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CORPORATE RENAISSANCE IN NIGERIA

INTRODUCTION

On August 7, 2020, President Muhammadu Buhari assented to the Companies and Allied Matters Act, 2020 (CAMA 2020) repealing the Companies and Allied Matters Act, 1990.

According to the World Bank's 2020 Doing Business Index, Nigeria is ranked 131 and moved up 15 places from its spot in 2019. However, business analysts have argued that while the rankings may reflect a positive movement, in reality, a truly improved economy is directly dependent and impacted by how many anti-business policies are in existence, affecting business operations. Hence, it is an incontrovertible fact of economics that government policy will always have a significant impact on business formation and economic growth.

Despite rising in the Doing Business Index, the President expressed that the goal is to reach top 70 by 2023. This shows that the efforts of the Presidential Enabling Business Environment Council (PEBEC) alone, cannot be enough if positive government policies and progressive laws are not pushed forward. It is this understanding that caused the acceptance of the fact that the Companies and Allied Matters Act (CAMA) 1990 is not progressive enough to create an enabling environment to attain the aforementioned goal. Hence its review since 2017.



The world has developed in over 28 years since the inception of CAMA 1990 and it became apparent that the Act was unable to cater for new business realities. This became even more evident with the advent of the current pandemic; with the World Bank reporting that Nigeria's economy faces its worst recession in four decades.

The new Act creates a dynamic framework with numerous timeous innovations which will now be discussed.

1. Sole Subscriber & the Formation of a Private Company:

Section 18 (2) of the CAMA 2020 has altered the status quo with respect to the formation of company. Basic company law dictates that there must be at least two subscribers to the Memorandum and Articles of Association of a company in order for it to come into existence validly. However, in addition, a new provision has been included to the effect that one person may form and incorporate a private company by complying with the requirements needed for the formation of a private company.

Right off the bat, it is essential to note that this new innovation only applies to formation as it concerns private companies. Thus, a single individual does not enjoy the same advantage where the formation of a public company is concerned.

The economic implication of the amendment is that it further encourages small businesses to register their businesses as companies thereby enjoying the advantage of separate legal personality while at the same time retaining ownership of the company. They equally enjoy certain exemptions as stated in CAMA 2020. For instance, exemption from Annual General Meeting as provided in Section 237(1) of CAMA 2020.



2. Power to Prescribe Model Articles:

Section 33 of CAMA 2020 gives power to the Minister to prescribe model articles of association for companies through regulations and the type/description of a company will determine the model articles applicable to it. It further states that a company can choose whether or not it wants to incorporate all or any of the provisions of the model articles.

The articles of association is highly instrumental in guiding the internal activities of a company because it serves as the constitution of the company covering issues dealing with the code of conducts that should guide the relationship between the company and its members. There is therefore a relationship between the articles of a company and its compliance with corporate governance principles. To this end, by having model articles made by the Minister (a regulatory authority) simply awaiting adoption by companies, it helps companies easily comply with the demands of corporate governance.

Section 34 further points out that these model articles cannot be excluded or modified. However it does not obviate the power of a company to create its own articles provided the model articles (as prescribed by the Minister) are equally incorporated into its own articles.

3. Unrestricted Objects:

Under the old CAMA, Section 39(1) pushed forward the ultra vires rule in that a company was not allowed to carry on any business not authorised by its memorandum and thus could not exceed the powers conferred by the memorandum. The implication therefore meaning that the company could only enter into contracts with respect to matters specifically stated in the memorandum.

However, the practicality of this section becomes questionable when consideration is given to Section 39(3) stating that regardless of what is stated in subsection (1) an act of a company cannot be considered to be invalid by reason of the fact that such act was not in

furtherance of the authorised business of the company or it exceeded its objects or powers. Also, it should be noted that a company in drafting its object clause can include an omnibus clause stating that the company is authorised to do all such other things incidental to the attainment of the object of the company.

Considering these realities, it is therefore not a surprise that Section 35(1) of CAMA 2020 now provides that unless a company's articles specifically restrict the objects of the company, its object are unrestricted. This immediately whittles down the ultra vires rule which the old CAMA tried to create. Thus, the only check on the company having unrestricted objects is that the company cannot engage in unlawful transactions.

The economic implication therefore means that companies can now engage in numerous business opportunities without any undue limitation.



4. Minimum Issued Share Capital:

Under the old Act, it was called authorised share capital, however the new Act in Section 27(2)(a) calls it issued share capital and has now increased the minimum issued share capital from N10,000 to N100,000 for private companies. For public companies, it has been increased from N500,000 to N2,000,000. It is interesting to note that while single formation of private companies is now a possibility it is qualified with this section that increases the minimum issued share capital. This increase will also help in the assessment of stamp duty payments.

5. Addition to Incorporation Documents:

Sections 36(4) and 37 added to the list of documents needed for the incorporation of a company. Thus, where member's liability is limited by shares, the application of registration must contain Statement of Initial Issued Shared Capital and Initial Shareholdings and a statement of guarantee for companies limited by guarantee.

6. Statement of Compliance:

Under the Old Act, a statutory declaration of compliance was to be issued by a legal practitioner to the effect that an applicant for registration had complied with the necessary requirements for registration.

However, under Section 40 of the new Act, the statement of compliance need not be by declaration any longer but may simply be a statement by the applicant himself/herself or his/her agent. While the section does not obviate the use of lawyers, it however has now widened the scope to the effect that an applicant can issue a statement of compliance and it will still be valid.

7. Limited Liability Partnership and Limited Partnership:

The new Act introduces the concept of Limited Liability Partnership (under Section 765) and Limited Partnership (under Section 795) which allows for the creation of businesses that have the flexibility inherent in the operation of partnerships and also the limited liability advantage which members of a company enjoy. Thus, the new Act provides the extent and scope of the limitation of partners under this new system. It is instructive to note that there are some notable differences between a limited liability partnership and a limited partnership. For instance, with respect to liability, limited partnerships are made up of general partners and limited partners. While the liability of limited partners are limited to the volume of their capital contribution, general partners are regarded as being liable for all debts and obligations of the firm as seen in Section 795(3).

However, for limited liability partnerships, Section 765 of the CAMA 2020 points out that while a partner may be an agent of the business, he is not an agent of other partners. The Act further thrust liability on the business itself and states in Section 767(1) that a partner is not personally liable for an obligation with respect to the partnership itself by the mere fact that he is a partner. Nevertheless it does not obviate the personal liability of the partner for his or her own wrongful act or omission.

This new system enhances the ability of partnerships to source for funds and investors which would have formerly proved difficult due to the risk involved. However, now the combination of flexibility in operations and limited liability of players involved makes it an attractive venture for investors.

8. Qualification of Small Companies:

Under Section 394(3) of CAMA 2020, the turnover and net asset value threshold was increased for small companies. The turnover increased from N2,000,000 to N120,000,000 and the net asset value increased from N1,000,000 to N60,000,000. The amounts are however subject to what the Commission may fix from time to time.

This increase automatically means that more companies within the range of these amounts can now be categorised as small companies thereby having the possibility to enjoy certain concessions and exemptions that may be made available to small companies e.g. exemption from Annual General Meeting as provided in Section 237(1), exemption from appointing auditors to audit financial records as seen in Section 402, exemption from having a secretary as seen in Section 330(1), etc.



9. Virtual Meetings & Other Electronic Innovations:

Another innovation which the CAMA 2020 creates is seen in Section 240 on place of meetings. Formerly under the old law, Section 216 simply stated that statutory and annual general meetings were to be held in Nigeria. However, under the new law, Section 240(2) provides that private companies can now conduct meetings digitally, provided it complies with the companies articles.

It is clear that this section is a ripple effect from the new reality and impact the COVID 19 pandemic has caused on business. However, if sub-section (2) is to be read in the light of Section 240(1) (which states that meetings should be held in Nigeria) it raises an interesting issue.

Does it imply that the virtual host of the meeting and other meeting participants must be in Nigeria (though different locations) or only the virtual host of the meeting should be in Nigeria? An argument can be made for the fact that in line with international best practice on the need to ensure ease in doing business, then the requirement of the Nigerian location with respect to virtual meetings should only apply to the virtual host of the meeting. Hence, participants should be able to connect from any part of the world provided they are valid members of the company. Though unrelated to place of meeting but with respect to notice of meetings, Section 243 of CAMA 2020 has now included the Commission as a party entitled to receive notice of general meetings of public companies.

Another electronic innovation is that instruments of transfer can now include electronic instruments of transfer as provided in Section 176(1).

Also, documents can now be electronically filed with the Commission as seen Section 860(1). Section 860(2) goes further to point out that certified true copies of electronically filed documents shall be admissible in evidence and have the same validity as the original documents.

10. Merger of Associations:

By virtue of Section 849 of the new Act, two or more associations with similar aims and objectives may merge based on terms and conditions laid down by the Commission through regulations. This therefore implies a reduction in the number of associations operating in the same area provided these associations agree to merge. Thus, the advantages that come with mergers of businesses can also apply to incorporated trustees.

11. Secretaries:

Under the old law, every company was expected to have a secretary. However, under Section 330(2) and (4), it makes the possession of secretary mandatory for only public companies and non-compliance makes the public company liable. By implication, the possession of a company secretary appears to be optional for private companies as the express mention of a thing is the exclusion of another. However, an argument can still be made that even if no punitive measure is attached to private companies that choose not to adhere to the requirement of owning a secretary, it does not excuse their need to comply with Sections 330(1) of the Act. This does appear contradictory. Only small companies are specifically mentioned as being excluded from having a secretary.

Given the fact that having a secretary is now optional for private companies this will invariably also affect the issue of register of secretaries. It is no surprise that Section 336 of CAMA 2020 now requires only public companies to maintain a register of secretaries.

12. Disclosures:

Under the old law, only a public company could direct a member of a company to indicate the capacity in which he or she holds shares and if he holds it as a beneficial owner, to indicate the persons interested in the shares and whether they are party to any agreement. A provision of this nature is also provided for substantial shareholders in public companies.

However, by virtue Section 119 any company (both private and public) can now direct any person with significant control in the company to indicate the particulars of such control. This is to ensure that the need for corporate transparency in this regard is not only applicable to public companies but also private companies.

13. Multiple Directorships:

Under the concept of multiple directorships, the new Act introduces a new provision to the effect that a person shall not be a director in more than 5 public companies as seen in Section 307(2). This therefore limits the control of one person over several public companies which fits nicely into the concept of corporate governance.

Section 278 also points out that there should be disclosure of multiple directorships where it is held by any person slated to be appointed as a director of a public company. This is to ensure a synergy with the Nigeria Code of Corporate Governance which is trying to ensure that issues of conflict of interest do not arise and directors are able to perform their duties efficiently.

On the issue of corporate governance, Section 265(6) of CAMA 2020 disallows a person to hold the office of Chief Executive Officer and Chairman of a public company. Hence, it pushes for a separation of the two roles in order to ensure adherence with international best practices.

14. Common Seal:

Under the old law, it was mandatory for a company to have a common seal. However according to Section 98 of CAMA 2020, it is not compulsory for a company to have a common seal. Formerly, possession of common seal was one of the means through which a person could gain control in the company as company contracts could not be ratified without a common seal. Hence, by making it optional it further strips one of the means of giving a person control in a company.

15. Insolvent Companies:

Under the new Act, there is now a framework for helping companies that are in troubled waters by coming up with a well thought out system and framework that will keep the company from being insolvent. Chapter 18 of the Act therefore focuses on administration of companies especially with respect to company voluntary arrangement. It is therefore a statutory procedure to help companies in financial difficulties restructure operations in order to survive insolvency. The goal of this inclusion is to promote sustainability of businesses in Nigeria.

16. First Offering:

CAMA 2020 by virtue of Section 22(2)(b) introduces a right of first offer in that a member is now disallowed from transferring/selling his or her shares in a company to a non-member without first offering existing members. Furthermore, the company cannot sell assets worth more than 50% of the total value of the company's assets without the consent of all the members. Again we are seeing an insistence on ensuring that the strength of the company and protection of its members is being upheld by the new Act.

17. Revocation of Certificate of Incorporation:

Section 41 of CAMA 2020 now gives power to the Commission to withdraw or revoke a certificate of incorporation that was obtained unlawfully or fraudulently and the Commission can go further to publish such information in the Federal Government Gazette.

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18. Alternative to Attorney General's Consent:

While the new Act maintains that the consent of the AG is still needed for grant of registration of a company limited by guarantee, it has however created an alternative. Section 26 now provides that where the AG fails to grant authority within 30 days (especially where there are no cogent reasons for refusal), then promoters can place an advert in 3 national dailies; inviting objections within 28 days. The Commission can then register the company without the AG's consent provided there are no objections after advert in the national dailies.



19. Foreign Companies:

Under the old law, foreign companies seeking to get exemption from registration in Nigeria had to apply to the President. However, by virtue of Section 80 of CAMA 2020, foreign companies seeking exemption can now apply to the Minister of Trade and upon obtaining the exemption must also notify the Commission.

20. Netting:

Sections 718-721 introduces the concept of netting which is a general concept used in financial markets. It basically involves the termination, liquidation or acceleration of any payment or delivery obligation or entitlement under one or more qualified financial contracts entered into under netting agreement. In simple terms, it is a method of reducing financial risks by combining multiple financial obligations a party may have, into a single net obligation sum.

EDITORIAL

This publication has succinctly explained how the ease of doing business in any nation, is one of the indications for how constructive an economy can be by creating an enabling environment for business operations to thrive. This is an essential factor which Foreign Direct Investors monitor to ascertain and project how successful their investments can be; especially on a macro-economic scale.

The publication also explains how the new CAMA can significantly impact the Nigerian economy as well as Nigeria's ranking on the Doing Business Index in the coming years. It has shown that this is possible because of the introduction of several timeous innovations which will allow Nigeria have a competitive edge with respect to how business operations are conducted. This is no surprise especially when consideration is given to provisions like virtual meeting which is extremely timeous given the current pandemic and even provisions now allowing a single individual start up a company seamlessly, *inter alia*.

This new law also has an understanding of the fact that business operations will increase when there is an active presence of investors. Thus, by allowing for unrestricted objects it opens the gate wide for companies to dabble into and expand the scope of their business operations. Thus, the more objects a company has the more investments they may be open to.

Also laudable, is a deep awareness of corporate governance and the need to ensure that unfair and prejudicial practices are no longer encouraged in business operations. Thus, by the Act putting a limitation on the number of companies in which an individual may be a director in, it roots out the unfair advantage that was formerly present in the old law. These innovations and many more, send a strong message both globally (to investors) and locally (to business owners and stakeholders).

Several researches reveal that SMEs make up 96% of Nigeria's businesses and the National Bureau of Statistics states that only 10% are registered with the Corporate Affairs Commission. Hence, many businesses are under the informal sector of the economy. Thus, despite the innovations the new CAMA brings into place, its applicability to businesses is still limited. It is the hope therefore that the new provisions will encourage these businesses to be validly registered thereby enhancing the tax landscape in Nigeria as well as the economy in general.



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We are a team of experienced professionals, knowledgeable in regulatory matters, corporate governance, innovative company secretarial solutions that enable our clients achieve their business objectives.



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