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CAMA Bill – Ambitiously leapfrogging Nigerian company law over three decades of stagnation

The Companies and Allied Matters Act (Chapter C20) Laws of the Federation of Nigeria 2004 (“CAMA”), modelled on the English Companies Act 1985, was initially made law in Nigeria in 1990 as a decree of the military government. Since its inception, there have been no significant amendments to the CAMA, notwithstanding that England has, over the past three decades, amended and replaced its own Companies Act. Accordingly, despite today’s dynamic and exponentially evolving global community, Nigerian companies have essentially been required to rely on a 28-year old law to govern the way local businesses operate.

This is, however, all set to change if the Companies and Allied Matters Act (Repeal and re-enactment) Bill (“Bill”), which was passed by the Senate on 15th May 2018, is passed into law in its current form. The Bill is intentionally ambitious, as it draws on lessons learnt from other jurisdictions while taking into account the peculiarities of the Nigerian market. The Bill seeks to address the various shortcomings of the CAMA and, if passed, will leapfrog our companies’ law over three decades of stagnation. The intended upshot is laudable as it will give Nigerian businesses and organisations the tools they need to operate and compete efficiently in modern times, with the overall objective of positioning Nigeria as a hub for entry into African markets.

Against this background, some of the significant innovations of the Bill are highlighted below.

- 1. Single-member and director companies –** Micro, Small and Medium Enterprises (“MSMEs”) are the powerhouse of the Nigerian economy, collectively employing about 60 million Nigerians, yet only about 14% of them are registered under the CAMA¹. It is therefore important to encourage small businesses by making it possible for sole proprietorships to register as companies and benefit from the limited liability that incorporation confers. Under the Bill, small companies can have a single shareholder and director.

¹ 2013 SMEDAN and NBS Collaborative Survey.

2. **Priority of Fixed Charge over Floating Charge** – Under the CAMA, the priority of a fixed charge over a floating charge is subject to the holder of the fixed charge having “actual notice” of a negative pledge. The term “actual notice” as used in the CAMA was not defined, and it was difficult to prove when a party had actual notice. Under the Bill, “actual notice” has been replaced by “notice”, thereby making it possible to prove that a party has received notice of a negative pledge that has been filed at the CAC.
3. **Company rescue procedures** - The Bill introduces company voluntary arrangements and administration into Nigerian company law. With this, the insolvency regime in Nigeria has a dual aim: saving viable businesses and ensuring that non-viable businesses can efficiently exit the market
4. **Netting** – The Bill introduces netting provisions as a means of mitigating credit risks associated with over-the-counter derivatives, thereby promoting financial stability and investor confidence in Nigeria.
5. **Acquisition by a company of its own shares** – Private and public companies will be permitted to buy back their shares subject to certain conditions, which are outlined in section 185 of the Bill.
6. **Small companies** – The parameters by which a small company is defined have been adjusted to reflect the reality of SMEs in Nigeria. The effect of this is that more SMEs will qualify as small companies under the Bill and, accordingly, will benefit from the concessions given to small companies under the Bill such as the exemption from audits and from the requirements to hold annual general meetings and have a company secretary. Under the Bill, a small company is a private company, at least 51% of the shares of which are held by its directors, and which has a turnover of not more than N120,000,000 and net assets of not more than N65,000,000 and which does not have any foreigner, government or government corporation as a shareholder. The thresholds under CAMA for the turnover and net assets of a small company are N2 million and N1 million, respectively.
7. **Limited Partnerships and Limited Liability Partnerships** can now be registered within the framework of the federal companies Act. This will resolve a lot of concerns for private equity funds and other investment funds seeking to establish a local entity in Nigeria as a partnership. Prior to the Bill, such partnerships could only be set up in Lagos State.
8. **Disclosure of Persons with Significant Control** – Under the Bill, both private and public companies are to be notified of the acquisition or divestment of shares amounting to 5% or more of the issued share capital of the company. The threshold under the CAMA for this disclosure is 10% and applies only to public

companies. These changes are aimed at increasing transparency and combating asset shielding.

9. **Trusts** – The provisions of Section 86 of the CAMA that prohibit the recognition of trusts over shares was left out of the Bill. The effect of this is that companies may recognise any trust in respect of shares, and a notice of trust over shares may also be filed at the CAC.
10. **Replacement of authorised share capital** – One of the most significant amendments made by the Bill is its replacement of the concept of ‘minimum authorised share capital’ with ‘minimum issued share capital’. In line with changes made in other jurisdictions such as England, a company is no longer required to have an authorised share capital that specifies the limit on the maximum amount of shares a company can allot. The rationale behind this is clear; the requirement for a company to pay stamp duty and CAC filing fees whenever it creates or increases its authorised share capital, notwithstanding that all the shares might not be allotted, amounts to a front-loading of costs. The Bill, therefore, has removed the concept of an authorised share capital and replaced it simply with a minimum issued share capital. Thus, provided a company has met the minimum issued share capital, it would have complied with the requirements of the Bill. Whenever a company wishes to issue more shares, it simply passes a resolution to do so, issues the shares, and pays the applicable stamp duty and CAC filing fees only in respect of the additional shares issued.

In addition, under the CAMA, the minimum authorised share capital for a private company is N10,000 and for a public company, N500,000. Under the Bill, a private company must have a minimum issued share capital of N100,000 while for a public company, the minimum issued is N2 million. A quarter of the issued share capital must be paid up.

11. **Reduction of Share Capital** - The CAMA treats private and public companies alike with respect to the process by which they may reduce their share capital. In order to ease the process of doing business, private companies under the Bill may reduce their share capital if they pass a special resolution to that effect, without the added burden of applying to court for a confirmation of the reduction.
12. **Issue of Shares at a Discount** – The issue of shares at a discount is unlawful under the Bill. The rationale for this is that the nominal value of the shares of most Nigerian companies is so low that the provision for issuance of shares at a discount is virtually redundant.
13. **Treasury Shares** – Treasury shares are formally recognised, defined, and provided for in the Bill.
14. **Prohibition of irredeemable preference shares** – The Bill prohibits the issuance of irredeemable preference shares, so that companies always have the option of redeeming any preference shares that they issue.

- 15. Companies limited by guarantee** – Three significant changes have been made in relation to companies limited by guarantee. First, the requirement for the approval of the Attorney-General of the Federation for the registration of such companies has been deleted and replaced with a duty on the CAC to cause the application to be advertised in 3 (three) national newspapers. Secondly, a framework for the conversion of companies limited by guarantee to companies limited by shares has been introduced. Thirdly, the aggregate amount guaranteed by the members of this type of company has been increased from N10,000 to N100,000.
- 16. Templates for constitutional documents** – The CAC has been given the power to issue regulations amending the templates of constitutional documents in Table A of the Bill. This will ensure that the form of constitutional documents can be amended as required without the need for an amendment of the Act itself.
- 17. Statutory recognition of CAC’s electronic processes** - Section 31 provides for submission of applications for reservation of names through electronic means. This amendment brings the provision in line with 21st century technological solutions, some of which have already been implemented at the CAC. For example, it is now possible to conduct an availability search electronically in order to reserve names. The process of incorporating companies, business names and incorporated trustees can also be effected online using the CAC’s portal at www.cac.gov.ng.
- 18. Electronic transfers** of shares are now expressly permitted in the Bill. The language of the CAMA required a physical document to be provided which increasingly is becoming redundant due to the use of electronic communication. This has now been addressed by the Bill.
- 19. Company seals** – The use of company seals by Nigerian companies will become optional.
- 20. De-criminalising offences under the CAMA** – In the CAMA, there are more than a hundred criminal offences, all of which attract a nominal monetary penalty or a term of imprisonment upon conviction. In the Bill, there are only 32 criminal offences. Most offences under the Bill are now administrative offences that the CAC is empowered to penalise through fines determined by the CAC. In relation to the offences that remain criminal, the courts are given the discretion to determine the quantum of fines and the duration of sentences. These changes will make it easier to penalise breaches of the law, and consequently, encourage compliance. In addition, the move away from specifying the quantum of fines in the law will make it easier to increase those fines to reflect current economic realities.
- 21. A more inclusive CAC board** - The board of the Corporate Affairs Commission (“CAC”) will now include a representative of the Institute of Chartered Secretaries

and Administrators of Nigeria, and the Nigerian Association of Small and Medium Enterprises. This will give professional company secretaries, who deal with the CAC regularly, and MSMEs, an opportunity to be heard and to contribute to improving the efficiency of the CAC as an agent for facilitating the ease of doing business in Nigeria. The Association of National Accountants of Nigeria will also, in collaboration with the Institute of Chartered Accountants of Nigeria, have a representative on the board.

The Bill is another step in the right direction as the Nigerian Senate continues to work towards legislative reform that will further boost investor confidence in Nigeria. If passed in its current form, the Bill will, amongst other things, align the Nigerian framework for the regulation of companies and other business entities with international best practice, and take Nigeria one step closer to positioning itself as a preferred destination for establishment of a corporate presence for pan-African investments – a truly welcome development!

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