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CORPORATE GOVERNANCE

- ➔ In a time of extraordinary changes to the administration of corporations, how decisions are taken, how due diligence is performed, what checks and balances are discarded to enable trade and commerce to continue are live legal issues. How have the legislatures and courts made executives and board members accountable? Are the developments consistent across the jurisdictions?



INTRODUCTION

- Meaning of corporate governance (CG)
- CG in Ghana
 - The 1907 Companies Ordinance (the English Company Act 1862)
 - The Companies Act, 1963 (Act 179)
 - The Companies Act 2020 (Act 992)

CORPORATE GOVERNANCE IN GHANA

- Over the years, no definition of corporate governance.
- However, general framework for the governance of company.
- Four pillars with supporting appendages and the relationship among these pillars.
- Four pillars are members, board of directors, officers and auditors.
- Supporting appendages include employees and even the community in which the companies operate.
- Rule of common law and equity as a guide to interpretation of the Companies Act. (Section 5 of Act 992)

FOCUS OF PRESENTATION



► Three areas for reflection:

How CG is achieved through:

1. Composition and qualification of the board to ensure optimum CG;
2. The Role of Regulators; and
3. Responsible business conduct/ Business and Human Rights.



1. COMPOSITION/QUALIFICATION/ COMPETENCE OF BOARD

- Qualification of directors
 - Qualification set at high standard to ensure fidelity to fiduciary duties.
 - **[Dis]qualification criteria 173/992. Then 177/992:**
 - person of unsound mind;
 - undischarged bankrupt [whether in the Republic or elsewhere];;
 - convicted [in the Republic or elsewhere] of an offence involving fraud, dishonesty or;

DISQUALIFICATION OF DIRECTORS (cont'd)

- an offence in connection with the promotion, formation or management of a body corporate; **[new]**
- or an offence involving insider dealing; **[new]**
- or any other criminal offence which is not a misdemeanor **[new]**.
- It appears that a person is debarred by the competent authority from being a member of a recognized professional body as a result of a disciplinary enquiry; **[new]**
- Ongoing criminal investigation. By a criminal investigating body or by the Registrar or the equivalent in a foreign jurisdiction regarding the matters in S 177

Leave required to be a director or manage a company.

Automatic disqualification [new]

- **5 years automatic disqualification** if:
 - Convicted within the last five years of an offence involving fraud or dishonesty or relating to the promotion, formation or running of a company;
 - Has been a director or senior executive of a company that has become insolvent within the last five years on account of or partly as a result of the culpable activities of that director; or
 - Has been disqualified to act as company secretary, receiver, manager or liquidator of a company

Automatic disqualification (cont'd)

➤ 10 years automatic disqualification:

- Subsequent second conviction

➤ Permanent automatic disqualification:

- Subsequent third conviction
- Disqualification order recorded a register of orders for this purpose and published in the Companies Bulletin.
- Register is open to inspection of a person on payment of a fee determined by the Registrar.

In other specific legislations And related CG Codes

- Banks and Specialized Deposit-Taking Institutions Act, 2016 (Act 930)
 - Bank of Ghana Corporate Governance Directives 2018
- Securities and Exchange Commission Act, 2016 (Act 929)
 - The Corporate Governance Code For Listed Companies 2020
- National Insurance Act 2021 (Act 1061)
 - Corporate governance Code for Life Insurers and Non- Life Insurers

In other specific legislations:

Deposit-taking institutions Act 2016 (Act 930)

- A Bank or Specialized Deposit Taking Institution needs the written approval of the Bank of Ghana before it appoints its Chief Executive or Deputy or a director of that bank or specialized deposit taking institution. - S60 of the Banks and Specialized Deposit-Taking Institutions, Act 2016 (Act 930).
- For a clear, professional and independent exercise of powers, emerging practice is giving sway to the appointment of directors who are not only independent but also non-executive directors.

In other specific legislations:

Deposit-taking institutions Act, 2016 (Act 930)

- “Independent Director” means a non-executive director who has the ability to exercise objective, independent judgment after fair consideration of all relevant information and views without undue influence from management or from inappropriate external parties or interests.
- This is elaborated by the Bank of Ghana Directives 2018.

In other specific legislations (cont'd)

- Further Directives given by the Bank of Ghana on competencies.
- Diverse competencies with reasonable knowledge in fields such as risk management, financial controls, sustainable development and understanding of local, regional and global economic market forces.

In other specific legislations (cont'd)

- The BoG for instance requires that **Regulated financial institutions must ensure that the composition of the Board has up to 30% of independent directorship and not more than two related parties as members of the board.**
- Note: These elaborate qualification and competence criteria being adopted by non-specific companies [into their constitution].

In other specific legislations (cont'd)

► Role of appointing authority:

- Conversant with specific qualification or competence criteria.
- Exercise power of appointment to align with fiduciary duties of directors and as required by law.
- Qualification or competence criteria a great guide to appointing authority and a measure for assessment and compliance with directors duties.

CASE STUDY

- **R V High Court, Accra; ex parte Ploetner** [1984-86] 2 GLR 107, SC (on disqualification of directors)- undischarged bankrupt. According to the court, the effect of that provision was to avoid the “pernicious effect of unleashing foreign bankrupts on us”
- **Luguterah v Northern Engineering**[1978] GLR 477-509

CASE STUDY (cont'd)

- **Adams v Tandoh [1984-86] 2GLR 561.** The court disqualified one A from becoming a director under the Act for four years. In this case, the court also explained the purpose of the then S. 186 of Act 179, now S. 177 of Act 992 thus:

'the object of section 186 (1) (c) was to safeguard the interests of members of the public who were shareholders of, or had either invested or given credits to, companies and to ensure that the said assets and investments were managed only by honest persons as directors and not by frauds or by persons with criminal propensity. In cases where the object of an enactment was the public safety, wide interpretation was called for or was necessary to effect that object.'

2. THE ROLE OF REGULATORS IN ENSURING CG



- In Ghana, there are, among other Regulators, the
 - **Office of the Registrar of Companies** – Companies Bulletin/Company Registers
 - **Bank of Ghana** (Directives)- 2018. Also 2022 (Corporate Governance Disclosure Directive.
 - **National Insurance Commission** (Governance and Risk Management Framework for Licensed Insurers).
 - **Securities and Exchange Commission** (The Corporate Governance Code For Listed Companies 2020)

THE ROLE OF REGULATORS IN ENSURING CG (cont'd)

- Other Regulators like the **Public Procurement Authority** to ensure sanity within the public procurement space.
- Also the **State Interests And Governance Authority** (SIGA)

Judicial pronouncement on CG directives by BOG

- The Court has held the Directives of the Bank of Ghana to be lawful in ***Association of Finance Houses v Bank of Ghana And Another*** (J1/04/2021) [2021] GHASC 24 (28 July 2021). The Supreme Court in a unanimous decision dismissed the action brought by the Association of Finance Houses, challenging the Bank of Ghana's authority to issue the Directives arguing that it ought to have been issued by Parliament as a Legislative Instrument in accordance with Article 11(7) of the 1992 Constitution of the Republic of Ghana and held that the Corporate Governance Directives was lawfully issued by the Bank of Ghana. The court ruled that the central bank's independence is guaranteed under the 1992 Constitution, hence making it subject to parliamentary scrutiny and oversight would be upsetting the necessary independence of the bank.



BANK OF GHANA DIRECTIVES ON CG

- These Directives provide for sound corporate governance standards. Paragraph 29 provides for the board composition.
- It provides that the board shall have at least five (5) members including the Chairperson and a maximum of thirteen (13) members, the majority of which must be non-executive and ordinarily resident in Ghana.
- It also provides for the tenure of the Managing Director/Chief Executive Officer. The maximum tenure of twelve (12) years. Such tenure may be split into three (3) terms not exceeding four (4) years per term

The Securities and Exchange Commission CG Code For Listed Companies 2020

➤ Whistle Blowing

- The Board shall appoint a person, an independent Director to whom whistle blowers may make disclosures on anonymity.

➤ Board Composition

- a majority of the directors shall be non-executive directors who shall be independent. a minimum of two directors shall be independent non-executive directors, one of whom may be the Chairman of the Board. Justification is required for a size of the Board smaller than [5] members or larger than [13] members
- the position of **chairman and chief executive officer** shall not be held by the same person at the same time except approved by the commission and shareholders without approval of the Commission and Shareholders.

National Insurance Commission CG

Code for Life and Non-Life Insurers

➤ **Composition of the board**

- at all times, have (a) at least seven directors; and (b) sufficient non-executive directors to ensure that more than half the members of the audit committee are non-executive directors.
- (a) at least one third shall be persons who are citizens of Ghana;
- (b) at least one third shall be persons who are resident in Ghana;
- (c) at least one third shall be independent non-executive directors.

The State Interests And Governance Authority (SIGA)

- The mandate of the State Interests And Governance Authority (SIGA) is to facilitate performance management in [State Owned Enterprises] SOEs and other prescribed bodies, within the framework of Government policy, to ensure that they operate efficiently, effectively and profitably thereby contributing towards the socio-economic development of Ghana.

The State Interests And Governance Authority (SIGA)

- **Some of its responsibilities include:**
- Developing an effective governance and risk management mechanism to facilitate the assessment of the various categories or industries of state interest entities as well as the management and mitigation of risks;
- Providing capacity-building support for the specified entities in the implementation and evaluation of governance, risk and compliance processes;

The State Interests And Governance Authority (SIGA) (cont'd)

- Providing support in monitoring and keeping abreast with regulatory developments, compliance controls, issues of non-compliance with legal, audit, ethical, regulatory and policy guidelines and reporting on instances of non-compliance by the state interest entities for resolution;
- Collation of information to facilitate the assessments of the institutional performance of identified state interest entities to ensure that they are in compliance with all operational, legal and regulatory requirements such as the Ownership Policy, Public Financial Management Act and Regulations, Companies Act, etc.

The State Interests And Governance Authority (SIGA) (cont'd)

- Liaison with relevant departments to conduct checks and investigations to aid decision-making on the appointments of CEOs and Board members;
- Preparation of periodic risk profile and other relevant reports for the Executive Management and the Board for strategic decisions on meeting business objectives.

HOW REGULATORS ENSURE CG



Setting requirements for:

- Board composition (including number of board of directors).
- Board qualification/competence.
- Tenure.
- Monitoring and controls.

HOW REGULATORS ENSURE CG (cont'd)

- Filing of returns, charges and compliance with mandatory reporting and accountability obligations of companies.
- regulatory /licensing conditions and strict compliance.
- Tackling corruption in public procurement (companies with corrupt persons as directors/shareholders disqualified from public procurement).



3. RESPONSIBLE BUSINESS CONDUCT

- Flows from the duties expected of directors [S.190 of Act 992].
- Act at all times in the best interest of the company so as to preserve the company's assets, further the business and promote the purposes for which the company was formed.
- In so doing, a director, must have regard to:
 - The likely consequence of any decision in the long term [new];
 - The impact of the operations of the company on the community and the environment[new]; and
 - The desirability of the company maintaining a reputation **for high standards of business conduct [new]**.

Business Conduct and Human Rights

- The UN Guiding Principles on Business and Human Rights.
- The need for board and management to be abreast with Pillar II of the UNGPs (Not business as usual).
- The role of businesses in ensuring respect for business rights [hinged on sustainable development (e.g. SDG8)].

PILLAR II OF THE UNGPS



The second pillar is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.

PILLAR II OF THE UNGPS (cont'd)



- Board's duty to set a policy commitment to respect human rights.
- Ties in with required reasonable knowledge of board on matters that cover fields such as sustainable development, global economic matters.
- Due diligence by management to identify, prevent, mitigate and account for how they address impacts on human rights, and remediation, if appropriate.
- Activities include activities with business partners and covers acts of omission (the supply chain value).

Human rights protection and Judicial decisions



- In Ghana;
- Article 12 (of Chapter 5 of the 1992 Constitution)
- Article 33(5) ---Ghana Lotto Operators Association & Others v National Lottery Authority [2007-2008] SCGLR 1088.
- National Action Plan on Business and Human Rights (in progress).

CONCLUDING THOUGHTS



- Current trajectory of CG requiring higher standards by way of ensuring transparency, accountability and responsible business conduct through:
 - Board composition/qualification/competence ;
 - Role of Regulators ;
 - Corporate responsibility to respect human rights.
 - Reporting on ESG Factors
 - These factors in addition to others on audit, duties of directors, ethics have enabled the strengthening of CG by the legislature and the courts.

➤ **ESG – Environment, Social and Governance Factors**

- The value placed on companies' choices to be environmentally conscious, ethically aware, and forward-looking underpins the the three central factors in measuring the sustainability of companies.
- The ESG Factors definitely affects the bottom-line of companies and investor-decisions.
- The companies Act of Ghana, Act 992 has placed responsibility on directors to uphold the ESG factors. Sections 190 (2)

THANK YOU

END