REVIEW OF SOME KEY PROVISIONS IN THE COMPANIES AND ALLIED MATTERS ACT 2020

Background

On 7th of August 2020, President Muhammadu Buhari assented to the Companies and Allied Matters Bill which has now become one of the extant legislations regulating business and non-business organisations in Nigeria. In this piece, we highlight the distinctions in the new law.

Introduction

The Companies and Allied Matters Act, 2020 (the "Act") repeals the Companies and Allied Matters Act, Cap. C20, Laws of the Federation of Nigeria, 2004 (the "old Act") and enacts the Companies and Allied Matters Act, 2020 making provisions on the incorporation of companies, limited liability partnerships, limited partnerships, registration of business names together with the incorporation of trustees of certain communities, bodies, associations; and for related matters. The Act has a total of 870 sections and 15 schedules unlike the 613 sections and 15 schedules in the old Act. Below are some of the notable changes we have identified in the Act: -

Pre-Incorporation Filings

1. Provision of single member/shareholder for small companies: The Act[1] provides that a person can form a private company. This is different from the previous provision that required at least two persons.[2] The new provision saves small founder-owned companies or indeed company shareholders from looking for a second shareholder to typically hold just one share. What is a Small Company? The answer is any such company that meets the following requirements[3];

    i. A private company.
    ii. Its turnover does not exceed 120 million Naira or such other amount the Corporate Affairs Commission (CAC) may prescribe.
    iii. Its net asset value is not more than 60 million Naira, or such other amount CAC may prescribe.

[1] S.18 (2) of the Companies and Allied Matters Act, 2020.
[2] S.18 of the Companies and Allied Matters Act, 1990 CAP C20 LFN 2004.
[3] S.394 of the Companies and Allied Matters Act, 2020.

iv. Has no foreigner as company member; and

v. Its directors hold at least 51% of the shares of the company.

2. Minimum number of Directors: The Act[4] now allows for small companies to have a single Director.

3. Company Limited by Guarantee: The Act[5] introduces a default approval mechanism for promoters of a Company Limited by Guarantee, where the Attorney General of the Federation fails to grant approval to the promoters within thirty days. Under the Act, the promoters of such a company may place an advert in three national dailies inviting objections within twenty-eight days. In the event that there are no objections, the Corporate Affairs Commission (CAC) can assent to their application for incorporation and register the company without the consent of the Attorney General of the Federation.

4. Share Capital: The term "authorised share capital" in the old Act has been substituted with "minimum issued share capital"[6].

S/N	Share Capital	Old Act (Authorised Share Capital)	The Act (Minimum Issued Share Capital)
I	Private Companies.	Not less than N10,000.00 (Ten thousand Naira).	Not less than N100,000.00 (One hundred thousand Naira).
II	Public Companies.	Not less than N500,000.00 (Five hundred thousand Naira).	Not less than N2,000,000.00 (Two Million Naira).

What this means for companies that still have unused authorised share capital is that the unused share capital will be unissued and may then be issued later to willing subscribers.

5. Alteration of the provision on the Statutory Declaration of Compliance: The Act[7] provides that the Statement of Compliance can now be signed by an applicant or his agent confirming that every legal requirement pertaining to registration has been duly complied with. In other words, either a Declaration of Compliance signed

[4] S.271 of the Companies and Allied Matters Act, 2020.
[5] S.26 (4)-(10) of the Companies and Allied Matters Act, 2020.
[6] S.27 (2) of the Companies and Allied Matters Act, 2020.
[7] S.40 (1) of the Companies and Allied Matters Act, 2020.

by a Legal Practitioner or a Statement of Compliance suffices for the purpose of registration.

Post-Incorporation Matters

6. Certificate of Incorporation: The Act[8] empowers the Corporate Affairs Commission (CAC) to withdraw or revoke any Certificate of Incorporation issued where it is discovered that same was obtained fraudulently, unlawfully or improperly procured. CAC can also publish the withdrawal, cancellation or revocation of certificates of incorporation, periodically in the Federal Government Gazette.[9]

7. Re-registration of Company: The Act[10] provides that a public company can now be re-registered as an unlimited company with a share capital. The section further states the pre-requisites for re-registration.

8. The Act[11] provides that unless otherwise specifically mandated, documents or proceedings that require authentication can be signed through **electronic means** by a director, secretary, or other authorised officer of the company; this was not a possibility under the provisions of the old Act[12].

9. Disclosure: Every person[13] with significant control of a company, shall within seven days of gaining such significant control disclose in writing the particulars of his control to the company.

10. Removal of the requirement for a Company Seal: Company seals were predominantly used by companies in common law jurisdictions and most countries have done away with the use of seals. Now,[14] it is no longer compulsory for companies to have a common seal.

11. Electronic register of shares: The Act recognises the electronic means by which shareholders' interests can be registered. [15]

12. Validation of improperly issued shares: Under the old Act, the Court was the first mechanism to be explored for the validation of improperly issued shares; while the Act[16] provides for a company to

[8] S.41 (7) of the Companies and Allied Matters Act, 2020.
[9] S.41 (8) of the Companies and Allied Matters Act, 2020
[10] S.75 of the Companies and Allied Matters Act, 2020.
[11] S.101 of the Companies and Allied Matters Act, 2020.
[12] S. 77 of the Companies and Allied Matters Act, 1990 CAP C20 LFN 2004
[13] Section 119 of the Companies and Allied Matters Act, 2020.
[14] S.98 of the Companies and Allied Matters Act, 2020.
[15] S.176 (1) of the Companies and Allied Matters Act, 2020.
[16] S.148 (1) of the Companies and Allied Matters Act, 2020.

validate the issuance/allotment of such shares through a special resolution and in the event that the company fails or refuses to do so, the aggrieved party may make an application to the Court[17].

13. Authority to allot shares: The power to allot shares in public companies under the Act[18] remains subject to the provisions of the Investment and Securities Act.

14. Variation of class rights: In addition to the provision of the old Act that "the rights of a class of shares may be varied with the written consent of the holders of three-quarters of the issued shares of that class or with the sanction of a special resolution passed at a separate general meeting of the holders of the shares of the class". The Act now provides a distinction, especially where the company's articles do not provide for the variation of those rights. It further adds that[19] any proposed amendment or addition of any provision in a company's Articles with respect to the variation of rights attached to a class of shares has to be with the written consent of the holders of three-quarter of the issued shares of that particular class.

15. Security: On the issue of priority of fixed charge over floating charge, the Act[20] makes a proviso that a person is deemed to have given notice of a prohibition in a floating charge where any such notice indicating the existence of that same prohibition is registered with CAC. This introduction imputes constructive notice for negative pledge clauses registered with the CAC. In addition, the Act[21] provides that despite any provision in the Act or any other law to the contrary, the holder of a fixed charge assumes priority over other debts of the company, preferential debts inclusive. (Preferential debts which, among others, include taxes and employees' deductions).

16. Filing Fees for Charges: The Act[22] provides that the total fees payable to the CAC with respect to charges whether filing, registration or release is now 0.35% of the value of the charge itself[23]. In addition,

[17] S.148 (2) of the Companies and Allied Matters Act, 2020.
[18] S.27 (2) of the Companies and Allied Matters Act, 2020.
[19] S.166 of the Companies and Allied Matters Act, 2020.
[20] S.204 of the Companies and Allied Matters Act, 2020.
[21] S.207 of the Companies and Allied Matters Act, 2020.
[22] S.222 (12) of the Companies and Allied Matters Act, 2020.
[23] In the old Act, the cost was 1% for every One million Naira (N1,000,000.00) or part thereof for private companies and 2% for every One million Naira (N1,000,000.00) part thereof for public companies.

CAC is obliged [24] to enter in the register of charges a notice indicating the existence of any provisions in the charge that prohibit or restrict the company from granting any further charge ranking in priority to or *pari passu* with the floating charge i.e. a negative pledge.

17. Meetings: The Act[25] provides that small companies need not hold statutory and annual general meeting in Nigeria as previously provided. Also[26], a private company can now hold general meetings electronically as long as the articles provide for same. This is a welcome development especially as remote meetings are the order of the day due to the Covid-19 pandemic. The Act[27] includes CAC as one of the persons entitled to receive a notice of meeting for public Companies.

18. Chairman/CEO: In line with international best practice and good corporate governance, the Act[28] severs the fusion of the Chairman and the Chief Executive Officer in one person, particularly for public companies[29] which in fact aligns with the provisions of the Corporate Governance Code.

19. Independent Director: The Act[30] makes a provision for public companies to have at least three independent directors. The section[31] defines an independent Director as:

"a director of the company who, or whose relatives either separately or together with him or each other, during the two years preceding the time in question –

(a) was not an employee of the company.

(b) did not –

(i) make to or receive from the company payments of more than N20,000,000, or

(ii) own more than a 30% share or other ownership interest, directly or indirectly, in an entity that made to or received from the company payments of more than the amount stated in subparagraph (i) or act as a partner, director or officer of a partnership or company that made to or

[24] S.223 (1)(b) (v) of the Companies and Allied Matters Act, 2020.
[25] S.240 (1) of the Companies and Allied Matters Act, 2020.
[26] S.240 (2) of the Companies and Allied Matters Act, 2020.
[27] S.243 of the Companies and Allied Matters Act, 2020.
[28] S.265 (6) of the Companies and Allied Matters Act, 2020.
[29] Code 2.7 of the Nigeria Code of Corporate governance 2018; Code 5.1(b) Code of Corporate Governance for Public Companies in Nigeria SEC Code.
[30] S275 (1) of the Companies and Allied Matters Act, 2020.
[31] S.275 (3) of the Companies and Allied Matters Act, 2020.

received from the company payments of more than such amount;

(c) did not own directly or indirectly more than 30% of the shares of any type or class of the company, and

(d) was not engaged directly or indirectly as an auditor for the company."

20. Multiple Directorships: The Act[32] provides that a person shall not be a director in more than five public companies. It further provides that "any person who holds such multiple directorships in more than five public companies shall, at the next annual general meeting of the companies after the expiration of two years from the commencement of this Act, resign from being a director from all but five of the companies".

21. Company Secretary: In contrast to the old Act which mandates every company to have a Company Secretary, the Act[33] provides that small companies will not require a Company Secretary. Also, only public companies are now required to keep Register of Secretaries.[34]

22. Insolvent Companies: The Act provides new mechanisms for saving companies in distress and to make them a *going concern* rather than insolvent. These provisions are on Company Voluntary Arrangements (S.434-442), Administration (S.443-549) and Netting regime (S.718-721).

23. Audit: Any small company that does not carry on business within its first year of incorporation is exempted[35] from complying with the audit requirements under the Act with respect to accounts of a financial year. Also, every public company is required to keep its audited accounts displayed on its website. [36]

24. Attachments: Unlike in the old Act[37] that provided that where a company is being wound up subject to the supervision of the court, any attachment, sequestration or execution put in force against the estate or effects of the company after the commencement of the winding-up, shall be void, the Act[38] adds a proviso that this would not apply to a fixed charge or any other validly created and perfected security

[32] S.307 of the Companies and Allied Matters Act, 2020.
[33] S.330 (1) of the Companies and Allied Matters Act, 2020.
[34] S.336 of the Companies and Allied Matters Act, 2020.
[35] S.402 of the Companies and Allied Matters Act, 2020.
[36] S.374 of the Companies and Allied Matters Act, 2020.
[37] S.497 of the Companies and Allied Matters Act, 1990 CAP C20 LFN 2004.
[38] S.577 of the Companies and Allied Matters Act, 2020.

interest other than a floating charge. This recognises the priority of a fixed charge and it is a welcome development for security holders.

25. Application of bankruptcy rules in certain cases: Again, the Act[39] adds a proviso that nothing shall affect the power of any secured creditor to realize or otherwise deal with his security during the winding up of an insolvent company. For emphasis, the insolvent company must be a company that is registered in Nigeria.

Conclusion

Without a modicum of doubt, the new provisions are innovative and will go a long way to promote business expediency in Nigeria.

This article is intended to provide an overview of the significant provisions of the Companies and Allied Matters Act 2020 and as such should not be taken as purporting to provide legal advice on any matter. Kindly send an email to enquiries@odujinrinadefulu.com if you have any queries with the Companies and Allied Matters Act, 2020.

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[39] S.656 of the Companies and Allied Matters Act, 2020.