

HOLDING OF ANNUAL GENERAL MEETINGS BY PUBLIC COMPANIES DURING THE COVID-19 PANDEMIC:

AN APPRAISAL OF THE CAC AND SEC'S REACTIONS

1 Cap C20, Laws of the Federation of Nigeria ("LFN") 2004.

2 Section 219 of CAMA

3 Section 217 of CAMA

4 Section 220 of CAMA

5 Section 222 of CAMA

6 Section 219 (2) of CAMA

7 Section 218(4) of CAMA

8 Section 218(2) of CAMA

9 Section 214 of CAMA

Proem

With the advent of the coronavirus disease ("COVID-19") and the resultant social distancing advice by the World Health Organisation ("WHO"), corporate gatherings such as Annual General Meetings ("AGMs"), amongst other business operations, have been affected worldwide. To this end, this article reviews the steps put in place, by the Corporate Affairs Commission ("CAC") and the Securities and Exchange Commission ("SEC"), for Nigerian registered public limited liability companies ("PLCs") to hold their AGMs during the COVID-19 pandemic

The Regime for Holding AGMs of PLCs

The principal law regulating companies in Nigeria is the Companies and Allied Matters Act¹ ("CAMA"). Pursuant to Section 215 of CAMA, every company incorporated in Nigeria is required to hold a general meeting every year (i.e. the AGM). The AGM is to be called by sending out notices to:

- (i) every member of the company;
- (ii) every person upon whom the ownership of a share devolves by reason of his being a legal representative, receiver or a trustee in bankruptcy of a member;
- (iii) every director of the company;
- (iv) the auditor of the company; and
- (v) the company's secretary².

The above stated notice is required to be sent at least twenty-one (21) days before the AGM³ and the notices are to be served personally or by post⁴. In relation to PLCs, and in addition to the foregoing, the notice of the AGM must be advertised in two (2) daily newspapers at least twentyone (21) days to the date of the meeting.⁵

Also, CAMA prohibits any other person other than the aforementioned parties, from receiving notices of an AGM.⁶ The notices must clearly state that a member has a right to appoint a proxy to attend and vote at the AGM instead of the member,⁷ and such proxy need not be a member of the company.

CAMA also states that the notice of the AGM must state the ordinary business that will be discussed⁸ which is:

- (i) declaration of dividends;
- (ii) presentation of the financial statements;
- (iii) reports of the directors and auditors;
- (iv) the election of directors in the place of those retiring;
- (v) the fixing of the remuneration of the auditors and where applicable, and
- (vi) the removal and election of auditors and directors.

Any other business other than the aforementioned will be deemed special business and must be stated in the notice of the AGM.⁹

The Investment and Securities Act, 2007 ("ISA") does not make provisions for the conduct of AGMs of PLCs. However, the SEC in Rule 602 (2) (a) of its Rules and Regulations¹⁰ provides that

"All public companies, collective investment schemes, securities exchanges/other S.R.O.s, issuers of public securities and merging companies shall officially invite the Commission to their general meetings."



- 10 *The SEC Rules and Regulations, 2013*
- 11 (1990) LPELR-SC.288/1988
- 12 (2010) LPELR-SC.204/2005
- 13 *PRINCE ADEMOLU ODENEYE v. PRINCE DAVID OLU EFUNUGA (Supra)*
- 14 (2978) LPELR – SC 92/1976.
- 15 See also *AKINGBADE v. LAGOS TOWN COUNCIL (1955) 2 NLR 12, 190.*

Whilst some school of thought are of the opinion that the SEC does not have the power to require PLCs to invite it to their AGMs, as the ISA does not provide for SEC's attendance at AGMs, PLCs have been inviting SEC further to the above Rule.

The CAC's Response to the Holding of AGMs by Public Companies amidst the COVID-19 Pandemic

In order to forestall mass gathering of people for the purpose of holding AGMs of PLCs, the CAC issued the Guidelines on Holding of Annual General Meetings of Public Companies using Proxies on March 26, 2020 (the "Guidelines") which provide as follows:

1. The approval of the CAC shall be obtained before an AGM is held during the COVID-19 pandemic. The application can be submitted to the CAC Head Office in Abuja or any of the branch offices in any of the States.
2. The CAC shall send representative(s) as observer(s) to the AGMs.
3. The AGMs shall only discuss the Ordinary Business of an AGM as provided in Section 214 of CAMA.
4. Notice of meeting and proxy form shall be sent to EVERY member in accordance with the requirements of CAMA. Companies will be required to provide the CAC with the evidence of postage or delivery of such notices after the meeting.
5. All the members shall be advised in the notice that in view of the COVID-19 pandemic, attendance shall only be by proxy with names and particulars of the proposed proxies listed for them to select therefrom. The invitation shall be issued at the company's expense as well as the stamp duties which shall be prepaid by the company. The proxies need not be members of the company.
6. The company shall be guided by the provisions of its Articles or CAMA as regards to a quorum. However, for the purpose of determining quorum, each duly completed proxy form shall be counted as one.

As proactive as the Guidelines seem to be, they create laws in addition to the ones provided for in CAMA for the holding of an AGMs. The Guidelines, being a subsidiary legislation, cannot amend or conflict with an Act of the National Assembly, in this case, CAMA. This was the position held by the Supreme Court in the case of *PRINCE ADEMOLU ODENEYE v. PRINCE DAVID OLU EFUNUGA*¹¹

To further buttress the above, we note that CAMA does not provide that the CAC has to approve the holding of AGM. Furthermore, the CAMA does not grant the CAC power to insist that it attends the AGMs of PLCs in whatever capacity. As stated earlier, Section 219 of CAMA clearly provides the categories of people required to receive notice to, and attend, AGMs. Moreover, CAMA prohibits any other person from receiving notices of, or attend, AGMs. If the CAC attends meeting of PLCs in whatever capacity, it must have been notified by the Company and such notification is illegal since it is contrary to Section 219 of CAMA.

In relation to the issue of appointing proxies, Section 81 of CAMA is relevant. It provides thus:

"Every member shall, notwithstanding any provision in the articles, have a right to attend any general meeting of the Company and to speak and vote on any resolution before the meeting"

Every member of a company has the right to attend and vote at an AGM of the company.

CAC's attempt through the Guidelines, in restricting the right of a member to attend a general meeting, clearly infringes on the rights of a shareholder. The Guidelines have essentially banned shareholders from exercising their right as members of a company from attending a general meeting of the company and stripping the shareholders of their right to vote personally. Also, the provision of a list of people that the shareholders can appoint as proxies defeats the purpose of appointing a proxy in the first place. Proxies are representatives of their appointers and are meant to represent the interest of their appointers solely. How then can a shareholder be sure that the proxies imposed on it by the company, with the full support of the CAC, will adequately represent its interest?

Another issue which the Guidelines addressed, and which is contrary to the CAMA is the kind of businesses to be discussed at the AGM. Excluding special businesses from being conducted at an AGM is contrary to Section 214 of the CAMA.

Based on the above, it is therefore clear that the Guidelines are questionable and ultra vires the powers of the CAC and so they are void. In the case of *AMASIKE v THE REGISTRAR GENERAL, CAC & ANOR*¹², the Supreme Court held that

"A public body or authority invested with statutory powers must act within the law and take care not to exceed or abuse its power, it must keep within the limits of the authority committed to it. It must act in good faith and reasonably."

Section 16 of CAMA grants the Minister charged with responsibility for matters relating to trade, the power to make regulations generally for the purpose of CAMA. Even where the Minister makes regulations, the Minister will still be guided by the provisions of CAMA in making the regulations since under Nigerian law, a subsidiary legislation cannot amend an Act of the National Assembly.¹³

It should however be noted that Section 213 of CAMA grants the CAC the power to give directions as CAC thinks fit in calling or directing the calling of the AGM where a company has defaulted in holding its AGM. Such directions include modifying or supplementing the calling, holding and conducting of the meeting. This power can only be exercised after an application has been made to the CAC by any member of the company and the company has defaulted in holding its AGM within the timelines prescribed by CAMA. Therefore, it is arguable that rather than issuing the Guidelines which is ultra vires the CAC's power, the CAC should have patiently waited for member(s) of a company, that has defaulted in holding its AGM, to apply to it and in granting the member's application, make directions similar to the Guidelines.

Lastly, as it is trite that a legislation is void when it is ultra vires, it is our opinion that the Guidelines are void and of no effect. See *BARCLAYS BANK OF NIGERIA LTD v. ASHIRU & 2 ORS*¹⁴, where the Supreme Court established that a subordinate legislation would be primarily ultra vires if it is inconsistent with the substantive provisions of the statute by which the enabling power is conferred or by any other statute, and equally, if it purports to affect existing statutes expressly¹⁵.

The SEC's Response to the Holding of AGMs by Public Companies amidst the COVID-19 Pandemic

Unlike the CAC, the SEC refrained from issuing guidelines, rules or regulations regarding the holding of AGMs by PLCs during the COVID-19 pandemic. Rather the SEC, firstly, issued a circular titled "Circular to Capital Market Stakeholders on Covid-19" and dated March 24, 2020 (the "Circular 1")



16 Section 213 (1) of CAMA

17 Section 213 (1)(b) of CAMA

18 Section 223 of CAMA

Parts of the Circular 1 touching on AGMs provide inter alia that:

"Public companies are advised to take appropriate precautionary measures as recommended by the Federal and State Governments as well as the Nigerian Centre for Disease Control (NCDC) to ensure the safety of shareholders and participants at Annual General Meetings/Extra-Ordinary General Meetings and other meetings which may be held during the prevalence of the pandemic."

Also, the SEC issued another Circular titled "Circular to all Regulated Entities and the Market" and dated on March 31, 2020 ("**Circular 2**") where it stated, inter alia, that:

"Public companies who plan to conduct AGMs are required to ensure that the conduct of the meetings comply with the provisions of the Companies and Allied Matters Act, the Investments and Securities Act, the SEC Rules and Regulations, relevant government and health circulars and guidelines issued in this regard."

Both Circular 1 and Circular 2 refrained from giving guidelines or rules as to the conduct of AGMs by PLCs. The SEC was careful to require PLCs to comply with CAMA, ISA, SEC Rules and Regulations and other governmental circulars/regulations in relation to the conduct of their AGMs during the COVID-19 pandemic.

Conclusion

As laudable as the Guidelines are, they are detrimental to any company who implements them during the COVID-19 and any business undertaking in said AGMS would be void and the companies may be exposed to litigation from their shareholders.

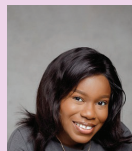
For a fact, it is difficult and nearly impossible to have a valid AGM in accordance with CAMA during the COVID-19 pandemic. Major states in Nigeria are on lockdown of movements and there

are restrictions on the number of people that can gather together in a place at a time. If the time between the last AGM of a company and the proposed AGM is less than fifteen (15) months,¹⁶ the company may postpone the AGM to a time after the lockdown so far, the postponed AGM is not after the fifteen (15) months' timeline. Alternatively, a company in default of holding an AGM within the timeline specified by CAMA, can make an application to the CAC requesting an extension of time within which an AGM can be held. The CAC can only grant an extension for three (3) months.¹⁷ In granting the extension, the CAC can give directions as it thinks fit in calling, convening and conducting of the AGM.

Another option is for a shareholder or a director entitled to vote at a meeting to apply to court for the AGM to be held in a manner that the court deems fit.¹⁸ Note that the sittings in Nigerian court have been suspended indefinitely except for urgent, time bound and essential cases. It is arguable that the holding of an AGM is strictly time bound as CAMA in Section 213 (3) envisages a situation where an AGM is not held in the year in which the default in holding the company's annual general meeting occurred, to be held in the following year.

The CAC should therefore take a cue from the SEC in encouraging companies in Nigeria to hold meetings in accordance with CAMA and observe the health circulars and regulations in relation to COVID-19. The foregoing would however require the CAC to first withdraw the Guidelines.

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