflicting interests and concerns in the exercise of discretion on a potentially volatile issue.⁶⁰

However, in spite of its prescriptive nature, the early intervention and resolution powers in Nigeria is faced with a number of challenges and like the case in the United States and the United Kingdom where the framework is not as prescriptive, it has exposed the taxpayer to potential losses that are currently estimated to be about ₦3trillion. At the point of intervention in distressed banks on the basis of these prescriptive provisions in the aftermath of the GFC in Nigeria, the CBN discovered that as a result of blatant financial misreporting, some of the banks had actually completely eroded their shareholder capital base and had started to dissipate depositor's fund.⁶¹ The CBN Governor noted that the audit revealed that 'Oceanic Bank had negative capital of ₦94.3 billion, Intercontinental Bank ₦330.71 billion, Bank PHB ₦242.31 billion; Afribank ₦260.9 billion, FinBank ₦104.8 billion, Equitorial Trust Bank ₦27.25 billion and Spring Bank ₦87.9 billion.'⁶² This

⁵⁵ A Campbell, J R LaBrosse, D G Mayes, D Singh, 'A New Standard for Deposit Insurance and Government Guarantees after the Crisis' (2009) *Journal of Financial Regulation and Compliance* 7.

⁵⁶ D Singh, 'The UK Banking Act 2009, Pre-Insolvency and Early Intervention: Policy and Practice' (2011) University of Warwick Legal Studies Research Paper N0 2010-27, 15 - 28 <<http://ssrn.com/abstract=1707406>> accessed 15 December 2012.

⁵⁷ *Ibid* 31

⁵⁸ M Brownbridge, C Kirkpatrick and S M Maimbo, 'Prudential Regulation' (September 2002) *Finance and Development* 1 <<http://www.sed.manchester.ac.uk/idpm/research/publications/archive/fd/fdbrief3.pdf>> accessed 12 December 2012

⁵⁹ E J Kane, 'Changing Incentives Facing Financial-Services Regulators' (1989) 2 *Journal of Financial Services Research* 265.

⁶⁰ P Calice, 'A Preliminary Assessment of the Regulatory Reform for African Countries' in L Ndikumana, A B Kamara, A Salami and M Albert (eds), *Policy Briefs on the Financial Crisis* (2010) 2.

⁶¹ CBN Blames Capital Market Crisis on Sharp Practices (*BusinessDay* Lagos 02 May 2012)

⁶² S Orosanye, 'Rescued Banks Shareholders Want 18 Months to Recapitalise' (*234Next* Lagos 13 June 2011).

prompted the CBN to intervene by extending a lifeline to the affected banks to the tune of ₦620 billion.⁶³

Clearly, there remain a number of challenges to the effectiveness of the early intervention regime in Nigeria and these would be discussed in the next section under the heads of shareholder rights and bank resolution and bolstering the early intervention framework in Nigeria.

Shareholder Rights and Bank Resolution

In Nigeria, some corporate law provisions that are generally aimed at protecting the interest of shareholders in a company have the potential to inhibit the certainty and speed required in the exercise of early intervention powers as a resolution tool for effective bank resolution. These are considered below under the heads of shareholder approvals, pre-emption rights and Claw-Back, Prejudicial Actions & Fraudulent Preferences.

Shareholder Approvals

Corporate law provisions that make it mandatory for shareholder approval to be obtained and sundry other notifications to be made before any material transaction is concluded are prime examples of legal provisions that could give rise to protracted litigations and inhibit the exercise of early intervention powers. Section 100 of the Companies and Allied Matters Act Cap C20 LFN (CAMA) which mandates that the decisions on the alteration of capital of a company in the form of consolidation, conversion, subdivision or cancellation must be made at a general meeting of its shareholders and Section 102 CAMA which requires a resolution for the increase in the share capital of a company to be approved by the general meeting are particularly relevant here as these would have bearing on the ability of regulatory authorities to promptly restructure a failing bank under the Nigerian framework even if the affected bank is under the control of a new management appointed by the CBN or the NDIC. It must be noted that before a general meeting of a company can be held under the provisions of section 217 of CAMA, it is mandatory that a notice of 21 days from the date of the meeting is sent to every person that is entitled to attend the meeting under section 219 of the CAMA specifying the date, place and time of the meeting.⁶⁴ A shorter notice period may only be allowed if the meeting is an annual general meeting called by all the members of the company that are entitled to attend and vote. In the case of any other general meeting, a majority of members with the right to attend and vote would have to call for the meeting and no business may be transacted at a general meeting unless the requisite requirements have been complied with.⁶⁵ In addition to the above, section 222 of CAMA specifically provides that 'every public company shall at least twenty one days before a general meeting advertise the notice of such meeting in at least two daily newspapers'.⁶⁶ A company seeking to merge with another company and needing to have to increase its capital after such merger would have to comply with these provisions which would inevitably cause delays and inhibit a speedy restructuring where that is considered necessary in a crisis situation.

⁶³ Ibid

⁶⁴ Persons entitled to attend the meeting in this regard includes every member, legal representative of a shareholder, directors of the company, auditor and secretary of the Company. See CAMA, s 218 and 220 for the full details of the content of the notice for the meeting and the method of service of the notice.

⁶⁵ See CAMA, ss 217 (2) and 218(3)

⁶⁶ CAMA, s 222

Similarly, in part XVI of the CAMA which deals with arrangements and compromises (i.e. any change in the rights and liabilities of members of creditors of a company), which is akin to a restructuring as contemplated under the NDIC Act and the BOFIA may only be carried out through court ordered meetings under section 539 of the CAMA. The arrangement would also have to be sanctioned by a majority representing not less than three-quarters of the value of the shares of members at the meeting and subsequently certified as fair by the court before it can be regarded as binding on all the parties involved.⁶⁷ An attempt to restructure a bank pursuant to early intervention powers would also have to comply with this requirement which could result in substantial delays in the resolution of a failing bank.

Pre-emption Rights

Shareholder pre-emption rights aimed at protecting the interest of shareholders in companies against the dilution of their shareholding could also constitute hindrance in this regard. In Nigeria, the power to issue shares under section 117 of CAMA is stated to be subject to the limitations in the articles of the company with respect to the number of authorised shares and pre-emptive rights prescribed in the articles of association. Thus, where pre-emptive rights are included in a company's articles of association, any securities issuance by the company would have to be done on a pre-emptive basis (i.e. securities on offer must first be offered to existing shareholders in proportion to their existing shareholding before an offer is made to other interested parties). It is also not unusual for the articles of association to stipulate that the offer for subscription on a pre-emptive basis should adhere to certain publicity requirements such as publication in national dailies or in writing to shareholders and allow a mandatory period of time for shareholders to exercise their rights. Again, any attempt at recapitalisation in the exercise of early intervention powers would have to comply with this requirement.

Claw-Back, Prejudicial Actions & Fraudulent Preferences

Other corporate law provisions that could inhibit the application and exercise of resolution mechanisms and tools for effective bank resolution include the 'claw-back' provision that could void asset transfers made within the 'suspect period' (i.e. the period immediately prior to the commencement of insolvency proceedings) and the power of the court to review the prejudicial actions of directors. In Nigeria, the courts are empowered to set aside the transactions made by directors and other officers of the company on terms that are prejudicial to the interest of the company's stakeholders under the CAMA.⁶⁸ An application for relief under applicable provisions in this regard may be instituted under section 390 of CAMA by a member of the company, director, former director, creditor, the corporate affairs commission or any other person considered by the court to have such rights.

Thus, where a restructuring or resolution mechanism adopted by the directors of a company including those appointed by the NDIC and the CBN pursuant to the exercise of early intervention powers is considered by any of these persons, to be prejudicial, oppressive or discriminatory to the interest of the company, its members or creditors, an action may be instituted in court to challenge it and the court is empowered to grant a wide variety of orders that

⁶⁷ CAMA, s 539

⁶⁸ See CAMA, ss 311- 312

would have the effect of derailing the resolution of a failing bank.⁶⁹ Also, section 495 of the CAMA dealing with fraudulent preferences provides that any conveyance, mortgage, delivery of goods, payment, execution or other acts relating to property that would be deemed as fraudulent preference in the case of an individual's bankruptcy would be so classified if done by or against a company within three months to its being declared insolvent and deemed to be invalid. In this regard, section 46(1) of the *Bankruptcy Act Cap B2 LFN 2004* (Bankruptcy Act) defines fraudulent preference as including:

‘Every conveyance, transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debt as they become due from his own money in favour of any creditor or any person in trust for any creditor with a view to giving such creditor or any surety or guarantor for the debt due to such creditor, a preference over the other creditors’.

Thus, where a failing bank receives secured capital assistance from an investor, the NDIC or the AMCON pursuant to an early intervention initiative and subsequently fails within three months of the restructuring or early intervention initiative, the transaction and security received which may result in the dilution of the interest of extant shareholders and the priority of other creditors of the bank could be voided under this provision of Nigerian corporate law.

From another perspective, the fact that the BOFIA and the Intervention Guidelines authorise intervention in a bank when regulatory thresholds are breached and not necessarily when a bank is balance sheet or cash flow insolvent as in the case of ordinary companies means that regulatory intervention could potentially also amount to an infringement of the rights of shareholders. Where in the exercise of early intervention and resolution powers, the CBN or the NDIC mandate a bank to seek liquidity or capital assistance based on the poor state of capital or liquidity levels of the bank, the liquidity assistance would have the effect of reducing the potential dividend that may be allocated to shareholders due to the need to repay the principal and interest due on the liquidity assistance or the capital assistance and this would have the effect of diluting the participating interest of existing shareholders in the bank. Where the more drastic early intervention tool of the revocation of license, takeover of control of the management of the bank or restructuring is exercised, the shareholders could in fact completely lose whatever interest they may have left in a failing bank. In view of the fact that the restructuring and early intervention directions given by the CBN and the NDIC could be mandatory, the overriding effect of the directives on shareholder interests could be likened to the compulsory acquisition of the property which runs contrary to the well-established principle under Nigerian law for the acquisition of property to be consensual.⁷⁰

4. RESOLVING THE DIVERGENCE: SHAREHOLDER RIGHTS AS PROPERTY RIGHTS

The approach of treating the rights accruable to shareholders as property rights is a recognised principle of law that is confirmed in the case of *Bank PHB v*

⁶⁹ CAMA, ss 311- 312

⁷⁰ *Ibrahim v State* (1991) 4 NWLR (Pt. 186) 399

CBN and 2 Others where the court noted that ‘Where association, whether private or public companies, are formed for profit, the value created in enterprises undertaken by such companies augments their capital structure and forms part of the assets of the company. This property resides in the shareholders proportionate to the equity they respectively hold in the Company’s Capital Structure’.⁷¹ An action challenging the restructuring effort of the NDIC or the CBN could therefore be instituted on grounds of the breach of property rights which is a right guarded and regulated by constitutional provisions. In this regard, section 44(1) of the Constitution of the Federal Republic of Nigeria 1999 (Nigerian Constitution), like the Universal Declaration of Human rights,⁷² the African Declaration on Human and Peoples’ Rights⁷³ guarantee that no moveable property (or interest in an immovable property) shall be taken possession of compulsorily.

The requirements for meetings, notices, court orders, sanctions, special approval by shareholders for arrangements or increases in a company’s capital, preemptive rights, fraudulent preferences, claw back provisions and constitutional protection of property rights of shareholders as contemplated in the foregoing would result in delays and make it challenging to promptly adopt or implement early intervention powers for effective resolution of troubled banks. The inhibitive effects of some these provisions on the exercise and application of resolution powers and mechanisms were highlighted in the aftermath of the GFC in Nigeria. Attempts to exercise resolution powers by taking over the management of banks, removing erring chief executives and directors, arranging restructurings for the resolution of troubled banks following the CBN/NDIC audit of the Nigerian banking sector in 2009 were greeted by protest and a number of litigious suits were filed challenging the validity of regulatory responses and seeking to upturn regulatory and resolution actions.⁷⁴

Thus, although section 53 of the BOFIA purports to permit the exercise of the powers conferred under the BOFIA without prejudice to the provisions of CAMA, the fact that shareholders rights have been likened to property right by the courts in Nigeria which is a constitutionally guaranteed right makes a reliance on this line of argument a failing one as any law that is inconsistent with the provision of the constitution is invalid to the extent of its inconsistency.⁷⁵ However, in view of the utilitarian nature and functions of banks, a balance must be struck between the object of shareholder protection and financial stability and the argument here is that the balance must be tilted in favour of a system that guarantees the exercise of early intervention powers in bank resolution with safeguards to prevent arbitrariness and abuse to the interest of shareholders which these corporate law mechanisms aim to achieve.

The possibility of tilting the balance in favour of general public interest of financial stability is in fact contemplated by the constitutional mechanisms that guarantee and protect property rights.⁷⁶ The African Charter on Human and

⁷¹ *Bank PHB v CBN and 2 others* (Unreported) Suit No FHC/L/CS/1243/2011, 13-14

⁷² Universal Declaration of Human Rights, Art. 17

⁷³ African Charter on Human and People’s Rights, Art. 14. Similar provision can be found in to European Convention on Human Rights, Art. 1, Protocol 1

⁷⁴ CBN, Public Statement on the Recapitalisation of Eight Nigerian Banks (9 June 2011) 5

⁷⁵ See Constitution of the Federal Republic of Nigeria 1999, s1(3)

⁷⁶ In a recent case, the ECHR permitted the curtailment of equity rights in *Bulgaria* where the sale of an insolvent bank was effected in order to achieve the prompt bankruptcy proceeding that was favourable to creditors without the participation of a controlling shareholder. See *Camberrow MM5 AD v Bulgaria* (Case of the European Court of Human Rights, 1 April 2004) <<http://vlex.com/vid/camberrow-v-bulgaria-26811394>> accessed 22 March 2012

People's Right on its part provide that the right to property may 'be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate law'.⁷⁷ Similarly, the Nigerian Constitution states that the right to possession of property could be denied if it is done in the manner and for the purpose prescribed by a law that among other things '(a) requires the prompt payment of compensation thereof and (b) gives to any person claiming such compensation a right of access for determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria'.⁷⁸ This is in line with the provision of the constitution, which guarantees a right to fair hearing for every individual with a reasonable time before the courts in the determination of an issue against any government or authority.⁷⁹

The three elements of public interest, compensation and judicial review are therefore vital considerations that should be incorporated into the administrative resolution framework circumscribing the corporate and constitutional rights of the shareholders in a bank in the event of intervention by regulators under the early intervention regime. While it may be argued that section 44(2) of the Nigerian constitution which lists the administration of property in the event of insolvency as one of the cases under which the need for compensation and public hearing may be unnecessary, the fact that an intervened bank should not be balance sheet or cash flow insolvent before regulatory intervention makes this a failing argument.

However, as noted by Ogunbare JSC in *UNTHMB v Nnoli* 'where a public body fails to comply with certain procedural safeguards in an enabling Act or Regulations, there is breach of a duty on it and its decision in such circumstances is ultra vires'.⁸⁰ Thus, in order to avoid a challenge to the validity of actions that impinge on shareholder rights under the early intervention framework in Nigeria, special provisions would have to be made for a form of judicial review and compensation of aggrieved shareholders under a framework that ensures that regulatory responses are generally taken in the public interest. While the need to preserve financial stability would generally satisfy the public interest elements for intervention, the framework for compensation and judicial review would have to be worked out. The World Bank and the IMF in advocating the establishment of a regime with clear rules for early intervention in this regard has noted that the judicial review that should be adopted for regulatory actions under the early intervention framework must be such that would not lead to a reversal of the decisions and actions of applicable supervisory or resolution authorities so as ensure financial stability. Instead, persons, whose rights are found to have been infringed by regulatory actions following the judicial review should be entitled to monetary compensation in the form of damages. Clearly the nature and framework of such a framework for the judicial review of the administrative actions of regulatory bodies like the CBN and the NDIC calls for further research in this field of study.

5. CONCLUSION: BOLSTERING THE EARLY INTERVENTION REGIME IN NIGERIA

It must be noted that for an early intervention regime to function effectively, the mechanism and procedure for generating the information that form the basis of

⁷⁷ *African Charter on Human and People's Rights, Art.14*

⁷⁸ Constitution of the Federal Republic of Nigeria 1999, s 44(1)(a) and (b)

⁷⁹ Constitution of the Federal Republic of Nigeria 1999, s 36(1)

⁸⁰ (1994) 8 NWLR (Pt. 363) 376 [412]

the indicators that trigger intervention under the framework must be efficient and devoid of manipulation or fraud. Where the information reported in financial reports of banks or those reported to supervisory authorities is manipulated, the early intervention regime would amount to no more than 'shadow chasing' as regulatory and supervisory authorities would be unable to ascertain the true position of things in a failing bank.

Gravitt and Johnston identify the forms of financial statement fraud to include (a) falsification, alteration or manipulation of financial records, supporting documents, (b) intentional omissions or misrepresentations in financial statements, (c) deliberate misapplication of accounting principles, policies and procedures to which I would add the use of inappropriate electronic accounting and reporting software.⁸¹ Where any of these goes on within a bank, it would compromise the integrity of the information which forms the basis of the trigger for regulatory intervention in a bank.

In order to address the possibility of financial reporting fraud in Nigeria, section 27 of the NDIC Act, section 33 of the CBN Act and section 30 of the BOFIA cumulatively provide that where a person required to provide information to the NDIC or the CBN fails to supply the information or supplies information which he knows to be false or has been reckless in ascertaining the truth or falsity of the information supplied, he is deemed to have committed an offence and would be liable on conviction to a fine or imprisonment. In view of the fact that the liability for the integrity of financial statements is placed on directors of banks under section 28(3) of BOFIA, a breach of the provisions relating to the need to ensure the integrity of financial report means existing directors and other persons found guilty under these provisions would be permanently prevented from acting as directors in a bank by virtue of sections 44(1)(c) of the BOFIA and 254 of the CAMA which deal with the disqualification of directors for offences. In spite of these provisions, the Deputy Governor of the CBN recently noted the financial reporting fraud committed by banks in Nigeria in aftermath of the GFC.⁸² While the cases of recent criminal prosecution of bank management officers has sent the signals about the readiness of the CBN to enforce the provisions of the law in this regard, the fact that the financial reporting fraud committed were not detected by the management, board of directors, audit committees, internal auditors and external auditors of the affected banks or by the CBN and the NDIC until the conduct of the special audit reinforces the view that more still has to be done to complement and reinvigorate the effectiveness of the supervisory processes of the authorities in Nigeria.

The CBN recently developed an electronic platform for accurate and prompt submission and supervision of individual and consolidated financial statements of banks through the electronic financial analysis and surveillance system (e-FASS), which require banks to submit daily, weekly, mid-monthly, quarterly and semi-annual returns in prescribed formats.⁸³ Undoubtedly, the e-FASS presents a good approach to information gathering for early intervention purposes. While it may be argued that compliance with these reporting obligations would be time consuming and costly, the possibility of a speedy devaluation of bank assets and the consideration of the costs that a lax reporting system could cause to the taxpayer as experienced in the

⁸¹ J Gravitt and J Johnston, 'United States: Recognising Financial Statement Fraud Red Flags' (*Monday* 27 January 2008) <<http://www.monday.com/unitedstates/article.asp?articleid=56058>> accessed 18 December 2012

⁸² CBN Blames Capital Market Crisis on Sharp Practices (*BusinessDay Lagos* 02 May 2012).

⁸³ CBN, 'Monetary, Credit, Foreign Trade and Exchange Policy Guidelines for Fiscal Year 2012/13' (2012) Monetary Policy Circular No. 39, 40-41

aftermath of the GFC in the Nigeria are justifiable reasons for the adoption of the current approach.

The adoption of the e-FASS has however made information technology inextricably linked to the task of financial reporting in Nigeria and the CBN must ensure that banks adopt best practices in effective information technology governance. The review of information technology framework in banks must not be limited to cases where a break down disrupts the provision of services to customers or affects the promptness of financial reporting obligations as contemplated under the Intervention Guidelines. The platforms and portals of all participating banks must be properly examined on a regular basis in order to ensure that applicable software for the financial reporting framework are not counterfeited or compromised. In order to achieve this objective of sound information technology governance, a special team on information technology must be established in the Banking Supervision Department of the CBN, which should be saddled, with the task of regular on-site examination of the information technology apparatus and governance framework of banks in Nigeria.