

ANALYSIS OF THE COMPANIES AND ALLIED MATTERS (REPEAL AND RE-ENACTMENT) BILL 2018



INTRODUCTION

The 8th Senate of the Federal Republic of Nigeria passed the Companies and Allied Matters (Repeal and Re-enactment) Bill 2018 on Tuesday, 15th May, 2018. This Bill is perceived as one of the biggest business reform bills passed in Nigeria in over 28 years. With the passage of the Bill, a regulatory framework that would promote the ease of doing business has thus been established. The Bill introduces salient provisions which when passed into law, has the potential to improve Nigeria's position on the World Bank Doing Business Rankings which is currently 145th of 190 countries.

Furthermore, the provisions of the Bill address the shortcomings of the existing Companies and Allied Matters Act CAP C20 LFN 2004 (CAMA) in line with global best practices. The Presidential Enabling Business Environment Council (PEBEC), chaired by His Excellency, the Vice President, Prof. Yemi Osinbajo SAN GCON, has been in

collaboration with some stakeholders and the 8th National Assembly to stipulate pragmatic provisions that would guarantee a conducive business and investment climate in Nigeria. The PEBEC also looks forward to the House of Representatives of the Federal Republic of Nigeria passing the Bill, as well as the Presidential assent to enable the passage of the Bill into law.

This report seeks to analyse salient provisions of the Bill against the provisions of the existing CAMA and its potential impact on ease of doing business in Nigeria.

COMPARISONS OF THE BILL AND CAMA

The Bill introduces new provisions and amendments to the corporate legislative framework in Nigeria with the aim of improving the ease of doing business in the country. The following are some of the salient provisions of the Bill in comparison to the provisions of the existing CAMA:



- Powers of the Board

The Companies and Allied Matters Act (CAMA) provides that the functions of the Commission are to administer and regulate the activities of companies in Nigeria (to serve as a registry). However, the Bill establishes a governing Board for the Commission in place of “members”. The governing Board shall not only perform the above stated functions, but shall also review and provide policy guidelines for discharge of the Commissions' duties. This provision is really vital because it allows for modification of laws applicable to companies from time to time through issuance of regulations which are subject to a lighter touch legislative process than Acts of National Assembly. This is also the position under the Companies Act of the United Kingdom 2006.

- Single member company

The provisions of CAMA clearly state that no company (i.e. a public or a private company), can be incorporated without having at least two shareholders/members/directors. However, the Bill replaces this provision with a provision that permits a single individual to form a company. This provision is modeled on the practice obtainable in some developed countries such as the United Kingdom.

- Annual General Meeting

The Bill introduces a provision to the effect that small companies will no longer be required to convene Annual General Meetings. This would be a welcome development to Micro, Small and Medium Enterprises (MSMEs) which constitute the bulk of Nigeria's service sector. The provision

was introduced to enable small companies thrive and focus more on growing their businesses.

- Consent of the Attorney-General prior to incorporation of a company Limited by Guarantee LTD/GTE

In order to establish a company Limited by Guarantee (LTD/GTE), the consent of the Attorney General (AG) is required under the provisions of CAMA. However, this has been substituted under the Bill with a provision that places a duty on the Corporate Affairs Commission to ensure that the application is advertised in three national dailies. This provision of the Bill seeks to eliminate the bureaucracies and bottlenecks associated with registering this type of company, thereby creating an enabling environment for various associations to promote their objectives and thrive.

- Optional common seal

The provision of CAMA mandates all companies to have a common seal. However, the Bill has reduced the threshold for adherence to this requirement from mandatory to optional. In other words, companies may choose whether or not to have a company seal.

- Disclosure of Beneficial Interests in Shares

This provision has been extensively amended under the Bill and the requirement to notify the company of substantial interest in its shares is no longer limited to public companies, but now extends to all companies, thereby combating asset shielding and increasing transparency. A 5% threshold for the disclosure has been introduced (i.e.

where a member of any company owns 5% of the shares in that company, they are under an obligation to notify the company to that effect) and such disclosures are required to be noted in the register of members and annual returns of the company.

- Exemption from Audit

In order to create an enabling business environment for small companies, the Bill exempts a small company from appointing an auditor provided that:

1. It has not carried on business since its incorporation; or in a particular financial year; or
2. The company's turnover is not more than N10m and its balance sheet total is not more than N5m.

- Minimum Issued Share Capital

The Bill also expunges the concept of "Authorized Share Capital" and replaces it with "Minimum Issued Share Capital". The rationale behind this amendment is to eliminate the 'front loading of costs' in the form of payment of stamp duties on the authorized share capital or upon an increase in the authorized share capital of a company, thereby making it difficult for MSMEs to do business. The Bill proposes to establish the minimum issued share capital thus enabling payment of stamp duties only on the issued share capital as opposed to the current practice of paying stamp duties on the entire authorized share capital of the company at incorporation.

- Limited Partnerships / Limited Liability Partnerships (LP\LLP)

The Bill proposes to establish Limited Partnerships and Limited Liability Partnerships as corporate entities in Nigeria. This is because they are attractive to investors due to their advantages (status of limited liability for its members and tax benefits) over the existing limited liability company. These forms of partnerships are the most preferred structure for private equity funds and other funds that form a significant portion of foreign investment that comes into the Nigerian economy. Under the CAMA, there is no structure for LPs and LLPs therefore; its inclusion in our corporate framework will attract investments into the country.

- Electronic Transfer of Shares

The Bill expressly recognizes the transfer of shares through electronic means. This provision was introduced to promote a more efficient business environment in Nigeria.

- Resolving Insolvency

In order to provide a more robust framework for resolving insolvency under CAMA, the Bill introduces a company rescue provision which is not focused on a company's demise, but on rescuing companies from insolvency. The insolvency provision seeks to save viable businesses and ensure that non-viable businesses can quickly exit the market, allowing deployment of assets to more productive firms.

The Bill envisages that where a company is unable to pay its debts, an insolvency practitioner to be known as an 'Administrator' may be appointed with the primary objective of rescuing the company unless he is convinced the company's interest is better served by pursuing an alternative course of action. The provisions as to time limits for the administration procedure among others also indicate a preference for salvaging businesses within a reasonable time frame or exiting the market timeously where there are indications that the business is not viable.

POTENTIAL IMPACT OF THE BILL

The following are some of the potential impacts of the Bill on the business and investment environment in Nigeria:

1. The impact of the Bill on Ease of doing Business and Foreign Direct Investments

The provisions of the Bill, if properly implemented, would enhance the ease of doing business in Nigeria and also attract Foreign Direct Investment (FDI) into the country. While Nigeria's overall ranking on the World Bank's Ease of Doing Business index for the year 2017 stood at 145 of 190 countries, the country was ranked 130 for the 'Starting a Business' indicator; 33 for 'Protecting Minority Interest'; and 145 for 'Resolving Insolvency'. The provision of the Bill addresses these three indicators amongst others. Therefore, it is pertinent to analyse the provisions of the Bill and its potential impact as it relates to starting a business in Nigeria, protection of minority interest and the resolution of insolvency.

- a. Starting a Business

In order to arrive at Nigeria's ranking for the 'Starting a Business' indicator in the year 2017, the World Bank specifically evaluated the time and cost associated with the following:

- Company Name Reservation;
- Payment of Stamp Duty upon Incorporation;
- Requirement for the Declaration of Statutory Compliance;
- Incorporation of Company at the Corporate Affairs

- Commission and Payment of Incorporation Fees;
- Use of Company Seal;
- Registration for Income Tax and VAT;
- Registration for Personal Income Tax (PAYE) at the State Tax Office; and
- Registration of Business Premises with the Lagos State Government.

In order to improve the efficiency of the Corporate Affairs Commission (CAC) in relation to the above business processes and to create an overall enabling business environment in Nigeria, the Bill introduced some pragmatic provisions that would significantly enhance the regulatory framework for five of the eight indicators listed above. The following are the relevant provisions of the Bill in respect thereof:

- i. **Company Name Reservation:** The Bill provides a legal framework for the electronic submission of applications and timely processing of such applications. Although, prior to the Bill, the CAC had introduced electronic applications to its practice procedure as part of its efforts to promote an efficient business environment in Nigeria. Currently, company name reservation is processed within a day of such application. It is believed that the formal introduction of electronic submission of applications into the legislative framework will play a major role in ensuring optimal performance and ultimately improve the business environment in the country.
- ii. **Payment of Stamp Duties upon Incorporation:** The payment of stamp duties has been a major factor in reaching a decision on the share capital for newly incorporated entities in Nigeria. Many stakeholders have called for the elimination of such costs as it discourages new businesses. Therefore, the introduction of the concept of a 'Minimum Issued Share Capital' to replace the present requirement for
- iii. **Requirement for the Declaration of Statutory Compliance:** The Bill has further simplified the process of registering a company by requiring promoters of a new company to supply the CAC with a statement of compliance as opposed to the current practice where a pre-designed CAC form is to be filled by a legal practitioner. The new requirement will facilitate self-service as contemplated by the drafters of the Bill and other stakeholders working to enhance the ease of doing business in Nigeria.
- iv. **Company Incorporation at the Corporate Affairs Commission (CAC) and Payment of Registration Fees:** While the Bill is silent on filing fees, it contains provisions allowing the use of electronic means to carry out registration of companies with the CAC. It is therefore contemplated that the payment of fees may also be done electronically.
- v. **Use of Company Seal:** The Bill eliminates the mandatory provisions of the existing CAMA, and makes the use of a company's common seal optional and further provides that where a company chooses to have

'Authorised Share Capital' is a welcome development under the Bill. It will significantly limit the financial exposure of newly registered entities. New investors would only be required to pay stamp duties on the issued share capital at the point of incorporation or increase. This will certainly attract more entities into the formal sector and array the fears of foreign investors that are concerned about the imposition of excessive stamp duties on the authorised share capital of companies.

However, the benefit of the provision of the Bill that eliminates payment of stamp duties on the authorised share capitals of companies will only be maximised where the imposition of exorbitant minimum share capital requirements for certain sectors such as maritime, oil and gas, and mining is similarly reviewed.



a common seal, its use should be regulated by the company's Articles.

b. Protecting Minority Investors

The parameters used in determining Nigeria's ranking on 'Protecting Minority Investors' include the extent of interest regulation, disclosure, director liability, ease of shareholder suits, extent of shareholders' governance, extent of shareholder's rights, extent of ownership control, and extent of corporate transparency. Nigeria's relatively impressive performance in the assessment of the regulatory framework for protection of minority investors indicates the existence of a robust legal framework in this regard but the Bill has sought to further enhance that framework.

Under the Bill, minority investors are assured of access to justice through the Courts which are empowered to grant reliefs, damages and injunctions restraining wrongful or oppressive actions of the majority, the company or its officers where applicable. Shareholders will also be able to bring actions against a company and any of its subsidiary companies and other companies related to the parent company.

c. Resolving Insolvency

In order to provide a more robust framework for resolving insolvency under CAMA, the Bill introduces a company rescue provision which is not focused on a company's demise, but on rescuing companies from insolvency. The insolvency provision seeks to save viable businesses and ensure that non-viable businesses can quickly exit the market, allowing deployment of assets to more productive firms.

The Bill envisages that where a company is unable to pay its debts, an insolvency practitioner to be known as an 'Administrator' may be appointed with the primary objective of rescuing the company unless he is convinced the company's interest is better served by pursuing an alternative course of action. The provisions as to time limits for the administration procedure among others also indicate a preference for salvaging businesses within a reasonable time frame or exiting the market timeously where there are indications that the business is not viable.

d. Other Considerations:

The Provisions of the Bill relating to the introduction of the Limited Liability Partnership (LLP) as a new form of business formation across Nigeria; the general relaxation of reporting obligations on small companies as well as the introduction of technology solutions will stimulate more investment in the country. These provisions, if effectively implemented would

promote the ease of doing business and place Nigeria in a strong position to compete with other viable investment destinations in Africa. Furthermore, the provisions of the Bill permitting single membership companies, single directorship, tax-friendliness and lower costs would significantly enable MSMEs thrive and ultimately boost the investment climate in the Country.

The beneficial ownership provisions under the Bill will also encourage transparency and strengthen corporate governance, thereby addressing concerns regarding unethical corporate practices

2. The impact Of The Bill On Micro, Small And Medium Enterprises (MSME)

Over the years, Micro, Small and Medium Enterprises (MSME) were saddled with the responsibility of ensuring that their businesses thrived in an overregulated environment without consideration for the nature of their business. The provisions of CAMA primarily benefits larger companies over MSMEs. This type of imbalance is crippling to a nation's economy especially one like Nigeria where the National Bureau of Statistics has reported that small and medium scale enterprises have contributed 48% to the nations' Gross Domestic Product in the last five years.

However, the Bill addresses modern business realities that are in tune with global best practices and caters to the fast growing MSME sector in Nigeria. The country is expected to experience an improvement in the fast-growing MSME sector in Nigeria. The following are some of the potential impacts of the Bill to the MSME sector:

a. Alleviation of unnecessary cost

The provision of the Bill makes it optional for small businesses to convene an Annual General Meeting. The Bill also eliminates the requirement on small companies to appoint an Auditor and Secretary respectively.

As earlier stated the introduction of the Minimum Issued Share Capital under the Bill will reduce unnecessary costs incurred by MSMEs as they would only be required to pay stamp duties on the issued share capital on incorporation or at a point of increasing the share capital.

The Bill also takes into consideration the realities of small businesses. It eliminates the need to undertake ineffective processes and the mandatory provisions on appointment of professionals (company secretary, auditors etc.) that may not serve any real purpose for their business. The removal of these unnecessary costs will allow MSME's to invest their funds towards the growth and development of their business.

b. Seamless Registration Process

The Bill has effectively modernised the process of registering a company through electronic means. This means that both local and foreign investors will henceforth be able to initiate and complete company registration processes online without the additional expense of hiring a legal practitioner.

c. Establishment of single-member companies

The Bill introduces a provision that allows an individual to form a private company and be the sole director and shareholder of such company. This provision aligns with modern day business reality as MSMEs are managed by individuals, thus eliminating the stringent provision under CAMA requiring a minimum of two directors / shareholders / members for the formation of a company.

d. Registration of a Company Limited by Guarantee (CLG)

The rationale behind the provision of CAMA requiring the Attorney General's Consent for establishing a Company Limited by Guarantee has always been unclear. In practice, individuals often forego this option and register an Incorporated Trusteeship in order to avoid the possible conundrum of liaisons with public offices.

However, the Bill replaces AG's Consent with a provision that vests the CAC with the sole power to approve the registration of a CLG thus making it easier for stakeholders in this sector to establish organisations to drive their specific objectives which will ultimately promote development in the country.

CONCLUSION

The passage of the Bill is a step in the right direction towards ensuring a conducive business environment that would encourage the required investments in the country. The Bill also reflects modern business realities and has the potential to improve efficiency across various sector of the economy. It has become pertinent that the Bill, when passed into law must be effectively implemented in order to yield the desired growth of the Nigerian economy.

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