Regulating Corporate Directors' Pay and Performance: A Comparative Review

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Abstract

This paper looks at the practice and reform with regard to directors' pay and performance in Australia, the United Kingdom (UK), and Nigeria. It examines the use and impact of incentive plans, Long Term, Short term, and Performance-Related, in compensating directors. Although all three jurisdictions can benefit from further reforms, this work finds that Australia's strong oversight of directors' pay and performance provide a more robust corporate governance strategy than the other two jurisdictions. It also argues that contrary to the UK non-interventionist approach, without a robust regime for addressing directors' pay, the chances of corporate failure are increasingly greater. Emerging economies like Nigeria need even stronger oversight to attract much needed investment and maintain confidence in the Nigerian corporate sector.

Key words: directors, performance, pay, reform, compensation, corporate governance

I. INTRODUCTION

The collapse of banks and businesses in 2008 highlighted the failure of corporate management to prevent inherent risks in financial transactions.[1] Despite this failure in

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[1]See generally, Adrian Blundell-Wignall, Paul Atkinson and Se Hoon Lee, " The Current Financial Crisis: Causes and Policy Issues" *Financial Market Trends* OECD (2009); Grant Kirkpatrick, "The Corporate Governance Lessons from the Financial Crisis" *Financial Market Trends* OECD (2008); David H. Erkens, Mingyi Hung, Pedro Matos, "Corporate Governance in the 2007-2008 financial crisis: Evidence from financial institutions worldwide", *Journal of Corporate Finance* Vol 18 Issue 2 (April 2012) 389-411; C. Meintjes and A. F. Grobler, 'Do public relations professionals understand corporate

risk management[2] it seemed as if directors would retain large compensations and pay-outs without any obligation to return or pay back the monies lost under their watch.[3] Directors' remuneration structures have therefore come under greater scrutiny. Remuneration is important because to attract, retain and promote successful corporate activity, management talent must be incentivised and compensated appropriately. Good corporate governance (CG) expects that a Board when considering executive pay, must take cognisance of the challenges in the tasks executed by directors.[4] The question is whether directors' performance always measures up to their often hefty remuneration packages? There is strong evidence that inappropriate incentive structures played a role in the 2008 crisis.[5]

Australia, the United Kingdom (UK) and Nigeria provide good bases to assess efforts at balancing directors' remuneration with performance. The three jurisdictions share common-law foundations. Nigeria is a fast expanding hub of corporate activity in the African continent, it will provide some insight into the challenges emerging markets face in adopting strategies on executive remuneration. The UK has made significant effort in encouraging good corporate governance through domestic regulation[6] and the

governance issues well enough to advise companies on stakeholder relationship management', *Public Relations Review* (2013) 161-170.

[2]Grant Kirkpatrick, op cit, 1.

[3]Clive Boddy, 'The Corporate Psychopaths Theory of the Global Financial Crisis', (2011) 102 *Journal of Business Ethics* 255.

[4]The OECD, Corporate Governance Board Practices Incentives and Governing Risks, paragraph 2.4 available at http://www.oecd.org/daf/ca/49081438.pdf accessed 9 February 2015.

[5]Paul Gregg, Sarah Jewell and Ian Tonks, 'Executive Pay and Performance: Did Bankers' Bonuses Cause the Crisis', (2011) 12 (1) International Review of Finance 89. See also, Eilís Ferran et al, *The Regulatory Aftermath of the Global Financial Crisis* Cambridge Uni. Press (2012).

[6]Brian R Cheffins, 'History and the Global Corporate Governance Revolution: The UK Perspective', (2001) 43(4) *Business History* 87 available at http://www.tandfonline.com/doi/pdf/10.1080/713999243 accessed 9 February 2015.

high performance of companies listed on the Australian Stock Exchange (ASX) suggest Australia is a "poster-child" for financial and CG reforms.[7]

The definition of corporate governance differs depending on one's perspective.[8] However the Organisation for Economic Co-operation and Development (OECD) states as follows:

> Corporate Governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate Governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.[9]

The Cadbury Report in the UK defined CG as "…the system by which companies are directed and controlled."[10] The Australian Securities and Investment Commission[11] (ASIC) definition is broken down into two parts. It states that:

> Firstly, it is about the mechanisms by which corporations are directed and controlled; and Secondly, it is about the mechanisms by which those who direct and control the corporation are monitored

[7]Jayalakshmy Ramachandran, Ramaiyer Subramanian and Liew Tze Yeen, 'Do corporate governance practices differ among countries?' Available at: http://www.academia.edu/4424998/Do_Corporate_Governance_Practises_Differ_Among_Countries accessed 1 April 2017.
[8]Stuart L. Gillan, 'Recent Developments in Corporate Governance: An Overview' (2006) 12(3) *Journal of Corporate Finance* 381-402 at 381.
[9]OECD Principles of Corporate Governance 2004 available at http://www.oecd.org/daf/ca/corporategovernanceprinciples/31557724.pdf accessed 9th February 2015.
[10]Sir Adrian Cadbury chairing the Cadbury Committee on corporate governance in 1992 available at: http://www.ecorporate governancei.org/codes/documents/cadbury.pdf accessed 9th February 2015.
[11]Supervisory and regulatory body created by the Australian Securities and Investment Commission Act No. 51 of 2001 (as amended).

> and supervised. That is, it is about mechanisms that ensure those who are in control are accountable.[12]

Earlier scholars have also made attempts to define CG.[13] Whether theoretical definitions match what obtains in practice today is open to debate, as Bloomfield contends that:

> much of what currently passes for the theory of corporate governance and which forms the foundation of regulatory policy is based on a description of forces, relationships and actors that holds very little similarity to the way that the real world operates. [14]

An aspect of CG which has attracted the attention of regulatory policy is the issue of directors' or executive remuneration or compensation.[15] Executive compensation is a key part of CG because it determines the incentives of the directors not only as to size but also to the structure of such compensation package.[16] The compensation package may consist of all or some of the following components: short term base salary and annual bonus; and long-term stock and stock options, insurance, pension benefits and severance pay.[17] For reasons of transparency and accountability there is a need for

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[12]Berna Collier, Commissioner of ASIC at the Corporate Governance Summit 2002 paper titled 'The Role of ASIC in corporate governance' available at: https://www.asic.gov.au accessed 9th February 2015.

[13] See for example, Andrei Schleifer and Robert W. Vishny, 'A Survey of Corporate Governance' (1997) 52(2) *The Journal of Finance* 737-783 at 737; Stuart Gillan and Laura T. Starks, 'A Survey of Shareholder Activism: Motivation and Empirical Evidence', (1998) 2(3) *Contemporary Finance Digest* 10; Stuart Gillan and Laura T. Starks, 'Corporate Governance, Corporate Ownership, and the Role of Institutional Investors: A Global Perspective', (2003) 13(2) *Journal of Applied Finance* 4.

[14] See Stephen Bloomfield, *Theory and Practice of Corporate Governance: An Integrated Approach* (2013) Cambridge University Press, xiii.

[15]In this article, the words director or executive are used interchangeably. Compensation and Remuneration are also used interchangeably in reference to directors' pay.

[16]Stephen Sapp, 'The Impact of Corporate Governance on Executive Compensation', (2008) 14(4) *European Journal of Management* 710

[17]Marc Goergen and Luc Renneboog, 'Managerial compensation', (2011) 17(4) *Journal of Corporate Finance* 1068. See also Konstantinos Stathopoulos et al, 'U.K. Executive Compensation Practices: New Economy versus Old Economy', (2004) 16(1) *Journal of Management Accounting Research* 57

companies to adopt proper compensation schemes and where (improper) schemes such as the "Golden Handshake", are used, to have mechanisms for reclaiming these compensation packages via "claw back polices".

Section II examines compensation schemes and processes to claw back improper compensation. Section III analyses the different forms of incentive plans, while Section IV considers the broad issue of directors' remuneration and reforms. Section V evaluates the challenges in measuring performance for remuneration purposes. The paper concludes in section VI.

II. COMPENSATION SCHEMES

Compensation plays a key role in motivating directors to ensure their efficient monitoring of management and to produce high standards of performance of the company.[18] If the key objective of CG is to ensure the sustainability and performance of a company in line with the interest of its stakeholders, it is only reasonable that directors' compensation packages should be sufficient stimulus for those who are to pursue this objective. We agree that the performance of a company is hinged on its compensation environment as per the size of pay, [19] and that compensation has to be appropriately designed if it is to motivate directors towards effective leadership and governance.[20]

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[18]Tod Perry, 'Incentive Compensation for Outside Directors and CEO Turnover', (June 2000) Paper presented at Tuck-JFE Contemporary Corporate Governance Conference available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=236033 accessed 9th February 2015.

[19]Jeff Koza and Claude Boulanger, 'Managing the complex relationship between executive pay and performance', (2004) 6 Ivey Business Journal available at http://iveybusinessjournal.com/topics/governance/managing-the-complex-relationship-between-executive-pay-and-performance#.Uz6Qh7SFdRU accessed 9th February 2015.

[20]Australian Government Productivity Commission, 'Executive Remuneration in Australia' Productivity Commission Inquiry Report No. 49, 19 December 2009 available at: http://www.afr.com/rw/2009-

Therefore in determining executive compensation, regard has to be given to the various stakeholders of the company.[21] In addition, the size of the board, the size of the company, familiarity between the members of the board, the managers and the major shareholders, the attraction and retention of executives are all contributory factors in the determination of an appropriate compensation scheme.[22] From the results of interviews carried out by Bender and Moir, there must be a balance between the affected parties as regards the compensation scheme of the executives.[23] Those who determine directors' compensation have to make fair considerations as to the interests of others given that the executive is paid from the residual profit of the company and excessive compensation reduces the profit of the company.[24]It appears that there is no generally accepted way of determining the appropriateness of executive compensation.[25] In practice, the market in which the company finds itself is used as a benchmark in determining executive pay and its levels of bonus and long term awards.[26]

For example, the Nigerian corporate environment mainly comprises private, single-leader companies run by heads of families, or friends and business remains largely cash-driven. There has been little external influence on the internal activities of companies by government regulation or reform and "share options and bonuses are not usually part

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2014/AFR/2010/01/27/Photos/291f10c8-0b02-11df-9175-33c750d86f9c_executive-remuneration-report.pdf accessed 13th February 2015

[21] This will include the other members of the Board, shareholders, employees, other officers of the company, and some other stakeholders including the opinion of regulatory bodies where applicable.

[22]Nat Ofo, 'Eight Engaging Issues for Directors of Listed Companies in Nigeria in 2013' The Corporate Prof (11 January, 2013) available at http://thecorporateprof.com/eight-engaging-issues-for-directors-of-listed-companies-in-nigeria-in-2013/ accessed 9th February 2015

[23]Ruth Bender and Lance Moir, 'Does 'Best Practice' in Setting Executive Pay in the UK Encourage 'Good' Behaviour?', (2006) 67 *Journal of Business Ethics* 75.

[24]Ibid, 81.

[25] Ruth Bender, 'How Executive Directors' Remuneration is Determined in Two FTSE 350 Utilities', (2003) 11(3) *Corporate Governance: An International Review* 206

[26]Ibid.

of non-executive compensation package in Nigeria."[27] Since businesses rely heavily on cash transactions directors are not too interested in non-liquid compensation packages such as LTIPs (Long Term Investment Plans) in the form of share options and other forms of equity. To some scholars, the environment provides room for greed and fraud.[28]

Weak regulatory and enforcement mechanisms and the relatively mild punishment that has accompanied previous corporate scandals in the country are also important factors.[29] Disinterest or lack of informed awareness of shareholders also mean that they exert little control over directors' activities. A nascent corporate culture and lack of management expertise by directors as to proper board processes and conduct may also be a contributory factor in malpractices related to remuneration.[30]

In Australia, paying reasonable remuneration to directors of a company is an exception to the rule requiring shareholders' approval for payment of financial benefits to a related third party under the Australian Corporations Law.[31] The Australian Institute of

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[27]Chris Ogbechie and Dimitrious N Koufopoulos, "Corporate Governance Practices in Nigeria" in SabriBoubaker and DucKhong Nguyen (eds) *Corporate Governance in Emerging Markets: Theories, Practices and Cases* 373-394 at 388.

[28] See S.C. Okaro, G.O. Okafor and G. Ofoegbu, 'Corporate Fraud in Nigeria- A Two Case Study',) *International Journal of Research in Management* (2013) 3:16, 9.

[29]See further, Joseph E. Abugu, 'Monitoring directors' remuneration, fat cat packages and perks of office', (2012) 19(1) *Journal of Financial Crime* 6; Kunle Aina, "Board of directors and corporate governance in Nigeria," *International Journal of Business and Finance Management Research* BluePen Journals (2013) 21-34; Chris Ogbechie and Dimitrious N Koufopoulos, op cit, at 387-8; John Adeleke, 'Africa's re-development needs: a Nigerian perspective' *openDemocracy*(UK, 8 July 2005) available at http://www.opendemocracy.net/globalization-G8/nigeria_2660.jsp accessed 9th February 2015; Veracity, 'Nigeria's Own Enrons' (Nigerian Politics, 18 December 2006), available at http://nigerianpolity.blogspot.co.uk/2006/12/nigerias-own-enrons_18.html accessed 9th February 2015.

[30] See the study by Christopher I Ogbechie, *Key Determinants of Effective Boards of Directors – Evidence from Nigeria* (PhD Thesis submission) Brunel University UK (2012) pp 193-4.

[31] Section 243Q Australian Corporations Law 1994; where remuneration (emoluments) are excessive, it may however attract civil sanction under S264 AA of the Corporations Law. See further Janine Pascoe, "Regulation and Disclosure of Financial Benefits to Directors and Related Parties: A Comparative Analysis of the Malaysian and Australian Approaches" *Singapore Journal of International and Comparative Law* (1999) 3 108-133 at 114; Cf, Kym Sheehan, "The Regulatory Framework for Executive Remuneration in Australia" *Sydney Law Review* Vol 31 (2009) 273-308; Roman Tomasic, Stephen Bottomley, Rob McQueen, *Corporations Law in Australia* Federation Press (2002) at 275-6.

Directors notes that compensation of directors should remain reasonable for the company and directors with the board deciding what is reasonable.[32] Also in Australia, special payments above salary entitlements paid to executives in cases such as retirement, the end of a contract, retrenchment or redundancy were collectively regarded as a "golden handshake".[33] The benefits accruing from these packages are significant.[34] For instance, five senior executives of the AMP Insurance Holdings Pty Ltd who were responsible for one of Australia's largest ever corporate losses were rewarded over $AU 12 million and the CEO of Southcorp Keith Lambert got $AU4.4 million even though during his tenure the company's shares lost 40 per cent of their value.[35] In 2009 the Australian government introduced the new golden-handshake law under which shareholders' approval is required for 'golden handshakes'.[36] The government has also used tax policies as a tool in clamping down on golden

[32] Australian Institute of Directors, *Remuneration Committees: Good Practice Guide,* (AICD, 2006)
[33] John Wasiliev, 'Golden hand shake-up' *The Australian Financial Review* (Australia, 12 May 2012) available at http://www.afr.com/p/personal_finance/smart_money/golden_hand_shake_up_mm86MxTujwrpAxGCN7hGZI accessed 9th February 2015.
[34] See Rachel Rickard Straus, 'Reward for failure: Britain's disgraced former bankers set to share £104 Million pension pot' *Thisismoney* (United Kingdom, 12 November 2012) available at http://www.thisismoney.co.uk/money/news/article-2231774/Reward-failure-Britains-disgraced-bankers-set-share-104-MILLION-pension-pot.html accessed 9th February 2015, commenting on the Royal Bank of Scotland failure; Jessica Corsi, 'Reward for failure', *HR Magazine* (19 June 2013) available at http://www.hrmagazine.co.uk/hro/features/1077524/reward-failure accessed 16th February 2015 commenting on the failure of Wire and Plastics Product Group. See also, Steve Slater and Chris Vellacott, 'Barclays executive pay-off slammed as "reward for failure"' Reuters (UK, 26th July 2012) criticising the pay to Jerry del Messier quit as the Chief Operating Officer after Barclay's bank had been fined the sum of $450 million for manipulating Libor interest rates. Available at http://uk.reuters.com/article/2012/07/26/uk-banking-libor-barclays-idUKBRE86P18P20120726 accessed 9th February 2015.

[35] John Shields, Michael O'Donnell and John O'Brien, 'The Bucks Stop Here: Private Sector Executive Remuneration in Australia', Report prepared for the Labour Council of New South Wales available at http://www.cufa.com.au/downloads/library/csr/The_Buck_Stops_here.pdf accessed 9th February 2015
[36] Paul Nyakazeya, 'Golden Handshakes Fuelling Corruption-Analysts', *The Standard* (Zimbabwe, 3 December 2009) available at http://www.thestandard.co.zw/2009/12/03/golden-handshakes-fuelling-corruption-analysts/ accessed 9th February 2015.

handshakes; any part of a compensation or golden handshake which takes the overall taxable income to $180,000 will be taxed at the normal marginal tax rate.[37]

A. Reclaiming improper compensation: Claw back policies

Pauline Renaud has suggested that companies should include clawback clauses or policies in their remuneration policies in the fight to curb reward for failure.[38] For this to work, it has to be proved that the executive has misbehaved or there is material error or; the company has suffered or is suffering a material downturn of performance or; the company suffers a material failure of risk management. In any of these circumstances, the Bank of England proposes that bankers will be forced to give back cash for up to six years after they have received or spent it.[39] The Financial Reporting Council (FRC) came up with a consultation paper on reforming the UK CG Code and of the three issues from which feedbacks were expected one was the issue of clawback policies. The Bank of England and the Prudential Regulatory Authority (PRA) have also issued a consultation paper which contains a recommendation that the *Remuneration Code* should contain a requirement for all PRA authorised companies or banks to amend employment contract to enable companies' claw back remuneration when it is the right thing to do.[40] The RBS Group Plc after the Libor scandal recovered about £302 million

[37]Jeff Whaley, 'Clamping down on golden handshakes' *Herald Sun News* (Australia, 9 May 2012) vailable at http://www.heraldsun.com.au/ipad/clamping-down-on-golden-handshakes/story-fn6bn4mv-1226350429357 accessed 9th February 2015.

[38]Pauline Renaud, 'Clawback Provisions in Executive Compensation Contracts' *Financier Worldwide* (January 2009) available at http://www.financierworldwide.com/article.php?id=2978 accessed 5th April 2014.

[39]James Barty and Ben Jones, 'Executive Compensation: Rewards for success not failure', *Policy Exchange* (UK, 04 July 2012) available at http://www.policyexchange.org.uk/images/publications/executive%20compensation.pdf accessed 9th February 2015.

[40]Aredhel Johnson and Bernhard Gilbey, 'Clawback: The Bank of England Seeks to Avoid First-mover Disadvantage' Squire Sanders (UK, 21 March 2014) available at http://www.globalcompensationinsights.com/2014/03/clawback-the-bank-of-england-seeks-to-avoid-first-mover-disadvantage/ accessed 9th February 2015.

by cutting its bonus pools and reclaiming compensation. It appears that the position of the UK is that it would rather claw back compensations made as a result of failure than cap executive pay.[41]

In Australia, the government's legislation has a dual policy on compensation. First, companies are required to disclose the pay package of executives and second, companies are required to ensure that bonuses can be clawed back in situations where the financial existence of the company have been falsified.[42] The Australian government in 2012 released a draft legislation following the *Productivity Commission* 2009 Report on Executive Remuneration amending the already existing disclosure laws on compensation. One of the new requirements is that companies will have to make disclosures on claw backs, actual termination payments, payments post termination, and past present and future pay.[43] The resulting legislation, the *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011* (Act 42 of 2011) introduced a "two-strikes" rule - where shareholders vote against a remuneration report at two consecutive AGMs, the company is required by law to put a motion before the shareholders to "say-on-pay" i.e. vote on re-election of the Board.[44] There are continued doubts about whether this law will actually curb excessive

[41]Bloomberg News, 'England's Central Bank proposes bonus clawbacks for naughty bankers', Financial Post (UK, 13 March 2014) available at http://business.financialpost.com/2014/03/13/englands-central-bank-proposes-bonus-clawbacks-for-naughty-bankers/ accessed 9th February 2015.

[42]Myriam Robin, 'Beware the clawbacks: govt to legislate on executive pay', Crikey (Australia, 27 November, 2012) available at http://www.crikey.com.au/2012/11/27/beware-the-clawbacks-govt-to-legislate-on-executive-pay/ accessed 9th February 2015.

[43] Australian Institute of Company Directors (AICD) (The Boardroom Report), 'Executive pay laws in for further shake-up', *AICD* (2013) 11(1) available at http://www.companydirectors.com.au/Director-Resource-Centre/Publications/The-Boardroom-Report/Back-Volumes/Volume-11-2013/Volume-11-Issue-1/Directors-pay-up accessed 9th February 2015.

[44] See Julie Walker, "Australia Has Had Three Years With The Two-strikes Law and Executive Pay Pain Won't Go Away" Business Insider Australia, available at http://www.businessinsider.com.au/australia-has-had-three-years-with-the-two-strikes-law-and-executive-pay-pain-wont-go-away-2013-10 accessed 9th February 2015.

executive remuneration although it appears to have improved Board-Shareholder information.[45] While it appears in different guises, the say on pay concept is not limited to Australia – the UK'S FCA Remuneration Code also proposes a similar shareholder approval for directors' remuneration although the Board retains the responsibility for determining the remuneration.[46]

There is no similar provision on recovering improper compensation in the Nigerian jurisdiction. Altogether, the fact that the available Codes on corporate governance in the country[47] are, "silent on remuneration" and that shareholder acquiescence at directors' suggestions for remuneration in general meetings is "expected" leaves little room for doubt about the freehand which directors have in determining their remuneration. [48] However while there is no claw back policy in Nigeria there has been a claw back *attempt* under a discretionary policy initiated in 2009 by the Central Bank of Nigeria following its independent investigation of a number of banks in the country on grounds of banking reform. Although it allowed the then Central Bank Governor to controversially and unilaterally, arrest bank directors, replace them with hand-picked new ones, and prosecute the arrested directors for return of monies alleged to have been fraudulently taken from the banks.[49]

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[45] Ibid.

[46]See the FCA web page "Remuneration Codes" available at http://www.fca.org.uk/firms/being-regulated/remuneration-codes accessed 9th February 2015.

[47]These are: the (voluntary) *Code of Best Practices for Public Companies* by the Securities and Exchange Commission 2006; the (mandatory) *Code of Corporate Governance for Banks operating in Nigeria* by the Central Bank of Nigeria (2006); and the (mandatory) *Code of Good Corporate Governance for the Insurance Industry* by the National Insurance Commission (2009).

[48]See Chris Ogbechie and Dimitrious N Koufopoulos, op cit, 388.

[49]See also, Chinedu Bosah, 'Bail out the poor, not the fat cats' *The Vanguard* (Nigeria, 3 November 2009) available at http://www.vanguardngr.com/2009/11/bail-out-the-poor-not-the-fat-cats/ accessed 9th February 2015.

III. INCENTIVES

In the UK, executive compensation is typically comprised of base salary, annual bonus element and long term pay which consists of share options and LTIPs.[50] Since the UK requires detailed disclosure on executive compensation practices, it is perhaps more probable that the disclosed pay of the directors is determined based on the performance of the company.[51] Nevertheless as a response to the culture of rewarding poor or bad performance, the EU parliament came up with a resolution to fix a bonus cap which aims to put a lid on annual performance related bonuses of executive.[52] The bonus cap will make changes to the way remuneration is structured, that is, from salary annual bonus and LTIP, to schemes that are expected to comprise salaries, share allowances and bonuses.[53]The UK government has so far resisted this cap on the argument that in the UK at least, executives are rewarded for success.[54] In order to circumvent the EU bonus cap which limits bonuses to 100 per cent of annual salaries or 200 per cent with shareholder approval, financial executives get more share payments as remuneration.[55]

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[50]Martin Conyon, Simon Peck, Laura Read and Graham Sadler, 'The Structure of Executive Compensation Contracts: UK Evidence', (2000) 33(4) *Long Range Planning* 478.
[51]Martin Conyon and Kevin Murphy, 'The Prince and the Pauper? CEO pay in the United States and United Kingdom', (2002) 110(467) *The Economic Journal* 640 at 644. See also Martin J. Conyon and Graham V. Sadler, 'Executive pay, tournaments and corporate performance in UK firms', (2003) 3(2) *International Journal of Management Reviews* 141.
[52]Sharon Bowles, 'Bankers' bonuses are here to stay until a change of culture occurs' *The Guardian* (London, 4 March 2014) available at http://www.theguardian.com/commentisfree/2014/mar/04/bankers-bonuses-change-culture-eu-bonus-cap accessed 9th February 2015.
[53]Jill Treanor, 'Britain's bank bosses to get millions in share payments in bonus cap dodge' *The Guardian* (London, 21 February 2014)
[54]Polly Toynbee, 'The push for performance-related pay is driven by faith, not facts' *The Guardian* (London, 12 November 2013) available at http://www.theguardian.com/commentisfree/2013/nov/12/performance-related-pay-risky-behaviour accessed 9th February 2015; See also Jon Jachimowicz, 'Using Insights From Behavioural Economics to Redesign Executive Compensation', *The Huffington Post* (UK, 24 October 2013) available at http://www.huffingtonpost.co.uk/jon-jachimowicz/executive-compensation_b_4148812.html accessed 9th February 2015.
[55]The BBC, 'Lloyds and Barclays avoid EU bonus cap by paying shares', *BBC News Business* (UK, 5 March 2014) available at http://www.bbc.co.uk/news/business-26453390 accessed 9th February 2015.

With UK's exit (Brexit) from the EU following the 2016 referendum, the impact of further EU proposals is debatable.

In Australia**,** the issue of executive directors' pay has received the interest of both the Australian public and the policy makers including the ASX.[56] The level of pay and the relationship of pay to performance have also come under scrutiny.[57] The ASX recommends that a relationship between remuneration and performance should be created and aligned and also be clearly disclosed to investors.[58] This suggests that in Australia there is a recognised link between remuneration and performance however Merhebi et al find that contrary to international evidence which suggests that executive pay is significantly correlated with company performance, the Australian situation is that the performance of companies is inconsistent with the pay of executives.[59]

In Nigeria, Obatan opines that executives of companies can only be motivated to work through financial incentives because by the nature of their positions, they are not promoted or promotable and therefore look to incentives to perform.[60] This suggests that motivation by incentives is fundamental to performance. One is not sure whether this is the case. So long as the company remains a going concern whether or not it makes losses consecutively or performs poorly compared to previous reports, there is no evidence to suggest that the director in the Nigerian jurisdiction will lose any agreed

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[56]Hristos Doucouliagos, Janto Haman and Saeed Askray, 'Directors' Remuneration and Performance in Australian Banking', (2007) 15(6) *Corporate Governance: An International Review* 1363; see also Glennis Hanley and Loan Nguyen, 'Right on the Money: What do Australian Unions think of performance-related pay?', (2005) 27(2) *Employee Relations* 141; Robert Dransfield, *Human Resource Management*, (Heinemann, 2000)
[57]Rachel Merhebi, et al., 'Australian chief executive officer remuneration: pay and performance', (2006) 46(3) *Accounting and Finance* 481
[58]ASX Corporate Governance Principles and Recommendations 2014, Recommendation 8
[59]Rachel Merhebi, et al., op cit.
[60]Kehinde Obasan, 'Effect of Compensation Strategy on Corporate Performance: Evidence from Nigerian Firms', (2012) 3(7) *Research Journal of Finance and Accounting* 37.

compensation, be stripped of any personal awards or even be subject to a review of the agreed remuneration package.

Part of the difficulty in assessing directors' remuneration is the complexities in the various means by which directors are rewarded, not least by incentive plans. These incentive plans are: Long term; Short term; and the more general if ambiguous Performance Related Incentives (PRIs). While Short-term incentive plans (STIPs) are more common than LTIPs,[61] they are not necessarily applied the same way across all three jurisdictions. However, the time frame of one-accounting year used in setting out the performance targets on which these incentive plans are based,[62] is common to all three.

A. Long Term Incentive Plans (LTIPs)

One of the advantages of LTIPs is that it provides a direct link between performance and executive pay.[63] LTIPs are awarded to executives both as an incentive to improve performance and in order to reduce fixed costs. They include: share option plans and bonuses linked to long term performance.[64] In Australia, there has been a shift in the mix of executive pay structure from fixed salary to LTIPs and STIPs.[65] One such shift

[61]M. Brown and J. Heywood 'Paying for Performance. What Has Been Learned?' in M. Brown and J. Heywood (eds) *Paying for Performance. An International Comparison* (Armonk NY, 2002) 261
[62]Piotr Urbanek, 'CEOs Remuneration in Corporate Governance Codes in EU Member Countries',(2009) (12)1-2 *Comparative Economic Research*, 45 available at http://www.degruyter.com/view/j/cer.2009.12.issue-1-2/v10103-009-0004-9/v10103-009-0004-9.xml accessed 9th February 2015.
[63]Marc Goergen and Luc Renneboog, 'Managerial Compensation' (2011) 17(4) *Journal of Corporate Finance* 1068.
[64]Sriyan de Silva, 'An Introduction to Performance and Skill-Based Systems', International Labour Organization ACT/EMP Publications available at http://www.ilo.org/public/english/dialogue/actemp/downloads/publications/srspaysy.pdf accessed 9th February 2015.
[65] See generally Graham O'Neill and Allan Berry, 'Remuneration of Australian executives: A practitioner review', (2002) 40(2) *Asia Pacific Journal of Human Resources* 228-245.

happened when in 2012 the shareholders of National Australia Bank voted on whether the CEO will be awarded a sum more than $2.7 million if he can take the company into the top quarter of its peer group by 2016. This fixation of pay with performance by demanding that the director achieve a set goal is a major reason why LTIPs have become increasingly popular in Australia.[66] In 2010, the three most influential companies in Australia structured their remuneration plans to be more shareholder friendly. The Commonwealth Bank, Argo Investments and BHP Billiton have increased and now calculate their LTIPs both for four years and five years respectively indicating that LTIPs are shareholder-friendly and are welcomed.[67]

In addition, the Australian Institute of Company Directors has created guidelines for executive share and option scheme deadlines (LTIPs). It recommends that there should be a reasonable structure for incentive schemes designed around appropriate performance benchmarks that measure performance and provide rewards that will improve the company's future performance.[68] Despite the fact that it is becoming popular, this approach to determining LTIPs has been criticised on the basis that companies will need to consider the peculiar nature of their business operations or

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[66] Myriam Robin, 'NAB's $4 million carrot: How to use long-term incentives to improve performance', *Smart Company* (Australia, 13 November 2012) available at http://www.smartcompany.com.au/leadership/management/39047-nabs-4-million-carrot-how-to-use-long-term-incentives-to-improve-performance-.html?limitstart=0 accessed 9th February 2015.

[67] Stuart Wilson, 'Companies see value of long-term thinking: long-term incentives', *The Australian* (Australia, 20 October 2010) available at http://www.theaustralian.com.au/business/companies-see-value-of-long-term-thinking-long-term-incentives/story-e6frg8zx-1225940897061 accessed 9th February 2015.

[68] AICD, 'Executive Share and Option Scheme Guidelines', (Director Resource Centre, 2007) available at http://www.companydirectors.com.au/Director-Resource-Centre/Policy-on-director-issues/Policy-Papers/2000/Executive-Share-and-Option-Scheme-Guidelines accessed 9 February 2015.

industry and not just adopt a standard model which may not suit their operational purposes.[69]

The UK's Financial Service Authority (FSA) Code[70] on remuneration has eight major principles which are aimed at avoiding incentive structures that encourage decisions based on short-term basis but rather to encourage incentive structures that take into account long-term effects.[71] The scope of the Code covers all aspects of remuneration including wages, bonus, LTIPs, options, severance packages and pension.[72] While LTIPs are not yet hugely popular in the UK, the Association of British Insurers (ABI) Principles of Remuneration, 2013[73] attaching importance to both STIPs and LTIPs, have nevertheless recommended that LTIPs are important in remuneration structures and should be considered for long term strategies.[74] The reason for their unpopularity in the UK may be that LTIPs can be manipulated by the executive in their favour and setting them usually entails setting a complex standard and choice of performance hurdle.[75] Problems begin when a company's long-term incentives are sacrificed for the

[69]Gareth Hutchens, 'Bosses incentive schemes guided by herd mentality', *The Sydney Morning Herald* (Australia, 12 January, 2013) available at http://www.smh.com.au/business/bosses-incentive-schemes-guided-by-herd-mentality-20130111-2clln.html accessed 9th February 2015; See also the comments of Edward Beale CEO, Citi Group who has criticised the UK approach as being a one-size-fits-all standard for LTIPs, in Gavin Hinks, 'Discounting the future: The furore over long-term incentive plans', *Financial Director* (UK, 16 January 2014) available at http://www.financialdirector.co.uk/financial-director/feature/2320345/discounting-the-future-the-furore-over-long-term-incentive-plans accessed 9th February 2015.
[70]The Remuneration Code of the Financial Services Authority (FSA) published 12 August 2009, in force 1 January 2010, and FSA Handbook's Principles for Business and Senior Management Arrangements, Systems and Controls sourcebook (SYSC).
[71]Yannick Hausemann and Elisabeth Bechtold-Orth, 'Changing remuneration systems in Europe and the United States: a legal analysis of recent developments in the wake of the financial crisis', (2010) 11(2) *European Business Organization Law Review* 195.
[72]See Anu Arora, 'Remuneration Practices in Banks and Other Financial Institutions: Part 2', (2012) 33(5) *Company Lawyer* 131.
[73]Association of British Insurers Principles of Remuneration issued 5th November 2013 available at https://www.ivis.co.uk/media/5887/ABI-Principles-of-Remuneration-2013-final.pdf accessed 9th February 2015.
[74]ABI Principles on Remuneration, 2013 sections B and C (2).
[75]Trevor Buck, Alistair Bruce, Brian G. M. Main and Henry Udueni, 'Long Term Incentive Plans, Executive Pay and UK Company Performance', (2003) 40(7) *Journal of Management Studies* 1709.

short-term goals that form the basis of reward structures for executives i.e., that executives need to receive competitive and credible remuneration appropriate to their expertise, their value and general knowledge.[76]

In Nigeria, LTIPs do not appear to be linked to directors' performance; indeed it is not clear how they are applied. For one, there is relatively lower level of shareholder participation and so companies are left to their own devises and two, company directors prefer cash. A third reason is that companies may not have transparent long-term market performance targets which means there is effectively no yardstick on which to determine their long-term performance. The Nigerian Securities and Exchange Commission (SEC) Code expressly states that the executive directors remuneration should also contain a component that is long-term performance-related and may include stock options and bonuses.[77] This suggests that the practice of *both* LTIPs and STIPs is in existence in Nigeria and should be considered in the remuneration structure of companies even if it is not widely used. Yet, there is a problem. The Nigerian SEC creates a gap for directors to manage and make decisions in a company where they have nothing at stake in terms of equity interests. It goes further to state that even where stock options are part of the package, these options can only be exercisable one year after the directors' departure.[78]What happens when a director retires within a year and sells his stock interest the following year? Such an instance will defeat the very essence of stock options as LTIPs.

[76]Demetra Arsalidou 'The regulation of executive pay and economic theory', (2011) 5 *Journal of Business Law* 431.
[77]SEC Code 2011, para 5.3.
[78]SEC Code 2011, para 14.4.

In sum, CG guidelines in the UK and Australia recommend that the LTIPs plan should include one or more performance hurdles. In Australia in particular, the Investment and Financial Services Association[79] recommend that incentive plans whether long-term or short-term, should contain demanding hurdles. The performance requirements should provide incentives to directors which in effect will improve the overall performance of the company.[80] The Nigerian approach on the other hand is not so clear.

B. Short Term Incentive Plans (STIPs)

Majority of STIPs are based on performance financial indices like operating income, earnings before interest and tax and profit after tax which are short term success indicators of company performance. In Australia, there is increasing scrutiny of the size of STIPs awards given to executives. [81] A research conducted by PWC in the financial year 2012, revealed that only 30 per cent of companies paid STIP awards or above targets awards, an improvement compared to the previous year when 38 per cent of ASX companies paid STIP awards. [82]

In the UK, the approach to STIPs is also performance and target based. Lamy and Goldin comment that business incentives have shifted to shorter-term focus as importance is attached more to market accounting, quarterly returns and short-term incentive or annual bonuses.[83] STIPs usually being annual bonuses have been at the

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[79]Investment and Financial Services Association (IFSA) Executive Share and Option Scheme Guidelines (IFSA, Sydney, 2002) para 7.1.

[80]G.P. Stapledon, 'The Pay for Performance Dilemma', (2004) 13 *Griffith Law Review* 57.

[81]See generally, Graham O'Neill and Allan Berry, op cit (n65 above).

[82]PWC, '10 minutes on….Executive remuneration trends-a tweak and a tuck to get a tick', (Australia, January 2013) available at http://www.pwc.com.au/consulting/assets/publications/Ten-Minutes-Jan13.pdf accessed 9 February 2015.

[83]Pascal Lamy and Ian Goldin, 'Short-termism in business can perpetuate instability and risk', *The Telegraph* (UK, 15th October, 2013) available at http://www.telegraph.co.uk/finance/comment/10381558/Short-termism-in-business-can-perpetuate-instability-and-risk.html accessed 9th February 2015.

core of criticisms on directors' pay in the UK. An instance is that of the Co-op bank which announced losses and was still paying its executives bonuses; the Bank despite recovering from a scandal had plans to lay off up to 5,000 employees while making bonus pay-outs to senior staff.[84]

In Nigeria the limitation of STIPs is seem more clearly where STIPs which are supposed to be performance-based distort performance as directors and executives use these STIPs to disguise excessive pay.[85] Olisaemeka observes in this regard that the Nigeria Capital Market was not seen as a market for the long term but as a short term one because majority of the companies listed on it were chasing short term goals and rewarding their executive on STIPs.[86] This opinion is supported by available information at least in the Nigerian media: STIPs are a significant if not a major component of remuneration packages in Nigeria.[87]

C. Performance Related Incentives (PRIs)

PRIs depict equity in compensation which means fairness and justice in pay.[88] Finkelstein and Hambrick contend that in practice, base salaries in many companies are very high and there is no need to resort to performance-related incentives which are

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[84]Jamie Doward, 'New Co-op storm as board awards bosses huge pay and bonus deals', *The Guardian* (UK, 8 March 2014) available at http://www.theguardian.com/business/2014/mar/08/new-co-op-storm-pay-deals accessed 9th February 2015.

[85]Bryan Gould, 'Executive bonus schemes do not work', *The Guardian* (UK, 5th September 2009) available at http://www.theguardian.com/commentisfree/2009/sep/05/executive-bonus-culture accessed 9th February 2015.

[86]A.G Olisaemeka, 'The Meltdown of the Nigerian Capital Market: Causes and Consequences-Investment', Nairaland (Nigeria, 1st March 2009) available at http://www.nairaland.com/241080/meltdown-nigerian-capital-market-causes accessed 9th February 2015.

[87]Naij: 'Top-8 Nigeria's Highest Paid CEOs and Their Daily Income', *Naij* (Nigeria, 22 November 2013) available at http://news.naij.com/52675.html accessed 9 February 2015.

[88]C. Obisi, C.B.N. Uche and N.E. Ifekwem, 'Employee Compensation Management in Nigerian Organisations: Some Observations and Agenda for Research', (2003) 1(1) *Swiss Journals of Management and Business Studies* 23.

based on share returns, accounting profitability and bonus pays.[89] Contrary to this view is the commonly held notion that for a company to be successful, it should link pay to performance, as pay is deemed essential in encouraging all round performance.[90] Brown and Heywood argue that there is need to consider the importance of the economic, institutional and cultural background of countries in deciding performance related pay schemes or incentives.[91] Janet Lee also notes that PRIs are not just related to the level of performance of the company but also relate to the change in performance and all of this relates to the ownership concentration, board structure and firm size.[92]

In Australia, there has been a shift in executive pay following the US model, with a growing emphasis on short and LTI payments.[93] The same can be said about the UK: companies tend to grant less share options to their executives leading to lower appreciation of LTIPs.[94] In practice however it seems UK companies are more concerned with *how much* of an incentive should be awarded rather than whether a PRI payment has been earned in the first place.[95] The result of this is that despite the incentive schemes, remuneration systems tend to sway towards the traditional fixed pay.[96] In Nigeria, use of PRIs is again not clear. Ude and Coker recommend that if PRIs

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[89]S. Frinkelstein and D.C. Hambrick, 'Chief Executive Compensation: A synthesis and reconciliation', (1988) 9 *Strategic Management Journal* 543

[90]See Richard J. Long and John L. Shields, 'Performance pay in Canadian and Australian firms: a comparative study', (2005) 16(10) *International Journal of Human Resource Management* 1783-1811.

[91]See M. Brown and J. Heywood op cit, (n61 above) 261.

[92]Janet Lee, 'Executive performance-based remuneration, performance change and board structures', (2009) 44(2) *The International Journal of Accounting* 138.

[93] Graham O'Neill and Allan Berry, (n 65 above).

[94] See Martin Conyon, Simon I. Peck and Graham Sadler, 'Corporate Tournaments and Executive Compensation: Evidence from the UK', (2001) 22(8) *Strategic Management Journal* 805-815.

[95]Ibid.

[96]Glennis Hanley and Loan Nguyen, 'The Dash for Cash: Performance Related Pay-An Australian Union Perspective'. (2003) Working Paper 4/03 Monash University, available at http://www.buseco.monash.edu.au/mgt/research/working-papers/2003/wp04-03.pdf accessed 9th February 2015.

are to be used, such PRIs must be identified, based on individual performance and the incentive must be feasible for the company to implement.[97]

The Nigerian SEC Code requires that the remuneration policy of a company should explain how rewards of senior management and executives are linked to both corporate and individual performance.[98] This provision may further embolden shareholder participation although the extent to which PRIs are included as part of compensation schemes is not always readily available from public records.[99]

IV. DIRECTORS' REMUNERATION AND REFORMS

Payment made to directors derive from their contracts subject to the company's Articles of Association. Benito and Conyon in a research into twenty-one UK companies' directors' remuneration policies between 1985 and 1994 following the Cadbury Report found that contrary to the assumption that company directors' pay was arbitrary,

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[97]Ugwu Ude and M.A. Coker, 'Incentive Schemes, Employee Motivation and Productivity in Organizations in Nigeria: Analytical Linkages', (2012) 1(4) *IOSR Journal of Business and Management* 32.

[98]The Securities and Exchange Commission (SEC) Code of Corporate Governance for Public Companies, 2011 available at http://www.sec.gov.ng/files/CODE%20OF%20CORPORATE%20GOVERNANCE%20FOR%20PUBLIC%20COMPANIES.pdf accessed 9th February 2015. Hereinafter the SEC Code. See SEC Code, para 14.1 (c).

[99]Adewale Ajayi et al, 'Nigeria: Post-Economic Crisis: Optimising Rewards For Business Performance', Mondaq (Nigeria, 15 November 2012) available at http://www.mondaq.com/x/206188/employee+rights+labour+relations/PostEconomic+Crisis+Optimising+Rewards+For+Business+Performance accessed 9th February 2015. For our present purposes, we looked at the records of executive pay in two public companies: PZ Cussons PLC- Annual Report and Accounts 2013, available at http://www.pzcussonsng.com/files/report-2013.pdf accessed 13th February 2015 and; United Bank for Africa PLC Annual Report 2012 available at http://www.ubagroup.com/upload/docs/2012-annual-report-financial-s_K8JAC_20130510113351kgapgbksff.pdf accessed 9 February 2015.

"directors' compensation is positively related to pre-dated shareholder returns and company size with the quantitative effect of the latter dominating the former."[100]

Under UK law however, the director is an officer of the company and he or she has no right of remuneration unless the company's articles state so.[101] The approach in Australia is not too different. Kym Sheehan points out that the regulatory framework for executive remuneration is not determined by the government, which means that there are no models like that of the UK.[102] Remuneration practice is therefore gleaned from the remuneration contract, its execution and termination.[103] The main source of the right a director has to remuneration is found in the company's Articles and where there is no such clause, the alternative rule in the Australian Corporation Act provides that the director will be paid such remuneration and expenses as determined by the general meeting of the members.[104]

The Nigerian approach is also similar to that in the UK and Australia and the remuneration agreed is essentially a contractual agreement between the company and the director with little or no input from the shareholders. The Nigerian Companies and Allied Matters Act (CAMA) does not define an executive director; they are treated as employees of the company although their service contract and compensation is

[100] See Andrew Benito and Martin Conyon, 'The Governance of Directors' Pay: Evidence from UK Companies', (1999) 3(2) *Journal of Management and Governance* 117.
[101] Director's Service Contracts- Fixed Salary (without PILON) available at http://simply-docs.co.uk/Directors_Service_Contracts/Director%E2%80%99s_Service_Contract_%E2%80%93_Fixed_Salary_no_PILON accessed 9th February 2015; See the early case of *Re Beeton & Co Ltd* [1913] 2 Ch 279. Director's Service Contracts is also provided for in the Model Articles of Association. See the UK Companies Act (2006) Model Articles, Table A.
[102] See Kym Sheenan, 'The Regulatory Framework for Executive Remuneration in Australia', (2009) 31(2) *Sydney Law Review* 273.
[103] Ibid.
[104] See Roman Tomasic et al, *Corporations Law in Australia,* (2nd edition, Federation Press, 2002), 276.

addressed differently from that of employees.[105] As decided by the court in *Longe v First Bank of Nigeria Plc* service contracts are regulated by the Articles of Association (AoA) of the company which have the effect of a binding contract.[106]

A. Australian Reforms

One of Australia's responses to the crisis was to provide for a more transparent overview of executive compensation. The Australian Prudential Regulatory Authority (APRA)[107] was therefore set up to constitute a more intense form of government monitoring of executive pay than has been in existence previously.[108]

Under the Corporate Law Economic Reform Program Act[109] (the CLERP 9 Act) listed companies are required to include a separate remuneration report as part of their directors' report in the annual report of each company under the heading "Remuneration Report"; further disclosure requirements being imposed where the remuneration of a director or executive is dependent on the satisfaction of a performance condition, or includes equity-based compensation.[110] There is a requirement for a non-binding (advisory) shareholder resolution to be put at a listed company's AGM that the remuneration report be adopted."[111] In the event of a contravention, the Australian

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[105]Delliote Corporate Services Limited (DCSL), 'Retirement by Rotation and the Removal of Executive Directors', (2013) 1(2) Governance Newsletter 1.
[106]*Longe v First Bank of Nigeria Plc* (2006) 3 NWLR (Pt 967) 228. See CAMA 2004, s 267(4)
[107]The Australian Prudential Regulation Authority (APRA) 2009 implementing the FSB Principles
[108]Jennifer G. Hill, Regulating executive remuneration after the global financial crisis: common law perspectives, in Randall Thomas and Jennifer Hill (eds) *Research Handbook on Executive Pay*, (Edward Elgar, 2012), 226.
[109]Corporate Law Economic Reform Program Act (the CLERP 9 Act), effective July 1, 2004.
[110] See Charles Rosedale and Soruban Rajakulendran, 'Australia: Company Law- Corporate Governance (Legislative Comment)', (2006) 17(5) *International Company and Commercial Law Review* N33

[111]Ibid.

Securities and Investments Commission (ASIC) has the power to impose fines as high as $100,000.[112]

Australian companies are now required to prepare remuneration reports in line with the applicable accounting standards.[113]In 2007, the Australian Stock Exchange (ASX) in the *Principles of Good Corporate Governance and Best Practices*, provided that directors' remuneration should be sufficient and reasonable and should be related to corporate and individual performance.[114] In 2013, the ASX proposed further recommendations on remuneration. Under these recommendations, companies that do not have remuneration committees should disclose that fact and also disclose what processes they have put in place in setting the remuneration level of directors and senior executives and must ensure that such remuneration is appropriate and not excessive.[115]

Another reform created by the Federal Government of Australia on July 1, 2011 is the 'two-strikes' law which was designed to hold directors accountable for salaries and bonuses of executives.[116] The first strike occurs when the company's remuneration report which gives detailed information on the individual director's remuneration, receives a disapproval vote of 25 per cent or above by its members. The second strike occurs when a subsequent report of the company's remuneration report also receives a

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[112]Ibid, pg N34

[113]Chapter 5,*Overview of the regulatory and corporate governance framework*. Online source available at http://www.pc.gov.au/__data/assets/pdf_file/0007/93598/08-chapter5.pdf accessed 6th April 2014.

[114]Jean Jacques du Plessis, J.J. Du Plessis, MirkoBagaric and Anil Hargovan, *Principles of Contemporary Corporate Governance* (2ndedn, Cambridge University Press, 2010). See also Charles Rosedale, 'Australia: Markets- Corporate Governance', (2009) 20(3) *International Company and Commercial Law Review* N20.

[115]Company Law and Governance Update, ASX Corporate Governance Council consults on proposed 3rd edition of the Principles and Recommendations (Ashurst, Australia, 28 August 2013) available at www.ashurst.com/doc.aspx?id_Content=9482 accessed 9th February 2015.

[116]Georgia Wilkins, 'What is the 'two-strikes' rule?' *The Sydney Morning Herald* (Australia, 8 October, 2012) available at http://www.smh.com.au/business/agm-season/what-is-the-twostrikes-rule-20121008-278us.html accessed 9th February 2015; see also Reza Monem and Chew Ng, "Australia's 'two-strikes' rule and the pay-performance link: Are shareholders judicious?" *Journal of Contemporary Accounting and Economics* Vol 9 Issue 2 (2012) 237-254.

25 per cent or more disapproval from its shareholders. Subsequently, there will be a 'spill meeting' requiring persons who were directors at the time the disapproved remuneration report was considered to stand for re-election. The rationale behind this law according to the Australian government is to provide an additional level of accountability, disclosure and transparency in deciding and reporting remuneration of directors and executives.[117]

B. UK Reforms

The concerns of the UK on executive remuneration are: the size of the basic pay; the large gains and the compensation payments to directors on loss of office.[118] These concerns had stimulated several reforms even before the 2008 crisis. In 1995, the Greenbury Committee was set up with the goal to "identify good practice in determining direct remuneration and prepare a Code of such practice for use by UK plcs."[119] Recommendations were made for the need of accountability, transparency and performance. The provisions were designed to ensure that directors' remuneration is linked to individual performance.[120] A later reform review, the Walker Review of 2009, gave recommendations on remuneration practices within financial institutions.[121] Its aim was not to define the level of remuneration that should be awarded to directors

[117]Georgia Wilkins, ibid.

[118]James J. Hughes, 'The Greenbury Report on Directors' Remuneration', (1996) 17(1) *International Journal of Manpower* 4.

[119]Reference of the Study Group on Directors' Remuneration chaired by Sir Richard Greenbury reported in July 1995.

[120]James J. Hughes, op cit. See also Manifest; the proxy voting agency, 'Milestones in UK Corporate Governance' available at http://www.transparencymatters.co.uk/tm/uploads/resourcesart/files/UK20CorporateGovernanceMilestones.pdf accessed 7th April 2014.

[121]Chaired by Sir David Walker limited to banks and other financial institutions (BOFIs). Its final recommendations were published on 26 November 2009.

rather it came up with proposals on how to improve the structure of remuneration in terms of risk taking and performance.[122]

Present action to further strengthen transparency and accountability in directors' remuneration for UK quoted companies include that the directors remuneration report should contain a statement by the remuneration committee, a clear indication of the companies' remuneration policy, and information on how the remuneration policy has been implemented in the financial year being reported.[123] The remuneration policy is subject to shareholder approval by a binding vote (resolution) at least once every three years under Section 439A of the UK Companies Act 2006.

C. Nigerian Reforms

The Nigerian Companies and Allied Matters Act (CAMA) provides that even where the Articles have fixed the remuneration of directors it can still be altered by the shareholders at the company's general meeting.[124] It states that where the directors receive remuneration not approved by the shareholders, they may be liable for misfeasance and will be accountable.[125] Following the 2008 crisis, Nigeria set up committees to recommend best Corporate Governance practices suitable for its business environment. The Atedo Peterside Committee[126] and the later M.B. Mahmoud

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[122]Roger Barker (Institute of Directors), 'The Walker Review of corporate governance-an assessment' available at www.iod.com/~/media/Documents/PDFs/.../The%20**Walker**%20**Review** accessed 7th April 2014. See also Olswang, 'Remuneration and the Walker Review' available at <www.olswang.com/employment/pel_apr10/PEL_-_April_2010_-_Remuneration_and_the_Walker_Review.pdf accessed 9th February 2015.
[123]The Financial Reporting Council, 'FRC to consult on executive remuneration' FRC News (UK, 02 October 2013) available at https://www.frc.org.uk/News-and-Events/FRC-Press/Press/2013/September/FRC-to-consult-on-executive-remuneration.aspx accessed 9thFebruary 2015.
[124]CAMA 2004, s267(3).
[125]Ibid, s267(6).
[126]Committee headed by Atedo Peterside (OON) mandated to identify weaknesses in current corporate governance practices in Nigeria.

committee[127] have both come up with recommendations but have not focused on remuneration of directors.

However the Securities and Exchange Commission (SEC) came up with a new Code of Corporate Governance for Public Companies in 2011. Unfortunately, the SEC Code's provisions on directors' remuneration are not detailed. [128] The SEC Code suggests that the level of remuneration should be sufficient to attract, motivate and retain skilled qualified persons needed to run the company successfully.[129] It requires companies to come up with well-structured policies on remuneration not just for directors but also for senior management and to define the standards and mechanisms for determining the level of remuneration and describing how and to what extent this links to the corporate and individual performance.[130] However, it does not lay down a structure for enforcement of the remuneration policy and proper detailed disclosure of individual directors' and their itemised compensation packages. It does however state that the company's remuneration policy and all material benefits paid to directors should be published in the company's annual report.[131]

A major problem here is that the SEC Code gives the directors and the remuneration committee powers to determine their own remuneration and not by the general meeting, as required by the CAMA.[132] This means that the SEC Code is in conflict with the

[127]National Committee chaired by M.B. Mahmoud for the review of the 2003 Code of Corporate Governance for Public Companies in Nigeria.
[128]See n 98 above.
[129]Chinonyelum Uwazie, 'Corporate governance for public company' available at http://www.iflr.com/Article/2799739/Corporate-governance-for-public-companies.html accessed 9th February 2015.
[130]SEC Code op cit.
[131]SEC Code, s14.10
[132]E.P. Ebhomielen, 'Expectation Gap with Securities and Exchange Commission's Code of Best Practice on Corporate Governance in Nigeria', (2009) 1(6) *Association of Accountancy Bodies in West Africa (ABWA) Journal* 36.

CAMA. In fact the CAMA supports pay according to performance, accountability and transparency even more than the SEC Code since the CAMA expressly states that the pay of directors must be apportionable[133] or in other words assigned appropriately and scrutinized by the shareholders at the general meeting.

There is also a Central Bank of Nigeria (CBN) code[134] which contains mandatory provisions that should be applied by the banks. As regards remuneration, it does not mention a policy or structure in deciding same. This allows bank executives to decide their packages thereby creating an avenue for abuse of shareholders' funds.[135] A promise that the Nigerian government through the CBN would step in to check the abuse of directors' powers by introducing measures to regulate remuneration and bonuses of executive officers has so far not been put into action.[136]

According to Kama and Chuku, management in Nigerian banks typically influence the selection process and determines who comes on the board.[137] Management boards of companies have typically acted for the benefit of those who appoint them and this surrogacy function results in management merely rubber stamping the decisions of their benefactors.[138]Furthermore, the CBN has not made further efforts to prescribe disclosure requirements regarding directors' remuneration. The CBN Governor's

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[133]The Companies and Allied Matters Act 2004, s267(7).
[134]The Code of Corporate for Banks in Nigeria Post Consolidation in force April 3, 2006 hereinafter the CBN Code.
[135]AdenikeAdewale, 'Corporate Governance: a Comparative Study of the Corporate Governance Codes of a Developing Economy with Developed Economies', (2013) 4(1) *Research Journal of Finance and Accounting* 65.
[136]Babajide Komolafe and Michael Eboh, 'Nigeria: CBN to Regulate Banks' Regional Expansion, Executive Compensation', *The Vanguard* (Nigeria, 1 November 2009) available at http://allafrica.com/stories/200911021175.html accessed 9th February 2015.
[137]Ukpai Kama and Chuku A. Chuku, 'The Corporate Governance of Banks in Nigeria', (2009) 3 *Social Network Research Network* 1 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1350735 accessed 9th February 2015.
[138]See Ben E.A. Oghojafor, Olufemi Olayemi, Patrick Okonji and James Okolie, 'Poor Corporate Governance and its Consequences on the Nigerian Banking Sector', (2010) 5(2) *Serbian Journal of Management* 243.

reason for this lack of action was that the issue of executive compensation in Nigeria was not at the heart or the principal cause of the financial crisis in Nigeria unlike other countries around the world and that comparison between the UK and Nigeria on the issue of remuneration is unfounded.[139]

V. MEASURING PERFORMANCE FOR REMUNERATION PURPOSES

The UK CG Code places importance on the relationship between company performance and executive pay and recognizes the value of performance evaluation in this context.[140] The Code states that there should be annual evaluation of the Board which will determine its.[141] In addition, the Association of British Insurers (ABI) created a report on Board Effectiveness which aims to help companies have a better understanding on effective boards, performance and pay. Board evaluation is one of the three key issues that help make an effective board. The reason for this was stated by the ABI Director General Otto Thoresen:

> Effective boardrooms should be the powerhouse of the UK economy. The board effectiveness report and long standing remuneration guidelines represent UK best practice. They aim to ensure that remuneration is linked to performance and shareholders' interests are protected. We continue to favour evolution, building on what we have learnt from recent years to make sure companies act

[139] Babajide Komolafe, 'Why we changed gear on executive compensation and bonuses, Sanusi' *The Vanguard* (Nigeria, 2 August 2010) available at <http://www.vanguardngr.com/2010/08/why-we-changed-gear-on-executive-compensation-and-bonuses-sanusi/ accessed 9th February 2015.

[140] See Mark Farmer, Stuart Archbold and George Alexandrou, 'CEO Compensation and Relative Company Performance Evaluation: UK Evidence', (2013) 8(1) *Compensation and Benefits Review* 88.

[141] UK Corporate Governance Code 2012, sB.6

> in shareholder's interests and deliver long term economic growth that will benefit society as a whole.[142]

Some suggest evaluation has an impact on remuneration.[143] It is important to point out at this point that there is a dilemma here, one of time. Directors' remuneration packages are usually agreed at the start of the financial year or prior to commencement of office; a subsequent appraisal may or may not highlight a failure or a potential crisis if the auditors do not testify to this. This makes it difficult to ascertain whether or not poor performance was due to "bad luck" or poor decisions.[144] Following the failure of the Royal Bank of Scotland, a report of the same title, by the Financial Services Authority in 2011 noted as below:

> Errors of commercial judgement are not in themselves sanctionable unless either the processes and controls which governed how these judgements were reached were clearly deficient, or the judgements were clearly outside the bounds of what might be considered reasonable. The reasonableness of judgements, moreover, has to be assessed within the context of the information available at the time, and not with the benefit of hindsight.[145]

In Australia, the ASX Corporate Governance Principles and Recommendations provides for the *annual* evaluation of the performance of the board and issues arising from the review.[146] This suggests that the Australian approach is similar to that of the

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[142] Association of British Insurers, 'UK boardrooms given clear guidance on executive pay and effective performance', News releases (28 Sept 2011) available at https://www.abi.org.uk/News/News-releases/2011/09/uk-boardrooms-given-clear-guidance-on-executive-pay-and-effective-performance.aspx accessed 9th February 2015.

[143] James Beck, 'CEO performance reviews that work', Effective Governance News (Australia, 12 August 2013) available at <http://www.effectivegovernance.com.au/ceo-performance-reviews-that-work/> accessed 9th February 2015.

[144] Richard Lambert and David Larcker 'Executive Compensation, Corporate Decision Making' in Fred K. Foulkes (ed) *Executive Compensation: A Strategic Guide for the 1990s* (Harvard Business Press, 1999);

[145] The Financial Services Authority Report into the RBS, page 9.

[146] ASX Corporate Governance Principles and Recommendations 2014, recommendation1.6.Italics for emphasis.

UK. Under the Guidelines for Executive Remuneration contained in the ASX principles and recommendations, performance based remuneration which is a component of executive remuneration, should be linked to specified performance targets and the way this can be done is through proper board evaluation or appraisal.[147] The ASX Principles and Recommendations in addition recommend that the company should introduce key performance indicators for executives' measure of achievement of objectives and link part of it to their remuneration.[148]

In Nigeria, the SEC Code recommends that the board of directors should establish a system to evaluate *its own* performance annually.[149] From the Code, the purpose of any evaluation or appraisal is mainly for training and for purposes of determining re-election.[150] The CBN Code offers a more transparent provision: that banks should carry out a performance appraisal and this appraisal should be done by an outside consultant whose appointment and termination should be approved by the shareholders at an AGM.[151]

It does not appear that at least at present, performance appraisal is accorded much importance in Nigerian companies. Where they are carried out, performance appraisals or evaluations are not conducted in relation to remuneration; they are conducted primarily on an evaluative basis and there is no further obligation on communicating the results of the appraisal to the shareholders.[152]

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[147] ASX Corporate Governance Principles and Recommendations 2014, recommendation 8.2.
[148] Ibid, Box 1.5.
[149] SEC Code 2011, s15.1.
[150] SEC Code 2011, s15.5 and 15.7.
[151] CBN Code 2006, s5.4 and 5.4.6.
[152] See further Chris Obisi, 'Employee Performance Appraisal and its Implication for Individual and Organizational Growth', (2011) 1(9) *Australian Journal of Business and Management Research* 92

A. The Appeal of Audits and Disclosure Requirements

Certain factors can impact the performance of the directors. These include the board of directors,[153] as the size of the board increases, the pay of the executives also increase.[154] Unless there is sufficient independence and competence on the board itself, the company may suffer and reward for its executives will be provided regardless.[155] The size of the company also matters as corporation size can be a partial representation of managerial ability.[156]

In our view, audit reports and disclosure requirements present a good means of measuring performance. In Australia, it has been recommended that reports on incentive measures must reflect the risks inherent in these measures as well.[157] On this basis, the ASIC has reiterated the need to ensure that risk reporting which is done through the audit committee remains of high quality.[158]In the UK, the Committee on Internal Audit recommended that the audit of a company should include risk and whether appraisal and remuneration processes are in line with values, ethics, risk

[153]Australian Government Productivity Commission *Research on Executive Remuneration* (Appendix D) available at http://www.pc.gov.au/inquiries/completed/executive-remuneration/report accessed 1 April 2017; James Hall, 'Executive Pay Report 2010: The UK's 12 highest-paid boards', *The Telegraph* (UK, 18 May 2010) available at http://www.telegraph.co.uk/finance/jobs/7731111/Executive-Pay-Report-2010-The-UKs-12-highest-paid-boards.html accessed 9th February 2015.
[154] See M.P. Guest, 'Board structure and executive pay: Evidence from the UK', (2009) *Cambridge Journal of Economics* 31
[155]A. Ujunwa, 'Board characteristics and the financial performance of Nigerian Quoted firms', (2012) 12(5) *Corporate Governance* 656.
[156]See further Rachel Merhebi, et al., 'Australian chief executive officer remuneration: pay and performance', (2006) 46(3) *Accounting and Finance* 481; See also Bruce Rosser and Jean Canil, 'Is there a Firm-size Effect in CEO Stock Option Grants?' *Corporate Ownership and Control* (2008) (6)1, 115; H.E. Scholtz and A. Smit, 'Executive remuneration and company performance for South African Companies listed on the Alternative Exchange (AltX)', (2012) 16(1) *South African Business Review* 22.
[157]PricewaterhouseCoopers on Audit Committee Matters, 'How do audit committees grow from changes?' (October 2010) available at http://www.pwc.com.au/assurance/assets/audit-committee/Audit-Committee-Matters-Oct10.pdf accessed 9th February 2015.
[158]Ibid.

appetite and overall policies of the company.[159] Australia and the UK have thus established a direct link between the audit committee and executive compensation.

In Nigeria the audit committees are more focused on the *financial* performance of the company as a whole, and not the performance of the board.[160] However, audit reports may impact remuneration in future, because if the company is not doing well and this is publicly disclosed in the audited accounts, excessive rewards for directors can be countered on available evidence.

With regard to disclosure, in practice, shareholders, the media and the general public can only rely on what is reported or disclosed. Contrary to the intended aims, it can argued that increased disclosure can cause problems. Greater disclosure can mean the greater likelihood of executives comparing their remuneration with those of others which can only serve to inflate remuneration generally.[161] On the other hand, executives may not be keen to let the public know just how much they earn as directors.

The Australian Corporations Act lays down requirements on the specific information companies must disclose on their remuneration.[162] There is a further requirement that time be allocated to discussing remuneration of executives at the general meeting which

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[159]Committee chaired by Roger Marshal and Director of FRC on Effective Internal Audit in the Financial Services Sector - Recommendations from the Committee on Internal Audit Guidance for Financial Services (July 2013).

[160]See U. Modum et al.' 'Audit Committees and Corporate Performance of Selected Listed Companies Quoted in the Nigerian Stock Exchange: a Perception Analysis', (2013) 4(16) *Research Journal of Finance and Accounting* 115.

[161] Chapters 5- 6 of the UK Companies Act 2006 set out provisions for directors reports including on remuneration. Other relevant regulatory provisions on remuneration include those under the *Directors' Remuneration Report Regulations 2002, SI 2002/1986* and *The Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008.* See also, J. Moriarty, "Do CEOs get Paid Too Much?", (2005) 15(2) *Business Ethics Quarterly* 257; Report by Mallesons Stephen Jaques, 'Directions 2012: Current issues and challenges facing Australian directors and boards', (2012) available at http://www.mallesons.com/Documents/Directions_2012.pdf accessed 9th February 2015

[162]Corporations Act 2001 (Cth), s300A.

will be voted on by the shareholder.[163] In Nigeria, the CAMA has mandatory provisions regarding proper disclosure.[164] Audit committees are charged with ensuring that there is proper compliance with disclosure requirements relating to the remuneration of executives and the highly paid staff of the company.[165] This provision has not made much impact and for banks in particular, the lack of transparency and disclosure of financial transactions has led to increased financial crimes.[166]

Furthermore, the contradictory approaches of the national law under CAMA and the bank (CBN) and market Codes (SEC) in Nigeria, do not help. Since the CAMA does not appear to have strong enforcement mechanism and poor regulatory oversight, executives can deliberately refuse to properly disclose certain information required by the Nigerian Accounting Standard Board.[167] According to Nat Ofo, the deficiencies in the Nigerian SEC Code also contribute to this. The SEC Code does not demand full disclosure of the remuneration and breakdown of executive remuneration. This is a loophole that creates an avenue for poor monitoring of the boards' activities.[168] The

[163] Jim Corkery and Sabina Medarevie, 'Executive remuneration under scrutiny: The cutting edge of the 'shareholder spring'', (2013) *Corporate Governance* (eJournal) 1 available at http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1027&context=cgej accessed 9th February 2015. Public information on directors' pay is also available in Australia. See AON Hewitt: The Australian Top Executive Remuneration Report available at http://www.csirem.com.au/Surveys/Australian/TopExec/ accessed 9th February 2015.

[164] Ige Omotayo Bolodeoku, 'Corporate Governance: The Law's Response to Agency Costs in Nigeria' (2006-2007)32(2) *Brooklyn Journal of International* Law 510.

[165] Mariane Ojo, 'The Need for Global Adoption and Adaptation of International Financial Reporting Standards: Post Enron Consequences and the Restoration of Confidence to Capital Markets following the 2008 Financial and Stock Market Crises', (2012) available at <http://eprints.covenantuniversity.edu.ng/1875/1/The%20Need%20for%20Global%20Adoption%20and%20Adaptation%20of%20International%20Financial.pdf accessed 9th February 2015.

[166] See Babalola Adeyemi, 'Corporate Governance in Banks: The Nigerian Experience', (2010) 7(4) *Corporate Ownership and Control* 34.

[167] See A.A. Idris, J.S. Kehinde, S.S.A. Ajemunigbohun and J.M.O. Gabriel, 'The Nature, Technique and Prevention of Creative Accounting: Empirical Evidence from Nigeria', (2013) 1(2) *eCanadian Journal of Accounting and Finance* 1.

[168] Nat Ofo, 'Eight Engaging Issues for Directors of Listed Companies in Nigeria in 2013' The Corporate Prof (11 January, 2013) available at http://thecorporateprof.com/eight-engaging-issues-for-directors-of-listed-companies-in-nigeria-in-2013/ accessed 9th February 2015.

provisions on disclosure of remuneration recommend that the company's interests are put before private interest.[169] Ejuvbekpokpo and Esuike recommend that in the absence of strong political and institutional framework, disclosure must be compulsory and compliance enforced if it is to be of any effect.[170]

The growing Nigerian market requires even stronger models of transparency and accountability. Disclosure of company accounts, appropriate, accessible and accurate information on relevant company matters as required by the CAMA and disclosure of directors remuneration, serve to alert shareholders and the wider public on company performance. These ultimately provide a yardstick to evaluate if only on a broad basis, the contribution directors make to the company in justification of their pay. Timely disclosure is also very important in the Nigerian context; much of the information on vital issues are reported in the media and accessed via media networks – they may not be recorded in academic or research material. It becomes even more difficult to access information when it is not provided and discussed at the time there is public interest in receiving same.

It is important to bear in mind that the environment and business culture also matters when considering directors' performance. The business environments in the UK and Australia differ significantly from Nigeria. According to Fajana et al, effective management in Nigeria cannot be divorced from the local values, customs, and the

[169]Osayaba Giwa-Osagie, 'Code of Best Practices for Corporate Governance' *International Law Office* (Nigeria, 28 November 2005) available at http://www.internationallawoffice.com/newsletters/detail.aspx?g=6dd1482f-e08a-4098-92d0-a8c92ca678ae accessed 9th February 2015.

[170]Stephen. A. Ejuvbekpokpo and Benjamin. U. Esuike , 'Corporate governance issues and its implementation: The Nigerian experience', (2013) 3(2) *Journal of Research in International Business Management* 53

overall external cultural environment.[171] This means that company executives still have to find ways around social challenges such as poor infrastructure, bureaucracy and limited regulation, single ownership and family control of boards, and the limited regulatory and enforcement oversight of corporate activity.

VI. CONCLUSION

Australia is in our view the most progressive of the three jurisdictions with respect to efficient corporate governance action over directors' pay. There is a mandatory tone to its executive remuneration provisions and disclosure of directors' remuneration is prioritized. The UK for its part is gradually moving towards granting shareholders more power in deciding executives' pay although time will tell what shareholders will make of the authority given to them. Intervention is still political it is either when a company has failed or is on the brink of failure, that CEOs are summoned before the House of Parliament. This approach is not sufficient since the intervention comes after the deed has been done and the executives can come up with a proper justification for their reward. A preventive approach will be more appropriate that is, regulatory provisions that asks questions where there is evidence of poor performance for example in audited corporate accounts for each financial year.

The major problem we found in examining practice in Nigeria was the lack of strong institutional infrastructure on corporate governance. However since the global efforts at recovery from the 2008 crisis and with a return to democracy, greater media and

[171] See Sola Fajana, Tunde Elegbede and Mariam Gbajumo-Sheriff, 'Human Resource Management Practices in Nigeria', (2011) 2(2) *Journal of Management and Strategy* 57. See also Steven Evans, CEO Etisalat in Stanley Opara, 'Challenges in Nigerian market not normal for mobile operators- Etisalat CEO' The Punch (Nigeria, 7 June 2013) available at http://www.punchng.com/business/ceo-platform/challenges-in-nigerian-market-not-normal-for-mobile-operators-etisalat-ceo/ accessed 9th February 2015.

public scrutiny has ensured that there is growing awareness about company executives' responsibility to work for their huge pay. Intervention has been limited to the actions of the Central Bank as previously discussed and corporate directors have not been reprimanded on the grounds of excessive remuneration, but for fraud and similar crimes.[172]

Regardless of the level of corporate activity in a jurisdiction, strategies taking into account the reward for performance given to directors, is imperative to sustain confidence in the market. It is also vital for the maintenance of transparency and accountability in the corporate sector. For emerging economies like Nigeria in particular, more efficient corporate governance processes including stronger regulatory oversight over directors' pay and performance can strengthen investment and efficiency in the corporate sector.

[172]This is under the authority of the Economic and Financial Crimes Commission (EFCC) Nigeria. The Commission publishes details of its investigations and arrests on its web site: https://efccnigeria.org/efcc/.