

20 INNOVATIONS IN THE COMPANIES AND ALLIED MATTERS ACT 2020

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Udo Udoma & Belo-Osagie



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The Companies and Allied Matters Act 2020 ("CAMA 2020") introduces several long-awaited changes and innovations into Nigerian company law. This newsletter highlights 20 of them and explains the rationale for each change.

1 Single Shareholder/ Single Director Companies

It is now possible to have single shareholder/single director companies. This is available to small companies¹. Single member and director companies will make it possible for business owners who currently trade as sole proprietors to register a company without the need to bring in new owners/directors at the initial stage, and continue to run their business as before but with added benefits of limited liability and access to credit. Private companies that do not qualify as small companies are permitted to have a single shareholder, however, such private companies must have at least two directors².

2 Small companies redefined, with additional benefits

The threshold for defining small companies has been increased, to enable more companies qualify as small companies and therefore enjoy the benefits conferred on small companies by the CAMA 2020. Under the Companies and Allied Matters Act 2004 ("Repealed CAMA"), a small company was a company that, amongst other criteria, had a turnover of not more than N2 million and a net asset value of not more than N1 million. Under the CAMA 2020 a small company is a company that, in addition to the other criteria that existed under the Repealed CAMA, has a turnover of not more than N 120 million and a net asset value of not more than N 60 million³. The additional benefits that small companies enjoy are that they do not have to hold annual general meetings⁴, appoint auditors⁵ or a company secretary⁶.

¹ Section 18 (2) and Section 271(1)

² Section 271(1)

³ Section 394 (3) (b) & (c)

⁴ Section 237 (1)

⁵ Section 402 (1) (b)

⁶ Section 330 (1)



3 Electronic innovations

CAMA 2020 contains several innovations that reflect the realities of conducting business in this digital age:

- i. company records can be maintained in electronic format⁷;
- ii. electronic share transfer forms will be accepted by all companies⁸;
- iii. a private company may hold its general meetings electronically provided that such meetings are conducted in accordance with the articles of the company;
- iv. in addition to the notice given personally or by post, notice may also be given by electronic mail to any member who has provided the company an electronic mail address⁹; and
- v. any document required to be annexed to the annual return may be delivered to the Corporate Affairs Commission ("CAC") either in hard or soft copy¹⁰.

4 Changes to Share Capital

There is no longer a concept of authorised share capital. Instead, companies are only required to ensure that they maintain the minimum issued share capital required under the CAMA 2020 and that a quarter of their issued share capital is paid up¹¹. The aim of this amendment is for the share capital of the company to provide a more realistic reflection of the true state of affairs with respect to the capital of the company that has actually been issued and paid up; the concept of authorised share capital did not reflect this. Another reason for this change is to eliminate the front-loading of costs associated with the creation of authorised share capital even where the company is not prepared to issue all of its authorised share capital. The minimum issued share capital for private companies is N100,000 while for public companies it is N2,000,000¹².

⁷ Section 731 (2)

⁸ Section 175 (1)

⁹ Section 244 (3)

¹⁰ Section 422 (3)

¹¹ Section 128(1)

¹² Section 27 (2)(a)



5 New corporate structures

New entities have been introduced into our company law. These are limited partnerships¹³ and limited liability partnerships¹⁴. These new forms of partnership will provide more options for investors seeking to structure their holdings in Nigerian businesses as well as private equity and venture capital fund managers who typically adopt such structures for their investment funds.

6 Reduced costs for registering security

Prior to the CAMA 2020, the CAC filing fee for registering security interests was 1% of the secured amount (for private companies) and 2% of the secured amount (for public companies). Under the CAMA 2020, the CAC cannot charge more than 0.35% of the secured amount¹⁵. This means that the cost of registering security interests at the CAC has been reduced by 65% for private companies and 82.5% for public companies! The implications of this for the cost to Nigerian businesses of obtaining credit cannot be overstated, as Nigeria, prior to the CAMA 2020, had a reputation for the significant regulatory costs associated with creating security for debt financing.

7 Framework for implementing mergers

CAMA 2020 now contains a framework for implementing mergers or other forms of arrangement or reconstruction between two or more companies. This framework is set out in section 711. Under this framework, once the transaction is approved by at least 75% in value of the shares held by shareholders present and voting at the relevant court-ordered meeting and thereafter sanctioned by the court, the merger becomes binding on the companies even before the court sanction is filed at the CAC. The court sanction must, however, be filed at the CAC within 7 days. An important point to note – these new provisions do not require the Court to refer the scheme to the Securities and Exchange Commission (SEC) to consider the fairness of the scheme. It is also possible to

¹³ Part C - sections 746 - 794

¹⁴ Part D – sections 795 - 810

¹⁵ Section 222(12)



8

Private company acquisitions (shares and assets)

structure a scheme of arrangement or compromise under s. 715 of the CAMA 2020 but schemes under s. 715 can be referred by the Court to the SEC to determine the fairness of the scheme. Schemes under s.715 do not become effective until the court order sanctioning the scheme has been filed at the CAC.

CAMA 2020 has implemented three key changes in relation to the sale of shares or assets of private companies¹⁶. First, in order to transfer shares in a private company, the selling shareholder must first offer the shares to the other existing shareholders before the shares can be offered to a third party. Secondly, shareholders cannot sell more than 50% of the shares of a private company to a buyer who is not a shareholder unless that buyer has offered to acquire the shares of all the remaining shareholders on the same terms. Thirdly, in relation to asset sales, the approval of all shareholders is required before assets valued at 50% or more of the company's assets may be sold. Investors in private companies will need to take the second point above into account when considering acquisitions of majority interests in private companies as this could have an impact on funding. CAMA 2020, however, recognises that companies can specifically exclude these restrictions in their Articles of Association. Private companies can, therefore, amend their Articles to exclude these provisions so that they do not apply automatically going forward.

9

Financial assistance by companies now lawful

Financial assistance by companies in relation to the acquisition, or proposed acquisition of their shares will now be permitted where (a) it is effected pursuant to a court sanctioned scheme of arrangement, merger or restructuring (b) the principal purpose in

¹⁶ Section 22 (2) (a)-(c)



giving the assistance is not to reduce or discharge any liability incurred by a person for the purpose of acquiring shares in the company or its holding company, but rather, is incidental to a larger purpose of the company, and the assistance is given in good faith in the interests of the company¹⁷. With respect to private companies, financial assistance for the acquisition of shares of a private company (or a subsidiary of a private company) is now permitted subject to certain conditions must be approved by a special resolution; the net assets of the company must not be reduced (or if they will be reduced, the assistance must be provided from distributable profits); and the directors of the company must make a statutory declaration before the financial assistance is provided by the company¹⁸. These additional exceptions, especially those applicable to private companies, are a welcome development particularly in relation to companies seeking to raise much needed capital and which may, for example, be required to provide certain indemnities to investors in connection with the capital raise.

10 Introduction of Company rescue processes

These processes are administration and company voluntary arrangements¹⁹. The introduction of these concepts will provide a way for Nigerian companies that are in financial difficulty to explore ways by which they can rescue their businesses and continue operating as a going concern. Winding up will no longer be the only option available for dealing with insolvent companies.

11 Updated insolvency test for companies

The test for insolvency (i.e. inability to pay debts as they fall due) has been increased from N2,000 to N200,000, to reflect present day realities²⁰.

¹⁷ Section 183(3)

¹⁸ Section 183 (4)

¹⁹ Sections 434-549

²⁰ Section 572 (a)



12 Netting

Netting is the process by which risk is reduced in financial contracts by aggregating two or more obligations or payments and offsetting them against each other in order to achieve a reduced single net obligation. It is an essential element of many qualified financial contracts such as derivatives, swaps and hedging transactions. The netting provisions contained in Chapter 28 of the CAMA 2020²¹ are based on the International Swaps and Derivatives Association, Inc. (ISDA) 2006 Model Netting Act and have been introduced to facilitate the participation of Nigerian entities in such qualified financial contracts. These netting provisions, amongst other things, prevent a liquidator from accepting, pursuant to the netting agreement, only those contracts that benefit the insolvent party and disclaiming the contracts that do not favour the insolvent party in a manner often referred to as “cherry-picking”.

13 Increased Transparency

Disclosures are now required of persons with significant control (i.e. persons who hold 5% or more of the voting rights) in private and public companies²² and limited liability partnerships²³. The CAC will also maintain a register of such persons which will contain the information received from companies, thereby increasing transparency and discouraging asset shielding.

14 Share buyback

The restrictions around share buyback in the Repealed CAMA have not been carried over into the CAMA 2020. By virtue of section 184 of the CAMA 2020, Companies may now buy back their shares from existing shareholders (*pro rata*) either pursuant to a scheme or on the open market, or from the company's employee stock option scheme, subject to certain conditions. The company's Articles of Association must permit the share buyback and it will

²¹ Sections 718-721

²² Section 119)

²³ Section 791



have to be approved by a special resolution. Only shares that are fully paid up can be acquired by the company and the share buyback may only be funded from the company's distributable profits. The acquisition must be published in the newspapers, and creditors or aggrieved shareholders can file an action in court to cancel the resolution. A company will, however, not be permitted to buy back its shares if, after doing so, all other issued shares of the company will be redeemable shares or treasury shares.

15 Treasury Shares

Treasury shares, i.e. previously issued shares of the company that it acquired from its shareholders, was referred to in a schedule to the Repealed CAMA but there were no provisions regulating it. The CAMA 2020 now formally recognises and defines this concept²⁴, and prescribes what a company can do with such shares after they are acquired. Companies are permitted to sell their treasury shares or transfer them into an employee share scheme²⁵. There are, of course, limitations; a company cannot hold more than 15% of its issued share capital as treasury shares²⁶.

16 Trusts over shares in company registers no longer prohibited

The restriction in the Repealed CAMA which prohibited the entry of a notice of trusts over shares in the register of members or the records of a CAC, is not contained in the CAMA 2020. This means that trust arrangements in relation to shares may now be formally recognised by companies and recorded in the register of members, as well as the records of the CAC.

²⁴ Section 868

²⁵ Section 189

²⁶ Section 187



17 Companies limited by guarantee

Non-profit organisations seeking to establish companies limited by guarantee will still need to obtain the consent of the Attorney General of the Federation prior to registration at the CAC. If, however, all requisite documents have been submitted but the Attorney General does not grant his consent or communicate his refusal within 30 days, the promoters may place an advertisement in 3 national newspapers inviting the general public to make any objections to the incorporation of the company which will be considered the CAC. If the CAC is satisfied that the memorandum and articles of association of the company are compliant with the CAMA 2020, the CAC will advertise the application in 3 national newspapers, inviting objections from the public to the proposed incorporation. If no objections are received from the public within 28 days (or the CAC receives, considers, but rejects such objections), the CAC can assent to the application and register the company without the consent of the Attorney General²⁷. To reflect current economic realities, the minimum amount to be contributed to the assets of the company by its members in the event that the company is wound up, has been increased from NGN10,000 to NGN100,000.

18 Governance of Public Companies and Multiple Directorships

CAMA 2020 introduces certain governance requirements. For example, the chairman of a public company is not permitted to act as the chief executive officer of that company²⁸. In addition, public companies are now required to have at least 3 independent directors and specific criteria must be met before a director will qualify as an independent director²⁹. These are as follows: in the two years preceding his nomination as an independent director, the relevant director and/ or such director's relative(s) (a) was not an employee of the company, (b) did not make or receive

²⁷ Section 26

²⁸ Section 265 (6)

²⁹ Section 275



payments from the company exceeding NGN 20 million nor own (directly or indirectly) more than 30% of the shares of an entity that received such a payment from the public company; (c) did not own (directly or indirectly) more than 30% of the shares of the public company; and (d) was not engaged (directly or indirectly) as an auditor of the company. Finally, and notably, there are now restrictions on multiple directorships of public companies and no person can be a director in more than 5 public companies³⁰. Any person who is currently a director in more than 5 public companies is required to resign as a director of all but 5 of the companies within two years from the date of the Act³¹.

19 Removal of a Director is now a basis for disqualification

CAMA 2020 retains the procedure for removal of directors outlined under the Repealed CAMA. A key change, however, is that directors who are suspended or removed in a general meeting of the company in accordance with section 288 of CAMA 2020, will be disqualified from being directors of other companies³².

20 Offences and Penalties

Only egregious offences relating to matters such as fraud remain criminal offences under CAMA 2020 and most offences, such as failure to file resolutions etc., are now administrative offences. The CAC is empowered to impose penalties for administrative offences through fines prescribed in its regulations which will make it easier to increase those fines to ensure that they are set at a level that acts as a deterrent to breaches of the Act without having to amend CAMA 2020 in order to achieve this. The CAC will need to work through the CAMA 2020 and publish penalties for various administrative offences under the Act.

³⁰ Section 307 (1)

³¹ Section 307 (3)

³² Section 283 (c)



OZOFU OGIEMUDIA
Partner



CHRISTINE SIJUWADE
Partner

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