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OVERVIEW OF THE AMENDMENTS TO THE COMPANIES AND ALLIED MATTERS ACT

Aisha Rimi
Safiat Akande

INTRODUCTION

On 15 May 2018, the Senate of the Federal Republic of Nigeria passed the Bill for an Act to Repeal the Companies and Allied Matters Act 1990 ("the Act") and enact the Companies and Allied Matters Act 2018 ("the Bill"). This Bill was subsequently passed by the Federal House of Representatives on Tuesday, 27 January 2019 and currently awaits the assent of the President of the Federal Republic of Nigeria to enable it become law in Nigeria.

This will be the first update/amendment to the Act, since it was enacted over twenty-eight years ago. The Bill introduces business regulations in line with global best practices and addresses the existing shortcomings in the Act. It has been touted as a "pro-business" Bill intended to promote the ease of doing business and foreign investment in Nigeria as well as reducing regulatory hurdles encountered by local business owners.

Highlights of the Bill

It introduces several changes and innovation to the extant Nigerian business regulatory regime along some of the following lines:

A. BUSINESS REGISTRATION

1. Formation of a company – The Bill has amended several provisions and introduced innovations in the process of formation of a company.

Process of Registration

Before the passage of the Bill, the Corporate Affairs Commission ("CAC") had introduced an electronic process for the registration of companies in order to save time and improve efficiency. The Bill incorporates this innovation and directs the CAC to establish and use any means of electronic communication to facilitate an automated: reservation of names of business entities; incorporation and registration; and the filing of information as may be required under the Bill[1]. It is expected that the tradition of electronic filing will drastically eliminate the difficulties associated with the manual (offline) registration of business entities in Nigeria.

Documents and Information for Registration

The Bill omits the requirement for a "statutory declaration of compliance" by a legal practitioner contained in the Act[2] and it merely provides for "a statement of compliance"[3]. Consequently, it is no longer required that the incorporation documents of a company be notarised by a Commissioner for oath and neither does the

[1]Section 8(3) of the Bill
[2]Section 35(3) of the Act
[3]Section 40 of the Bill

declaration have to be by a legal practitioner. The simple statement of compliance will suffice as evidence of the Business Owner's compliance with the requirements for registration of a company.

Furthermore, the Bill expands the scope of information required for the registration of a company. Where a member's liability is to be limited by shares, the application for registration should contain a Statement of Capital and Initial Shareholdings or a Statement of Guarantee where the member's liability is to be limited by Guarantee[4].

Minimum number of Shareholders

Previously, a company needed a minimum of two (2) directors and shareholders at all times[5]. This is a challenge to most Small to Medium Scale Enterprises (SMEs) in Nigeria which largely operate as sole proprietorships and often resulted in the inclusion of passive participants in business in order to meet the minimum membership and governance requirements of an incorporated company.

However, the Bill amends this requirement and allows companies to be owned and controlled by a single person[6]. One effect of this provision is that it gives arbitrary powers to sole proprietors of such companies, who will no longer be required to be answerable to a board or other shareholders. However, the sole shareholder may choose to bring on investors in the future by the transfer of shares.

2. **Articles of Association of a Company** – The Bill empowers the CAC to make regulations mandating companies to adopt model Articles of Association and further requires that different model Articles be prescribed for different types of companies[7].

3. **Re-Registration of Companies**[8] – The Bill introduces certain conditions for re-registration of a private company as a public company which were not previously stated in the Act[9]. These conditions impose requirements relating to the share capital and net assets of the company.

B. COMPANIES LIMITED BY GUARANTEE

The Bill introduces a major amendment in the incorporation of companies limited by guarantee by omitting the requirement to obtain the consent of the Attorney General of the Federation ("AGF"). Current provisions require that the consent of the AGF must be obtained for approval of the memorandum, prior to the incorporation of a company

[4]Sections 37 and 38 of the Bill
[5]Section 18 of the Act
[6]Section 18(2) of the Bill
[7]Section 33 of the Bill
[8] The provisions on re-registration of a private company as a public company are extensive and contained in sections 56 – 62 of the Bill.
[9] Sections 56(2), 57, 58 and 59 of the Bill

limited by guarantee[10]. This requirement has led to bureaucratic delays in the process of registration of non-profit organisations, to the extent that the office of the AGF has extended this power to include approving names of companies. However, the Bill solves this problem by eliminating the requirement for prior approval of the AGF.

In addition, the Bill introduces a duty on the CAC to cause an application for registration of a company limited by guarantee to be advertised in three (3) national daily newspapers[11].

The Act provides that the minimum total liability to be guaranteed by members in the event of winding up is not less than ₦10,000 (Ten Thousand Naira)[12] but the Bill, provides a more realistic sum of ₦100,000 (One Hundred Thousand Naira)[13].

The Bill also includes provision for the retirement or removal of a member of a company limited by guarantee by a special resolution of the company[14], which was silent in the Act.

In addition, the Bill provides a comprehensive framework for conversion of a company limited by guarantee to a company limited by shares[15].

C. SHARE CAPITAL, SHAREHOLDERS AND SHARES

The Bill features several amendments in relation to the share capital of a company including the following:

1. **Issued Share Capital & Paid-Up Capital** – The Bill replaces "authorised share capital"[16] as provided under the Act, with "issued share capital"[17]. Therefore, with respect to costs for registration of a company which are calculated based on the total share capital of a company, a company only needs to pay costs on the shares issued/allotted. The minimum issued share capital as prescribed in the Bill is ₦100,000 (One Hundred Thousand Naira) in the case of a private company and ₦2,000,000 (Two Million Naira) for a public company.

   The Bill mandates that twenty-five per cent (25%) of the issued share capital of a company must be paid up at all times.

   This innovation is particularly welcome as it reduces the financial burden new business owners may face when starting a business. Under the Act, stamp duties are paid on the

[10]Section 26(5) CAMA
[11]Section 26(4) of the Bill
[12]Section 26(7) CAMA
[13]Section 26(6) of the Bill
[14] Section 26(7) of the Bill
[15]Sections 55(f) and 78 of the Bill
[16]Section 27(2) of the Act
[17]Sections 27(2) and 125 of the Bill

value of the authorised share capital of a company irrespective of whether shares are issued to the full value of the authorised share capital or not. Consequently, companies are faced with the burden of paying duties on capital which has not been raised at the point of incorporation. However, pursuant to the Bill stamp duties shall be paid on only the issued share capital.

2. **Reduction of Issued Share Capital**

   The Bill eliminates the requirement for private companies to obtain a court order confirming a reduction of their share capital. Only public companies have that obligation under the Bill. [18] A private company may reduce its share capital by merely passing a special resolution to that effect[19].

3. **Disclosure of Beneficial Ownership & Substantial Shareholding** - There is no obligation under the Act for a member of a company to disclose beneficial ownership of shares. However, the Bill mandates persons holding nominal interest in shares on behalf of other persons to disclose the identity of such persons[20]. Punitive measures apply where such disclosures are not made.

   The Act provides for disclosures by a person who has acquired shares of a public company which entitle him to exercise ten percent (10%) of the unrestricted voting rights at any general meeting of the company[21]. Under the Bill, whilst a public company is to be notified of the acquisition or divestment of shares, the threshold for such disclosure has been reduced to five percent (5%)[22]. Such notice of substantial shareholding must be given within fourteen (14) days after the shareholder becomes aware that he is a substantial shareholder.

4. **Issue of shares at a discount** – The Bill makes it unlawful for a company to issue shares at a discount[23] which is currently authorised by the Act[24]. The Bill also makes it mandatory for all preference shares issued by a company limited by shares to be redeemable[25], whereas, the issuance of redeemable preference shares is optional under the Act[26].

5. **Acquisition by a company of its own shares** – The Bill lifts the conditional restriction contained in the Act[27] prohibiting a company from acquiring its own shares. The new

[18]Section 134 of the Bill
[19]Section 132 of the Bill
[20]Section 120 of the Bill.
[21]Section 95 of the Act
[22]Section 121 of the Bill
[23]Section 147 of the Bill
[24]Section 121 of the Act
[25]Section 148(1) of the Bill
[26]Section 122 of the Act
[27]Section 160 of the Act

conditions which must be fulfilled for a company to acquire its own shares including being permitted to do so by its articles and a special resolution[28].

6. **Financial assistance to members** – The Act precludes a company from giving financial assistance to persons for the purpose of acquiring its shares, with certain exemptions[29]. The Bill introduces more exemptions to this rule[30] and provides conditions to be fulfilled for a private company to give financial assistance including having net assets, approval by special resolution and statutory declaration in a prescribed form.

D. MEETINGS, DIRECTORS AND SECRETARIES

1. **Meetings** – The requirement for a statutory meeting of public companies within six (6) months of incorporation is retained under the Bill[31]. However, small companies and companies having a single shareholder are excluded from the requirement of having annual general meetings[32] and are also exempt from the requirement to hold general meetings in Nigeria[33].

   The Bill expressly allows a private company to hold its general meetings electronically where this is permitted by the articles of the company[34] and introduces a requirement for notice of general meetings of public companies to be served on the CAC[35]. The Bill also provides for electronic service of notice of meetings and electronic voting at meetings[36].

2. **Directors** – The Bill makes it mandatory for a person proposed to be appointed as a director of a public company to disclose any other directorship(s) which he holds in another public company to the company at a general meeting[37] The Bill implies that small companies can operate officially with one (1) director.[38] This brings the new company regulations in Nigeria on par with other commonwealth jurisdictions. By permitting SMEs to operate with one (1) director, the Bill improves on the practicality of bringing SMEs within the formal sector of the Nigerian economy.

   Businesses utilising these provisions are also able to take advantage of the benefits of incorporation such as limitation of liability and the capacity to sue and be sued as a separate legal entity.

[28]Section 185 of the Bill
[29] Section 159 of the Act
[30]Section 184 of the Bill
[31]Section 236(1) of the Bill
[32]Section 238(1) of the Bill
[33]Section 241 (1) of the Bill
[34]Section 241(2) of the Bill
[35]Section 244(1)(e) of the Bill
[36]Section 245(3) of the Bill
[37]Section 277(3) of the Bill
[38]Section 271(1) of the Bill

3. **Secretaries** – Under the Act every company - private or public - is required to have a company secretary[39]. However, the Bill exempts all small companies from the requirement to have a company secretary and restricts this requirement to public companies[40]. Furthermore, private companies do not need to keep a register of secretaries[41] as required under the Act[42]. The Bill, however, includes provisions which require all companies, including small companies, to file annual returns. The annual returns are to be filed along with a certificate signed by a director and secretary of the company[43]. These provisions are contradictory to the provisions of the Bill exempting small companies from the requirement to have a secretary.

E. PARTNERSHIPS

1. **Limited Liability Partnerships[44] and Limited Partnerships**[45] - There are currently no provisions for Limited Liability Partnerships ("LLP") and Limited Partnerships ("LP") under the Act and the Bill creates these new forms of legal entities.

   Under the Bill, the LLP and LP must have a minimum number of two (2) partners. In the case of a limited partnership, there must be a minimum of one (1) limited partner and one (1) general partner who is responsible for the day-to-day management of the LP. The maximum number of persons that can join a LP is twenty (20), while that of a LLP is unlimited.

   Under the Bill, an LLP is a body corporate and a separate legal personality from that of its partners. The Bill requires an LLP to have a minimum of two (2) designated partners who must be individuals responsible for all things required to be done in accordance with the provisions of the Bill. Every partner in an LLP is an agent of the LLP but not of the other partners. Detailed provisions for its operations are specified in the Bill.

   A Limited Partnership under the Bill must have one (1) or more general partners who are to be liable for all debts and obligations of the firm, and other limited partners. The major distinction between an LLP and an LP is the liability of the general partner in an LP. Therefore, a Limited Partnership unlike an LLP is not a body corporate.

   The Bill also provides that the provisions of the Partnership Act 1890 shall govern LPs only. Where there are inconsistencies between the provisions of the Bill and the provisions of the Partnership Act 1890, the provisions of the Bill will prevail.

[39] Section 293 of the Act
[40] Section 329(1) of the Bill
[41] Section 335 of the Bill
[42] Section 292(1) of the Act
[43] Section 421(1) and (2) of the Bill.
[44] Section 738 of the Bill
[45] Section 787 of the Bill

Constitutionality of provisions of the Bill on Limited Liability Partnerships and Limited Partnerships

It is imperative to note the constitutionality of the provisions of the Bill with respect to LLPs and LPs. Under the constitution, the National Assembly has powers to make laws with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to the Constitution. The National Assembly also has concurrent powers with the various State Houses of Assembly to make laws with respect to matters listed in the Concurrent Legislative List.

The Constitution provides[46] that the National Assembly may make laws for 'the incorporation, regulation and winding up of bodies corporate' within the purview of the Federal Government. However, it excludes 'co-operative societies, local government councils and bodies corporate established directly by any Law enacted by a House of Assembly of a State" from exclusive federal legislative competence. Therefore, the National Assembly is duly empowered to make laws for bodies corporate in Nigeria i.e. an entity having authority under law to act as a single person distinct from the shareholders or natural persons who make it up, exists indefinitely apart from them, and has the legal powers that its constitution gives it[47].

Whilst the provisions of the Bill on Limited Liability Partnerships create an entity separate and distinct from the partners which constitute the LLP and make an LLP for all intents and purposes, a body corporate, LPs are not corporate bodies, and there is therefore a strong argument to be made that the National Assembly does not have the constitutional power to make laws governing LPs.

F. COMPANY RESCUE REGIME

Company Voluntary Arrangements[48] - The Bill introduces Company's Voluntary Arrangement and Administration in Nigerian corporate law. The Voluntary Arrangement is a process whereby the directors of a company, an administrator or liquidator make a proposal to its creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs. Under this scheme, a person is nominated ("the nominee") to act in relation to the voluntary arrangement either as trustee or otherwise for the purpose of supervising its implementation.

Company Administration[49] - The Bill has expanded the scope of options available to a company in distress by introducing an expansive company rescue system of Administration. Company administration is meant to serve as a rescue mechanism for insolvent entities, allowing such entities to carry on the running of their businesses. This

[46]Item 32 of the Exclusive Legislative List
[47]Black's Law Dictionary, Tenth Edition Pg. 415
[48]Chapter 18, Sections 432 – 440 of the Bill
[49] Sections 441 – 547 of the Bill

is a procedure which essentially allows a company to settle its debts by paying only a proportion of the amount that it owes to creditors. It also allows a company to reach some other arrangement with its creditors over the payment of its debts. The objective of the Administrator is to: rescue the company, the whole or any part of its undertaking, as a going concern; achieve a better result for the company's creditors as a whole than would be likely if the company were wound up, without first being in administration; or realize property in order to make a distribution to one or more secured or preferential creditors.

G. OTHER PROVISIONS

1. **Notice of Grant of exemption to Foreign Company** – The Act places the responsibility of publication of the exemption of a foreign company from registration in Nigeria, in the President[50]. However, the Bill makes it mandatory for such a foreign company granted an exemption to deliver a notice of such exemption to the CAC within 30 (thirty) days of the grant thereof[51]. The Bill also introduces an unspecified penalty for failure to file a notice of exemption and for failure to file an annual report with the CAC[52].

2. **Common Seal** – The Act makes it mandatory for a company to have a common seal[53]. However, the Bill has made it optional for a company to own a common seal and the usage, design and legibility of such common seal shall be regulated by the Articles of Association[54].

3. **Authentication of Documents** – The Bill recognises that an electronic signature satisfies the requirement for authentication of document[55]. In addition, the Bill provides in respect of Deeds of a company that such Deeds may also be executed by a single director in the presence of a witness who shall attest the signature[56]. For the purposes of other laws which require the common seal of a company for authentication, the Bill provides that the authentication requirements contained in the Bill shall suffice[57]. The introduction of electronic signature is laudable because the insistence on manual signature has indeed been a cumbersome requirement especially where the directors and/or shareholders are resident in foreign jurisdictions or reside in different parts of the country.

4. **Audit Requirement** – The Bill exempts companies which have not carried on any business since incorporation; or companies with a turnover of not more than ₦10,000,000 (Ten Million Naira) and balance sheet of not more than ₦5,000,000 (Five

[50] Section 56 of the Act
[51] Section 82(7) of the Bill
[52] Section 82(8) of the Bill
[53] Section 74 of the Act
[54] Section 99 of the Bill
[55] Section 102 of the Bill.
[56] Section 103(2) of the Bill
[57] Section 104 of the Bill

Million Naira) from the requirement to conduct an annual audit[58]. The CEO or CFO of a company other than a small company must certify each audited financial statement verifying that such statements do not contain any untrue, misleading statements of material facts[59].

5. **Priority of Fixed Charge over Floating Charge** – Under the Act, 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[60]. The term "actual notice" as used in the Act 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[61]. In addition, the Bill also gives a holder of a fixed charge priority over other debts of the company[62].

6. **Qualification of a Small Company** - Under the Act, a small company[63] is a private company which:
    - has a turnover of not more than ₦2,000,000 (Two Million Naira);
    - has net assets of not more than ₦1,000,000 (One Million Naira);
    - none of its members is an alien or government agency; and
    - the directors between themselves hold not less than 51% (fifty one percent) of the share capital of the company.

The Bill has amended the qualification of a small company by increasing the threshold of turnover and net asset. A small company is now defined as a private company with a turnover of not more than ₦120,000,000 (One Hundred and Twenty Million Naira) and net assets of not more than ₦65,000,000 (Sixty-Five Million Naira)[64].

CONCLUSION

The Bill has largely lived up to the expectations of the Nigerian business community as the innovations in the Bill are ambitious and constitute a much-needed and long-awaited reform in the regulation of business entities in Nigeria. In addition, the Bill emulates modern corporate regulations in other developed countries and fosters the ease of doing business in Nigeria in line with 21st century expectations.

It is hoped that as developments inevitably occur in the business environment, the Bill will be amended to adapt to developments and the needs of the business community.

[58]Section 400(1) of the Bill
[59]Section 403 of the Bill
[60]Section 179 of the Act
[61]Section 205 of the Bill
[62]Section 208(4) of the Bill
[63] Section 351 of the Act
[64]Section 392 of the Bill