THOUGHT LEADERSHIP INSIGHTS

JULY 2019

DEFINITIONS AND DEVELOPMENTS:

CORPORATE GOVERNANCE IMPLICATIONS OF JUDICIAL INTERPRETATION OF 'PUBLIC INTEREST ENTITIES' IN EKO HOTELS LIMITED V. FRCN FHC/L/CS/1430/2012

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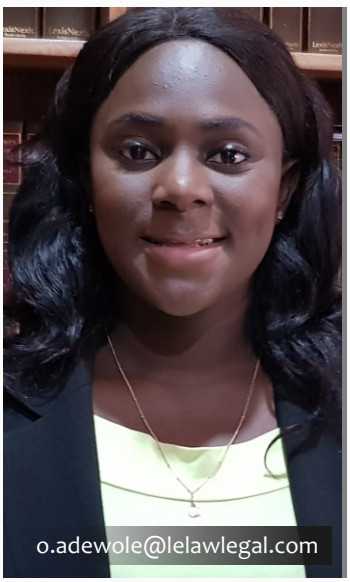
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The scope of the ***Financial Reporting Council of Nigeria (FRCN)*** powers and functions pursuant to ***sections 7*** and ***8 FRCN Act***[1] - and the applicability of its ***section 77*** compliance requirements for "*public interest entities*" to file returns with the FRCN to privately held companies - was recently put to the test in ***Eko Hotels Limited v. FRCN.***[2] There, the Federal High Court (FHC, *Abang J.*) ruled that the FRCN can only regulate public interest entities and that its powers does not extend to private companies. He further stated that "*Where a statute does not empower a statutory body to do certain things, such body cannot so act.*"

According to the Court, the FRCN cannot enlarge its powers to regulate private companies outside its purview. Whilst the FRCN has not apparently appealed against the decision, the ministerial proclamation of the ***Nigerian Code of Corporate Governance (CCG), 2018*** on January 15, 2019 (as a prelude to its formal commencement), provides further guidance on construing the scope of FRCN regulatory oversight on public and private companies.[3]

1 ***FRCN Act No. 6 of 2011.***
2 Unreported ***Suit No. FHC/L/CS/1430/2012***; judgement of 21.03.2014 delivered by *Abang, J.*
3 See FRCN's Public Notice, ***'Adoption and Compliance with Nigerian Code of Corporate Governance 2018'***, *The Guardian, 14.02.2019, p.34.* The ***CCG 2018*** commencement date is January 15 2019.

This article will, after analysing the statutory provisions on *'Public Interest Entity'* (PIE) and considering the Eko Hotels Limited (EHL) decision cum the divergent views on the various dimensions of the issue, weigh in with our own views and predictions of future trend and practice.

Eko Hotels Limited v. FRCN: Facts

EHL received a notice from FRCN mandating EHL's registration with FRCN and also to file annual returns for 2011 and 2012. EHL responded that it is not a public company nor a PIE, hence it is not required to register, or file annual (or any) returns with FRCN. The FRCN however insisted that the definition of PIEs under ***section 77 FRCN Act*** includes EHL – because the provision mandates private companies with reporting obligations to sectoral regulators (like in the case of EHL, the Nigerian Tourism Development Corporation (NTDC)).[4] EHL consequently sought a declaration from the FHC that FRCN's demand was *ultra vires* FRCN's powers.

The four (4) issues for determination upon which the determination of the case turned, were:

I. Whether Eko Hotels is required to register with the FRCN under the FRCN Act 2011?

ii. Whether Eko Hotels is liable to pay the statutory and renewable annual dues to the FRCN for 2011 and 2012?

iii. Whether Eko Hotels is required to furnish the FRCN with evidence of its statutory filing with the Corporate Affairs Commission and the Federal Inland Revenue Service?

iv. Whether the FRCN could penalise it for failure to submit the annual returns and statements?

Eko Hotels Limited v. FRCN: Decision

On the first and main issue of whether EHL is required to register with the FRCN, resort would have to be made to the ***FRCN Act*** provisions. ***Section 77 FRCN Act*** defines PIEs to mean *"governments, government organizations, quoted and unquoted companies and all other organizations which are required by law to file returns with regulatory authorities and this excludes private companies that routinely file returns only with the Corporate Affairs Commission and the Federal Inland Revenue Service".*[5]

Notably, some of FRCN's functions contained in ***section 8 FRCN Act*** can provide additional context. ***Section 8(1) FRCN Act*** provides that FRCN is empowered to *inter alia*: *"(f) specify, in the accounting and financial reporting standards, the minimum requirements for recognition, measurement, presentation and disclosure in annual financial statements, group annual financial statements or other financial reports which every public interest entity shall comply with, in the preparation of financial statements and reports... (i) enforce compliance with the Act and the rules of the Council on registered professionals and the affected public interest entities".*

FRCN's argument was that since EHL is obliged by law to file returns with its sectoral regulator (the NTDC), it is subject to ***section 77 FRCN Act***. However, our review of the ***NTDC*** and ***FRCN Acts*** reveals that there is no mandatory filing requirements on operators such

4 Prior to its enabling legislation, the ***NTDC Act Cap. N137, LFN 2004*** being held unconstitutional by the Supreme Court in ***Hon. Minister for Justice & Attorney-General of The Federation v. Attorney-General of Lagos State [2013] Vol. 8 ALL NTC, 425 at 449***, the NTDC was responsible for the registration, classification and grading of all hospitality and tourism enterprises in Nigeria (***section 4(2)(b) NTDC Act***).

5 ***Para. 29.1.20 CCG 2018*** also defines *"Regulated Private Companies"* along the lines of ***section 77 FRCN Act*** to mean *"private companies that files returns to **any regulatory authority** other than the Federal Inland Revenue Service and the Corporate Affairs Commission." (Emphasis Ours)*

as EHL to the NTDC.[6] Thus, in our view, (and as rightly decided by the FHC), the FRCN's position was erroneous.[7] Furthermore, subsequent decision of the Supreme Court (SC) in ***AG Lagos v AG Federation***[8] that the Federal Government (FG) is incompetent to legislate on hotel and tourism in terms of the ***NTDC Act***, has removed any doubts on this point.

However, if States like Lagos then requires operators to make periodic filings to the State sectoral regulator, such may provide ammunition for FRCN to re-assert regulatory oversight on private companies subject to such sectoral filing requirements.[9]

The second issue of ***whether EHL is liable to pay the statutory and renewable annual dues to the FRCN for 2011 and 2012,*** becomes moot, flowing from the FHC's decision that EHL was not subject to ***FRCN Act***'s compliance requirements. By the same token, the issue of whether EHL would be liable to any enforcement action by way of fines and penalties for failing to register or file returns with the FRCN does not arise.

Reasonability/Absurdity Test:

One way of viewing the EHL decision is against the legislative intent behind enactment of the ***FRCN Act.*** What mischief was the ***FRCN Act*** meant to cure? According to its long title, it is - *"An Act To Repeal The Nigerian Accounting Standards Board Act, No.22 Of 2003 And Enact The Financial Reporting Council Of Nigeria Charged With The Responsibility For, Among Other Things, Developing And Publishing Accounting And Financial Standards To Be Observed In The Preparation Of Financial Statement Of Public Entities In Nigeria; And For Related Matters."*

The question that arises is how will regulation of EHL by the FRCN help to protect the investing public? Since EHL's financial statements does not in any way have the potential to impact the public, it is a bit tenuous to justify the need for FRCN to regulate EHL. The foreseeable exposure, if any is to EHL's customers – their health and safety, not primarily financial. However, FRCN by its functions contained under the Act is charged with oversight responsibility over financial state and records of a company and nothing more.

The Act in no way envisages a situation whereby the Council probes into the day-to-day running of an organisation to meet up with health and safety standards. The position would have been different if for example the private company was a pension fund administrator (PFA), insurer, bank/finance house, stockbrokerage firm or

6 For example, ***section 20(a) National Tourism Development Corporation (NTDC) Act, Cap. N137, LFN 2004*** states that *"The Minister may with the approval of the President, make regulations generally for the purpose of giving effect to the provisions of this Act and may in particular without prejudice to the generality of the foregoing provisions make regulations - +*
(a) providing for the registration by the Corporation of any class of hotels and other similar establishments in Nigeria *at which sleeping accommodation is provided by way of trade or business.*
(b) requiring the classification or grading of hotels, *restaurants and night clubs and prescribing standards for their upkeep" (Emphasis ours).*
Similarly, ***section 4(2)(b) NTDC Act*** provides for the NTDC's powers – *"to register, classify and grade all hospitality and tourism enterprises, travel agencies and tour operators in such manner as may be prescribed."* In our view, because these provisions do not prescribe any periodic reporting obligation by EHL to NTDC, FRCN was wrong to argue in effect that being in a regulated sector is sufficient to trigger FRCN regulatory oversight over a private company.

7 See also, ***'The Court Says That Financial Reporting Council of Nigeria (FRCN) Is Not Empowered To Regulate Private Companies'***,03.05.2016:<http://www.orandcconsultants.com/Downloads/Financial%20Reporting%20 Council%20of%20Nigeria%20Vs%20Private%20Companies.pdf> (accessed 18.05. 2019).

8 ***AG Federation v. AG Lagos State [2013] 6 NWLR (Pt. 1380), 249 at 303.*** The SC upheld the ability of the Lagos State House of Assembly to enact the ***Hotel Licensing Law Cap H6 Laws of Lagos State of Nigeria 2004,*** and ***the Hotel Licensing (Amendment) Law No. 23 of 2010***, because the duties of hotel regulation, registration, classification and grading etc. fall within the ***Residual Legislative List (Part 1, 2nd Schedule, 1999 Constitution of the Federal Republic of Nigeria)***.

9 In our view, filings such as under the ***Hotel Occupancy and Restaurant Consumption Law*** (***Cap. H8, Laws of Lagos State, 2015***) to enable the Lagos State Internal Revenue Service (LIRS) enforce 5% consumption tax collections will not be a sectoral filing requirement, since it is essentially a tax compliance obligation. In effect, the ***section 77 FRCN Act*** reference to FIRS arguably includes other relevant tax authorities that companies make filings to.

parent/subsidiary of entity, filing returns to respective regulators: Pension Commission (PenCom), National Insurance Commission (NAICOM), Central Bank of Nigeria (CBN) and Securities and Exchange Commission (SEC).[10]

If any of the above sectoral examples have subsidiaries (or *vice versa*), there would be compelling arguments in support of the applicability of ***FRCN Act*** to such subsidiaries (especially as subsidiaries accounts (for example, misstatements may impact the regulated entity's accounts) or vice versa.[11]

If EHL is not required to file its financials with NTDC for example, then provisions such as ***section 59(1) FRCN Act*** on preparation of financial reports in accordance with the Standards, *"The accounts, financial reports or annual returns and other documents required under the following Acts... shall be adopted for that purpose by the Council ... (c) Investments and Securities Act; (f) Pensions Reform Act 2014..."*[12] would be otiose. Such irrelevance provides further ground for arguing that the FRCN could not have intended that sectoral regulation without more is a trigger for FRCN oversight of private companies.

The exclusion of the FIRS and CAC filings[13] is important as otherwise ***all companies*** would have been subject to FRCN oversight.[14] The inference therefore is that the legislator is looking at a narrow class of regulated companies to be made subject to FRCN oversight.[15]

It is also to be remembered that the legislator cannot be presumed to want to interfere with the 'closed' nature of private companies unless for very significant reasons – there must be a compelling need or public interest to be promoted by making a hospitality industry player like EHL subject to FRCN reporting obligations.[16]

Regulatory provisions on 'Public Interest Entities'

Different legislation have lent their respective views to what can be termed as a PIE. The erstwhile Minister for Industry, Trade and Investment, Dr. Okechukwu Enelamah, in exercise of his power to make Regulations under ***section 73***

> The Exclusion Of The FIRS And CAC Filings Is Important As Otherwise All Companies Would Have Been Subject To FRCN Oversight.

10 Similarly, sometime in 2015, the scope of the FRCN's powers was called into question when it purportedly suspended the directors and some key officials of Stanbic IBTC Holdings Plc (Stanbic), who had attested to financial statements, adjudged by the FRCN to be fraught with discrepancies and identified accounting errors The FRCN purportedly acted within the powers conferred on it by ***section 7 (1) FRCN Act*** that provides *inter-alia: "The Council shall have powers to do all things necessary for or in connection with the performance of its functions."* In addition to suspending its directors and officials, the FRCN also imposed a fine of N1 billion on Stanbic. Stanbic instituted an action against the FRCN and the National Office for Technology Acquisition and Promotion (NOTAP) asking the court to, amongst others, determine whether FRCN has powers to: impose the fine; license Directors and other officers of PIEs; and to suspend the said license by suspending a Director or officer of the PIE. The Court ruled in favour of the FRCN, underscoring FRCN's power to intervene in matters relating to PIEs. It must however be noted that the above scenario can be distinguished from the ***EHL's case*** as Stanbic is both a PIE and a public company and therefore clearly within the scope contemplated by the ***FRCN Act***. See: Joseph Jibueze, ***'Court Dismisses Stanbic IBTC, KPMG's Suits Against FRC'***, *The Nation, 15.12.2015*: https://thenationonlineng.net/court-dimisses-stanbic-ibtc-kpmg-suits-against-frc/amp/ (accessed 19.01.19).

11 *Abang J's* decision suggests that the subsidiaries are not subject to FRCN oversight. Arguments in support of the applicability of ***FRCN Act*** to the subsidiaries (for example if misstatements in parent company's accounts flow down to the subsidiaries) can be buttressed by ***section 59 FRCN Act.*** Although the FRCN has appealed the Eko Hotel decision to the CA, until set aside, the ***EHL*** decision represents the law. See Tayo Oke, ***'FRCN, Corporate Governance and Regulatory Overreach (1)'***, *Punch 10.01.2017*: https://punchng.com/frcn-corporate-governance-regulatory-overreach-1/ (accessed 05.08.2019). Note that the same approach was followed in defining *"regulated private companies"* under the ***Nigerian Code of Corporate Governance 2018 (Code): Principle 29.1.20, Code:*** *-"'regulated private companies' means private companies that file returns to any regulatory authority other than the Federal Inland Revenue Service and the Corporate Affairs Commission."*

12 ***Section 59(2) FRCN Act*** further provides that where there is any conflict between financial reports or annual returns (submitted to FRCN) and other documents required or prepared in fulfilment of the relevant legislation *"which deal with financial reporting, the standards and guidelines adopted for that purpose by the [FRCN] shall to the extent of that inconsistency, prevail."*

13 ***Section 370 CAMA.***

14 By virtue of ***sections 26 FIRS (Establishment) Act Cap. F36, LFN 2004 and 370 CAMA***, all companies have filing obligations to the FIRS and CAC.

15 Otherwise the FRCN itself would be constrained to effectively exercise oversight over all companies.

16 'Public interest' can be defined as something in which the public as a whole has a stake; especially an interest that justifies governmental regulation: Bryan A. Garner, ***'Black's Law Dictionary'***, *(9th ed., 2009), p.1350*. It is that in which a class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected. See *Campbell C.J.* in ***R v. Bedfordshire, 24 L.J.Q.B 84***; ***Stroud's, Judicial Dictionary of Words and Phrases'***, *(7th ed., 2006) Vol. 3 P-Z pp. 2204-2205*. Based on this definition, *can it be said that EHL is a public company that could potentially affect the public's pecuniary interest?* Our considered answer is **No**. An allusion can be drawn from ***Aso Tim Doz Investment Co Ltd v. Abuja Markets Management Ltd & Anor, (2016) LPELR-40367(CA), 14B-D*** where *Mustapha, JCA* in opining on a statutory definition of *'public interest'* held that: *"Section 2(b) of the Land Use Act once again defines public interest for which land which was otherwise allocated to an individual could be revoked as: "the requirement of the land by the government of the state or by local government of the state or by local government in the state, in either case public purposes within the state or the requirement of the land by government of the federation for public purpose..." See also* ***Paragraph 19.2.1 CCG 2018*** which defines *"Listed and Significant Public Interest Entities"* as entities whose market capitalization is not less than N1billion and/or whose annual turnover is not less than N10billion. This rationale for the threshold can be pegged to the fact that entities which hold that amount have the capacity of affecting the general economy of a country or that of a particular sector, thus underscoring the need for regulation by the FRCN.

FRCN Act, issued a Public Notice[17] for the adoption of the ***CCG 2018*** that:

"(1) From the commencement of this Regulation, the following entities shall adopt and comply with Nigerian Code of Corporate Governance 2018, which is the Schedule to this regulation:

a) all public companies (whether listed or not)
b) all private companies that are holding companies of public companies and other regulated entities;
c) concessioned and/or privatized companies; and
d) all regulated private companies being private companies that file returns to any regulatory authority other than the Federal Inland Revenue Service (FIRS) and the Corporate Affairs Commission (CAC)..."

Whilst this 2019 Ministerial proclamation seeks to provide clarity to ***section 77 FRCN Act*** by including ***paras. 1(b)(c)*** above, however the erstwhile provisions including ***para 1(d)*** would not have made any difference to FRCN's purported attempt to enforce compliance against EHL (it merely restates in part, ***section 77 FRCN Act*** provisions).[18]

Conclusion:

The FRCN's potential overreach of its powers regarding private companies *vis a vis* valid regulation of same, still remains a matter of serious debate amongst stakeholders. However, the FHC's decision in the ***EHL case*** restrict the FRCN from acting *ultra vires* by narrowly construing a private company's PIE status.

The SC's position in ***AG Lagos v. AG Federation*** significantly supports EHL's case by further stating that the ***NTDC Act***, a provision of the National Assembly, does not override the ***Laws*** of the States' Houses of Assembly regarding hotel regulation, etc they are not items within the ***Exclusive and Concurrent Legislative Lists***, but rather on the ***Residual List***. This in turn makes the FRCN appeal to the CA almost moot.

As earlier reiterated, FRCN's position could have held water if EHL operates as a public company or has any subsidiary that falls within the PIE category, which is not the situation in this case. Thus, the FHC's decision still remains the law until reversed by a superior court of record.

17 Although there is a debate as to the constitutionality of the Public Notice as it is already a settled law in ***Amusa v. State (2003) LPELR-473 (SC)*** that a judicial notice of a subsidiary legislation is taken as having the force of law without further proof. However, the challenge is its applicability on private companies which is further discussed in subsequent subheadings in this article.

18 It is a trite law that a subsidiary legislation cannot purport to amend its principal Act nor repeal any other statute whatsoever. See ***Osadebay v. A-G. Bendel State (1991) LPELR-2781(SC), 40D-E,*** where *Karibi-Whyte* held that: *"The rationale for an enabling or parent legislation is to give validity to the subsidiary legislation. The general principle of retrospectivity is to enable the legislation take into account matters which had happened before it came into existence and with which it is intended to deal."* Note also that *'Concessioned' or 'Privatized'* companies are companies/ corporations previously owned or operated by any of the arms of government subsequently ceded or sold (wholly or in part) to private investors. So, in essence they are simply private companies previously wholly/partly owned and/or run by the government. The rationale for delineating this category as PIEs is not far-fetched: these companies are usually involved in providing essential services to the public and were probably divested for more efficient operations by the new private sector management. In addition, certain contractual obligations may exist between current investors and the government pertaining to how they are run. Ordinarily, *"Mere participation of any government in a private company does not, ipso facto convert such a company into a public one": **Orji v. Zaria Industries Ltd & Anor (1992) LPELR-2768(SC), 25B,*** *per Wali, JSC.*

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