Bank CEOs, Tenure Limit: Legality and Regulatory Issues
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The Central Bank of Nigeria (CBN) recently issued a guideline to banks limiting the tenure of bank Chief Executive Officers (CEOs) to 10 years. This guideline is generally controversial for two main reasons.

First, it arguably interferes in private arrangements by intervening in and rewriting banks’ memorandum and articles of association as well as the service contracts of the CEOs. These documents are generally regarded as private contracts. For example, this private contractual status is recognised in section 41(1) of the Companies and Allied Matters Act which provides that the memorandum and articles of association of companies (including banks) constitute a contract between the company, and its members and officers.

Second, the CBN’s guideline purports to have a retroactive effect. It expressly provides that 31 July 2010 is the cut-off date for the 10-year tenure with the result that it affects any CEO who has been in office from 1 August 2000. In calculating the period of office, times spent as CEO of any bank apart from the current bank are combined with the latter.

The fundamental issue arising from the CBN’s guideline is that it could be interpreted as an implied removal of the affected CEOs albeit from a future date.

The CBN’s power to effect the removal of the CEOs consequently needs to be investigated from at least two perspectives. The first is legality. This requires subjecting the guideline to the provisions of the apparent enabling statutes- CBN Act 2007 and the Banks and Other Financial Institutions Act (BOFIA) as well as the Constitution. The second aspect of the scrutiny goes beyond legality and constitutionality by looking at the CBN’s guideline in the light of theoretical and practical questions of regulation and intervention in apparently private affairs.

Simply put, the twin issues are one of ‘right’.

First, there is the question of the (legal) right (‘power’) of the CBN to issue the guideline. Irrespective of the answer to the first question, the second issue is the right (that is the ‘appropriateness’) of the state or an agency of the state (the CBN) to intervene in private arrangements generally and in the particular case of management of banks. Incidentally, the CBN’s guideline expressly provides that it applies notwithstanding contractual provisions on the tenure of bank CEOs. The second issue is now topical, for example, in the United States where President Barack Obama recently announced a number of proposals including limiting the size of banks and the prohibition of banks from engaging in certain high-risk businesses.

This essay therefore examines the legality of the CBN’s guideline in view of the CBN Act and BOFIA as well as relevant regulatory issues. The constitutionality or otherwise of the guideline will be examined in another essay.

As previously indicated, the legality of the CBN’s action depends on the relevant statutory provisions. Specific provisions of BOFIA relating to qualifications of directors and officers of banks appear to be in sections 19, 33 and 44. It seems that none of the provisions expressly permit the CBN to issue a guideline restricting the tenure of bank CEOs. Section 19 prohibits employment of bankrupts and persons convicted of offences involving fraud, dishonesty or professional misconduct. It also prohibits joint directorships of banks and engagement of bank directors in any other business or vocation. Section 19 does
not in any way authorize the CBN to limit the tenure of CEOs or prevent banks from engaging their CEOs for more than 10 years.

The theme of qualification as a bank director is also contained in section 44. Section 44 disqualifies the following from being directors or continuing as directors of banks: persons of unsound mind, bankrupts, persons convicted of fraud or dishonesty and persons subject to actual or suspected disqualification from professional practice. Section 44(3) prevents directors and other persons directly concerned in the management of a bank that has been wound up from managing banks without the express authorization of the CBN.

Section 33, which is concerned with a failing bank, contains provisions for removal of bank directors and other officers. A failing bank under section 33(1) is a bank which has informed the CBN of its likely inability to comply with its obligations under the BOFIA, an insolvent bank or a bank the CBN has determined to be in a grave situation after carrying out a special examination under section 32. Section 33(2) (c) and (d) provide that the CBN Governor may remove directors, managers and officers irrespective of anything to the contrary in any written law or in a bank's memorandum and articles of association. The CBN Governor may also appoint any person as a director or adviser of a failing bank. The reasonable interpretation of section 33, therefore, is that the CBN's power to remove a bank director, whether or not the CEO, is conditional on the bank's status as a failing bank.

The clear conclusion is that there are no explicit enabling provisions in the BOFIA for the recent CBN tenure limit guideline. However, there are provisions in the CBN Act and BOFIA that suggest the CBN's legal right to impose tenure limit on banks’ CEOs. It is submitted that a holistic approach to both statutes would indicate that the CBN was probably legally right, at least under the two statutes, in issuing the tenure limit guideline. For example, section 42(1) of the CBN imposes a duty on the CBN to, among other matters, ensure high standards of conduct and management in the banking system. Although tenure limit is arguably an issue of high standards of conduct and management, the difficulty here is that the CBN’s duty is to "seek the co-operation of and co-operate with other banks in Nigeria." Mandatory tenure limit is plainly not a co-operative activity.

However, section 2(d) of the CBN Act provides that one of the principal objects of the CBN is the promotion of a sound financial system in Nigeria. More importantly, section 33(1)(b) of the CBN Act confirms that the CBN has the power to "issue guidelines to any person and any institution under its supervision" (emphasis supplied). Read with section 2(d), the implication is that the CBN can issue guidelines to any such person and institution while acting in furtherance of the statutory object of promoting a sound financial system in Nigeria. Tenure limit arguably comes within this remit. It is clearly a question of proper governance of banks which, in turn, is connected to the existence of a sound financial system. Incidentally, sections 1 and 2 of BOFIA confirm that the CBN retains and can exercise its powers under the CBN Act and BOFIA.

Part of the legality question is the permissibility of a retroactive tenure limit guideline under the CBN Act and BOFIA. There is nothing in the two statutes that seems to expressly or impliedly require the CBN’s guidelines to have prospective effect only. An approach that looks at the retroactivity of the guideline a bit more broadly may be helpful in appreciating whether the CBN was legally right to issue a retrospective tenure limit guideline. For example, would one question the CBN’s guideline if it has, instead, disqualified persons convicted or running away from a charge of sponsoring or participating in terrorism within a period from being bank CEOs and directors? Would it matter that the CBN directs the immediate removal from office if a CEO has been convicted or is a fugitive from a charge of money
laundering and corruption within the past 10 or so years? The CBN’s action in either case is arguably for Nigeria’s financial stability. Incidentally, the CBN’s legal role of promoting a sound financial system is not restricted to issuing prospective guidelines.

There is one view that banks are private enterprises and, as a result, there is the need to encourage free enterprise and entrepreneurial spirit instead of interfering in their affairs. However, insisting that banks are private institutions and their affairs are private is a weak argument. The recent local and global financial crisis, at least, has clearly demonstrated that this argument is spurious and supposititious. It is akin to saying that banking profits are for operators of banks while its losses are community or state-owned. It is evident from the interventions of governments and state agencies including the bailouts of banks and provision of stimulus packages for the economy that banks are not exclusively private institutions. This is also the inference from the fallouts of local and global banking corporate governance failures and other scandals.

Following the issue of whether the right of the state to intervene in banks is justified is the question of the regulatory appropriateness of the intervention.

What is corporate governance is the critical issue here. Corporate governance is a concept that encompasses internal corporate processes and structures in as well as society’s (including the state) mechanisms for controlling the internal and external operations of corporations. Issues in corporate governance include the existence, membership, role, control and effectiveness of internal structures such as the board of directors, non-executive directors and the members in general meeting.

In looking at the broader question of interference in private arrangements in banks, the key questions include whether internal control or self-regulation by banks individually or as an industry would have been more effective; and whether shareholders can be trusted to ensure proper governance of banks by, for example, ensuring that personality cults do not exist or are promoted to the detriment of the banks. Without going into details, it is apparent from the recent and persistent banking failures and scandals in Nigeria that proper corporate governance and effective internal control mechanisms, including shareholder control, in banks are either non-existent or at least severely attenuated in many banks. A corporate governance model based on shareholder control and other internal mechanisms has not worked with many Nigeria banks. The result is that the CBN cannot effectively perform its role of ensuring financial stability and promoting a sound financial system without intervening in apparently private arrangements in banks. CEOs’ tenure is presumably one of such arrangements that affect internal corporate governance and the national financial system.

In conclusion, the CBN was probably right to issue the tenure limit guideline. There is nothing in the CBN Act and BOFIA that suggest usurpation or overstepping of legal power. Going beyond the strictly legal questions, the CBN was also probably right to interfere with private arrangements in banks in order to ensure the proper governance of the banks and a sound financial system in Nigeria.

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