

The Role of Corporate Affairs Commission in Corporate Governance Oversight in Nigeria

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Abstract

The Corporate Affairs Commission (CAC) is charged with the mandate of administering the company law of Nigeria, i.e., the Companies and Allied Matters Act (Cap. C20), LFN 2004. The ultimate function of CAC is therefore to ensure accountability regimes in Nigerian public and private companies, and, by implication, fight corporate corruption and promote corporate probity. However, the pervading business culture in Nigeria do not strongly lean towards corporate probity. Thus, against a review of the meaning corporate governance and its underlying grids, this paper critiques the role of the CAC in the realm of corporate governance in Nigeria with particular emphasis on formation of companies, company management and protection of shareholder interest.

Keywords: Corporate Governance, Corporate Affairs Commission, Company Law, Nigeria

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Introduction

Were it that the corporate scandals of Enron, WorldCom, Parmalat, Lehman Brothers, General Motors and their ilk that made history in the US and the West had not happened^[1], the prevailing business culture in Nigeria, on its own right, would have triggered the ongoing concern with corporate probity^[2]. In Nigeria, corruption and underhand deals have held captive the entire processes associated with company formation and subsequent management^[3, 4]. Olaleye-Oruene^[5] say that it is a cultural thing with colonial antecedents. However it is, corruption has a percolative property^[6] and can easily normalise and become the norm^[7, 8]. It is virtually everywhere: in procurement^[9], in the telecoms sector^[10], in the civil service^[11], and even in the judicial system of the country^[12-14]. The concern of this paper is on corruption in the formation and management of companies in Nigeria.

It has been argued that doing business in Nigeria has become more and more expensive because of the prevailing culture of corruption. While the ranking of Nigeria has improved over the years on the World Bank's global ease of doing business scale, thanks to Buhari's uncompromising stance on corruption, Nigeria's ease of doing business score is barely average (56.9), the country coming 131 out of 190 countries^[15]. Ntongho^[16] has shown that prevailing cultural practices more often supersede even statutory provisions designed to bring about changes in the way companies are managed. Thus, where an inappropriate culture holds sway and becomes normative, people will go with the normative flow and act inappropriately. Because illegality provides a competitive advantage, many will unquestionably take recourse to it without the least hesitation^[17]. In this kind of corporate environment, bringing sanity and probity to business practices necessitates the intervention of regulatory authorities.

In Nigeria, various attempts have been made to ensure that companies are directed and controlled based on attaining the interest of the shareholders and other stakeholders. The bottom line is to ensure accountability in the management of public and private companies in

Nigeria. There are various sectoral codes for corporate governance in Nigeria. They include Code of Corporate Governance for the Telecommunication Industry 2016, issued by the Nigerian Communications Commission (replaced 2014 NCC Code); Code of Corporate Governance for Banks and Discount Houses in Nigeria 2014 issued by the Central Bank of Nigeria (replaced 2006 CBN Code); Code of Corporate Governance for Public Companies in Nigeria 2011 issued by the Securities and Exchange Commission (replaced 2003 SEC Code); Code of Good Corporate Governance for Insurance Industry in Nigeria 2009 issued by the National Insurance Commission; and Code of Corporate Governance for Licensed Pension Fund Operators 2008 issued by the National Pension Commission. To avoid the conflict such multiplicity of codes is bound to generate^[18], the Financial Reporting Council of Nigeria (FRCN) issued a general code (the *Nigerian Code of Corporate Governance 2018*), suspending all other existing codes. FRCN Code seeks to "institutionalise corporate governance best practices in Nigerian companies"^[19]. This FRCN Code settles the observation by some scholars that Nigeria lacks a single harmonised code^[20].

The FRCN Code was issued pursuant to the powers conferred on the FRCN by Sections 11c and 51c of the Financial Reporting Council of Nigeria Act No. 6, 2011: namely, to ensure good corporate governance practices in the public and private sectors of the Nigerian economy and to issue the code of corporate governance and guidelines. However, in contradistinction to the sectoral codes to which compliance is voluntary, compliance to the FRCN is mandatory and has the force of law. Deviations from the Code attracts "appropriate sanctions"^[19].

From the above, we can see that in regulating corporate governance in Nigeria, three institutions play key roles: namely, the Securities and Exchange Commission (SEC), Corporate Affairs Commission (CAC), and Central Bank of Nigeria (CBN)^[21]. This paper seeks to examine the role played by CAC in regulating corporate governance practices in Nigeria, with particular emphasis on its function of administering the



subsisting company law, i.e., the Companies and Allied Matters Act (Cap. C20), LFN 2004. It is, however, germane to this discourse to review the literature on the concept of corporate governance.

Corporate Governance

Extant definitions of corporate governance can be broadly classified into two: the narrow and the broad perspectives^[22]. The broad conception sees corporate governance in terms of issues relating to institution, legal and capacity building as well as the rule of law (This is where the role of CAC is more pronounced); the narrow perspective conceives corporate governance as concerned with shareholder protection and management control (There is the regulation dominance of SEC in this sphere). A good sample of the narrow appreciation of corporate governance is given by Nganga, Jain and Artivor^[23]. They define it as a set of mechanisms through which outside investors are protected against expropriation by insiders (e.g., managers) through outright theft of assets, transfer pricing, excessive executive compensation, entrenchment of inept management teams, diversion of funds to unsuitable projects that benefits one group of insiders, and others. The broader approach to corporate governance is basically concerned with the relationship between the internal governance mechanisms of corporations and society's conception of the scope of corporate accountability^[24].

In general, corporate governance is the system by which companies are directed and controlled. A legal perspective sees corporate governance "as measures that enable and ensure compliance with all applicable laws, rules, regulations, and standards"^[1]. It is thus consists of "processes, systems, practices and procedures, the formal and informal rules that govern institutions, the way these rules and regulations are applied and followed, the relationship that these rules and regulations determine or create and the nature of those relationships"^[25]. Corporate governance describes how companies ought to be run, directed and controlled. It is the set of instruments and mechanisms contractual, legal and market-deployed to ensure that corporate managers act to maximize shareholder value. It is about supervising and holding to account those who direct and control management. It concerns the respective roles of the shareholders as owners and the managers (director and other officers). It is about setting rules and procedures as to how the company is run. It is also about putting checks and balances in place to prevent abuses of authority and ensure the integrity of financial results.

The pertinent question here is: Does the foregoing discourse on the meaning of corporate governance reflect the functions and roles of Nigeria's Corporate Affairs Commission (CAC).

Corporate Governance Provision in CAMA (Cap. C20) LFN 2004

The Companies and Allied Matters Act (Cap. C20) LFN 2004 is the subsisting company law in Nigeria. The Companies and Allied Matters Act (Cap. C20), LFN 2004, as the is the subsisting company law in Nigeria, has an impressive array of forebears, including the Companies Ordinance (Amendment and Extension) Ordinance 1917, the Companies Ordinance 1922, the Companies Act of 1968, and the Companies and Allied Matters Decree, 1990. However, CAMA (Cap. C20) LFN 2004 will soon be repealed and replaced by a new company statute. The Bill for the new legislation, the Companies and Allied Matters Act (Repeal and Re-enactment) Bill^[26], was passed by the lower and upper chambers of the National Assembly of the Federal Republic of Nigeria on the May 15 2018 and January 17 2019, respectively^[27]. The CAMA Bill now awaits presidential assent to become the new company law in Nigeria.

CAMA (Cap. C20) LFN 2004 embraced the various common law principles and the doctrines of equity as they relate to company practice^[28]. The provisions CAMA (Cap. C20) LFN 2004 virtually cover all the basic mechanisms of corporate governance, including disclosure and transparency issues, minority shareholder rights and oversight management^[22]. For example, the combined effect of sections 38, 39, 40, 68 and 69 of CAMA (Cap. C20) LFN 2004 give

protection to company shareholders as well as outside creditors against the company managers and promoters. Notwithstanding these and other provisions of CAMA (Cap. C20) LFN 2004 pertaining to corporate governance, Akpotaire raised the question of whether the provisions are exhaustive as far as regulating the modern company in Nigeria is concerned^[29].

Brief highlights on the provisions of CAMA (Cap. C20) LFN 2004 touching on some of the mechanism for orchestrating corporate governance are given in the following sections.

Disclosure and Transparency Issues

The provisions of CAMA (Cap. C20) LFN 2004 effectively require company directors to prepare and report to shareholders financial statements reflecting the true and fair view of the company during financial year. In addition, information on director's compensations, etc as well as interests in company transactions are required to be disclosed. It is also a requirement of transparency that companies appoint auditors, with stringent procedures provided for in CAMA (Cap. C20) LFN 2004 for the appointment of such auditors. CAMA (CAP. C20) LFN 2004 also has provisions for equity ownership disclosure. The Act requires that a register of ownership interest and values be kept and updated and be made known to all shareholder. High director's compensation must be made public; also subject to disclosure are the identity and background of directors and senior managers and the relationship between them as well as disclosures on transactions on loans, quasi-loans, and other dealings that favour directors and connected persons ^[22].

Minority Shareholder Rights

The CAMA (CAP. C20) LFN 2004 also makes provisions for the protection of minority against illegal and oppressive conduct or "against tyranny of the majority"^[22]. A minority member of a company can initiate court action to stop directors of the company from committing fraud against him/her or the company, or where undue advantage is given to majority shareholders, or where the directors appropriate to themselves company contracts, or where they make questionable gifts of company property to others, or where the directors benefited themselves at the expense of the company, or where there is an abuse or misuse of power by the majority^[29, 30]. Oyejide and Soyibo^[22] discussed the protections CAMA (Cap. C20) LFN 2004 offered minority member to include the right in meeting participation, secure the share registration of minority shareholders and the ability to transfer ownership and enforcement of rights.

Oversight Management

The CAMA (CAP. C20) LFN 2004 makes comprehensive provisions for prudent management of shareholders assets by, for example, legislating on shareholders meetings which have supervising functions over company directors; on financial accounts of companies which must be certified by external auditors; on annual returns to be rendered to CAC, SEC, CBN, NAICOM, etc^[31]. In addition, CAMA (CAP. C20) LFN 2004 legislated for Audit Committee in public companies and these committees serve as overseers for the audit function in the company^[22]. Crucially, the CAMA also legislated liabilities and sanctions for directors who fail to perform. For example, section 348 of CAMA (CAP. C20) LFN 2004 prescribes the penalty for each director of a company that lays a faulty financial statement before any meeting of shareholders; section 503 prescribes penalty for falsification of company books; section 504 prescribes the liability for not keeping proper accounts; section 507 prescribes the power of law courts to assess damages against delinquent directors while the prosecution of delinquent offices and members of the company is provided for in section 508 of CAMA (Cap. C20) LFN 2004.

The foregoing highlights on the provisions of CAMA (CAP. C20) LFN 2004 touching on issues of corporate governance are indeed impressive. However, what agitates the mind of legal experts^[29, 32-34] is the ability of CAC to sanction violators of the Act's provisions. This brings us to the role expected to be played by CAC in corporate governance processes in Nigeria.



CAC and Corporate Governance in Nigeria

There are various institutions in Nigeria that statutorily have powers to regulate corporate governance practices. They include the Securities and Exchange Commission as regular of capital markets; the Central Bank of Nigeria as regulator of financial institutions; Nigerian Insurance Commission with overseas insurance companies and Nigeria Communication Commission which regulate telecommunication companies^[21]. However, the CAC is the regulatory authority of companies in Nigeria^[35]. CAC powers to this end are provided for in section 7 of CAMA (CAP. C20) LFN 2004, where it is charged with the function of administering Nigeria's company law. But who is the Corporate Affairs Commission?

Dada^[28] summarises CAC sections 1, 2 and 3 of CAMA (CAP. C20) LFN 2004 in defining CAC. He states that CAC is "established as a body corporate with perpetual succession and common seal; can be sued and sue in its name; can acquire or hold interest in movable or immovable properties; and is headquartered at Abuja, with branches in states of the federation. Section 7(1), subject to the ouster clauses 7(2) and 541, sets out the functions of the commission to include the following:

- a) Administer CAMA (CAP. C20) LFN 2004;
- b) Regulate and supervise the formation, incorporation, registration, management, and winding up of companies;
- c) Establish and maintain adequately equipped companies registry and offices in all states of the federation;
- d) Arrange or conduct investigations into the affairs of any company where the interests of the shareholders and public so demand;
- e) Give effect to all relevant laws pertaining to companies;
- f) Reform all other activities on which the efficacy of CAMA (CAP. C20) LFN 2004 depends.

The combined purport of the above functions confers on CAC wide ranging powers and roles in the corporate governance milieu of Nigeria. These powers are felt right from the birth of companies as legal persons to their death (winding up). The apparent goals of the CAC are three-fold:

- a) To ensure that companies are formed according to the requirements of company law;
- b) To ensure that companies are run, managed, directed and controlled prudently; and
- c) The interest of shareholders and other stakeholders are protected and advanced in fairness.

These goals are at the heart of corporate governance and represent the metrics by which corporate governance best practices are measured. Let's examine these goals one after the other in the light of the requirements for good corporate governance^[36] as discussed earlier in this paper.

Formation of Companies

CAC is the sole institution responsible for midwifing companies in Nigeria. Its role in corporate governance begins here. Where it registers toxic companies, or bogus companies, or armchair companies, the stage is set for corporate scandals. Hence, the CAC is in a position to pre-empt corporate rapacity by (i) registering and incorporating companies that show concrete evidence of viability and probity and (ii) de-registering companies that are found to be mere conduits for the perpetration of fraud. Akpotaire^[29] reported that in 1996, the CAC had deregistered some companies found wanting on various counts.

Although CAMA (CAP. C20) LFN 2004 has made the incorporation of companies much more easier than was the case under the 1968 companies Act, a fact which some legal scholars are against^[29], the provisions under chapter 4 of CAMA (Cap. C20) LFN 2004, where efficiency administered, will serve well the ends of corporate governance in Nigeria as safeguards against the emergence of potentially fraudulent companies. For example, in addition to stating

the duties and liabilities of a company promoter, (section 62), CAMA (CAP. C20) LFN 2004 also makes the promoter a fiduciary to the company and compels him to observe good faith in all his activities with or on behalf of the company (section 61(1)) and prohibits his use of company information or property for secret personal profits (section 62(3)).

It is now theft to CAC to devise ways of ensuring that, in the process of registering a company, the promoters remain faithful to the provisions contained under chapter 4 of CAMA (CAP. C20) LFN 2004.

Company Management

The functions of CAC as outlined in section 7(1)a of CAMA (CAP. C20) LFN 2004 invests the commission with oversight powers on the management of companies. These powers are amplified in most of the provision of the Act. For example, section 370 mandated companies to render annual returns to the Commission, showing, in the case of a company having shares other than a small company, list of members, debenture holders, shares and debentures, past and present directors and secretaries, company indebtedness, etc. Compliance with such provisions (filing annual returns) was dismally low in Ireland (about 15 to 20 percent)^[17], it is worse in Nigeria today. This detracts from the overall corporate governance profile of the country. A remedy may be to create an office for corporate enforcement within the CAC but with powers enshrined in the CAMA (Cap. C20) LFN 2004 to police compliance with the provisions of the Act.

Protection of Stakeholder Interest

Whereas the provisions of CAMA (Cap. C20) LFN 2004 adequately takes care of the interests of all stakeholders, especially the shareholders and investing public, yet the role of CAC in seeing that these provisions are respected seems to be nebulous. The Commission decidedly has powers to investigate erring companies, but with companies having outsider (dispersed) ownership structure^[37], the oversight functions of CAC in this regard becomes difficult, notwithstanding the elaborate provisions on minority shareholder rights. Nevertheless, CAC should do well to partner with shareholder organisations, fund managers, corporate lawyers, chambers of commerce to find ways of further safeguarding the interests of all stakeholders and promoting best practices in corporate governance.

Conclusion

The Corporate Affairs Commission is the regulatory authority of companies in Nigeria and the Chief Administrator of company law. Its functions are wide and include oversight of companies. This place the Commission in a vantage position to play crucial roles in fostering best corporate governance practices in the country. However, reservations have been voiced on the Commission's ability to enforce in totality the 696 provisions and 17 schedules that makes up the primary company legislation in country (i.e. the Companies and Allied Matters Act (Cap. C20) LFN 2004). To this end, scholars have continued to proffer amendments to the Act with a view of improving its overall efficacy. In fact, some have called for a Nigerian version of the US Sabernes-Oxley Act of 2002, a legislation of revolutionary consequences in US Corporate governance practice. But for now, CAC seems to occupy a secondary place to the CBN and SEC in corporate governance regulation in Nigeria. Perhaps, the Companies and Allied Matters Act (Repeal and Re-enactment) Bill^[26] may change all this.

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