

LEGAL ISSUE BRIEF

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A Review of the Securities and Exchange Commission's Use of Regulatory Powers Against Oando PLC.

Yahaya Shamsu, LL.B, LLM, BL
Legislative Support Service Department

Introduction

The Securities and Exchange Commission (SEC) received petitions in 2017 by two major shareholders of Oando PLC, Alhaji Dahiru Barau Mangal and Ansbury Incorporated against the management of Oando PLC. The petitions alleged gross abuse of corporate governance and financial mismanagement by the board of Oando PLC. The petitioners sought the removal of Adewale Tinubu and Omomofe Boyo as Group CEO and Deputy Group CEO, respectively.¹

Upon receipt of the petition, SEC engaged Deloitte & Touche to conduct a forensic audit of the activities of Oando PLC. The audit report revealed serious infractions such as false disclosures, market abuses, misstatements in financial statements,

corporate governance lapses, unjustified disbursements to Directors and management of the company, amongst others.² SEC subsequently directed that Oando's Group Chief Executive Officer, his deputy and other directors of the company to resign their positions immediately; setting up of an interim management team to oversee the affairs of Oando PLC; an Extra-Ordinary General Meeting of the company should be convened to appoint new directors³; all issues with possible criminality would be referred to the appropriate criminal prosecuting authorities.⁴

Oando PLC reacted by denying the alleged infractions. The company said it had not been given fair hearing as it was not granted the opportunity to see and respond to the forensic audit report and so was unable to ascertain

¹ <https://dailypost.ng/2017/10/18/oando-sec-suspends-companys-shares-financial-mismanagement/>

(last accessed on 25/06/2019).

² <https://sec.gov.ng/press-release-on-investigation-of-oando-plc/>

(last accessed on 19/06/2019).

³ Although the issue arose in 2017, SEC only recently (June 2019) decided to act on the audit report.

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<https://www.proshareng.com/news/Frauds%20&%20Scandals/SEC-Announces-Far-Reaching-Decisions-On-The-Investigation-Of-Oando-Plc/45543>

(last accessed on 19/06/2019).

what findings were made in relation to the alleged infractions and defend itself.

Consequently, it took the matter to the Federal High Court. The Court granted an interim injunction, following an application by Oando's Chief Executive Officer and his deputy, restraining SEC from executing the sanctions. The court further ruled that all parties involved are to maintain the status quo pending the determination of the motion on notice.⁵

The controversy has generated some controversies among stakeholders. Some stakeholders have alleged lack of due process in the investigations of Oando PLC and even questioned the regulatory authority of SEC.⁶ They also expressed worry that the forensic report, which SEC used to make such far-reaching decisions has not been made public.⁷ On the other hand, some stakeholders have expressed support for SEC in its decision against Oando PLC.⁸

As a fall out of the decision by SEC, Oando PLC's share price dropped in the stock market.⁹ This presents a worrying scenario because the company is a major player in the downstream sector of the petroleum industry and is also likely indebted to many commercial Banks. This may mean that a distress in Oando PLC could trigger bigger

problems that could affect not only the stock market, but the banking sector and the economy. It is also worthy of note that the capital market is critical to investor confidence and the development of the economy. It is an avenue where the wealth of a country is sold and bought through instruments (securities or stocks).¹⁰ While some of the issues surrounding the saga may only be given adequate attention by economists, there is a need to consider whether SEC acted in line with extant laws in reaching its decision. This forms the main focus of this brief.

Issues for Determination

This brief formulates issues for determination which include:

- a) Whether SEC acted in line with extant laws in issuing sanctions against Oando PLC.
- b) Whether Oando PLC was given fair hearing by SEC.

a) Whether SEC acted in line with extant laws in issuing sanctions against Oando PLC

It is pertinent as a starting point to highlight the regulatory powers of SEC under the Investment and Securities Act (ISA). Under

⁵ <https://punchng.com/oando-sec-saga-court-adjourns-hearing-till-june-24/> (last accessed on 19/06/2019).

⁶ <http://sec.gov.ng/investigation-of-oando-plc/> ((last accessed on 19/06/2019).

⁷ <https://allafrica.com/stories/201906050067.html> (last accessed on 19/06/2019).

⁸ Some shareholders urged the Nigerian Stock Exchange (NSE) to suspend trading on the shares of the company to avoid massive dumping from

investors. They also urged the NSE to suspend trading on the shares of Oando PLC to avoid massive dumping from investors.

⁹ <https://punchng.com/oando-disagrees-with-sec-on-agm-suspension/> (last accessed on 19/06/2019).

¹⁰ Ahmed Aliyu, 'Managing Capital Market Crimes: the Role of Nigeria's Securities and Exchange Commission'. IOSR Journal of Humanities and Social Science (IOSR-JHSS) [2014] (19) p. 56-63.

the ISA¹¹ SEC is established as the apex regulatory authority of the capital market and securities transactions in the country. In regulating the market, SEC is empowered to protect investors, market operators and also ensure market integrity. SEC does this using tools like registration of securities and market intermediaries, inspection, investigation, enforcement and rule making. Unlike the Corporate Affairs Commission, SEC only deals with public companies and other entities entitled by law to transact or trade in securities.¹² Its regulatory functions are therefore relevant, given the increasing role of public companies in the country. Some of the statutory responsibilities of SEC include:

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- a. regulation of investments and securities business in Nigeria;
- b. registration of securities of public companies and regulation of all offers of securities by public companies;
- c. registration and regulation of corporate and individual capital market operators;
- d. protection of investors and maintenance of fair and orderly markets;
- e. protecting the integrity of the securities market against all forms of abuses including insider dealing;
- f. promoting investors' education and the training of all categories of

intermediaries in the securities industry;

- g. intervening in the management and control of capital market operators which it considers has failed, is failing or in crisis including entering into the premises and doing whatsoever SEC deems necessary for the protection of investors;
- h. preventing fraudulent and unfair trade practices relating to the securities industry; and
- i. seeking judicial order to freeze the assets (including bank accounts) of any person whose assets were derived from the violation of the Act, or any securities law or regulation in Nigeria or other jurisdictions.

From the above provisions of the Act, it can be gleaned that SEC monitors operations of capital market players and ensures compliance with the Act. The roles of SEC are more sensitive given the immense influence of public companies, the risk involved in their ventures and the extent of their spheres of operations.¹⁴ It is in this light that the Act is viewed as a 'comprehensive' legislation that gives 'teeth' to SEC.

SEC also has power to issue subsidiary legislation. In this regard, it has issued a set of rules and regulations ('the Rules') which provide for investor protection, fair market practices and corporate governance.¹⁵ These

¹¹ Investment and Securities Act, 2007.

¹² **This includes limited liability companies whose shares are quoted on the stock exchange.**

¹³ See Section 13 of ISA.

¹⁴ A.B. Ahmed, Muhammad Bello, 'Regulatory Failures and the Collapse of the Capital Market In

Nigeria: Aligning Responsibilities with Accountability'. Journal of Law, Policy and Globalization [2015] (40) p.167- 184.

¹⁵ General Rules and Regulations Pursuant to the Investment and Securities Act, 2007, (SEC Rules, 2011).

Rules were reviewed and updated in 2011.¹⁶ Under the Rules, every public company is required to file an annual report which must 'state the level of compliance of the public company with the Code of Corporate Governance for Public Companies'. The Rules also require all public companies to include risk management as part of their accounting policies, disclose any material effect of unmitigated risk on corporate profitability and to disclose strategies for preventing risks which they are exposed to.¹⁷

The Rules also require the registration of all capital market operators and other regulated entities.¹⁸ In this regard, all appointments of directors of capital market operators and establishment of branches must be approved by SEC.¹⁹ After registration of any operator by SEC, such operator is also obliged to comply with the post-registration requirements of membership, inspection, etc.²⁰ Capital market operators are also subject to examination and inspection by the SEC. Accordingly, operators that are in default may be taken over by SEC.²¹ SEC also has the power to revoke the registration of any failing operator, appoint a provisional liquidator and apply to the Federal High Court for winding up.²² The ISA even adds another ground for winding up outside those stated under section 408 of the Companies and Allied Matters Act.²³ It should thus be noted that even though the Companies and

Allied Matters Act is a general company law legislation, there is an apparent regulatory 'intersection' here.²⁴

From the provisions of ISA and the SEC Regulations, it is quite evident that SEC possesses powers to issue the sanctions against any erring market operator. In particular, Section 13 (g) of ISA gives SEC power to regulate capital market operators, while Section 13 (v) grants SEC power to intervene in the capital market by doing whatsoever SEC deems necessary for the protection of investors.

Indeed, SEC has been deficient in the exercise of its regulatory powers. This may be due to lack of strong management or undue influence by the supervising ministry. Indeed, the frequent sacking and reconstitution of the Boards of regulatory bodies are unhealthy for a smooth development of the capital market in the country. It would be recalled that the former Director General of the Securities and Exchange Commission, Munir Gwarzo was suspended by the then Minister of Finance, Mrs Kemi Adeosun. Mr. Gwarzo alleged that Mrs Adeosun punished him for refusing to stop an ongoing probe of the oil firm, Oando PLC.²⁵

The deficiency in SEC was partly responsible for the near collapse of the capital market between 2007 and 2011. SEC therefore needs

¹⁶ Ibid Rule 39.

¹⁷ Ibid Rule 43.

¹⁸ Ibid Rule 45.

¹⁹ Ibid Rules 21 & 28.

²⁰ Ibid Rules 30-31.

²¹ Sections 49 and 50 of ISA.

²² Sections 51 and 53 of ISA.

²³ CAP C20 LFN, 2004.

²⁴ Ahmed (note 8).

²⁵

<https://www.premiumtimesng.com/news/headlines/271138-dg-of-sec-mounir-gwarzo-docked-for-alleged-fraud-granted-bail.html> (last accessed on 21/06/2019).

to do more by utilising its regulatory powers in the areas of investors' protection to forestall further losses in the nation's capital market. The Ad hoc Committee that investigated the near collapse of the Nigerian capital market concluded that it was abundantly clear that the capital market and its institutions have been a den and haven for corrupt practices which have resulted in very low investors' confidence.²⁶ Consequently, the SEC can only be commended for beginning to wield its regulatory powers by sanctioning the erring members of the Oando board of directors in line with the ISA and the SEC rules and regulations ('the Rules').

b) Whether Oando PLC was given fair hearing by SEC

SEC has released a statement stating that Oando PLC was given fair hearing before being sanctioned and was provided sufficient opportunity of being heard before it was penalised.²⁷ Oando PLC on the other hand contended that it was not given fair hearing and invited before the Administrative Proceedings Committee of SEC. It argued that Rule 599(1) of the SEC Rules and Regulations established the Administrative

Proceedings Committee for the purpose of hearing capital market operators and institutions in the market who are perceived to have violated or have violated the provisions of the Act and the rules and regulations of SEC and such operators against whom complaints/allegations have been made to the Commission.

Oando further argued that the Administrative Proceedings Committee was adopted by SEC in the case of Mr. Olubunmi Oladapo Oni vs. Administrative Proceeding Committee & Securities and Exchange Commission²⁸ and other cases as the parties involved were afforded opportunities to be heard before the panel prescribed appropriate punishments.²⁹

On the issue of fair hearing, the courts have indeed made some pronouncements. For instance, in the case of *Central Securities Clearing Systems Ltd V. Securities & Exchange Commission*³⁰, the Court stated that although the issue of fair hearing is not a technical one but one of substance, it is quite fundamental; for it is well settled that any proceedings conducted in breach of a party's fundamental right to fair hearing, which is guaranteed by Section 36 of the Constitution

²⁶ The House of Representatives conducted an investigation into the activities of SEC in 2012. The issue was so serious that on 20th March, 2012, the House of Representatives dissolved its Standing Committee on Capital Market chaired by Rep. Herman Hembe after it got entangled in allegations of corruption with the Director General of the SEC, Ms Arunma Oteh. An ad hoc Committee chaired by Rep. Ibrahim Tukur Elusdi was set up to continue from where the Standing Committee stopped. The Report of the Ad hoc Committee of the House of Representatives revealed that there was a complete failure of regulation by the apex securities market

regulator. In fact, the records showed that SEC was directly complicit in the collapse of the capital market between 2007 and 2011. SEC was also directly implicated in the missing 8 Billion Naira arising from a public offer by one bank in 2005.

²⁷ <http://sec.gov.ng/investigation-of-oando-plc/> (last accessed on 25/06/2019).

²⁸ (2014) N.W.L.R. (part 1424) 334

²⁹ https://www.oandopl.com/press_release/oando-plcs-response-to-secs-statement-regarding-fair-hearing-in-the-investigation-of-the-company/ (last accessed on 25/06/2019).

³⁰ CA/K/68/2016.

of the Republic of Nigeria (as altered), renders the entire proceedings null and void.

The Supreme Court in *Falomo v Lagos State Public Service Commission*³¹ stated that a duty on the part of an administrative body to act judicially in the sense of applying the rules of natural justice, may be excluded expressly or impliedly, by statute; that where a statutory provision excludes the need for prior hearing of the party whose rights are to be affected by the decision of an administrative body, and if in addition, the statute provides for an administrative appeal from, or judicial review of the body's decision, these are sufficient to negate the existence of any implied duty on the part of such a body to apply the rules, before the original decision is made.

In the case of *Itsueli V Securities and Exchange Commission*³² the court stated that the exercise of executive, legislative and judicial powers by SEC and by extension the Investment and Securities Tribunal was constitutional and did not result in a breach of Section 36 of 1999 constitution (right to fair hearing). Section 36(2) of the 1999 constitution recognises the existence of tribunals and administrative bodies governed by rule of fair hearing and natural justice.

From the above case law, it can be gleaned that the Supreme Court has stated that a statutory provision can exclude the need for prior hearing of the party whose rights are to be affected by the decision of an

administrative body, as long as the statute provides for an administrative appeal.³³ Furthermore, judicial recognition has been given to the right of SEC to exercise of executive, legislative and judicial powers and by extension the Investment and Securities Tribunal as being constitutional and not a breach of right to fair hearing.³⁴ Consequently, SEC has the power to sanction erring market operators without strict adherence to the rules of fair hearing provided under the SEC Rules. Therefore, the provisions of ISA which give SEC overriding regulatory powers supersede the SEC Regulations providing for an Administrative Proceedings Committee, which Oando PLC claimed were not followed by SEC.

Recommendations

1. The National Assembly to encourage the management of SEC at any given time to duly exercise their regulatory powers by using oversight powers and Resolutions.
2. The frequent sacking and reconstitution of the Boards of regulatory bodies is unhealthy for a smooth development of the capital market in the country. In this wise, given the critical role of SEC as the regulator of the capital market, it is recommended that the ISA should be amended to provide for the appointment and removal of the chief executive officer of SEC not to be

³¹ (1977) NSCC 230

³² (2011) LPELR- 4343 (CA).

³³ *Falomo v Lagos State Public Service Commission* (supra).

³⁴ *Itsueli V Securities and Exchange Commission* (supra).

subject to the recommendation of the supervising minister. This is in line with the protection of tenure of office the Governor of the Central Bank of Nigeria, which is a similar government agency to SEC.³⁵

3. The ISA provides that ‘the Minister may give to the Commission such directives as appear to him to be just and proper for the effective discharge of the functions of the Commission under this Act and it shall be the duty of the Commission to comply’.³⁶ It is recommended that the Act should be amended to provide SEC with more operational independence, devoid of too much control by the supervising minister.

Conclusion

The role of a regulator is very important for the growth of the capital market. Regulations enable the capital market to function fairly and efficiently. A well regulated market has the potential to boost investor confidence and contribute in the development of the

economy. In Nigeria, SEC is the regulator of the capital market and is obliged to operate within the established legal framework in carrying out its role. This brief has examined SEC’s regulatory sanctions against Oando PLC, with a view to determine whether they are in line with extant laws. The findings show that SEC is granted the regulatory powers under the Investment and Securities Act and its Rules and Regulations to sanction erring capital market operators. Furthermore, the courts have given recognition to the powers of SEC to regulate the capital market.

From the analysis, it is clear that SEC acted within its powers in ordering some Board members of Oando PLC to resign their appointments. Although SEC has introduced several measures to curb the occurrence of crimes within the market, it needs to do more to enforce those measure and seek the cooperation of other agencies whose activities are also linked to the operations of the capital market in order to boost investor confidence. SEC should also continue to improve on regulations to strengthen the stock market in Nigeria.

³⁵ CAP C4, LFN, 2004.

³⁶ Section 298 of the Act.