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THE CAMA 2020 SERIES

**Changes Introduced by the Companies and Allied Matters Act 2020
to Business Combinations**

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In this article, we examine the key changes and introductions in the Companies and Allied Matters Act 2020 (“**CAMA 2020**”) that affect business combination transactions.

Preemptive Rights

CAMA 2020 gives shareholders of a private company the liberty to include the following preemptive rights in their articles of association.

- (i) A shareholder of a private company who intends to transfer its shares to a third party is required to first offer the shares to the existing shareholders of the company.
- (ii) A shareholder or a group of shareholders of a private company acting together, shall not sell or agree to sell more than 50% of the shares in the company to a third party unless the third party has offered to buy all the shares of the existing shareholders on the same terms.
- (iii) A private company may not transfer assets with a value of more than 50% of the total assets of that company without the consent of all its shareholders. These restrictions are, however, subject to the provisions of the articles of that company.¹

CAMA 2020 has statutorily introduced the concepts of (i) a right of first offer, and (ii) a tag along right. These concepts are not new and were erstwhile introduced contractually in shareholders’ agreements between shareholders of companies. It is important that to note that the inclusion of these rights in the articles of association of private companies is not compulsory and is subject to the subscribers or shareholders of these private companies.

In addition to the foregoing optional preemptive rights for private companies, CAMA 2020 makes it mandatory for a company (whether private or public) to first offer shares to existing shareholders in the proportion of their respective shareholding where an allotment of shares is proposed². This preemptive right, unlike the one applicable to private companies alone, is mandatory. Ideally, this provision should not be applicable to public companies. It is practical and manageable for private companies. In the context of follow-on equity offerings by public companies, this provision will pose a challenge. Some options to address this challenge may be to exclude the applicability of this provision in the articles of the relevant company or have the company resolve in general meeting that the company may proceed with the offer without a first offer to the shareholders.³

Increase of Share Capital and Allotment of Shares

Before now, the share capital of a company used to be increased by an increase of the authorized share capital of that company and allotments were done out of the unissued share capital created

¹ Section 22 (2).

² Section 141(1).

³ These options may still be subject to scrutiny where a dissenting shareholder challenges the public offer in court.

under the increase of the authorized share capital. CAMA 2020 has abolished the “authorized share capital” concept.

The increase of the share capital of a company can only be done by an allotment of shares by the shareholders in general meeting by an ordinary resolution. This allows potential investors to know, at a glance, the number of shares issued in a company. As a consequence of the allotment of shares, the memorandum of association of that company will require an amendment to state the new issued share capital of that company.⁴

CAMA 2020 goes further to provide that the shareholders of a private company may delegate the power to allot shares to the directors of that company and leaving the power to allot shares of a public company in the hands of the shareholders and subject to the provisions of the Investments and Securities Act, 2007 (as amended).⁵ It is unlikely that the directors of a private company can exercise the power to allot shares of a private company. Section 127(1) of CAMA 2020 unequivocally provides that “a company having a share capital, may in general meeting and not otherwise, increase its issued share capital by the allotment of new shares of such amount as it considers expedient”. The reference to the phrase “may in general meeting and **not otherwise**” places the power to allot shares of a company, whether private or public, in the shareholders of the company.

Given the inconsistency noted above, business combination transactions that require the allotment of shares should be effected by a resolution of the shareholders in general meeting and not a resolution of the directors to ensure that the validity of the allotment is not questionable.

Another interesting introduction where a company’s share capital is increased is the accommodation of regulatory approvals for share capital increases. Where a regulated company requires the approval of its regulator to effect the increase of its share capital, CAMA 2020 requires the company to notify the Corporate Affairs Commission (“CAC”) of that fact and the time within which the CAC should be notified of the increase for registration purposes will be extended by a period of 10 days after the receipt of the regulatory approval by that company. However, where the regulatory approval is not obtained within 9 months from the date of the first notification to the CAC, the increase and the allotment thereunder becomes null and void. In share subscription transactions, it is important to take this 9-month period into consideration when determining the longstop date for that transaction.

Schemes

Before CAMA 2020, schemes between two or more companies could only be effected under the Investments and Securities Act 2007 (as amended), a securities law legislation. The relevant provisions under the securities law legislation were repealed by the Federal Competition and Consumer Protection Act, 2018. This repeal left a lacuna that required advisers to be more innovative where a scheme of merger between two or more companies was proposed⁶.

⁴ Sections 127(1), 127(8) and 128(1).

⁵ Section 149(1).

⁶ Companies effected schemes in this period by separate schemes of arrangement under section 539 of the repealed Companies and Allied Matters Act, 1990.

CAMA 2020 has addressed this lacuna and introduced provisions that allow two or more companies to undergo a joint scheme rather than separate schemes whether for mergers, arrangements, reconstructions or compromise, under the main company law legislation.⁷

In addition to schemes between 2 or more companies, CAMA 2020 provides for schemes within a company, whether between its shareholders or its creditors. Unlike a scheme under section 711, an internal scheme under section 715:

- (i) may be referred by the court to the Securities and Exchange Commission to determine its fairness;⁸ and
- (ii) takes effect only when a certified true copy of the order of the court is filed at the CAC.⁹ A scheme under section 711, takes effect as soon as the order of the court is made.¹⁰ The court may also make other orders apart from the order sanctioning the scheme. Section 711 deals with transfer of the whole or part of the undertaking of a company to another company.

The above differences under a scheme in section 715 appear to be a full replication of section 539 of the repealed Companies and Allied Matters Act, 1990. This replication did not take into cognizance the repeal of sections 118 to 128 of the Investments and Securities Act, 2007 and the consequent limitation of the powers of the Securities and Exchange Commission to mergers involving only public companies. In our view, the court should only be required to refer a scheme under section 715 of CAMA 2020 to the Securities and Exchange Commission where the company is public.

Mergers of Associations

Two or more associations, registered as incorporated trustees, with similar aims and objects may now merge under terms and conditions to be prescribed by the CAC.¹¹ The modalities for undertaking a merger of associations is unclear unlike the elaborate provisions of section 711 to 715 for companies.

The applicability of this provision will be dependent on the regulations that will be issued by the CAC pursuant to CAMA 2020.

Financial Assistance

CAMA 2020 has modified the rule on financial assistance. First, the definition of financial assistance is now *“a gift, guarantee, any form of credit or any other financial assistance given by a company, **the net assets of which are thereby reduced up to 50% or which has no net assets**”* By this definition, financial assistance by a company only occurs where the act by the company reduces its net assets by up to 50% or completely erodes the net assets. The rule on financial assistance is further clarified by CAMA 2020 by the introduction of the definition of “net assets” as *“the aggregate of the company’s assets less the aggregate of its liabilities”*.

⁷ Section 711.

⁸ Section 715(2).

⁹ Section 715(4).

¹⁰ Section 711(3).

¹¹ Section 849 of CAMA 2020

Also, the rule now has more exceptions than previously obtained such as any assistance arising from a scheme sanctioned by the order of the court.

While the rule on financial assistance is applicable to both private and public companies, CAMA 2020 allows private companies to give financial assistance where the acquisition of shares in question is an acquisition of shares in the company or if the private company is a subsidiary of another private company provided that (i) the net assets of the company are not reduced and where such net assets are reduced, the assistance is provided out of distributable profits, (ii) the assistance is approved by special resolution of the company in a general meeting, and (iii) the directors of the company or holding company make a statutory declaration before the financial assistance is given.¹²

Share Buyback and Treasury Shares

A limited liability company may now buyback its own shares including redeemable shares where it is permitted by its articles, a special resolution is passed by the shareholders approving the share buyback and additional conditions under CAMA 2020 are satisfied. Payment for the share buyback shall be made from the distributable profits of the company. The dissenting shareholding or any of the company's creditors may apply to court for an order cancelling the resolution.¹³

As a consequence of a share buyback allowance, CAMA 2020 has introduced treasury shares holding by companies. Treasury shares are shares in a company's issued share capital which the company holds in proprietary capacity and enjoys legal, beneficial and economic interest. Prior to the introduction of treasury shares, companies could only buy back their shares in very limited circumstances such as where redeemable preference shares have been issued. Then, the shares acquired by the company were required to be cancelled. However, the introduction of treasury shares allows a company to elect to hold acquired shares as treasury shares rather than cancelling them. One significant advantage of this is the reduction of future issuance costs where the company intends to transfer the treasury shares in the future whether to third parties or employees under an employee stock option.

A company may only hold a maximum of 15% of its issued shares as treasury shares provided that where a company buys back more than 15% of its issued share capital, the company is required to reissue, cancel or reissue and cancel such excess shares before the end of 12 months from the date of the share buyback. The company is not permitted to attend or vote at meetings and no dividend or distribution of company's assets shall be made to the company in respect of the treasury shares provided that allotment of fully paid bonus shares in respect of the treasury shares or payment of amount payable on redemption of the treasury shares may be made to the company. Also, where a company holds shares as treasury shares, the company shall be entered in the register of members as the member holding those shares.¹⁴ Treasury shares may, at any time, be transferred by the company.

In terms of business combination or acquisition transactions, the introduction of broad share buybacks and treasury shares allows short to medium term investors such as private equity and

¹² Section 183 of CAMA 2020

¹³ Sections 184, 185 and 186 of CAMA 2020

¹⁴ Sections 187 and 184(5) of CAMA 2020

venture capital investors to have an additional exit option. The company may step in to acquire shares where the investor is unable to exit from company through more traditional exit options.

Significant Control

Disclosure of significant control over an entity is now required for companies or limited liability partnerships. Persons with significant control are persons that (i) hold directly or indirectly at least 5% of the voting rights, shares or interest in a company or limited liability partnership, (ii) have the power to appoint or remove a majority of the board or partners of a limited liability partnership, or (iii) exercise significant influence over the activities of a company or limited liability partnership.¹⁵ These persons are required to make disclosures in writing to the company or limited liability partnership within 7 days of acquiring such control. The company or limited liability partnership is also required to (i) notify the CAC within 1 month of receipt of the information and (ii) state such information against the name of such persons in the register of members.

Also, a substantial shareholder in a public company is now a person that holds at least 5% of the unrestricted voting rights at any general meeting of the company. Where such substantial holding ceases, the company is required to notify the CAC within 14 days of receipt of notice of change in substantial shareholding.¹⁶

This provision has far reaching implications for direct and indirect acquisitions. The disclosure requirement is applicable to both direct and indirect shareholdings and therefore, requires ultimate beneficial holders to disclose their holding in the entity or their control over the company.

Execution of Transaction Documents

The modalities for the execution of transaction documents have been simplified in two significant ways:

- electronic signatures are now acceptable as valid means of authenticating transaction documents by an authorized signatory of a company; and
- a company may now execute a deed without affixing its common seal so long as it is executed on behalf of the company by a director and a secretary, or at least two directors, or a director in the presence of at least one witness who shall attest the signature.¹⁷

The recent practice by parties of executing transaction documents electronically is now fully backed under company law legislation in line with recent trends. This significantly simplifies the execution of transaction documents where the transaction is cross-border. This development may also be an attempt to align with the recent changes to the determination of when a document is brought into Nigeria under the Stamp Duties Act by the Finance Act, 2019. In our opinion, where documents are executed electronically, transmitted electronically and take effect

¹⁵ Section 868 of CAMA 2020

¹⁶ Sections 120 (5) and 121(3) of CAMA 2020

¹⁷ Sections 101 and 102 of CAMA 2020

electronically, there will be no ambiguity regarding when those documents are brought into Nigeria. As soon as they are accessible electronically in Nigeria, they will be deemed to have been brought into Nigeria.

Other Significant Changes

- **Valuation of Consideration other than Cash for Shares.** The requirement for an independent valuer to value consideration other than cash in a share subscription is now restricted to public companies.¹⁸ This limitation simplifies the method for valuing consideration other than cash in transactions that involves private companies. CAMA 2020 further defines “valuer” as “*an auditor, a valuer, surveyor, an engineer or accountant not being a person in the employment of the company nor an agent or associate of the company or any of its directors or officers.*”
- **Share Transfer Instruments.** Electronic share transfer instruments are now recognized for the purpose of recording share transfers by the company.¹⁹ This development is a clear consequence of the allowance for electronic execution of transaction documents for transfer of shares.
- **Irredeemable Preference Shares.** Companies limited by shares are now prohibited from issuing irredeemable preference shares.²⁰

Conclusion

As a general overview, CAMA 2020 has introduced concepts that will help develop novel structures in business combination transactions. These changes will especially (i) ease entrance and exit for private equity and venture capital investors into portfolio companies and (ii) allow companies to explore schemes to address any structuring issues that may arise.

¹⁸ Section 162 of CAMA 2020

¹⁹ Section 175(1) of CAMA 2020

²⁰ Section 147(1) of CAMA 2020

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