



IMPACT OF COVID-19 ON BOARD AND GENERAL MEETINGS OF COMPANIES IN NIGERIA

The Companies and Allied Matters Act, CAP C20, LFN 2004 (“CAMA”) imposes duties, responsibilities and statutory obligations on the members and directors of public and private companies regarding their Board of Directors meetings (“BOD”), Annual General Meeting (“AGM”) and other meetings.

However, the various social gathering prohibitions and stay at home orders made by the President of the Federal Republic of Nigeria during his 29th March, 2020 broadcast restricting movement in Lagos, Ogun and the Federal Capital Territory (“FCT”) Abuja , similar to measures previously announced by several State governors and the Minister of the FCT, will undoubtedly have a direct impact on the ability of public and private companies to convene the mandatory meetings prescribed by CAMA due to the corona virus pandemic (“COVID-19”).



For example, the mandatory notice period for holding an AGM under CAMA is a minimum of 21 clear days', which must be strictly complied with by public companies, while for a BOD meeting the notice period is 14 days. Thus, a notice issued on 20 March 2020 would have effectively been restricted by the COVID-19 related restrictions on movement announced by the President, since the venue to host the AGM or BOD meeting might no longer be easily accessible.

This article therefore seeks to explore the impact of COVID-19 on company meetings and recommend ways to ensure that the corporate governance procedures and formalities are complied with by members and directors of companies, notwithstanding necessary but drastic movement restrictions intended to curb the spread of the deadly virus.

With regard to BOD meetings, CAMA requires that Directors of both private and public companies should hold BOD meetings every year and the first BOD meeting should be held within six (6) months after a company is incorporated. Also, the Nigerian Code of Corporate Governance, 2018 ("Code") which is applicable to both public and private companies recommends that BOD meetings should be held at least once every quarter.

CAMA empowers the BOD of a company to meet together for the dispatch of business and to regulate their meetings as they deem fit. However, the law is silent about the location (whether physical or virtual) for holding of BOD meetings. In contrast, CAMA specifies that AGMs must be held in Nigeria. This has led to the practice of some BOD meetings taking place at venues outside Nigeria and also holding of BOD meetings via virtual media such as telephone or video conference.

Valid notice specifying the venue and details for such meetings will also be circulated to the entire BOD prior to the meeting and it is expected that such meeting should be held in accordance with the information contained in the notice. In view of the Federal government's restrictions which limit movement until 28 April 2020 except for emergencies or trips to the market to shop for food items and with the Lagos State government restrictions on public gatherings of not more than 20 persons in a venue, it will be extremely difficult for public or private companies within these locations to hold their BOD meetings during this period.

Companies will no doubt seek for alternatives to hold their BOD meetings within this period and the option of holding the BOD meetings through tele/video conference or other means of electronic communication will most likely be considered.

The reality is that a company cannot convene its BOD meetings virtually unless this is provided for in the company's Articles of Association ("**Articles**"). Over the years, private companies have largely altered their Articles with the consent of the Corporate Affairs Commission ("**CAC**") to allow for virtual BOD meetings. However, it would appear that no policy on the regulation of virtual BOD meetings has been introduced by the CAC, for example it is unclear how the mode of participation, confirmation of identity of directors and ascertaining continuous participation of the directors during the meetings will be determined.

This raises the question of whether all directors of a private or public company empowered by its Articles to hold virtual BOD meetings can attend the BOD meetings virtually without at least one director being physically present at the scheduled venue specified in the notice of meeting.

Although the laws of the jurisdiction where a company is situated may govern the manner in which virtual BOD meetings are held, it appears that the concept of a completely virtual BOD meeting has not yet been fully embraced globally. This is so because remote BOD meetings in most jurisdictions are still expected to be anchored to physical locations. Therefore, best practice seems to dictate that at least one director of the BOD be present at the physical venue of a BOD meeting stated on the notice of BOD meeting, whilst other directors may attend the meeting via tele/video conference. This for example, is the practice in the UK and the US and it curtails any dispute that may arise regarding the validity of the meeting and facilitates proof to the regulatory authority that the BOD meeting was in fact held as scheduled in the notice.

For instance, a situation may arise where the BOD meeting of a private company cannot be postponed after a valid notice of meeting has been circulated to members of the BOD and it is clearly foreseeable that on the date scheduled for the meeting, board members would be unable to access the meeting venue due to COVID-19 restrictions. If the company's Articles permit the holding of virtual meetings, in order to address the issue of a director being present at the notified physical venue of the meeting, a prudent solution will be to change the meeting venue to an alternate or more convenient venue (e.g. a director's residence or private office etc.) to enable at least one director to be physically present at the notified venue while others may attend the meeting virtually, in compliance with best practice. The change of venue may be effected by e-mail correspondence to the BOD members setting out details of the new address, pursuant to the broad powers conferred by CAMA on members of the BOD to regulate their meetings as they deem fit.

India is an example of a jurisdiction that has developed elaborate procedures and guidelines in its Companies Act and Rules, for the regulation of BOD meetings held either in person or virtually using video/audio visual means. The procedures and guidelines detail steps to be taken to establish that a virtual BOD meeting was held and that it was duly attended by members of the BOD. The guidelines require video/audio visual equipment deployed for virtual BOD meetings to have recording, recognition and data storage capabilities facilitating recognition of directors' participation in the meeting and recording/storage of the proceedings with the attendant date and time of the meeting. The notice convening such BOD meetings are required to state the option of attendance/participation by the directors at the meeting either in person or virtually, and there is no requirement for at least one director to be present at the notified meeting venue.

Indian procedures and guidelines on virtual BOD meetings are similar to those of other jurisdictions. They however differ from the regulations in the UK and the US in one material respect. They offer a solution to the dilemma of having at least one member of the BOD at the notified physical venue of a virtual BOD meeting when attendance at the notified physical venue of the meeting is difficult or impracticable, for example, due to COVID-19 restrictions. The guidelines stipulate that BOD meetings attended by all directors virtually (i.e. without any director present at the notified physical venue of the meeting) would be deemed to have been held at the notified physical venue for such meetings. In our view, the Indian example appears to be more in tune with current realities and it is recommended for adoption by the CAC in providing a more viable alternative to holding physical BOD meetings in Nigeria, particularly under extant COVID-19 restrictions.

On 15th April 2020, the Nigerian Stock Exchange ("NSE") published a set of guidelines titled, "Guidance on Companies' Virtual Board, Committee and Management Meetings" ("**Guidance**"). The Guidance was issued to guide Nigerian public companies quoted on the NSE in convening virtual meetings in view of the current uncertainties. It is recommended in the Guidance that virtual BOD meetings be transparent, efficient and meet the business and corporate governance needs of stakeholders. It is further recommended that the Articles (or Board, Committee and Management Charters or Terms of Reference) be amended to allow for virtual BOD meetings and provides steps to be adopted for such meetings to include: precise agenda; communication of meeting details timeously; acquiring necessary facilities and technical support to afford remote participants a considerably similar access as they would have had in person; and ensuring information security and data protection. These recommendations are useful considerations for virtual meetings that should be noted by the

CAC in developing much-needed guidelines for the regulation of virtual BOD meetings in Nigeria with a view to providing clarity on the foregoing issues.

Where it is impossible to hold a physical or virtual meeting of the BOD due to COVID-19 restrictions, companies may utilise the option of passing written resolutions in which decisions of the BOD are taken in the absence of a physical meeting. A written resolution must however be signed by all the directors of the company. This requirement presents a difficulty under COVID-19 restrictions of obtaining wet signatures from all the directors of the Company, particularly for public companies that may have numerous directors. Although the Evidence Act 2011 recognizes the use of electronic signatures and companies may want to utilize this in executing such resolutions, the CAC does not accept resolutions signed with electronic signatures, perhaps due to fraud.

The CAC's power to reject electronic signatures derives from section 5 (2) & (3) of the Companies Regulations 2012, which empowers it to determine the requirements for signatures to corporate documents. Unfortunately, the CAC's rejection of electronic signatures on resolutions will impose undue hardship on companies during the COVID-19 lockdown in Lagos and Ogun states and the FCT, Abuja, as they are unlikely to be able to secure wet signatures from their directors due to restrictions on movement.

It is therefore notable that Nigerian law provides a measure of relief to both private and public companies dealing with the foregoing issues during the COVID-19 lockdown, to wit: (i) urgent situations where the Articles of Association of a company does not expressly provide for virtual meetings and a physical meeting has been scheduled and cannot be postponed; (ii) it is impracticable for at least one director to be present at the notified venue of the meeting; and (iii) it would be impossible to obtain wet signatures of all the directors that attend a virtual meeting. Section 223 of CAMA provides that where it is impracticable to call a meeting of a company or of the BOD or to conduct such meetings in accordance the Articles or CAMA, an application may be made to the Federal High Court ("FHC"), by a director. Incidentally, this provision will also apply to general meetings where an application may similarly be made to the FHC by a member who is entitled to vote at general meetings discussed below, to order such meeting to be called, held and conducted in such manner as the court deems fit. By virtue of such order of the court, any meeting called, held and conducted accordingly, shall for all purposes be deemed to be a meeting of the company, or of the BOD duly called, held and conducted.

In the circumstances enumerated in the preceding paragraph, a company may take advantage of the foregoing provision to apply to the FHC by way of urgency, for an order of court: (i) converting a physical meeting into a virtual meeting; (ii) deeming a virtual meeting as having been held at the notified physical venue, regardless of the absence of the directors at such venue; (iii) directing that electronic signatures of directors shall be sufficient proof of due execution of the resolutions passed at the virtual meeting; and (iv) for all purposes, deeming such virtual meeting as a meeting of the company or the BOD, duly called, held and conducted. It is of course important to emphasise that such applications can only be brought before the FHC in urgent circumstances where the meeting in question cannot await the lifting of COVID-19 restrictions. It may be prudent to consider approaching FHC divisions in states where lockdown directives have not been imposed by State governments to ease logistics, in view of restrictions on movement in Lagos and Ogun states and the FCT, Abuja.

Therefore, we recommend that court ordered meetings should be considered by private and public companies during the COVID-19 lockdown as a means of holding and facilitating virtual meetings in urgent situations.

A company is also statutorily mandated to hold general meetings. General meetings are of 2 (two) types namely, the AGM and Extra-Ordinary General Meeting (“EGM”). The AGM and EGM are platforms at which the shareholders/members of a public or private companies may take collective decisions regarding certain matters which include appointment of directors, auditors, dividend payments, etc.

The essential difference between an AGM and EGM is that the business transacted at an AGM, as its ordinary business is clearly provided for in CAMA. Whereas, the EGM is convened for shareholders to deliberate and take decisions on matters of urgency (special business) that cannot be suspended until the AGM, especially if an AGM has already been held in that year.

Another difference between the AGM and EGM is that the EGM is not expressly required to be held in Nigeria.¹ It would therefore appear that attendance at an EGM need not be in person, if the company’s Articles allows for tele/video conferencing.

¹ S.216 of CAMA

In contrast, CAMA requires that every company (both public and private) should hold its AGM each year, subject to the requisite notice, in addition to any other meeting² of the members of the company. It however expressly prescribes that an AGM must be held in Nigeria.³ This also contrasts with a private company whose shareholders have the option of executing a consent to convene its AGM at shorter notice. All persons entitled to receive notice of the AGM (which includes all shareholders), who wish to attend in person are obligated to be physically present at the venue of the AGM held in Nigeria. The shareholders of both private and public companies who are unable to be physically present, can however elect proxies to represent them at the AGM⁴.

Following the limited gathering and movement restrictions made by the Federal and State Government in response to COVID -19, there are many instances of public companies that had scheduled their AGM to hold in March/April 2020, that were faced with some of the discussed challenges of violating government regulations. In order to ensure compliance with the initial restriction limiting human gathering of not more than 20 persons, the CAC by a public notice dated 26th March, 2020 issued guidelines on public companies holding AGMs. The guidelines allow public companies, with the CAC's consent, to hold its AGM in which the members can attend via proxy. Members are provided with a list of available persons (of not more than 20 (twenty) who may act as proxies to the members at such meeting. From the CAC's guidelines on nominating a proxy to attend AGMs during the period of COVID-19 restrictions, it is clear that the physical presence of persons at such AGM is compulsory. Therefore, convening an AGM, to be attended by shareholders/members virtually is not permissible under CAMA. It is noteworthy that several publicly listed companies, were recently given approval by the CAC to hold their AGM using the above CAC guidelines.

Still the regulations made pursuant to the directives by the President of the Federal Republic of Nigeria restricting all other than essential movement of persons, presents a further challenge to good corporate governance. This restriction means that companies cannot currently hold their AGM meetings in Lagos or Ogun States or in the FCT without infringing the Presidential directives. Therefore, all AGMs scheduled to hold within the period of restriction will need to be postponed. Public companies that are listed on the NSE, must however ensure that they file the necessary reports with the NSE in compliance with its rules.

² s.213 of CAMA

³ s.216 of CAMA

⁴ S. 230 of CAMA

Another pertinent question that arises at this point, is whether private companies, which are not affected by the said CAC guidelines, can convene their AGM virtually? In our view, CAMA does not empower Nigerian companies to do this and if private companies were to unilaterally disregard the provisions of CAMA on the ground that it has been adversely affected by COVID-19 restrictions, chaos would ultimately ensue.

In times like this, where there is an urgent need for a general meeting, companies may explore the use of EGMs, which may be attended virtually, provided the Articles of the relevant company has been altered to allow for meetings to be held by tele/video conferencing. The notice of EGM may be shortened by consent for private companies and the venue of meeting can be amended to an alternate or more convenient venue (i.e. a director's residence, private office etc.) to enable a director to attend physically while others can dial in virtually provided that the quorum of members is formed.

In addition to the EGM, private companies may also consider the option of passing a resolution for special business matters by written resolutions signed by all members of the company who are entitled to attend and vote. Written resolutions cannot be utilized for ordinary business which have been specifically identified as matters for an AGM. In respect of AGMs of UK companies, the Chartered Governance Institute which in collaboration with reputable law firms and the Financial Reporting Council UK, have provided guidance with suggestions on options for holding an AGM namely: adapting the basis on which the AGM is held; delaying the convening of AGM; postponing the AGM (if permitted under the Articles); adjourning the AGM; and conducting a hybrid AGM (if permitted under the company's Articles)⁵. This may be something that the CAC may find useful in issuing future guidelines.

In conclusion, considering the current COVID-19 restrictions on movement and the possibility of similar circumstances such as a curfew imposed under a state of emergency, we recommend that companies alter their Articles to allow the holding of BOD meetings and EGM's virtually, whilst also establishing clear internal policies and procedures guiding the holding of virtual meetings as soon as the Presidential directive imposing the COVID-19 lockdown is lifted. The option of court-ordered meetings is a useful alternative to be explored. We also recommend that the CAC provides regulations clearly permitting virtual meetings, deeming such meetings as having been held at the

⁵ Guidance about AGMs and Impact on COVID <https://www.icsa.org.uk/about-us/press-office/news-releases/guidance-about-agms-and-impact-of-covid-19-issued>

notified physical venue, and endorsing the use of electronic signatures on resolutions passed at virtual meetings. The foregoing is imperative as the use of technology will continue to play a vital role in the conduct of the affairs of companies and their businesses beyond COVID-19.

Ajumogobia & Okeke is a full service law firm specialising in Corporate & Commercial, Intellectual Property, Aviation and Energy Law.

This article was co-authored by the following and further request for information on company meetings can be forwarded to them:



Osarieme Edokpolo Anyamele

Associate

loedokpolo@ajumogobiaokeke.com



Oluwatosin Okunrinboye

Associate

ookunrinboye@ajumogobiaokeke.com



Anita Odukoya

Associate

aegbuabor@ajumogobiaokeke.com

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