

# The sea is history – the Companies and Allied Matters Act, 2020 aspires to optimize corporate regulation in Nigeria

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The repeal and re-enactment of the Companies and Allied Matters Act, 1990 (CAP C20, LFN 2004) ('CAMA') as CAMA 2020 ("the Act") is a major game changer in the corporate regulatory landscape. Recall that the National Assembly had passed an amendment in 2018, which was covered in our [Regulatory Alert of May 2018](#), and His Excellency, President Muhammadu Buhari GCFR, declined assent to it and requested the National Assembly's reconsideration of the Bill.

The newly enacted Act introduces measures to ensure efficiency in the registration and regulation of corporate vehicles, reduce the compliance burden of small and medium enterprises (SMEs), enhance transparency and stakeholders' engagement in corporate vehicles and, overall, promote a more friendly business climate. The overhaul of the CAMA, which is the foundational legal basis for corporate vehicle regulation, is long overdue as this is its first comprehensive update in 30 years.

The Act has 870 sections which are classified into chapters under Parts A to G. Part A deals with the composition and administration of the registry which functions as a regulator - the Corporate Affairs Commission ('CAC'). Part B has 29 Chapters which stipulates the lifecycle of companies from their incorporation through to liquidation. Parts C & D have 11 and 2 chapters, respectively, and set out provisions that govern limited liability partnerships and limited partnerships. Parts E & F reprise sections on the registration and regulation of Business Names and Incorporated Trustees, with a few changes outlined in chapters 3 and 7, respectively. Part G introduces the quasi-judicial body - the Administrative Proceedings Committee - in its first chapter and covers general miscellaneous matters in its other chapter.

The key modifications introduced by the Act are categorized as follows:

## 1. Business registration

- 1.1 *Expansion of CAC's oversight powers* - The CAC has now been given wider regulatory oversight powers with the amendments to the CAMA, and it is now empowered to act with quasi-legislative powers. The CAC's enhanced powers to make regulations and sanction behavior would complement its role as a registry.
- 1.2 *Electronic registration* - To enhance the ease of doing business, the Act has codified an option to electronically file documents as an alternative to physical filing with the CAC. This should consolidate gains made in significantly improving

the turnaround time for company incorporation and business set up processes. Consequently, it is imperative to upgrade the IT systems of the CAC to minimize downtimes currently experienced, and to ensure reliability of the electronic filing systems.

- 1.3 *Provision of model articles* – The Act requires the CAC to prescribe model Articles of Association that would apply to all companies, except where a company specifically chooses to register its distinctive Articles of Association. The prior Act had prescribed the standard form and content of the Articles of Association in Table A of the First Schedule to the Act. The removal of the model Articles from the Act and vesting the CAC with the authority introduces flexibility and ensures ease of future modifications.

- 1.4 *Stipulation of business object* - The Act now recognizes unrestricted objects for incorporated companies, except where a company elects to restrict its business objects by its Articles of Association. This should further obviate the *ultra vires* rule in relation to companies' objects and remove the need to incorporate separate companies for independent business lines.

While commendable, this rule change blurs the distinction between the ordinary profits of a company taxable under the Companies Income Tax Act ('CITA') and profits from other activities. Special consideration should be given to this, and companies are advised to seek expert tax advice in evaluating the effect of this amendment.

1.5 *Flexibility on Attorney General's consent for companies limited by guarantee* – The approval of the Attorney General of the Federation (“AGF”) may no longer be required to incorporate a company limited by guarantee (“Ltd/ Gte”). Where the AGF does not give a decision within 30 days to an application for approval of incorporation of a Ltd/ Gte, CAMA now provides the promoters an alternative to advertise their intention to register the Ltd/ Gte in 3 national dailies and call for objections from the public. The CAC can proceed to complete the registration of the Ltd/ Gte if there is no objection or if any objection has been addressed.

This amendment should make Ltd/ Gte more attractive to not-for-profits and other interested stakeholders who hitherto might have been discouraged by the procedure for its registration.

1.6 *Statement of compliance* – CAMA now admits a Statement of Compliance by an applicant or their agent as a sufficient alternative to a Statutory Declaration by a legal practitioner affirming compliance with CAMA's registration procedures. This measure would contribute to the ease of doing business by removing the need for legal practitioners to verify documents.

## 2 Share capital

2.1 *Elimination of front-loaded fees* - The Act replaces the concept of “authorized share capital” with “minimum issued share capital” with a minimum threshold of ₦100,000 for private companies and ₦2,000,000 for public companies. This change effectively increases the minimum nominal amount of share capital assessable to stamp duties and filing fees at incorporation, from the ₦10,000 and ₦500,000 hitherto applicable.

Also, this amendment eliminates the requirement for companies, especially private and unlisted entities, to denominate their authorized share capital in the Naira. This is consistent with practices in other jurisdictions such as the United Kingdom (UK). This would be optimal if their functional business currencies are in other currencies such as the USD or Euro. This amendment would be an attractive mechanism to enable foreign investors preserve value in their Nigerian subsidiaries and shield their imported capital from local inflation until they are ready to deploy such funds into the business.

Consequently, other regulators with a line of sight over foreign investments may need to update their rules/ regulations to align with this CAMA rule change.

2.2 *Entrenchment of the pre-emptive rights of existing shareholders* - The Act reinforces the first right of refusal for existing shareholders of any newly created class of shares in the proportion of their substantive holdings before allotment to the public.

2.3 *Valuation report for non-cash consideration for shares* – Private companies are no longer required to obtain a valuation report issued by

a third party professional when they issue their shares for consideration other than cash. While this modification allows increased autonomy for private companies, it may lead to disputes between shareholders as to the appropriate valuation of the business.

2.4 *Inclusion of electronic share transfer and clarity on treasury shares* - The Act provides for electronic transfer of shares, simplifies the rules on treasury shares held by companies and clarifies that such shares can be sold or transferred to an employees' share scheme.

## 3. Company re-registration

The Act provides a robust framework on re-registration of companies, including changing their forms from private to public; from limited to unlimited or limited by guarantee, or vice versa. A notable implication of the new changes is how multi-directional the conversions of any incorporated company can now be. Particularly, the provisions are aimed at providing flexibility and protecting shareholders' rights during the conversion process. These changes are commendable.

## 4. Formation of single-member companies

To mitigate entry barriers for Small and Medium Enterprises (SMEs), the Act provides that a private company can now be formed by one person. This should stimulate the growth of smaller owner-controlled businesses and assist in making the business regulatory environment favourable to them.

## 5. Relaxation of compliance requirements for small companies

The Act reduces certain compliance requirements for small companies (small companies are described in the Act as private companies with only Nigerian shareholders in which the majority shareholding is held by the directors, and with a turnover of less than ₦120million and net assets of not more than ₦60million). The compliance requirements include:

- Provision for single directorship;
- Preparation of modified Financial Statements with fewer disclosure requirements;
- Exemption from the requirement to undertake a statutory audit;
- Exemption from convening statutory and annual general meetings;
- Exemption from mandatory provision for appointment of company secretary; and
- Discretionary use of common seal.

Easing the financial reporting requirements of small companies is a commendable development that aligns with global best practice proposed by the International Federation of Accountants (“IFAC”). However, commercial considerations other than statutory obligations also drive the requirement for small companies to audit and report their financial activities.

For instance, banks require audited financials of SMEs to assess their creditworthiness, large corporates may require audited financials of SMEs to approve them as prospective vendors, and the tax laws require audited books to assess companies properly to tax, etc.

Essentially, SMEs are likely to continue to prepare full financials which are audited by independent third parties. We hope that subsequent amendments to the CAMA would stipulate alternative safeguards and measures to enable users of financial statements of SMEs have adequate confidence in relying on their financial information.

## 6. Disclosure of significant control and beneficial ownership

6.1 *Disclosure of beneficial ownership for private companies* - All shareholders who hold shares in trust for another person are now required to disclose that fact, and to state the identity of the beneficial owner of the shares.

6.2 *Disclosure of substantial shareholders and filing requirement at the Commission* - The Act has expanded the duty of new shareholders to notify and disclose acquisition of substantial shareholding control to all companies. Hitherto, this was applicable to only public companies. Similarly, all companies are now required to file the particulars of their substantial shareholders with the CAC within a month of any changes in substantial shareholding structure and to include details of substantial shareholders in their annual return.

These new measures are commendable as they would ensure greater transparency and discourage the opacity of investment activities associated with money laundering and financing of terrorism. Interestingly, the CAMA does not prescribe any specific penalty for a Trustee's failure to disclose the nature of his interest in the shares.

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## 7. Establishment of a legal framework for registration of Limited Partnerships (LPs) and Limited Liability Partnerships (LLPs)

The Act provides a framework for the regulation of LPs and LLPs. The framework covers registration, assignment and transfer of rights, dissolution and other compliance requirements. These structures are now available to investors across the entire Federation.

7.1 *Limited partnerships* - The scope and nature of business enterprise is now set to experience new dynamism. Prior to the new CAMA, LPs were unrecognized under the Partnership Act of 1890 (an Act received from England during Nigeria's

colonialism as a Statute of General Application) and the various Partnership Laws of the States, except Lagos State where the structure was registrable.

Under the Act's provisions, some partners have limited liability similar to the shareholders of a company, in that a limited partner is not responsible for the conduct or acts of the other partners. However, LPs are required to always have at least one general partner who would have unlimited liability with respect to all the debts and obligations of the firm.

7.2. *Limited liability partnerships* - The Act ascribes incorporation status to partnerships registered as LLPs with perpetual succession and power to acquire, own, and dispose of property. For administrative purposes, LLPs are required to have at least two designated partners as compliance officers for the provisions of the Act.

With this amendment, the subscribing partners to an LLP and the LLP itself have separate legal personalities. LLPs should be able to appropriate benefits of both companies and partnerships - benefits of companies, such as limited liability and benefits of a partnership, such as tax transparency at the LLP level. This accords with the practice in the UK and United States, where LLPs have corporate personality and retain a tax pass-through status.

The introduction of this corporate vehicle will permit an optimization of the business structures of law firms, accounting firms, private equity firms, venture capital firms and other similar sophisticated users.

7.3. *Foreign limited liability partnerships* - The Act recognizes LLPs registered outside Nigeria but stipulates that they need to incorporate a local business structure to carry on business in Nigeria. However, the Act empowers the Minister to exempt a foreign LLP from the requirement to set up a local vehicle.

## 8. Establishment of a framework for handling insolvency issues

Hitherto, the insolvency mechanisms available to creditors in Nigeria were limited to receivership and/or liquidation. The Act has now introduced an expanded insolvency framework which includes tools focused on ensuring overall business continuity of challenged companies. In circumstances where business failures are inevitable, these tools may be a precursor to liquidation to ensure optimal outcomes. The new insolvency mechanisms include administration, voluntary arrangements, take-overs, striking off, and recognition of netting arrangements.

8.1. *Administration* - Administration is a mechanism to ensure the optimal outcome for insolvent company which may be its business continuity or its liquidation. However, the ordinary approach in an administration is to ensure the survival of the insolvent entity as it is only where an insolvent company's survival is not feasible that the Insolvency Practitioner may proceed to liquidate the company in an orderly manner that maximizes returns to all the company's stakeholders.



- 8.2. *Voluntary arrangement* - A company's Board of Directors is now empowered to arrange a composition of a company's debts with its creditors to enable it to vary the terms of its loans and enable the company pay over an extended period to ensure its survival, or put together a scheme of arrangement to organize its affairs.
- 8.3. *Share transfer schemes ("Take-overs")* – The Act enables private companies and public companies (provided the 30% share threshold is not met) to be taken over by other companies pursuant to conditions stipulated in the Scheme or Contract.
- 8.4. *Striking off* - The Act allows companies which are yet to commence business to apply to the CAC to have their names struck off the companies' register rather than going through liquidation process.
- 8.5. *Netting* - The Act contains Netting provisions to mitigate credit and settlement risks associated with over-the-counter derivatives and related instruments in the event of the insolvency of one or more of the parties.

Overall, the new insolvency mechanisms are commendable, as they should promote business continuity of struggling companies. Nonetheless, inclusion of take-overs may have introduced some ambiguity on the regulatory oversight among the CAC, the Securities and Exchange Commission and the Federal Competition and Consumer Protection Council.

Interestingly, the Act now limits the competence of insolvency practitioners to the Business Recovery and Insolvency Practitioners Association of Nigeria ('BRIPAN'), although certain other professional bodies may be recognized by the CAC. The specific reference to BRIPAN may be perceived as an overreach of legislative power, and potentially lessen healthy competition especially for excluded bodies.

## 9. Enhancement of corporate governance

- 9.1. *Independent directors* – To further strengthen corporate governance principles in public entities, the Act provides for the qualifications, appointments and minimum threshold for Independent Directors (ID) in public companies. This will complement the existing corporate governance structure and enhance credibility of public companies in Nigeria.

However, there are some conflicts between the Act and the *Principle 7* in the Code of Corporate Governance 2018 (CCG) published by the Financial Reporting Council of Nigeria (FRCN) on the recommended practices bordering on the qualifications for ID. The conflict may otherwise disqualify competent directors from holding the seat of ID. It is hoped that the operations of the Act will align with the established principles in the CCG to ease the breath of confusion as already being perceived.

- 9.2. *Dual position of Chairman and Chief Executive Officer in a public company* - The Act reiterates the established CCG principle which prohibits the MD/ CEO as the Chairman of the same Company and reinforces the best practice which restricts the Chairman from the day-to-day running of the

operations of the company. This will ensure the protection of shareholders' interests.

Further, the Act limits the numbers of public entities a person can serve as a director, to five. Prior to the amendment, there was no limit to the number of public companies that a director could serve on their boards. These new reforms will strengthen the corporate governance structure for public companies in Nigeria and boost shareholders' confidence.

- 9.3. *Responsibility of Chief Executive Officer and Chief Financial Officer for financial statements* - Departing from the stipulation under the repealed CAMA that any two directors could attest to the audited financials, the Act provides that the CEO and the CFO are to make the attestations and they are to be held responsible if the assertions prove to be wrong.

## 10. Minority shareholders protection

Based on the Act, shareholders now have power to bring derivative action against a company and its affiliated entities. This amendment further enhances minority shareholders' rights and seeks to promote transparency in corporate governance in Nigeria.

## 11. Virtual meetings

The Act permits private companies to hold virtual meetings subject to the provisions of their Articles. Virtual meetings have become a necessity, as the Covid-19 pandemic and rules on social distancing have made virtual meetings inevitable. However, the ability to hold virtual meetings was not extended to public companies. It is hoped that this gap will be addressed in due course.

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## 12. Financial assistance rules

The Act has introduced provisions permitting private companies to provide financial assistance for acquisition of their own shares upon meeting certain conditions. The conditions include non-reduction of net assets, or where reduced, such assistance should be financed out of distributable profits. Further, a special resolution of the shareholders and a declaration of the directors in a form to be prescribed by the CAC are required to accompany such transaction.

The rule change is commendable and will unlock value potentials of companies and trigger economic activities, such as increased mergers, acquisitions and deal completion activities. However, the changes in financial

assistance rules may have adverse consequences given that the Nigerian market lacks the depth that jurisdictions that permit such financial assistance have. Further, the change may aid unsavory practice among majority shareholders who might abuse their voting power.

It is hoped that the Minister or the CAC will provide safeguards through a Regulation to ensure that minority shareholders and creditors are not shortchanged by aggressive structuring of transactions enabled by this relaxation of the hitherto prohibitions.

### 13. Incorporated Trustees - merger provisions and suspension of trustees

The Act has introduced an avenue for Incorporated Trustees (IT) with similar purposes to merge. The CAC will issue Regulations for the merger process. This is a commendable reform to the existing law and will further strengthen ITs to attain their economic objectives.

A notable feature of the provision is the power of CAC to suspend Trustees and appoint Interim Managers to oversee the affairs of the IT where such suspension is desirable in the public interest or due to incidence of misconduct, mismanagement or fraud. As with all discretionary oversight powers, it is hoped that the CAC would be judicious and circumspect in exercising its powers. Nonetheless, such discretion is always subject to judicial review by the courts which should provide adequate safeguard against any abuse.

### 14. Administrative Proceedings Committee

The Act has introduced an administrative tribunal, the Administrative Proceedings Committee ("the APC"), to act as an arbiter of first instance for resolving disputes or grievances arising from the operations of the Act. The APC is also empowered to impose administrative penalties for contraventions of the Act.

This is a welcome development, as the concept of the APC, though novel in our clime, is not peculiar to Nigeria. South Africa has the Companies Tribunal, and India, the National Company Law Tribunal, which are specialized administrative courts to provide speedy resolution of company dispute.

There are concerns, however, that the APC may face objections to its jurisdiction in view of the provisions of Section 251(1)(e) of the 1999 Constitution (as amended) which exclusively empowers the Federal High Court to adjudicate on any disputes arising from the operation of CAMA. These objections might be similar to legal challenges to the jurisdiction of other administrative tribunals, such as Tax Appeal Tribunal and Investment and Securities Tribunal, which were settled by the pronouncements of the courts.

### Conclusion

The Act appears to complement the key objectives of the Presidential Enabling Business Environment Council in improving the investment climate and business environment in Nigeria. It is expected that the Act, when fully implemented, would address some of the difficulties faced by businesses (such as administrative bottlenecks, high compliance costs, etc.) and lead to significant improvements in the country's Ease of Doing Business rankings.

Overall, the Act aligns with financial accounting considerations, as evidenced by the definition of net assets and distributable profits available for dividends. Further, the Act seeks to improve the commercial viability of the Nigerian market as an investment destination by introducing additional insolvency mechanisms, registration of LLP and LP, etc. These provisions should stimulate increased economic activity which would create employment, generate additional wealth and increase tax revenue for the government.

However, not all is well in Camelot yet. The retention of the requirement for foreign businesses to incorporate entities to do business in Nigeria is unlikely to achieve the desired end of retaining more value in Nigeria. We, therefore, hope that reviews will be done to acknowledge the borderless nature of global business and the digital economy by introducing measures such as re-introduction of branch registration of foreign companies, especially the digital giants and technology companies, and addressing cross border insolvencies, among others.

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