

# The Re-Establishment of the Corporate Affairs Commission under the Companies and Allied Matters Act of 2020 in Nigeria: A Critical Appraisal

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## Abstract

*The Companies and Allied Matters Act 2020 (CAMA 2020) re-established the Corporate Affairs Commission (CAC) as the apex regulatory agency for companies' operations. Never in the history of Nigeria has the legislation on companies' regulation and practice been criticised like CAMA 2020. Thus, this article examines the government agency created to implement CAMA 2020, the CAC. The article aims to show that the new CAC's board composition gives the impression that it is poised to make ease of doing business a reality, but a critical evaluation of the composition of the board as is presently constituted reveals that it may not achieve that purpose. The article asserts that until the board is enlarged to accommodate other regulatory agencies in the corporate sector, the CAC cannot become stronger than its predecessor, and effective performance of the enormous responsibilities bestowed on its shoulders by CAMA will not be fully achieved. The article concludes that there is a need to equip the CAC with more competent personnel from other related regulatory agencies on the governing board to ensure the success of the overall objectives of the Act.*

## Keywords

Companies and Allied Matters Act (CAMA); Corporate Affairs Commission (CAC); Federal Competition and Consumer Protection Act; Federal Regulation Services Coordinating Committee; National Financial Intelligence Unit; Pre-Action Notice; Securities and Exchange Commission (SEC)

## 1. Introduction

The Companies and Allied Matters Act, 2020 (CAMA 2020), signed into law on 7 August 2020, was passed essentially to ensure ease of doing business. The main thrust and philosophy behind its passage were to make Nigeria an investment hub and to ensure that Nigeria has a concrete platform that will ultimately attract more global investors. CAMA 2020 came into existence in line with this objective. Section 869(1) of CAMA 2020 repealed CAMA 1990, CAMA 2004, and other statutes hitherto passed to amend CAMA 1990.<sup>1</sup> CAMA 2004 was validated by virtue of the Revised Edition Laws of 2007, and it raised the question of whether it was the same as the 1990 Act. The view then was that

1 It was titled the Companies and Allied Matters Act, 2020.

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since the 2004 Act substantially re-enacted the 1990 Act, both laws were the same, and in any case, no provision in the 2004 Act repealed the 1990 Act. This position was judicially approved in *Corporate Affairs Commission v The Registered Trustees of Celestial Church of Christ*. The court concluded that it was better to do substantial justice rather than base its decision on mere technicalities.<sup>2</sup>

However, it may be argued that since the whole of Part XVII of CAMA 2020 was repealed and transferred to the Investments and Securities Act 1999 by section 263(1)(c), it may not be completely accepted that they are the same. Both positions are, however, of only historical significance now as section 869(1) has repealed both statutes by stating that, subject to the provisions of the section, the Companies and Allied Matters Act, 1990, the Companies and Allied Matters (Amendment) Act, 1990, the Companies and Allied Matters (Amendment) Act, 1991, the Companies and Allied Matters (Amendment) Act, 1992 and the Companies and Allied Matters (Amendment) Act, 1998 are repealed on the commencement of CAMA 2020.<sup>3</sup>

However, in 2009, in justifying the need to review the 1990 Act, the Nigerian Law Reform Commission noted that the amendment was necessary to make the provisions more effective by addressing identified loopholes as the provisions remain relevant, and most were found to be adequate. The Commission observed that the problem was mostly that of implementation and concluded that some CAMA provisions needed to be improved in light of recent developments.<sup>4</sup>

It must also be remembered that the Companies and Allied Matters Bill, 2016 (CAMB 2016), passed by the eighth National Assembly, was never implemented as the President did not assent to it. It was sent back to the ninth National Assembly to consider some observations on the Bill to have better legislation on company matters to enjoy global acceptance and make Nigeria a preferred choice and a safe haven for business investments. One such instance was business rescue proceedings, which were given brief recognition by CAMB 2016,<sup>5</sup> but have had their scope enlarged by CAMA 2020<sup>6</sup> and are referred to as company voluntary arrangements (CVAs). A CVA is an alternative arrangement available to companies facing financial challenges, which can conveniently structure the repayment

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2 2009 11 NWLR (Pt. 1151) 40. The court in effect held that there was no difference between the two laws.

3 Although CAMA 2004 was omitted, it is safe to conclude that it has been repealed since the title of the Act stated that it was repealed. In effect, CAMA 2020 has repealed both statutes.

4 After considering all the options available for the amendment of CAMA, the Nigerian Law Reform Commission concluded that it was better to use amending legislation to effect any further amendments to CAMA. See *Report on the Review of the Companies and Allied Matters Act*, Laws of the Federation of Nigeria 2004 (CAMA) at 2. However, the Review never saw the light of the day.

5 Under ss 388-402 of CAMB 2016, Okene, OVC and Otuturu, GG 'Moving Beyond Receivers and Managers in Nigeria: Lessons from the United Kingdom and Australia' (2016) 1 *LASU Law Journal* 1-22; Idigbe, AI 'The Nigerian Insolvency Law and the Rights of Creditors and Account Holders of International Securities vis-à-vis the Insolvent Intermediary' (Paper delivered at the Securities and Exchange Commission on UNIDROIT Workshop on International Securities held in Abuja, Nigeria, May 2009).

6 Now chapters 17 and 18, ss. 434-549 of CAMA 2020. The provisions of CAMA 2020 on CVAs are modelled primarily on the UK's law of insolvency.

of debts to their creditors. The passing of the Bill and the President's assent brought CAMA 2020 into law.

This article focuses on CAMA 2020 as it relates to the re-establishment of the Corporate Affairs Commission (CAC), especially its composition by virtue of sections 1 to 17. The article then draws some conclusions on these specific areas as highlighted.

## 2. Establishment of the Corporate Affairs Commission

### 2.1 Re-establishment of the Corporate Affairs Commission

The re-establishment and status of the CAC is clearly articulated under section 1 of CAMA 2020.<sup>7</sup> As the regulatory authority of companies' operations, the CAC underwent some substantial changes, like other areas under the Act. Section 1(1) of the Act establishes the CAC. Section 1(2) states that the CAC is a body corporate with perpetual succession and a common seal, capable of suing and being sued in its corporate name and acquiring, holding or disposing of any property, movable or immovable, to carry out its functions.<sup>8</sup>

The CAC, like its predecessor, is thus made a statutory corporation because it is created directly by an Act of Parliament. Section 1(2) merely repeated the former sub-section 1(1) of CAMA 1990. It becomes the apex regulatory authority of companies' operations in Nigeria, with section 8 stating its functions. In *Edison Automatic Industries Ltd v National Economic Reconstruction Fund*,<sup>9</sup> the court affirmed that corporate personality may be conferred on an organ of government or public body by a statute either expressly or by implication.

However, it is significant to relay that the CAC, as noted before, had already been established before this Act. Hence, it is submitted that the sub-section should have read: 'There is hereby re-established'.

The CAC came into existence in 1990 after it replaced the Department of Trade,<sup>10</sup> which was then a department under the Ministry of Trade. To indicate that it was in existence before this Act, it can be noted that the CAC has sued and has been sued by various organisations and individuals alike since its inception in 1990. A few examples will suffice. In *Corporate Affairs Commission v Mr Taiwo Aiyedun*,<sup>11</sup> the Court of Appeal stated that the Registrar-General of Companies was not mandated under section 36 of CAMA 1990 to apply to the court for a direction to register a name. In *Adekola Mustapha*

7 The CAC is similar to the Companies and Intellectual Property Commission (CIPC) of South Africa. See <<http://www.cipcregistration.co.za/>> accessed on 24 June 2021. It is an agency of the Department of Trade and Industry in South Africa. The CIPC was established by the Companies Act 71 of 2008, which came into effect on 1 May 2011, as a juristic person to function as an organ of state within the public administration, but as an institution outside the public service. The CIPC was created from the merger of the Companies and Intellectual Property Registration Office (CIPRO) and the Office of Company and Intellectual Property Enforcement (OCIPE).

8 Section 1(3): the headquarters of the Commission shall be situated in the Federal Capital Territory, Abuja, and there shall be established an office of the Commission in each State of the Federation.

9 (2009) 8 NWLR 535. See also *Adekoye v NSPMC* (2009) 5 NWLR 322.

10 Via the Companies and Allied Matters Act 1 for the first time. It has retained the name to date.

11 (2008) 18 NWLR (pt. 957) 391.

*v Corporate Affairs Commission*,<sup>12</sup> the appellant presented the names of three proposed companies to the respondent for registration or reservation. Still, the respondent refused to reserve the names on the ground that there were in existence registered companies with identical or similar names. The appellant, not satisfied with the respondent's decision, filed a writ of certiorari seeking an order quashing the CAC's position not to accept the names sent to it for reservation pursuant to section 32(1) CAMA 1990 and an order compelling it to accept the names. The Court of Appeal dismissed the appeal on the ground that the respondent was under a mandatory duty to refuse to register any company in Nigeria with a name identical or so resembling another company already registered. In *Bernard Amasike v The Registrar-General, Corporate Affairs Commission and Anor*,<sup>13</sup> the appellant filed an action, seeking, among other things, a declaration that the respondent's rejection of his proposed company names – 'Institute of Corporate Governance', 'Bureau of Corporate Governance' and 'Institute of Corporate Policy and Corporate Governance' – by designating same as 'Not Registrable' under Part C of CAMA – was improper, *ultra vires* and not in accordance with the provisions of the law. The appeal was dismissed.

Section 869(2) of CAMA 2020<sup>14</sup> provided a transitional provision to show that the CAC had already been established and existed before the new Act; hence there should be continuity.<sup>15</sup>

Although the above provision may pass for a transitional provision, it is submitted that, given proper scrutiny, it appears to be limited in scope, and the following should have been added to section 869 for emphasis and to complement the above provision:

The Minister can make transitional provisions to give full effect to the provisions of this Act and in the process ensure that all assets, funds, resources and other movable or immovable property vested in the Commission established by the CAMA 1990 are vested in the Commission re-established by the CAMA 2020.

Section 869, which is the saving and repealing provision of CAMA 2020, repeals CAMA 1990. Accordingly, in terms of section 869, all the laws repealed and amended under the old sections are repealed and amended, respectively.

In *Purification Techniques (Nigeria) Limited v Lagos State Bulk Purchasing Corporation*,<sup>16</sup> the court, in interpreting the implication of the phrase 'repeal of a statute', stated clearly that an existing right, liability or obligation remains unaffected by the repeal of a statute. This is the purpose of section 6(1) of the Interpretation Act. In *Ajaokuta Steel Company Limited, Minister of Power and Steel, Central Bank of Nigeria v Corporate Insurers Limited*,<sup>17</sup> a statutory corporation was defined as any body corporate established directly by or under any law in force in the Federation.

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12 (2006) 8 NWLR (pt. 1142) 35.

13 (2006) 3 NWLR (pt. 968) 462.

14 Similar to s 617(2) of CAMB 2016.

15 See also ss 869(3) and 358 of the Act.

16 (2001) 10 NWLR 86.

17 (2004) 16 NWLR (Pt. 369). On the meaning of 'Agency of Federal Government', the court stated that an agency of the Federal Government is defined to cover all organs established by law through which

However, to the extent that the new law changed the structure or composition of the then existing CAC, section 1(1) of CAMA 2020 may be technically correct or, at best, represent a half-truth.<sup>18</sup>

In terms of section 1(2) of CAMA 2020, the CAC shall be a body corporate with perpetual succession and a common seal and may sue and be sued in its corporate name. It is submitted that the words 'and may sue and be sued in its corporate name' are no longer necessary. It goes without saying that as it is a body corporate, all the incidences of corporate personality apply to it.

In *Ataguba and Company v Gura Nigeria Limited*,<sup>19</sup> the Supreme Court stated emphatically that, undoubtedly, for an action to be properly constituted so as to vest jurisdiction in the court to adjudicate on it, there must be a competent plaintiff and a competent defendant. As a general principle, only natural persons, human beings, and juristic or artificial persons such as body corporates are competent to sue or be sued. Consequently, where either of the parties is not a legal person, the action is liable to be struck out as incompetent.<sup>20</sup>

The law, however, recognises that apart from natural and juristic persons, some non-legal entities can sue and be sued. Thus, it has been held that no action can be brought by or against any party other than a natural person or persons unless such a party has been given – by statute, expressly or impliedly, or by the common law – either a legal persona under the name by which it sues or is sued. Those are corporation sole and aggregate, bodies incorporated by foreign law and quasi-corporations constituted by Act of Parliament, or a right to sue or be sued by that name such as partnerships, trade unions, friendly societies and foreign institutions authorised by their own law to sue and be sued, but not incorporated.<sup>21</sup>

Following from the above, the CAC as a statutory body can sue and be sued as such status has been conferred expressly by the statute. Under section 1(3), the CAC has the power to acquire, hold or dispose of any property, movable or immovable for the purpose of carrying out any of its functions under this Act. The same argument adduced for section 1(2) above also holds sway here. Once a body is incorporated, it becomes a juristic person. It is given. Although the objective of the law is to codify existing common-law

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the Federal Government carries out its functions. See *WRPC v Agbaje* (2005) 5 NWLR (Pt. 917) 63; *University of Abuja v Ologe* (1996) 4 NWLR (Pt. 445) 706; *NEPA v Edegbere* (2002) 18 NWLR (Pt. 798) 79; *Daniel O Ironbar (carrying on business under the name and style of Danielson Enterprises) v I. Cross River Basin and Rural Development Authority 2. Mrs Lucy Inyang Udoh (Deceased)* (2004) 2 NWLR (Pt. 857) 411. However, it should be clearly emphasised that the mere fact that a person is appointed by the Federal Government to carry out certain responsibilities on its behalf does not make such person an agent of the federal government. See *Cotecha Int Ltd v Churchgate Nig Ltd 2. Nigeria Customs Service* (2004) 11 NWLR at 129; *FMBN v Ottob* (2002) 9 NWLR (Pt. 773) 475.

18 It could, however, also be argued that a statute should be wholly construed by reference to other sections of the Act. To that extent, s 869 remains relevant to s 1(1) of the Act.

19 11 February 2005. See Babalola, *O Corporate Law & Practice* (2014) 19.

20 *Shitta v Ligali* (1941) 16 NLR 23; *Agbonmagbe Bank Ltd v General Manager GB Ollivant Ltd and Anor* (1961) 1 All NLR 116.

21 *Fawehinmi v NBA (No 2)* (1989) 2 NWLR (Pt. 105) 558; *Knight and Searle v Dove* (1964) 2 All ER 307 at 301; *Carlen (Nig. Ltd v Unijos)* (1994) 1 NWLR (Pt. 323) 631.

principles on company law, this particular situation is arguably no longer necessary and may therefore be regarded as superfluous. In this respect, the case of *Salomon v Laing*<sup>22</sup> is very relevant. *Salomon v Salomon and Coy Ltd*<sup>23</sup> and section 42 of CAMA 2020<sup>24</sup> further confirm this position. Section 43(1) of CAMA 2020<sup>25</sup> pushes the argument further by giving a corporation the full capacity power of a natural person.

### 3. Composition of the Corporate Affairs Commission

Section 2(1) establishes a governing board for the CAC, and the board is responsible for performing the functions of the CAC. Section 2(2) reconstitutes the board of the CAC, which retains the following members: the chairman, who the President appoints on the recommendation of the Minister; one representative of the business community;<sup>26</sup> a member of the legal profession; a representative of the Institute of Chartered Secretaries and Administrators; a representative of the Manufacturers Association of Nigeria; and a representative of the Securities and Exchange Commission not below the rank of a director or its equivalent.<sup>27</sup> Each representative of the Federal Ministries of Industry, Trade and Investment; Justice and Finance who shall not be below the rank of Director; and the Registrar-General of the Commission were clearly retained. However, a nominee of the accountancy profession, appointed by the Minister after consultation with professional bodies of accountants as established by Acts of the National Assembly, may pose a serious challenge. The provision will raise the question as to the body that will be represented on the board of the CAC: either the Institute of Chartered Accountants of Nigeria (ICAN) or the Association of Nigerian Accountants of Nigeria (ANAN), which are the two recognised professional bodies. The issue is which one of them should be given the first choice and whether the appointment should be a rotating one. It also raises the question of the likely event of when the National Assembly creates another professional accountancy body as to whether they would be considered for appointment.

The background to this provision dates back to 2009, during the Nigerian Law Reform Commission's review of CAMA when the Commission considered the memoranda submitted by certain accounting bodies. The Commission observed that only one accounting body was recognised by CAMA 1990 to perform some functions assigned under the Act. This was clearly due to the fact that when CAMA was promulgated in 1990, only one accounting body was established by an Act, namely, ICAN, but things have

22 1850 (12 Beau 339). Langdale MR stated that: 'a railway company incorporated by Act of Parliament is bound to apply all the monies and property of the company for the purposes directed and provided for by the Act and for no other purpose whatever.'

23 (1897) AC 22.

24 s 37 of CAMA; later s 36 of CAMA 2016.

25 s 38(1) of CAMA 1990.

26 The NLC representative has been removed; a representative of the engineering profession approved to be included in the board in terms of the Companies and Allied Matter (Amendment) Act 1991 did not appear either.

27 There is no form of reciprocity as the CAC is not a member of the board of the Securities and Exchange Commission, although both are members of the Financial Services Regulation Coordinating Committee (FSRCC) by virtue of s 43 of the Central Bank of Nigeria (Establishment) Act, which established the FSRCC.

changed since 1990. The Commission recommended that these bodies be recognised in CAMA, provided that an Act establishes them. One such accounting body is ANAN.<sup>28</sup>

It is submitted that the recommendation of the Nigerian Law Reform Commission, which is logical and reasonable, should have been implemented by allowing each professional accounting body to have its own representative on the board of the CAC so as to avoid needless controversy. This becomes more compelling in the sense of having more representatives on the board as soon as they are created in the foreseeable future. It will enable the CAC to tap from the wealth of experience of such accounting bodies. It must be emphasised that CAMA, ICAN and ANAN are all federal laws, and the possibility of the board being bloated by accountants will not arise in the near future. Therefore, the position of the Commission is clearly a progressive and sound one that should have been adopted by CAMA 2020.

Another addition to the board of the CAC is a nominee of the Nigerian Association of Small and Medium Enterprises.<sup>29</sup> The inclusion of a member from the Small and Medium Enterprises Development Agency of Nigeria (SMEDAN) on the board of the CAC has its origins in 2009, when SMEDAN, in its memorandum to the Nigerian Law Reform Commission in 2009, suggested among other things that it should be given a chapter in CAMA. This was because of its importance in the economy by providing support and incentives to small and medium enterprises. The composition of the CAC's board needed to include SMEDAN. It was argued that this would allow for matters concerning policy formulation and advocacy on the promotion, facilitation and development of micro, small and medium enterprises to be properly and promptly addressed by the CAC.<sup>30</sup> The inclusion of a nominee of SMEDAN is clearly a masterstroke as arguably no nation can develop its economy without small- and medium-scale enterprises.

A board member shall hold office for a term of three years and may be eligible for re-appointment for one further term of three years and no more.<sup>31</sup> This is in line with the view expressed that all public and private institutions must embrace a culture of succession. To achieve this, the government should provide appointments to important sensitive jobs for which several qualified candidates should be on a non-renewable contract basis.<sup>32</sup>

However, the Minister may, with the approval of the President, at any time remove any member of the board from office if the Minister believes that it is not in the interest of the CAC for the member to continue in office and shall notify the member in writing to that effect. It is submitted that the removed member may challenge this provision if he

28 The Commission considered these Acts and recommended that ANAN and any other such accounting body established by an Act be recognised by CAMA.

29 SMEDAN is joining the CAC's board for the first time, while a representative of the National Association of Small Scale Industries has been removed.

30 Because of this convincing argument, the Nigerian Law Reform Commission recommended that the board should include a nominee of SMEDAN. This submission makes it clear why a nominee is now on the board of the CAC.

31 Not being an *ex-officio* member.

32 Report of the Panel on the Review of the Nigerian Capital Market (Final Report) Federal Ministry of Finance (September 1996) at 18.

feels that the Minister's action or opinion was not exercised in good faith. Hence, the court is likely to have the last say where this is challenged, and the Minister will have to show good faith for this provision to be effective.

Members of the board, except the Registrar-General, are part-time members of the board, and a member of the board shall cease to hold office if he resigns his appointment as a member of the board by giving three months' written notice to the Minister; if he becomes of unsound mind or is incapable of discharging his duties; if he becomes bankrupt or has made arrangements with his creditors; if he is convicted of a felony or any offence involving fraud or dishonesty; if he is guilty of serious misconduct relating to his duties; or, in the case of a person who possesses a professional qualification, if he is disqualified or suspended from practising his profession in any part of Nigeria by order of any competent authority made in respect of him personally.

A vacancy will occur on the board if a member dies or is removed from office, or resigns from office or completes his tenure of office, or ceases to hold office as a result of insanity, bankruptcy, felony or dishonesty or where he is guilty of serious misconduct, or where, as a professional, he has been disqualified or suspended from practising his profession. A vacancy on the board shall be filled by the appointment of another person to the office as soon it is reasonably practicable after the occurrence of such vacancy. Where a vacancy on the board is created as a result of the death, removal or resignation of a member of the board, a replacement for the immediate past member shall be appointed to complete the unexpired term.

The challenge with the composition of the board of the CAC lies in the fact that it fails to include members of other government agencies that have been created in line with global best practices and that would have assisted in the effective performance of its enhanced role under the Act. Recent developments tend to emphasise the need for synergies between these agencies rather than them operating strictly independently. For instance, there should have been a representative from the Federal Competition and Consumer Protection Commission,<sup>33</sup> a representative from the National Financial Intelligence Unit,<sup>34</sup> a representative from the Nigerian Communication Commission,<sup>35</sup>

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33 The Federal Competition and Consumer Protection Act 2018 established the Federal Competition and Consumer Protection Commission and the Competition and Consumer Protection Tribunal for the promotion of competition in the Nigerian markets at all levels by eliminating monopolies, prohibiting abuse of a dominant market position, and penalising other restrictive trade and business practices.

34 The Nigerian Financial Intelligence Unit (NFIU) is the central national agency responsible for the receipt of disclosures from reporting organisations, the analysis of these disclosures, and the production of intelligence for dissemination to competent authorities. The NFIU is an autonomous unit, located within the Central Bank of Nigeria and the central coordinating body for the country's Anti-Money Laundering, Counter-Terrorist Financing and Counter-Proliferation Financing (AML/CFT/CPF) framework. See <<https://www.nfiu.gov.ng/Home/About>> accessed on 26 November 2020. The NFIU was formally established in 2004 and became operational in 2005 as a unit of the Economic and Financial Crimes Commission (EFCC). In 2018, the Nigerian Financial Intelligence Unit (Establishment) Act transformed the unit into an autonomous and independent agency located within the Central Bank of Nigeria.

35 The Nigerian Communications Commission (NCC) is the independent regulatory authority for the telecommunications industry in Nigeria. The NCC was created under Decree Number 75 by the

a representative from the Financial Reporting Council,<sup>36</sup> and a representative from academia.<sup>37</sup>

It could also be argued that the non-inclusion of members of religious organisations or charitable institutions has strengthened the argument that the provisions on incorporated trustees should not have been included in the Act, as obtained in other jurisdictions, especially the United Kingdom where an entirely different body regulates them.<sup>38</sup> This is clearly based on the fact that the CAC already has enough to regulate commercial enterprises and should not be troubled by charitable or religious organisations in a world where corporate investments are moving at an incredible pace as a result of globalisation.<sup>39</sup>

### 3.1 Role of the board

The board must review and provide general policy guidelines for performing the functions of the CAC in accordance with international commercial best practice; have general oversight of the administration of the CAC; review and approve the strategic plans of the CAC; receive and consider management reports and advise the Minister on the reports; determine the terms and conditions of service of employees of the CAC; fix the remuneration, allowances and benefits of employees of the CAC, in compliance with the National Salaries, Income and Wages Commission; ensure compliance with the provisions of CAMA 2020; and do such other things as are necessary to ensure the effective and efficient performance of the functions of the CAC.

Members of the board are paid such remuneration and allowances as the Minister may direct from time to time. The board is empowered to make standing orders regulating its proceedings. The chairman must preside at every meeting of the board, but, in his absence, the members present must elect one of them present to preside at the meeting. The quorum for meetings of the board is five. The board may appoint any of its officers to act as secretary at any of its meetings.

A member of the board who is directly interested in any company or enterprise, the affairs of which are being deliberated upon by the board, or is interested in any contract

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Federal Military Government of Nigeria on 24 November 1992. See <<http://www.ncc.gov.ng>> accessed on 26 November 2020.

36 The Financial Reporting Council of Nigeria, formerly the Nigerian Accounting Standards Board, is an organisation charged with setting accounting standards in Nigeria. See <<http://www.financialreportingcouncil.gov.ng>> accessed on 26 November 2020. See now the Financial Reporting Council of Nigeria Act 2011.

37 This would enable the research department of the CAC to thrive and to keep abreast of global best practices on the corporate regime.

38 See the Charitable Commission Act 2011 at <<https://www.legislation.gov.uk/ukpga/2011/25/contents/enacted>> accessed on 26 November 2020.

39 Indeed, the inclusion of religious bodies for regulation by CAMA 2020 unfortunately led to heated debates and arguments, with some concluding that CAMA 2020 should be repealed, without considering the major aim of the Act, which is to ensure ease of doing business. If they had been separated, it is submitted that CAMA 2020 would have represented one of the best pieces of legislation ever produced in Nigeria for, in truth, attention has been diverted from the objective of the Act, which is very unfortunate. Surely you cannot throw out the baby with the bathwater. There is no doubt that CAMA 2020 was drafted in compliance with global standards. See ss 1-822 of CAMA 2020. See also ss 851-870 of CAMA 2020.

made or proposed to be made by the board shall, as soon as possible after the relevant facts have come to his knowledge, disclose the nature of his interest at a meeting of the board. Such disclosure must be recorded in the minutes of the board, and the member must not take part, after such disclosure, in any deliberation or decision of the board with regard to the subject matter in respect of which his interest is disclosed. He must be excluded for the purpose of constituting a quorum of the board for any such deliberation or decision.<sup>40</sup>

### 3.2 Functions of the Corporate Affairs Commission

The CAC must administer the Act, including the registration, regulation and supervision of the formation, incorporation, management, striking off and winding up of companies; business names, management and removal of names from the register; and the formation, incorporation, management and dissolution of incorporated trustees.

The CAC must also establish and maintain a companies registry and office in each State of the Federation, suitably and adequately equipped to perform its functions under the Act or any other law; arrange or conduct an investigation into the affairs of any company, incorporated trustees or business names, where the interest of shareholders, members, partners or public so demands; ensure compliance by companies, business names and incorporated trustees with the provisions of the Act and such other regulations as may be made by the CAC; perform such other functions as may be specified in the Act or any other law; and undertake such other activities as are necessary or expedient to give full effect to the provisions of the Act.<sup>41</sup>

The functions of the CAC must not, however, affect the powers, duties or jurisdiction of the Securities and Exchange Commission<sup>42</sup> under the Investments and Securities Act or its amendment or re-enactment.

It can be argued that the provision which makes the functions of the CAC not to affect that of SEC in relation to investment matters should have been deleted entirely

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40 This is in consonance with the common-law rule that a person must not allow his personal interest to conflict with his fiduciary duty. See *Bray v Ford* [1896] AC 44.

41 The functions of the CIPC in South Africa are clearly articulated as: the registration of companies, co-operatives and intellectual property rights (trademarks, patents, designs and copyright) and the maintenance thereof; to disclose information on its business registers; to promote education and awareness of company law and intellectual property law; to promote compliance with relevant legislation; to monitor compliance with, and contraventions of financial reporting standards, and make recommendations thereto to the Financial Reporting Standards Council (FRSC); licensing of business rescue practitioners; and reporting, researching and advising the Minister on matters of national policy relating to company and intellectual property law. See Companies and Intellectual Property Commission (CIPC): eServices at <eservices.cipc.co.za> accessed on 23 August 2017.

42 The Securities and Exchange Commission is the government agency that regulates the securities industry. It is known as the Securities and Investments Board in the United Kingdom. It is referred to as the Securities Commission (SC) in New Zealand, and is a statutory body responsible for monitoring standards and promoting investment. In South Africa, the Financial Services Board (FSB) was the financial regulatory agency responsible for the non-banking financial services industry in South Africa from 1990 to 2018. It was an independent body which had a mandate to supervise and regulate the non-banking financial services industry in the public interest. This included the regulation of the biggest stock exchange in Africa, the Johannesburg Stock Exchange. From 1 April 2018 the FSB was split into prudential and market conduct regulators: the Financial Sector Conduct Authority (FSCA) and the Prudential Authority (PA).

as it probably serves no useful purpose.<sup>43</sup> In effect, it is superfluous as the provisions on securities law were removed by the Investments and Securities Act of 1999.<sup>44</sup> CAMB 2016, in line with the above argument, expressly removed it, but interestingly it resurfaced under CAMA 2020, which raises the question as to why it was brought back. Part XVII of CAMA 1990 has always been within the exclusive jurisdiction of the Securities and Exchange Commission, which is the apex regulatory body of the capital market. It must be remembered that when CAMA 1990 was being considered, the capital market had not really become prominent, but the legislation on it was developing gradually. Since the laws needed for its development were related to CAMA, the legislature, in its wisdom, saw nothing wrong in extending the reforms to capital market regulation and development. Hence, the whole of Part XVII of CAMA 1990 was devoted to this.<sup>45</sup> This brings to the fore the submission of a learned writer where he opined forcefully that the time has come for both laws to go their separate ways so as to give room for liberalisation when raising capital from the public and that raising capital from the securities market should not be the exclusive preserve of the public companies alone.<sup>46</sup> However, our view is that this argument about the separation of both laws cannot be sustained for now as some provisions of CAMA 2020 still refer to the provisions of the Investments and Securities Act. In effect, they clearly complement each other.<sup>47</sup>

### 3.3 The Registrar-General

The CAC is mandated to appoint a Registrar-General<sup>48</sup> qualified to practise as a legal practitioner in Nigeria, has been so qualified for at least 10 years, and, in addition, has had experience in company law practice or administration for at least eight years. The Registrar-General is the Chief Executive of the CAC and, subject to the directives of the board, shall hold office on such terms and conditions as may be specified in his letter of appointment, and other terms and conditions as may be determined by the board with the approval of the President. The Registrar-General is also the accounting officer for the purpose of controlling and disbursing amounts from the Fund established by the Act.

43 That is, the provision of s 8(2) of CAMA 2020.

44 Specifically, Part XVII of CAMA 1990. These provisions have also (after the repeal of the Investments and Securities Act 1999) been transferred to ss 67-196 of ISA 2007.

45 That was why the former s 7(1) of CAMA 1990 was made subject to s 541, which relates to the functions of the SEC. Section 7(2) of CAMA 2020, which is the same as s 8(2) above, should therefore, arguably, have been completely deleted. Interestingly CAMB 2016 rectified this position by deleting the whole of s 7(2) and by deleting the underlined words since the Investments and Securities Act 2007 is now a separate law.

46 See Nnonna, CG 'The Province of Securities Law Defined: Streamlining the Interface of the Companies and Allied Matters Act with the Investments and Securities Act' (2011) *Nigerian Law Reform Journal* 45-78. He argued forcefully that if other forms of business association are allowed access into the capital market to raise funds and not only public companies it will encourage more capital inflows into the securities market.

47 See ss 36(4), 404(3), 149(2), 868 of CAMA 2020.

48 He is referred to as the Commissioner in South Africa. See <<http://www.cipc.co.za>> accessed on 24 June 2021.

#### 4. Pre-action notice

An innovation of CAMA 2020 is introducing the concept of the pre-action notice for the first time in the history of Nigerian company law statutes. It has hitherto appeared in the statutes setting up other regulatory agencies like the Central Bank of Nigeria and the Securities and Exchange Commission. A pre-action notice provides that a suit shall not be commenced against the CAC before the expiration of 30 days after a written notice of intention to commence the suit is served upon the CAC by the intending plaintiff or his agent, stating the cause of action, the particulars of the claim, the name and place of abode of the intending plaintiff, and the relief sought.

In *Nonye v Anyichie*,<sup>49</sup> it was held that non-compliance with the requirement of a pre-action notice does not abrogate the right of a plaintiff to approach the court or defeat his cause of action. Suppose the subject matter is within the jurisdiction of the court. In that case, failure on the part of a plaintiff to serve a pre-action notice on the defendant gives the defendant a private right to insist on such notice before the plaintiff may approach the court, pending compliance with the pre-condition.<sup>50</sup> The defence of non-service of a pre-action notice, like any similar defence touching on the jurisdiction, should preferably be raised soon after the defendant is served with the writ of summons; it could also be pleaded in the statement of defence. The effect of non-service of a pre-action notice, where it is required by statute, is only an irregularity that renders an action incompetent. The irregularity can be waived by a defendant who fails to raise it either by motion or plead it in the statement of defence. However, if a defendant refuses to waive it and raises it, then the issue becomes a condition precedent that must be met before the court can exercise its jurisdiction.<sup>51</sup> The introduction of the pre-action notice is a welcome development as it may promote the speedy administration of justice between the aggrieved party and the CAC since the matter may be settled at that stage without recourse to the courts.

#### 5. Conclusion

CAMA 2020 is a welcome development, and it is expected that its operation will enjoy a seamless implementation. However, for the Act to achieve its objective of ease of doing business in Nigeria, especially in terms of attracting foreign investors, the composition of the board needs to be reviewed to accommodate the representatives of the agencies and institutions suggested. This will make the CAC a one-stop agency for investors, as any approval can be initiated by the CAC and concluded by a representative of the relevant agency on the CAC board, which will clearly speed up the process serve as a confidence booster for such investors. The above observations in respect of the composition of the board are likely to provoke further debate as to which agencies or institutions should be on

49 [2005] 2 NWLR 631.

50 *Barclays Bank Ltd v CBN* (1976) 6 SC 175; *Okotie-Eboh v Okotie-Eboh* (1986) 1 NWLR (Pt. 16) 264; *Ijebu-ode Local Govt v Adedeji Balogun & Co Ltd* (1991) 1 NWLR (Pt. 166) 136; *Eze v Ikechukwu* (2002) 18 NWLR (Pt. 799) 348.

51 *Katsina Local Authority v Makudawa* (1971) 1 NMLR 100.

the board of the CAC and may constitute a major discourse in the future amendment of the Act since legislating is a continuous process.

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