

‘CHARITABLE OBJECTS’:

LEGAL AND REGULATORY ISSUES IN NIGERIA’S NOT FOR PROFIT SECTOR

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‘ MOST NFPs FOCUS THEIR ACTIVITIES ON CERTAIN SECTORS OR ISSUES OF CONCERN TO THEM, WHERE THEY HOPE TO CATALYSE CHANGE ’

Nigeria’s Not-for-Profit (NFP) Sector is becoming increasingly visible for the uptick in their charitable causes. Through the years, charity has progressed from random individual/religious charitable acts of helping the poor to more organised philanthropy, including diverse corporate social responsibility (CSR) initiatives by companies, activities by family foundations and group endowments. “Giving back” is now a popular mantra amongst high net worth individuals (HNIs), whilst religious organisations are also upping their ante in institutionalising and using NFP vehicles to contribute their quota in furtherance of social causes.

Based on history, and other considerations underlying their preferences for certain sectors and causes, the reality is that most NFPs focus their activities on certain sectors or issues of concern to them, where they hope to catalyse change: educational, financial, religious, scientific, health, cultural, sporting, social, and charitable spheres.² For instance, the Nigerian Economic Summit Group (NESG) is

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² See for example, the Nigerian Conservation Foundation (NCF) which is focused on the environment, and amongst other affiliations, is associated with the World Wide Fund for Nature (WWF): <https://www.ncfnigeria.org/about-ncf> (accessed 01.02.2020); EFINA (Enhancing Financial Innovation & Access promotes financial inclusion in Nigeria, with funding from the UK Government’s Department for International Development (DFID) and the Bill & Melinda Gates Foundation: <https://www.efina.org.ng/> (accessed 01.02.2020); etc.

an NFP think tank that facilitates public and private sector engagement to drive economic reforms in support of Nigeria's development goals.³ Other NFPs implement programmes to inspire and empower specified members of the society⁴ or advance national or international (especially cultural) interests.⁵ Some other NFP entities are clearly international agencies like the International Committee of the Red Cross, *Medecin sans Frontiers*, etc.

NFPs have different operating models. Whilst a number of international philanthropic institutions are active in Nigeria,⁶ many considering Nigerian entry must do so on the basis of proper appreciation of the applicable legal regulatory context. Given the heightened need to make their finances (often comprising grants and donations) go the furthest distance on targeted interventions, it is imperative that NFPs operate efficiently. The operating model can hugely affect the quantum of the NFP's impact - it is thus important to consider which vehicle will best serve the NFP's purposes: incorporated

trustees (ITs), company limited by guarantee (Ltd/Gte), unincorporated associations⁷ and charitable trusts/foundations.

This article examines the “top of the mind” legal and regulatory issues pertaining to the establishment and running of NFPs in Nigeria.

Start-Up Considerations: What Vehicle?

As noted, there are many options for setting up/structuring charitable vehicles in Nigeria. It goes without saying that *peculiarities of the group or common practice may 'force' the decision of the type of vehicle on the group*. For example, most religious groups tends to be organised as incorporated trustees. Also, there may be preference for statutorily created vehicles such as company Ltd/Gte or incorporated trustees or contractual arrangements that may not be subject to strict regulatory oversight by way of compliance requirements such as charitable trusts. *Usually, the choice of which vehicle to utilise could also be influenced by the 'regulatory burden' (and costs) of both start-up*

and maintenance requirements. Hereafter, we comparatively analyse the available vehicles from the foregoing perspectives.

A. Charitable Trusts

The unincorporated charitable trust vehicle is available in Nigeria, consistent with our common law heritage. It is created/constituted either by an effective transfer of the trust property to trustees or by an effective declaration of trust.⁹ Thus, where the whole of a property is devoted to purposes which excludes all the donee's beneficial interest, or where property is given upon condition that a fixed and definite sum, which does not exhaust the entire revenue, shall be applied in a specified charitable way, a trust is created.¹⁰ The settlor must however do all that is necessary to render the settlement binding upon him.

Start-up Requirements

If the settlor is the legal owner of the property, he must take all due steps within his power to vest the property in the trustees, using the

3 See NESG website: <https://nesgroup.org/about> (accessed 01.02.2020).

4 Women in Management, Business and Public Service (WIMBIZ) is another NFP entity that implements programmes that inspire, empower and advocate for greater representation of women in leadership positions in the public and private sector; WIMBIZ: <http://wimbiz.org/who-we-are/> (accessed 01.02.2020).

5 For example, *Alliance Francaise* is a Nigerian NFP institution whose statutes have been approved by the Alliance Francaise of Paris and which is involved in the training of Nigerians in French language and culture: <https://www.educartis.com.ng/centers/alliance-francaise-victoria-island/> (accessed 01.02.2020).

6 Examples include Ford Foundation (their West African Office is based in Lagos), Bill and Melinda Gates Foundation's Nigeria office is in Abuja, etc.

7 As an incidence of the freedom of association enshrined in section 40 1999 Constitution, Cap. C23, *Laws of the Federation of Nigeria (LFN) 2004 (as amended)*, persons may come together to form groups/associations to pursue a lawful purpose/protect their interests without necessarily being incorporated or registered with the Corporate Affairs Commission (CAC).

8 Apparently, Action Aid Nigeria was registered as Incorporated Trustees, based on press reports issued by its “Board of Trustees”, and self-described commentary that: “Although we started operation in Nigeria in 1999 as a Country Programme of ActionAid International, we have transformed into an autonomous national organisation registered with the Nigerian Corporate Affairs Commission.” See: <https://nigeria.actionaid.org/news/2019/press-release-issued-board-trustees-actionaid-nigeria-state-nation-26th-day-october-2019>; and <https://nigeria.actionaid.org/about-us> (both accessed 09.10.2020); NESG is a Ltd/Gte entity; Fate Foundation (<https://fatefoundation.org/>) is also Ltd/Gte.

9 Oakley A. J., Parker and Mellow, *The Modern Law of Trusts*, Sweet & Maxwell, London, 2008, Page 103.

10 *Halsbury's Laws of England*, (4th ed., 2001), Vol.5(2) Para, 68, p. 75. It is trite that the essential elements for the creation of a trust are: certainty of words/intention; certainty of subject-matter; and certainty of objects: Taiwo Adewale and Akintola Oluwatoyin, *Introduction to Equity and Trusts in Nigeria*, (Princeton, 2016), p. 223. Thus, for a trust to be valid: it must be clear that the settlor or testator intended to impose binding obligation on his chosen trustees by the words used; the property to be held on trust must be certain and clearly identifiable: *Palmer v. Simmonds (1854) 2 Drew 221*; the beneficial interest to be taken by the beneficiaries must also be certain otherwise the trust will fail for uncertainty and the trustee will hold on a resulting trust for the settlor: *Re Moore, Prior v. Moore (1901) 1 Ch. 936*; and it must be possible to ascertain who the beneficiaries are.



appropriate methods and instrument of transfer.¹¹ Trust deeds are also subject to stamp duties at the Federal Inland Revenue Service (FIRS) in compliance with the **Stamp Duties Act (SDA)**.¹² Also, relevant **Wills Law** of the State of residence of a testator will apply where a charitable trust is created by will.

It is noteworthy that by **section 7 Statute of Frauds (SoF) 1677**, any declaration of trust in respect of land must be evidenced by a memorandum in writing signed by the parties creating the trust.¹³ **Section 9 SoF** also provides: “all grants and assignment of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or else, shall be void and of no effect.”

The second method of constituting a trust is by a settlor declaring himself to be trustee of the property for the beneficiary and he may do so whether his interest is legal or equitable. It should be noted, however, that such a declaration must be evidenced by writing, signed by him if it relates to land, but if it relates to other properties, it may

be made by word of mouth or may be inferred from conduct.¹⁴

Benefits and Challenges

Charitable trust is relatively easier to create because same require nil or limited interface with regulatory agencies, neither is publicity mandatory; thus, the vehicle is ‘flexible’. The downside however is that absence of sufficient regulatory linkage which is usually evidenced by a certificate of incorporation, may generally affect operations like opening of bank account and obtainment of Tax Identification Number (TIN) – the TINs and Bank Verification Numbers (BNVs) of trustee(s) may be required as part of know your customer (KYC) protocols. Also, charitable trust created via a will can only take effect upon the demise of the testator.

Dissolution/Termination

A trust can generally be terminated by: revocation, effluxion of time/fulfilment of the objects of the trust, and by a disclaimer.¹⁵ Generally, a settlor cannot revoke the trust unless the trust expressly or by implication reserves a power to revoke or terminate the trust on him.¹⁶ At expiration the trustee usually transfers the residue of the trust fund to the beneficiary or the settlor in accordance as the case may be, in line with the provisions of the trust deed.

B. Company Limited by Guarantee (Ltd/Gte)

Section 26 Companies and Allied Matters Act (CAMA),¹⁷ recognises the company limited by guarantee (Ltd/Gte) as an NFP vehicle. It must not be registered

¹¹ See Gilbert Kodinliye, 'An introduction to Equity in Nigeria', (Spectrum, 1990), p. 76. This means that for a freehold, deed of grant must be executed: *Richards v. Delbridge (1874) L.R. 18 E.711*; for leasehold, a deed of assignment must be executed: *Antrobus v. Smith (1806) 2 Ves. 39*; for chattels, property is transferred by delivery or deed of gift: *Re Rose, Rose v. IRC (1952) Ch. 499*; while for registered shares, it is transferred through the execution of proper share transfer form: *Re Rose Midland Bank v. Rose (1949) Ch. 78*.

¹² *Cap. S8, LFN 2004*. See **section 63 SDA**.

¹³ The SoF applies as a statute of general application in many States that have not enacted their equivalent SoF provisions. See also **section 78(1) Property and Conveyancing Law (PCL) Cap. 100, Laws of Western Nigeria (LWN) 1959**.

¹⁴ See **section 9 SoF and section 78(1) PCL**.

¹⁵ Renunciation of the office of trustee by the party appointed by the settlor could result in termination of the trust, vide a rejection by a way of disclaimer; however this must be done timeously. See Leo Okafor, 'Principles & Practices of Living Trust', (Prestige, 2009), p. 126.

¹⁶ *Toker v. Toker (1863) 3 De G.J. & S. 487*.

¹⁷ *Cap. C20, LFN 2004*.

with a share capital: the members rather undertake to contribute to the assets of the company upon winding up, and such 'guaranteed liability' must not at any time be less than ₦10,000. If surplus property remains after the discharge of all its debts and liabilities upon winding up, same must be transferred to another Ltd/Gte entity having similar objects to that of the wound up company. It is inflexible that a Ltd/Gte entity cannot have as part of its object, the carrying on business for the purpose of making profits for distribution to its members.

Start-up Requirements

The incorporation process for a Ltd/Gte company begins with application for consent of the Registrar-General (RG) of the Corporate Affairs Commission (CAC) consent to use the proposed name;¹⁸ upon approval, availability check of the proposed will be done, and if available, same would be reserved.¹⁹ The CAC Form 1.1 will thereafter be filled online before filing fee and a stamp duty fee are paid to CAC and the FIRS respectively. The completed incorporation documents are then

uploaded in PDF form for processing. The CAC is obliged to obtain approval of the Attorney General of the Federation (AGF) to the proposed objects, before incorporating the company ltd/gte.

Post-Incorporation Compliance

Ltd/Gte companies are required to file annual returns with the CAC. Modifications such as change of name, change of directors or secretaries, amendment of Articles, change of place of business, are all required to be notified to the CAC. Furthermore, the company is subject to the **CAMA's** provisions on meetings and management, etc.

Benefits and Challenges

The Ltd/Gte entity has distinct legal personality, separate from its members, who rather than being 'shareholders' whose interest in the company is represented by their shares, they undertake to pay the debt of the company on winding up to the extent of their respective (guaranteed) limits. The requirement of AGF's consent usually elongates the ltd/gte company's incorporation timelines, relative to regular companies (limited by shares).²⁶

However, there are no mandatory publicity requirements for start-up and changes in Ltd/Gte apart from filings to the CAC. Furthermore, Ltd/Gte vehicle enjoys flexibility as its Articles provide that members can retire or be excluded from the membership of the company.²⁷ Of course, profits are not distributable to members, but must be applied to promotion of objects of the company.

Dissolution/Winding

Like its limited liability counterpart, a company Ltd/Gte can be wound up by the court, voluntarily, or subject to the supervision of the court. Winding-up by Order of Court generally occurs pursuant to a petition for winding-up on the following grounds: the entity has achieved the purpose for which it was set up; inability to pay its debts; failure to hold statutory meetings or deliver statutory reports to the CAC; number of members falling below the statutory minimum of two (2); or any other grounds upon which the Court believes it is just and equitable that the company be wound up.²⁸

¹⁸ The letter will be submitted with the application fee of ₦5,000. This consent is generally not required for companies limited by shares.

¹⁹ By **section 32 CAMA**, a name can be reserved for 60 days and will be available for reservation renewal for another 60 days as long as the name remains untaken. Also, by **section 30 CAMA**, names similar to existing companies are prohibited and same cannot be reserved or used. This is also the position for names that suggests affiliation with the government.

²⁰ The stamp duty for Ltd/Gte is a flat fee of ₦500 as opposed to limited liability companies which is *ad valorem* the share capital.

²¹ This comprises of Form CAC1.1 together with Memorandum and Articles of Association (Memart), copies official identification (ID) for director(s)/subscriber(s) and secretary.

²² It is noteworthy that, depending on the proposed sector of the Ltd/Gte entity, there may be regulatory sign-offs which will be required to be uploaded to CAC along with incorporation documents. For instance, if the NFP entity intends to operate in the education sector, a letter of no objection must be obtained from the Federal Ministry of Education and submitted to CAC.

²³ Pursuant to **section 26(5) CAMA** which conditions the AGF's approval on the legality of the proposed objects of a company Ltd/Gte.

²⁴ **Section 370 CAMA**. Being companies, they are also to file tax returns with the FIRS pursuant to **Companies Income Tax Act (CITA)** and will also be subject to compliance requirements under the **Personal Income Tax Act (PITA)** if they have employees.

²⁵ See **Sections 32, 248, 293 and 35 CAMA** respectively.

²⁶ One major highlight of the **Companies and Allied Matters Act 2004 (Repeal and Re-Enactment Act) Bill 2018** (in **section 24(6)**) was the removal of the AGF consent requirement but inclusion of publication of the application for registration in three national newspapers. This change would make the registration process similar to what is currently obtainable for ITs. High regulatory hurdles generally forces groups to operate informally, albeit operating informally can be a right step, for example if the scale of the intended NFP vehicle does not justify incurring huge set up costs and time. The **CAMA Repeal and Re-enactment Bill 2018** also allows a single person to form a private company, meaning that a company ltd/gte can have a single member, while small companies are not mandated to hold an Annual General Meeting. It is however hoped that these changes will not have adverse effect on corporate governance of companies generally, especially Ltd/Gte.

²⁷ **Section 26(8) CAMA**.

²⁸ **Section 408 CAMA**.

C. Incorporated Trustees (ITs)

By **section 590 CAMA**, an association or community of people with common religious, cultural, educational, scientific, literary, development, sporting, charitable or social interest or purpose may formalise their structure by incorporating some of its members as trustees.²⁹ The CAC also has regulatory oversight for registration and administration of ITs. Nigerians and foreigners can be registered as trustees. As corporates cannot be directors of companies, non-natural legal persons cannot be registered as trustees, but may natural person(s) as trustee(s) to represent their interest. Similarly, there is no requirement of a minimum number of members of the association: organisations with open membership and restricted memberships respectively may be registered.

Start-up Requirements

The process of incorporating an association as an IT begins with the availability check of the proposed name and reservation of same for sixty (60) days, if available.³⁰ Thereafter, notices of the proposed registration including names of the trustees



must be published in three (3) national dailies, including a widely circulating local newspaper in the area where the organisation is based.³¹ Form CAC/IT/1 is thereafter completed online using the biodata of the trustees and the objects and address of the organisation. Same is to be printed and signed by the Trustees and Secretaries along with the Trustees Declaration which is to be signed before a Commissioner for Oaths. The impression of the common seal is also affixed on the designated portion of the form.³²

Post Incorporation Compliance

ITs are required to file annual returns with the CAC.³³ Modifications such as change of Trustees or secretaries are all required to be notified to CAC.³⁴

Benefits and Challenges

ITs have corporate legal personality through the Trustees. There is no minimum or any capital requirement at all in the process of registration of an IT. Also, the consent of the AGF is not a requirement, thereby reducing the bureaucratic delays that may be associated with obtaining said consent. However significant publicity is involved in the process of registration of an IT as mentioned above, notices must be published in three national dailies. Changes in names, objects/amendment of Constitution or of Trustees, change of place of business of the IT will also necessitate newspaper publications,³⁵ unlike Ltd/Gte. Also whilst an unregistered association can easily be unravelled with formal procedures, an IT has to follow the formal procedure as provided by law for dissolution.

Dissolution/Winding Up

Dissolution is the necessary ending of a body voluntarily, administratively or judicially. For

²⁹ **Section 590 CAMA** provides: "Where one or more trustees are appointed by any community of persons bound together by custom, religion, kinship or nationality or by anybody or association of persons established for any religious, educational, literary, scientific, social, development, cultural, sporting or charitable purpose, he or they may, if so authorised by the community, body or association (in this Act referred to as "the association") apply to the Commission in the manner hereafter provided for registration under this Act as a corporate body".

³⁰ The name expires after and a new application for reservation must be submitted after said days: **Section 32 CAMA**.

³¹ See **sections 597 and 599 CAMA**.

³² The aforementioned are thereafter uploaded along with: the original newspaper publications; 2 copies of Applicant's constitution; Minutes of the meeting whereat the trustees were appointed, having the list of members present and absent and showing the voting pattern, signed by Chairman and Secretary of the Association; Minutes of the meeting where the special clause rules was adopted into the constitution of the organisation signed by Secretary and Chairman; two passport photographs of each Trustee; receipt of payment of prescribed fees. Currently, the CAC fees is N37,000 (filing/registration fees of Trustees N30,000, certified true copies of Constitution and incorporation documents being N5,000 and N2,000 respectively).

³³ **Section 607 CAMA**.

³⁴ **Section 599 CAMA**.

³⁵ See **Section 597(2) CAMA**.

ITs, **section 608(2) CAMA** is to the effect that ITs may be dissolved by the court on a petition brought for that purpose by: the governing council; one or more trustees; members of the association constituting not less than 50% of the total membership; or the CAC. The grounds for dissolving an IT includes, that: the aims and objects for which it was established have been fully realized and no useful purpose would be served by keeping the corporation alive; the corporate body is formed to exist for a specified period which has expired and it is not necessary for it to continue to exist; all the aims and objects of the association have become illegal or contrary to public policy; and that it is just and equitable in all circumstances that the corporate body be dissolved.

NPFs and “Doing Business”: The “Profit” Question

Generally, NPFs are not to be set-up as profit making entities for distribution to members. Illustratively, **section 24(4) CAMA** expressly prohibits a company Ltd/Gte from being incorporated

to carry on business for the purpose of distributing profits to its members. A school of thought holds the view that the implication of the above provisions is that incorporated NFP entities is not to make any profit. But is this the intendment of the law?

Our view is that incorporated/registered NFP entities may engage in business³⁶ but may not distribute profits to its promoters/members. **Section 26(1) CAMA** provides that a company Ltd/Gte's “income and properties are to be applied solely towards the promotion of its objects.” Similarly, **section 603(1) CAMA** is to the effect that “the income and property of [ITs] is to be applied solely towards the promotion of the objects of the body as set forth in its constitution and no portion thereof shall be paid or transferred directly or indirectly, by way of dividend, bonus, or otherwise by way of profit to any of the members of the association.”

The above provisions presupposes that NFP entities may undertake business in order to generate or acquire the “income and properties” that are to be

solely applied towards the promotion of its objects. Other sources could be through donations, but the law did not limit ‘sources’ of income to donations – meaning that business could be an acceptable way of generating income. The foregoing is supported by provisions of the tax laws that taxes business related profits generated by charitable entities, whilst preserving tax deductibility for donors to these entities.³⁷

Running an NPF: Governance Issues

Some of the extant compliance obligations in the day to day administration of NPF entities in Nigeria includes:

Adherence to Constitutional (Corporate) Documents

An Ltd/Gte, like other companies, are required to adhere to their Memorandum and Articles of Association (Memart); by **section 41(1) CAMA**, the Memart constitutes a contract between the company and its members.³⁸ Similarly, ITs are required to

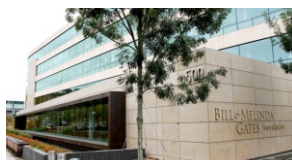
³⁶ According to **Black's Law Dictionary**, (9th ed., 2009), p. 226: “Business” is “a commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain; a commercial enterprise...”

³⁷ See **sections 25(1), 25(5) and Fifth Schedule CITA**.

³⁸ There also diverse case law on this point. For example, in **Continental Chemists Ltd v. Dr Ifeakandu**, (1966) 1 All NLR 1 (a pre-CAMA decision), the SC declared that on incorporation, the Memart becomes the company's charter of activities and defines its field of operation. It delimits the powers and operations of the company. Whilst the Memorandum governs the relationship of the company with third parties (largely through the objects clause), the Articles governs the internal workings of the company. **Section 39(1) CAMA** requires every company to state in its Memorandum of Association the nature of the business which the company is authorised to carry on, or if the company is not formed for the purpose of carrying on business, the nature of the objects or objects for which it is established.



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comply with their objects, as contained in their incorporation documents;³⁹ the registered objects cannot be altered without the consent of, and adherence to the direction of the CAC.⁴⁰

It is important to note that Nigerian law makes no provision for branch registration for multinational NFP entities, hence a new corporate vehicle is required to be incorporated in Nigeria. Presumably, the constitutional documents of the NFP entity in Nigeria, will align with the NFP global model.

Money Laundering Prohibition:

The Special Control Unit against Money Laundering (SCUML) of the Economic and Financial Crimes Commission (EFCC) is charged with monitoring, supervising and

regulating the activities of Designated Non-Financial Institutions (DNFIs) in line with the **Money Laundering (Prohibition) Act (MLPA)**⁴¹ and the **Prevention of Terrorism Act.**⁴² In line with **section 25 MLPA**, NFP entities are regarded as one of the DNFIs and are therefore required to register and cooperate with SCUML. Registration is free but compulsory. Also, NFPs are to report their financial transactions in excess of the statutory threshold of US\$1,000 cash transaction.⁴³

Corporate Governance:

Entrenchment of rigorous corporate governance is key to the seamless operation of NFP entities. The NFP's constitutional documents should detail the modalities for decision making, etc, but whilst this could be quite

true for ITs (because of provisions in the constitution), the current practice of the CAC to only allow a two or three page Memorandum does not give ltd/gte companies sufficient legroom. The way to address this could be vide a Process Manual and/or Members Agreement in addition to Board Charter, which will supplement the Memart and ensure that bespoke rules are applicable to the company. In addition, when issued, the NFP could adopt elements of the **National Code of Corporate Governance 2018**.

Expectedly, international donors will always ask for evidence of corporate governance practice before making significant donation(s) or providing long term funding support.⁴⁴ On the financial side, an NFP entity with poor financial track record, for example as evidenced by misappropriation, accounting irregularities or auditors' qualification of its financial statements runs the risk of prejudicing its access to funding. Financial irregularities or loose financial governance which tends to be quite prevalent amongst NFPs was one of the reasons why the Financial Reporting Council of Nigeria (FRCN) recently attempted to extend its regulatory oversight to NFPs. This plan was however shelved following public outcry.⁴⁵ Indeed, the FRCN's **Code of Corporate Governance 2016** was suspended and the offending parts⁴⁶ were not included when the **National Code of Corporate Governance 2018** was eventually issued by ministerial regulation in January 2019.⁴⁷



³⁹ Section 593 CAMA. The objects are contained in the Incorporated Trustees Application Form (Form CAC/IT/ 1) and the constitution which in addition to the objects of the organisation, also governs its internal operations.

⁴⁰ Section 597 CAMA. See also *The Registered Trustees, Pentecostal Assemblies of the World Inc. v. The Registered Trustees of the African Apostolic Christ Church* [2002] 15 NWLR (Pt.790), 447.

⁴¹ Cap. M18, LFN 2004.

⁴² Cap. C38, LFN 2004.

⁴³ Section 5(1)(b) MLPA.

⁴⁴ Donors and prospective sometimes insist on having monitoring rights

⁴⁵ *The Nation*, 'Should Government Regulate Churches Mosques': <https://thenationonlineng.net/govt-regulate-churches-mosques/amp> (accessed 03.01.2020). In the same vein, a private member Bill proposing regulation of NFPs was also discarded. One major focus was to prevent 'corporate capture' of such NFPs by dominant figures such as founder(s) or chief executives. See Titilope Fadare, 'Bills Board: Another NGO Bill Surfaces in the Senate', *Order Paper*, 18.01.2019, <https://www.orderpaper.ng/bills-board-another-ngo-bill-resurfaces-in-senate/> (accessed 03.01.2020).

⁴⁶ Ndubuisi Francis, 'New Code of Corporate Governance Silent on Religious Bodies, CSOs', *ThisDay*, 16:07:2018: <https://www.thisdaylive.com/index.php/2018/07/16/new-code-of-corporate-governance-silent-on-religious-bodies-csos/> (accessed 17:02:2020).

⁴⁷ On 17th October 2016, FRCN issued the **National Code of Corporate Governance** which is a three-in-one code seeking to regulate public and private companies as well as NFPs. The arm of the Code applicable to NFPs would compel founders to vacate their headship positions after twenty years or upon attaining the age of seventy. This provision, perceived to target churches and other religious groups, led to one of the most prominent religious figures in the country vacating his position as the national leader of the Church, whilst remaining as the global leader. See 'Corporate Governance Code: The Intrigues, Politics and Untold Story' *ThisDay*, 15.01.2017: <https://www.thisdaylive.com/index.php/2017/01/15/corporate-governance-code-the-intrigues-politics-and-untold-story/> (accessed 06.07.2019).



Specialised Regulation?

Related to the foregoing were proposals for NFPs specific regulation vide a 'Charities Commission' that will exercise regulatory oversight the way CAC does for companies. One immediate consequence of this would have been the need to amend the **CAMA**, such that CAC would no longer oversee companies Ltd/gte and ITs. Two major attempts to procure passage of related bills in the House of Representatives (HoRs) and the Senate were unsuccessful, being hugely unpopular.⁴⁸

It was argued by the civil society that the objectives that the **NRB 2016** seeks to achieve are already incorporated within existing laws: the CAC already plays supervisory role over incorporated/registered NFPs in Nigeria and passing the **NRB 2016** will lead to duplicity of agencies and a waste of public funds. Another contentious issue relate to the draconian provisions of the **NRB 2016**.⁴⁹ However, with the recent claims by the Nigerian Army that it had credible intelligence that some NFPs actually support Boko Haram, the HoRs reportedly decided to revisit consideration of the **NRB 2016** on the ground that it would assist in the war against insurgency.⁵⁰ Our respectful view is that the current criminal (reasonable) legal framework covers such alleged conduct; the **NRB 2016** with all its draconian provision will do next to nothing in countering insurgency in Nigeria, but will provide a platform to further violate the rights of lawfully constituted entities in Nigeria.

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A. The first was *The Non-Governmental Organisation Regulatory Commission Bill 2016 (NRB 2016)* presented by the late Umar Buba Jubril (Kogi State) seeking "to provide for the establishment of the Non-Governmental Organisations Regulatory Commission for the supervision, co-ordination and monitoring of non-governmental organisations, civil society organisations etc., in Nigeria and related matters." Its proponents argued that it will check the excesses of some NFPs who operate without regard for the law and without accountability and transparency in their operations. *The Bill* passed second reading before being shelved by the National Assembly owing to outcry from the public who view the Bill as a pretext by the government to weaken civil society's ability to challenge misdeeds by the government and its agencies. See Festus Ogun, '*NGO Regulation Bill and Tragedy of the National Assembly*', *The Guardian*, 05.12.2017: <https://m.guardian.ng/features/ngo-regulation-bill-and-tragedy-of-the-national-assembly/>, accessed 04.01.2020. See also Olayinka Ailleru, '*Why NGO Bill Should be Dropped*', *The Punch*, 14.12.2017, <https://punchng.com/why-ngo-bill-should-be-dropped/amp/>, (accessed 04.01.2020).

49 Some of the powers of the Commission under the **NRB 2016** includes: supervision of NGOs (*Section 7*); power to facilitate and coordinate the activities of NGOs (*section 8*); power to receive and discuss annual reports of NGOs (*section 8(c)*); providing policy guidelines to NGOs and approve projects of NGOs (*section 26*), etc.

50 Jerome-Mario Utomi, '*Deconstructing Lawmakers' Decision to Re-visit NGO Bill*', *The Guardian*, 21.10.2019: <https://guardian.ng/opinion/deconstructing-lawmakers-decision-to-re-visit-ngo-bill/amp/>, (accessed 04.01.2020).

51 See Tope Fadare (*supra*).

52 *Cap. P8, LFN 2004*.

53 *Section 26 Capital Gains Tax Act Cap. C1, LFN 2004*.

The Federal Charities Commission of Nigeria Bill 2019 (FCCN Bill) seeking to create the FCCN to be "saddled with the sole responsibility 'for providing regulatory framework, set and enforce institutional standards and administrative mechanisms in enablement of recurrent registry and supervision of charitable and Non-Governmental Organisations in Nigeria'" was presented on 17th January 2019 by Senator Duro Faseyi (Ekiti State). It also aimed at "strengthening inter-dependency of external multilateral and indigenous interventions with a view to developing a viable third sector for public benefit thereby achieving institutional capacity for transparent and sustainable development." **Part 8 FCCN Bill** envisaged different departments in the FCCN regulating defined categories charitable activities and sectors of NGOs.⁵¹

Taxation

By virtue of **section 23(1)(c) CITA** and **Section 19 with Para 13, Third Schedule Personal Income Tax Act (PITA)**, profits of any company/institution engaged in ecclesiastical, charitable, benevolent or educational activities of a public character are exempt from income tax provided such profits are not derived from a trade or business carried on by such body. Thus tithes, offerings and gifts to churches are tax exempt. Also, NFPs are also exempted from tax on capital gains from disposal of assets, provided such gain is not derived from disposal of any asset acquired in connection with any trade or business.⁵³

Where NFPs engage in any trade or business, the profit derived therefrom will be subjected to income tax as provided for in the tax laws.⁵⁴ Being taxable, NFPs' returns on investments by way of interest income, rent or dividends will suffer withholding tax (WHT), which is effectively advance payment of tax.⁵⁵

Since engaging in business may be unavoidable for many NFPs in order to fund their objects, one way to optimise their tax position from any business venture is to concentrate on tax exempt or preferential sectors and instruments. For example an NFP could invest its excess cash flow in government securities which are not subject to WHT, or in agricultural companies which by the new **section 23(1)(1A) CITA**⁵⁶ can enjoy up to eight (8) years tax holiday.⁵⁷

In addition to the core income tax exempt status of NFPs as noted above, **Section 25 CITA** provides

that any company making donations to such an organisation listed under **5th Schedule CITA**⁵⁸ shall enjoy tax deductible donation not exceeding 10% of the total profits of that company for that year as ascertained before any deduction of such donations is made and must not be of capital nature.⁵⁹

Goods purchased for use in humanitarian donor funded projects are zero rated under the **Section 4 and Schedule 1 Value Added Tax Act**.⁶⁰ It must however be noted that only goods purchased by the applicable NFP are zero rated, and services procured shall be charged at 5% VAT. Books, medicines and basic food items (which many NFPs may be involved with in production, procurement and distribution) are all on the VAT exempt list; the favourable VAT treatment could be a boon to NFPs as it enables them achieve

more.

Furthermore, both Ltd/Gte and ITs are required to register with the FIRS⁶¹ and obtain a TIN from the FIRS. Both Ltd/Gtes and ITs are also required to file tax returns.⁶²

In **Best Children International Schools Ltd v. FIRS**,⁶³ Adah, JCA held that the fact that a company owns a school/ educational institution is not enough to exempt it from payment of taxes under **Section 23(1) CITA**. Thus, a company cannot hide under any name or object to escape its tax obligations. Furthermore, NFPs must keep record of employees, deduct Pay-As-You-Earn (PAYE) from employees' salaries and remit same to the appropriate tax authority.⁶⁴ They must also deduct WHT on qualifying payments to its contractors/ suppliers and remit same to appropriate tax authority in accordance with statutory prescriptions or suffer the consequences of default.⁶⁵ Finally,

⁵⁴ Companies Ltd/gte will be subject to CIT on their profits based on their gross turnover pursuant to amended **section 40 CITA** provisions at one of: (a) 0% (N25 million and below), 20% (greater than N25 million but less than N100 million); and 30% (above N100 million turnover). They are all liable to pay Tertiary Education Trust Fund Tax (TETFT) at 2% of assessable profits the **TETFT (Establishment, etc.) Act No. 16 of 2011 (TET)**. The profits of Charitable Trusts and ITs are taxable in the hands of the Trustees, **section 27(1) PITA**; see *Arbico Ltd v. FBIR* [1996] 2 NLR 303.

⁵⁵ See **Sections 78 - 81 CITA**; and **sections 69-71 and 73 PITA**.

⁵⁶ Amendment vide **section 9 Finance Act 2020**.

⁵⁷ By **section 23(1) Finance Act (new section 23(1)(a) CITA)**, the tax exempt status of the investee company does not affect the WHT deductions to be suffered by dividends payable by such investee companies to their NFP parent companies/shareholders.

⁵⁸ By **Amendment of the Fifth Schedule to the Companies Income Tax Act, Order No. 1 of 2011**, the Minister of Finance amended the **5th Schedule CITA** to widen the list of NFP activities to which companies may donate to enjoy tax deductibility. Fourteen new NFP activities were added, in exercise of powers conferred on the Office of the Minister of Finance by **section 25(6) CITA (as amended)**.

⁵⁹ However, the 10% total profits donation limitation will not be applicable where the donation falls under the provision of **Section 25A CITA** –whereby the corporate donation is to a university or other tertiary institution. Under this provision, Donation made to a company is allowed as tax deductible by the company out of the profits of that period notwithstanding that the donation is of a revenue or capital nature.

⁶⁰ **Cap.V1, LFN 2004**.

⁶¹ See FIRS, '**Guidelines on the Tax Exemption Status of Non-Governmental Organisations (NGOs)**' (**NGO Guidelines**) Information Circular, 08.2010: <https://www.firs.gov.ng/sites/Authoring/contentLibrary/32cdeb90-429f-4be4-850d-c942b68ad53313.CIRCULAR%20ON%20NGO%20TAX%20EXEMPTION%20STATUS%20IMD%20NO%20PCT-To2.2.3.%201028.pdf> (accessed 02.29.2020). See **Para 5.0 NGO Guidelines** for the registration requirements. **Para 1.0** described an NGO as an "association of persons registered under **Section 590 of the Companies and Allied Matters Act (CAMA) 1990** for the advancement of any religious, educational, literary, scientific, social development, cultural, sporting and charitable purpose. They are non-profit making organizations." The correct statement however is that NGOs may also be other vehicles apart from the IT referred to by FIRS in the above quote.

⁶² **Section 55 CITA**. See also **Para 6.0 NGO Guidelines** which provides in part that: "in line with **section 55 of CITA**, it is mandatory for every NGOs (sic) to file its tax return every year..." Tax exempt status is not approximate to relief from tax compliance obligations. An "NGO seeking clarification on its tax exemption status can direct its inquiry the ITO where it was registered..." (**Para 7.1, NGO Guidelines**).

⁶³ (2018) LPELR-46727(CA), 12-22, C-B.

⁶⁴ See **Section 81(1) PITA**.


⁶⁵ See generally **Para 8.0 NGO Guidelines (Other Statutory Obligations of NGOs)**. For example **Section 42 FIRS (Establishment) Act, Cap. F36, LFN 2004** on penalty for failure to deduct and remit tax; **section 42** prevails over inconsistent earlier provisions like **section 82 CITA** that provides specifically for penalty failure to deduct WHT

the law requires them to maintain proper books of accounts,⁶⁶ and they could be subject to tax audits like all other entities that have tax reporting obligations.⁶⁷ NGOs are also eligible to apply for tax clearance certificates (TCCs).⁶⁸

Conclusion

There is an increase in awareness and in establishment of

philanthropic initiatives and organisations. Individuals, families, wealthy capitalists, celebrities, and church leaders are now using foundations and other non-profit forms to contribute their resources in addressing social problems. The altruistic intents of these organisations do not exempt them from compliance

requirements. Every non-profit organisation must prioritize its compliance obligations for smooth operations. The government must prioritize the passage into law of the **Companies and Allied Matters Act 2004 (Repeal and Re-enactment Act) Bill 2018** to allow the reforms proposed by the Bill to take effect for the benefit of entities including NFPs. 



“ SINCE ENGAGING IN BUSINESS MAY BE UNAVOIDABLE FOR MANY NFPs IN ORDER TO FUND THEIR OBJECTS, ONE WAY TO OPTIMISE THEIR TAX POSITION FROM ANY BUSINESS VENTURE IS TO CONCENTRATE ON TAX EXEMPT OR PREFERENTIAL SECTORS AND INSTRUMENTS ”

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Thank you for reading this article. Although we hope you find it informative, please note that same is not legal advice and must not be construed as such. However, if you have any enquiries, please contact the authors, Afolabi Elebiju at a.elebiju@lelawlegal.com, Daniel Odupe at d.odupe@lelawlegal.com or Okemute Ogbeni Erumevba at: o.erumevba@lelawlegal.com, or firm email: info@lelawlegal.com.

⁶⁶ See **Section 331 CAMA** (for companies); all taxable persons are mandated to keep accounting and financial records under respective tax legislation.

⁶⁷ Per **Para 2.0, NGO Guidelines** (inter alia): “By virtue of Section 23(1)(c) of CITA and Section 19, Para 13 Third Schedule of PITA, profits of any company/institution engaged in ecclesiastical, charitable, benevolent or educational activities of a public character are exempt from income tax provided such profits are not derived from a trade or business carried on by the company. Where an NGO engages in any trade or business, the profit derived therefrom will be subjected to income tax as provided for in the Act. Also, where the NGO invests its assets in any institution, the income derived from such investment shall be subjected to tax. It should be noted that Capital Gains Tax (CGT) shall arise where assets are disposed of by the NGOs at a gain.”

⁶⁸ See **Para 7.2 NGO Guidelines**: “Application for Tax Clearance Certificate (TCC) - An NGO shall direct its application for Tax Clearance Certificate (TCC) to the tax office where it was registered and files its tax returns. The relevant tax office shall process the application and issue TCC if the NGO is found qualified and if unqualified be given reasons in writing within two weeks of the