An Appraisal of Corporate Investment Mechanisms Under the Nigerian Law

By
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Abstract
Undoubtedly, the economic situation of a country in addition to the line of business a company engages goes a long way to determine its corporate viability. When a company is in need of funds, it usually calls for public subscription of its shares, which funds it uses as capital. It then carries out its business and pays the profit in form of dividends to the investors who are known as the shareholders. Consequently, a dominant feature in developed economies is the simplified and flexible processes of incorporation and management of corporate entities which underscores the importance of creating an atmosphere that promotes ease of doing business and means of making strategic investments. It is for this reasons that the significance of the new Companies and Allied Matters Act, 2020 "(CAMA 2020)[1]" cannot be gain said. CAMA 2020 which repealed the Companies and Allied Matters Act 1990 introduced essential reforms in the regime of corporate investments which are geared towards whittling down regulatory hurdles in the corporate sector that will in turn boost local and foreign investments in Nigeria. It is noteworthy that a company is by law empowered to raise money for its undertakings, by either selling its shares or by direct debt finance, which is by approaching the financial institutions for loans to pursue its business plans mostly inform of debentures. The purpose of this paper is to examine the nature of corporate securities and legal regime of the various corporate investment mechanisms under the Nigeria law with a view to ascertain the current practices under the new law. The paper found that despite the seeming reform by the new CAMA, the 100% automation of the Corporate Affairs Commission processes in company registration in the face of the constant network challenges, and the increment of the minimum share capital thresholds in registering companies are clog in the wheel of ease of doing business and hence this paper recommend the reduction of same. It uses the black letter approach, relying particularly on the relevant provisions of the Companies and Allied Matters Act CAMA 2020, the Investment and Securities Act 2007 and decided judicial authorities.

Keywords: Corporate Investment, Corporate Securities, Corporate Entities, Corporate Viability

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1.1 Introduction

This paper examines the nature of corporate securities the various corporate investment mechanisms and the attendant rights and obligations of a corporate investor(s) in Nigeria, with a view to ascertaining the current practices under Nigerian law.

The law is fairly settled that upon incorporation, a company becomes a separate and distinct legal entity with enormous powers and obligations under the law. Consequently, it has the power of a natural person, can borrow money and hold property, sue and be sued in its corporate name and have perpetual succession[1]. It is in evitable that in running a company, capital is generally required. This capital can be raised through the issuance of securities in form of shares, debentures or stock as the case may be with ultimate reward in form of dividend to subscribers, as provided under section 349 of CAMA 2020.

A company limited by shares may be either a private or a public company. In Nigeria, only public limited companies can offer their shares for public subscription in the capital market[2], for the purpose of becoming shareholders thereby becoming part of the owners of the company. This can be done either privately during an initial public offering or through trading on the stock market amongst others. The acquisition of company shares or securities which constitute the corporate property of the company, vest in the 'acquisitor' or otherwise called 'investor' a bundle of corporate rights which are exercisable by the investor and also corresponding duties/obligations which can be enforced against the investor[3].

1.2 Nature of Company Securities

Securities are defined as stock, share, debentures, bonds or any other rights to receive dividends or interest[4]. While section 315 of Investment and Securities Act (ISA)[5] defined securities to include shares, debentures, options, bonds commodities.
Consequently, the commonest form of company security is the shares. A share is a unit of ownership interest in a company that makes up a company's share capital. It represents a portion of a company's share capital and confers certain rights and liabilities on the shareholder. The companies and Allied Matters Act (CAMA)[6] defines share as interest in a company's share capital of a member who is entitled to a share in the capital or income of such company. While in *Borland Trustee Vs Steel Brothers & Co. Ltd* [7]defined share" as

[1] Section 42-43 Companies and Allied Matters Act (CAMA) No. 124 2020, See also Lee Vs Lee Air Farming Ltd (1961) AC 13, CDBI Vs COBEC (Nig) Ltd (2004) 13 NWLR (pt 948) 376.
[2]NCS Ogbunanya, *Essentials of Corporate Law and Practice in Nigeria* (1st Edition, Nobena Publishers Ltd, Lagos, 2010) p. 58.
[3] Ibid,
[4]*Oxford Dictionary of Law* (6th Edition, Oxford University Press, 2006) 485
[5] Investment and Securities Act No. 29, 2007.
[6] S. 868(1), CAMA No. 124 2020
[7] (1901), Ch. 279

the interest of a shareholder in the company measured by a sum of money for the purpose of liability in the first place, and of interest in the second place, but also consisting of series of mutual covenants entered into by all shareholders inter-see…." Thus a share represents a unit of a bundle of right and liabilities which a shareholder has in a company, as provided by the term of issue and the articles of association of the company[8].

In Nigeria, where any corporate activity entails investment in securities in the Capital Market, it is regulated by the Investment and Securities Act (ISA) and administered by the Securities and Exchange Commission (SEC) as its apex regulatory body. Also all securities exchange or capital trade points must be registered with the Corporate Affairs Commission (CAC) and the Securities and Exchange Commission (SEC).

By the provisions of CAMA[9] definition of shares also includes stock, which is a bundle of shares. A company cannot issue stock directly unless it first issue shares, which it then converts into stock. Only shares which are fully paid-up can be converted into stock by ordinary resolution of the company at a general meeting[10]. Also, one of the cardinal changes brought by CAMA 2020 in relation to capital of a company is that the entire share capital of companies must be fully issued. Prior to this, in the replaced CAMA 1990[11] every company could have a prescribed authorized share capital out of which 25% must be issued to shareholders. The minimum authorized share capital for private & public companies was 10,000 & 500,000 respectively. The requirement to issue minimum of 25% authorized capital allowed companies to retain unissued shares for future allotments. Now by virtue of section 124 of CAMA 2020[12] companies must have minimum issued share capital of 100,000 for private & 2,000,000 for public companies and that no company shall have a share capital which is less than its minimum issued share capital and required that every company with unissued shares must not later than six (6) months from the commencement of CAMA 2020 issue shares up to an amount not below its minimum issued shares.[13]

1.3 How to Become a Corporate Investor

There are various ways by which a person can acquire the status of an investor in a public company. The various ways mentioned below have one characteristics i.e., they involve the acquisition of securities or an agreement or implied understanding to take up securities of

[8] I. J Essien, Becoming a Corporate Investor: Matters Arising, *Nasarawa State University Law Journal [2012*] Vol. 5 p. 129.
[9] S. 868 (1) CAMA, 2020.
[10]Essien (n. 8).
[11] CAMA 1990 Cap C20 LFN 2004.
[12] CAMA No. 124 2020
[13]CAMA come into force 1st January, 2021 and the deadline is now 30th of June, 2021 as provided by Rule 22 of Companies Regulation Rule, 2021.

the company. The legal consequence is as a result of the effect of statutory provisions on the status of such investor.

Thus, the focus is on securities subject to public acquisition, therefore public companies shall be the point of reference. It must be noted that the Securities and Exchange Commission (SEC), only exercises statutory regulatory powers over securities of public companies in Nigeria. A person may become an investor in any of the following ways:

i) By subscribing to the memorandum of association at incorporation of the of company
ii) By allotment of shares in the company.
iii) By obtaining directors qualification shares.
iv) By taking transfer of the company shares.
v) By transmission of shares.
vi) By subscribing to company's debenture.

i) **By Subscription to the Memorandum of Association at Incorporation**

In commencing the incorporation of a company, two or more persons sometimes the promoters of the company are required to endorse their respective names and signatures on the memorandum of association of the company with specific number of shares placed against their respective names. These persons are otherwise called 'subscribers'.

The term 'subscription' has been construed by the courts to mean an undertaking by an investor to pay for shares in cash[14] or by offering of assets in lieu of cash consideration. In *Akerhielm v. De Mare Co. Ltd,*[15] the Privy Council held that there is no effective difference between, on the one hand, issuing shares for cash and using that cash to purchase other assets, and on the other hand, buying assets directly by using shares for them. These two methods of subscription has the statutory backing of Section 138 of CAMA[16] wherein it is provided that a company may by its article permit payment for its shares to be made by valuable consideration. Where this is the case, Section 138 requires that the assets must be valued by an independent value so as to ensure that the value of the asset is proportionate to the price of the shares offered for the asset. By the provision of Section 140 of CAMA, valuable consideration also extends to services rendered to the company.[17]

One of the most important incidences of an investor subscribing to the shares of a company is an implied agreement to become a member of the company upon incorporation. This implied agreement has the statutory backing of Section 105 (1) of CAMA which provides *inter-alia* "the subscribers of the memorandum of the company shall be deemed to have

[14] Government Stock & Other Securities Ltd. VS Christopher(1956)1 NWLR 237
[15] (1956) AC 789
[16] CAMA No. 124 2020
[17] Ibid.

agreed to become members of the company and on its registration shall be entered as members in it register of members"[18]

This provision it is submitted makes subscribers automatic members of the company by operation of the law and is deemed to have taken the shares set against their respective names.[19] Their membership cannot be affected even where the company fails or omits to register their names in the register of members. The implication of this is that a subscriber cannot repudiate the agreement to take up the shares after incorporation. The only circumstances where repudiation may be permitted is where there is cogent evidence of mistake, ignorance, inducement or misrepresentation of facts on the part of the promoters, where the subscribers are not themselves the promoters of the company. This position is supported by the Supreme Court decision in *Ezeonwu v. Onyechi*[20] where it was held that endorsing a person's name and signature in the memorandum is merely a prima facie evidence of being a subscriber to it and which can be rebutted by introducing evidence to the contrary. Any contrary evidence of rebuttal it is submitted will vitiate the intention to contract which is an essential element in any mutual agreement. The investor must also be able to establish that he was not negligent in signing the memorandum, for as noted by Megaw L. J. in the case of *United Dominion Trust v. Western &Anor.*[21]

"a person who signs a document and parts with it so that it may come into other hands, has a responsibility…… to take care what he signs, which if negligent prevents him from denying his liability under the document."

The essence of making subscribers automatic members of the company by operation of law is to ensure compliance with Section 18 (2) (b) of CAMA,[22] Which mandatorily requires at least two members to form a company. This strict rule of automatic membership admits of one exception, which may arise where the company fails to allot shares by reason of the fact that there are no shares to be allotted to the subscribers. The subscriber would in this circumstance not be liable to pay for the shares in event of a call being made.

This position is supported by the case of *Re Tal – State Co, Mackley's case*[23] where the court found as follows:

> Now it has occurred to me that when it appeared that there were no shares which Mr. Mackley could have if he had wanted, then the

[18] Ibid.
[19] See Evans Case (1967) LR 2Ch.L 427
[20] (1996)3 NWLR (Pt 438)499 at 527
[21] (1976) Q.B 513 at 521
[22] No. 124 2020
[23] (1875) Ch. D 247 at 250 per Millin VC

> company were not in a position to say that they would continue to hold him liable for the shares for which he had signed.

It is doubtful whether the courts can under this circumstance deem the subscribers as a member or shareholder of the company[24] for the purpose of any form of liability. It is submitted that the contract to subscribe for the shares can properly be classed as a pre-incorporation contract, which by the provision of Section 96 (1) CAMA[25]can be ratified by the company after incorporation.

It is interesting to note that even where the company fails to ratify, this cannot absolve the company of liability as the subscribers can sue the company under the provision of Section 41 of CAMA which makes a registered memorandum and article to have the effect of a contract under seal between the company and its members including subscribers who are normally the first members of the company. This position is in line with the Supreme Court decision in *Stephen v. Buildco (Nig) Ltd.*[26] In this case one Sa'aid and Stephen agreed to form a company and orally agreed to take shares in the ratio of 51 % and 49% respectively and to be fully paid up. Sa'aid paid for his shares in full. After incorporation Stephen was called upon to pay for his shares and he could not. The shares were declared forfeited and his place as director declared vacant. In an action for restoration of his shares, he argued that the contract was a pre-incorporation contract and could not be ratified. In dismissing his claim for the restoration of his shares, the Supreme Court held that there was a binding agreement between him and the company to pay for the shares.

The importance of the subscriber in the formation of a company cannot be over emphasized. This unique position cannot in anyway affect the separate corporate personality of the company. The subscriber's liability as different from that of the company only extends to the amount unpaid on the shares actually allotted to him by the company. The Court of Appeal reaffirmed the extent of his liability in the case of *N. I. D. B. v. Fembo*[27] when it held *inter-alia:*

> "The company is at law a different person all together from the subscriber to the memorandum and although it may be that after incorporation the business is precisely the same as it was before, and the same person are managers and the same hand receive the profits the company is not in law the agent of the subscriber or trustee for them. Nor

[24]Essien (n.8)
[25] S.96(1) of CAMA is a cure for the injustice which follows the common law principle in kelner Vs Baxter (1867) LR 2 CP 174 that a company cannot ratify a pre-incorporation contract because it had no legal existence to contract before incorporation.
[26](1968)1 All NCR 188.
[27] (1997)2 NWLR (Pt. 489) 543 at 564 per Akintan JCA (as he then was)

> are the subscribers as members liable in any shape or form, except to the extent and in the same manner provided by the Act".

ii) **By Allotment of Shares**

An incorporated company may choose to raise capital for its undertakings through the allotment of shares to investors. Where the company is a private company, this is done through an application for shares to the company. This application could be in writing or oral. The only shortcoming of an oral application is that an investor may be saddled with the responsibility of proving his title where there are conflicting claims to the same shares or in an application for rectification of the register where the company has failed or refused to enter the investor's name in the register.

The allotment of shares in a public company, normally, follows a formalized procedure resulting in a concrete allotment agreement between the investor and the company. *Section* 150(1)*(b)* of CAMA[28] provides *inter-alia:*

> ''In the case of a public company, subject to any condition imposed by the Securities and Exchange Commission where the issue of share is public, there shall be returned to the company a form of application as prescribed in the company's articles, duly completed and signed by the person wishing to purchase shares:''

In practice a public company normally issues a standard form of application which must be accompanied by a prospectus in compliance with Section 48(1) of ISA.[29] That section makes it unlawful to issue any form of application for securities in a public company unless the form issued with a prospectus. A prospectus is defined in CAMA as:

> ''Any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debenture of a company and includes any document which save to the extent that it offers security for a consideration other than cash is otherwise a prospectus''.

It is however important to point out that securities as an intangible commodity incapable of physical appraisal, require the availability of full and frank information that would assist investors in taking a decision to invest or to refrain from investment in a company's securities. Therefore the prospectus normally enumerates the state of affairs of both past, present and future forecast of the company, as well as the advantages accruable for investing in the company. The use of the phrase "other invitation, offering to the public" in

[28] CAMA No. 124 of 2020
[29] Investment of Securities Act No, 29 of 2007

the definition of prospectus raise questions as to the legal effect of the phrase. The phrase is suggestive of the fact that it is the company that makes the invitation as well as the offer. Orojo[30] has even opined that both terms should be construed as having the same meaning i.e. they should be construed as meaning invitation by the company to prospective investors to make an offer for the company's shares.

With respect it is submitted that a person cannot in law make an invitation and an offer at the same time. Legally what a company does when it issues a form of application accompanied with a prospectus is to invite the investing public to make an offer for its shares. This act in contractual terms is referred to as an "invitation to treat". The offer is made by any investor who completes the form accompanying the prospectus and lodges same with the company for its acceptance or rejection as the case may be. It has been suggested that the word 'offering' in the definition of prospectus should be deleted.[31] While suggestion may be taken to be in line with the legal effect of the terms as used in the definition of prospectus,[32] it must be noted that one instance where a public company's act of allotment of shares to investors may be construed as a concrete offer is in situations of right issue. In a right issue, the existing shareholders are given the pre-emptive choice to purchase additional securities in proportion to their existing holdings. This would qualify as an offer. The acceptance under this circumstances made by the shareholder by exercising this pre-emptive right is in recognition of this fact that the word "offering" should be applied contextually.

Furthermore, Orojo[33] also expressed reservation about the phrase "consideration other than cash" as being in ad-variance with Section 162 of CAMA,[34] which confers discretion on the company to accept payment for shares by a valuable consideration other than cash. While it may be commercially of great convenience to allow an investor to pay for his shares by any means available to him provided it is acceptable to the company, it must be borne in mind that in a public issue, the numerical volume of investors normally cut across the entire length and breadth of Nigeria. To allow an option of payment for allotted shares in a public issue would involve the carrying out a valuation assessment of assets (valuable consideration) offered for units of shares in accordance with the provision of Section 162(5) of CAMA.[35]

The company may accept or reject the application. Where it accepts the application it will make allotment to the applicant and within 42 days after the allotment notify the applicant

[30]J.O Orojo, *Company Law and Practice in Nigeria* (3rd Edition, Mbeyi& Associates Nig. Ltd, 1992) p. 89.
[31]Essien J. (n.8)
[32] Ibid.
[33]Orojo (n.30)
[34] CAMA No. 124 2020
[35] Companies and Allied Matters Act No. 124 of 2020

of the fact of allotment, and the number of shares so allotted in accordance with Section 150(1)(c) of CAMA.[36] This section does not specify whether receiving of application amount to the acceptance of the investors offer for allotment of shares for the purpose of determining when time starts to run. Lord Cairns in *Pallet's case*[37] face with similar situation held "I think that where an individual applies for shares in a company, there being no obligation to let him have any, there must be a response by the company, otherwise there is no contract". The "response" it is submitted completes the elements that constitute a valid contract. Section 151[38] (c) recognizes this important element and provides *inter-alia:*

> ''An allotment of shares made and notified to an applicant…… shall be an acceptance by the company of the offer by the applicant to purchase its shares and the contract take effect on the date on which the allotment is made by the company''.

Notification of allotment is usually effected by sending share certificate specifying the number of shares so allotted to the investor. However, no allotment shall be made to an investor unless the amount stated in the prospectus as the minimum amount that is required to be raised by the public issue has been achieved.[39] The application form normally specifies the minimum number of shares that may be subscribed for. Any investor who fails to meet that requirement would not be allotted any share and would have his application cancelled.

At common law, an investor cannot revoke the application for allotment made pursuant to a prospectus until after the expiration of the third day after the opening of the subscription list. This limitation on the power of revocation was to prevent speculators from 'staging' the issue,[40] i.e. from applying for more shares than they intend to take up with a view to selling them on the market at a profit, or withdrawing their application if the issue is not successful.[41] This common law position is entrenched in Section 66(1) of the Investment and Securities Act (ISA).[42]

Perhaps the only remedy open to an investor who cannot exercise the power of revocation is to bring an action for rescission under Section 71 of ISA[43] which provides:

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[36] Ibid.
[37] (1867)LR Ch 527 at 535.
[38] CAMA No. 124 2020
[39] S.67(1) ISA 2007
[40] O. Duru, *Shares and Class Rights in Nigeria's Company Law*: *An Appraisal.* Available at http//:www.researchgate.net>publications accessed 30th April 2021. Ensure NALT reference compliance.
[41] Ibid.
[42] Investment and Securities Act No. 29 2007.
[43] Ibid.

A shareholder may bring an action against a company which has allotted shares under a prospectus for the recession of allotments and the payment to the holders of the shares of the whole or part of the issued price which has been paid in respect of them if either of the prospectus:

i) Contained a material statement, promise or forecast which was false, deceptive or misleading; or
ii) Did not contain a statement report or account required to be contained in it by Section 52 and second schedule to the Act.

The basis of this remedy was first enunciated by Kindersley V.C. in *New Brunswick & Canada Rly Co v. Muggeride*[44] *inter-alia:*

> ''Those who issue a prospectus; holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking and inviting them to take shares on the faith of the representations there in contained are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge. The exercise of which might in any degree affect the nature or extent or quality of the privileges and advantages, which the prospectus holds out as inducement to take shares''.

The remedy of recession which evolved from common law and which has found a place in statutes is to be strictly applied by the courts. This is so because the foundation upon which securities practice thrives is on disclosure, and the protection of investor is the principal function which the SEC as a regulatory institution is saddled with. Where there is absence of full and frank disclosure then there would be absence of protection for investor and investments. The ultimate result would be the lack of confidence of the investing public on the securities market. [45] Lord Chelmsford, LC in *Central Rly of Venezuela v. Risch*[46]thinking in this light observed that no misstatement or concealment of any material facts or circumstances ought to be permitted because the public who were invited by a prospectus to join in any new venture ought to have the same opportunity of judging everything which had a material bearing on the true character of the adventure as the promoters themselves possessed, and that their statement to the public ought to be characterized by utmost candor.

iii. **By Obtaining Directors Shares Qualification**

Director's qualification shares are a specified number of shares which a person holding the position of a director of a public company must hold in the company. The rationale for

[44] (1860) IDR & SM 363, Cited by Essien (n.8)
[45]Onyekachi D. (n.41)
[46] (1867)LR HL 99 at 123

having directors take up shares in the company was emphasized by the English court in the case of *Re North Autralian Territory Co; Archer's case*[47] where Lindley J. stated *inter-alia:*

> ''What is the object of having a stipulation in the article of a company that a director should have qualification shares? It is to give him a personal interest in the affairs of the company, and to induce him to attend to them in a way very different from what it would be if he had no interest in them at all''.

It is noteworthy that the essence is to ensure that (directors) have a material stake in its (the company's) success, and will consequently devote their best endeavors in its service if only to preserve the value of their own investment. The acquisition of these shares invariably makes directors investors in the company in which they hold directorship positions.

Under the 1968 Companies Act[48] it was mandatory for directors to hold the qualification shares and a greater discretion was conferred on the company to prescribe the directors qualification. However it does appear that there has been a considerable relaxation in this area when a proper examination of Section 277(1) of CAMA[49] is done. The section provides *inter-alia:*

> "the shareholding qualification for directors may be fixed by the article of association of the company and unless and until so fixed no shareholding qualification shall be required."

The implication of this section it is submitted means that directors shareholding under the CAMA 1990 Act[50] is not mandatory except the article of association makes provision for it. This provision as it is, leaves much to be desired when it is recalled that the failure of most public companies have largely been attributed to the fraud of directors, who normally have no financial stake in the company. This unsatisfactory state of the law needs review so as to protect investment. It is even suggested that the total shareholding of directors of public companies should be 25% so as to give directors greater commitment to the success of the company. The amendment of the above section is strongly recommended. Director's shareholding should not be left at the discretion of the articles of public companies should make stipulations for director's shareholding.

Where a company's article has fixed share qualification for director, a director who does not already hold the qualification share must do so within two months of becoming a

[47] (1891) All LR 150 at 154
[48] Sections 172-173 English Companies Act 1968
[49] CAMA No. 124 of 2020
[50] Ibid, S.277(2)

director. A director who fails to comply with this stipulation would be deemed to have vacated his office as director.[51]

iv. **By Taking a Transfer of Company Shares**

As personal properties, shares are capable of transfer from one investor to another in the manner provided in the article of association of the company.[52] The right to transfer shares has since been recognized at common law. Thus in *Re Discoverers Finance Corporation Ltd; Lindlar's Case*[53]*Buckely L. J.* re-emphasized this right as follows:

> ''In the absence of restriction in the articles, the shareholder has by virtue of the statute the right to transfer his shares without the consent of anybody to any transferee, even though he be a man of straw, provided it is a bonafide transaction…….''

The transfer of shares is normally done by either a registered member of a company or a shareholder of the company. This is different from allotment, which is normally made by the company to an investor while a transfer is a private transaction between two investors.

The mode of transfer of shares is regulated by Section 178 of CAMA,[54] and the articles of association of the company. The act provides that transfer shall be affected by the delivery of a proper instrument of transfer to the company and the subsequent registration of the transferee in the register of members. The instrument of transfer varies depending on the method of transfer to be adopted. Where it is a transfer by way of gift then a deed of gift and the share certificate would suffice. And where it is an outright sale the deed of sale and the share certificate would constitute proper instrument of transfer.

An investor may decide to transfer all or part of the shares comprised in his share certificate. The transfer of all the shares is done by a simple process of giving to the transferee a duly executed instrument of transfer with the share certificate. Once a proper instrument has been lodged with the company, it must within 2 months either register the shares or issue a new certificate to the transferee in accordance with Section 177(1) of CAMA. If the directors refuse to register the transfer they must send to the transferee a notice of refusal.[55] Where the company fails to do either of one of the above things, the investor has a right to institute an action to rectify the register by including his name.[56]

[51] Ibid, S.277(3)
[52] Ibid, S.175(1) CAMA 2020 has elevated this process to include even electronic transfer of shares
[53] (1910) 1 Ch 312
[54] CAMA No. 124 2020
[55] CAMA No. 124 of 2020
[56] Ibid, S.177(2)

Where an investor is transferring a fraction of shares contained in a certificate, he first certifies the transfer by sending an instrument of transfer along with the share certificate to the company. The company endorses the instrument with the words "certificate lodged". The certificate is only a representation by the company that it has been shown documents that provide prima facie evidence of the transferor's title to the share. Upon completion the instrument is returned to the transferor who takes it for execution by transferee before application is made by the transferor to the company for the registration of the transfer. The company would then issue two share certificate one to the transferor for the remaining and unsold part of the shares and another to the transferee.

v. **By Transmission of Shares**

The phrase "transmission of shares" means the devolution or vesting of shares by death or bankruptcy of a member as distinct from transfer which is affected by the act of a member.

A person may become an investor and be recognized as such by the company upon the death or bankruptcy of a registered member if he is the survivor or one of the survivors where the deceased was a joint holder or the personal representative of the deceased in the case of a sole holder, or a trustee in bankruptcy of the bankrupt member.[57] This mode of becoming an investor does not require the laying out of money.[58]

In the case of transmission by death, the investor must produce sufficient document, which by law is sufficient evidence of probate of a will or letters of administration of the estate or confirmation as executor of a deceased members estate to the company as evidence of grant to be entitled to the interest in the shares.[59]

Upon the presentation of sufficient evidence to the company, the personal representative or trustee in bankruptcy becomes entitled to dividends and other advantages accruing from the shares as if he were the registered holder. He can however not exercise the rights of membership like voting at meetings except the article so permit.[60] The rationale for this limited capacity as was held in *Macdonald v. City of Glasgow Bank*[61] is that the production to the company of such documents does not ipso facto, make the personal representative a member of the company. The Supreme Court reemphasized this in *Tika-Tore press Ltd &Ors v. Abina*[62] where it was held that a person may become a shareholder of a company by transmission on the death of the holder and is entitled to dividend other advantages as the registered holder but cannot before being registered as a member in respect of the

[57] S.179(1) CAMA No. 124 2020
[58] Ibid, S.179(2)
[59] Ibid, S. 179(2)
[60] Ibid, S. 179(4)
[61] (1973) NSCC 233
[62] (1979)6 NWLR 621

shares exercise any rights conferred by membership in respect of the shares, in relation to the meeting of the company.

vi. **By Subscribing to a Company's Debenture**

Debenture is one of the debt instrument traded in the capital market in Nigeria for which a person can invest in. section 191 CAMA[63] empowers a company to borrow money for its undertaking and providing *inter-alia:*

> ''A company may borrow money for the purpose of its business or objects and may mortgage or charge its undertaking, property and uncalled capital, or any part thereof and issue debentures, debenture stock and other securities whether outright or as security for any debt, liability or obligation of the company or of any third party.''

From the above provision it is evident that a debenture represents a distinct security given by a company in favour of the investor for the money advanced as an investment to the company. In this way, a debenture creates fixed or floating charge over the company's property as security in favour of an investor who has advanced money to the company. Debentures are issued in accordance with the provision of the memorandum and article of association of the company. Where debentures are subject to public subscription by investors, Section 44 of ISA requires compliance with the provision of the Act relating to the issuance and registration of a prospectus.[64] This therefore implies that just like shares, a public company which invites the public to subscribe to its debentures must issue the form of application for the debenture along with a prospectus. The prospectus must be registered with the SEC.[65]

The status of an investor in debenture is akin to that of a creditor of a company.[66] However by acquiring interest in the property of the company thereby secured by the debenture through the laying out money in expectation of receiving premium at redemption of the debenture, in addition to the payment of the entire loan granted to the company, the holder of a debenture becomes an investor in the company. Though a debenture holder cannot exercise the rights of membership of a company, like the right to be entitled to notice of meeting, however it is clear from the provision of Section 196 of CAMA that investor who hold a debenture secured by a floating charge is entitled to notice of meeting where a special resolution for the alteration of the company's business or object clause is to be considered.

[63] CAMA No. 124 2020
[64] Investment and Securities Act No. 292007
[65] Ibid, S.57
[66] Ibid

The departure from the traditional practice is justified by reason of the fact that a debenture holder may have advanced money to the company on the strength of his agreement with the nature of the business currently carried on by the company. The change of business of the company may not be agreeable to the debenture holder. Therefore to change the business of the company without his knowledge would more or less mean the deviation from the purpose of raising loan via debenture as stated in the prospectus accompanying the form of application for the debenture, which induced an investor to subscribe to the debenture in the first instance. It is also reasonable that a man who advances money to another for a particular business should not change the line of business without the agreement of the person who loaned him the money. It is in recognition of this fact that a right apply to court for the cancellation of the alteration inures in favour of the debenture holder. Debenture is a charge created over the assets of a company. As such it must be registered with Corporate Affairs Commission.[67] It is not worthy that dealing with Corporate Affairs Commission in respect of company processes are now automated to be carried out online, this is in line Company Regulation Rules 2021

1.4 Classes of Shares

Subject to its Articles of Association (the Articles), a company may issue different classes of shares with rights or restrictions.

The most popular classes are:-

i) Ordinary shares- These category of shares carry not special rights or restrictions and rank lower in priority compared to preference shares (e.g. in terms of distribution of dividends and proceeds from liquidation following winding up). Nonetheless, they entitle the shareholder to one voting right per share pursuant to section 140 (1) of the Companies and Allied Matters Act.[68]

ii) Preference share- These are preferred because of the priority attached to them. Additionally, they may entitle a shareholder to more than one vote per share subject to the Articles and section 168(1) of CAMA.[69]

iii) Deferred shares-Also known as Founders shares, they entitle a shareholder to a portion of the company's profits after payment of fixed dividends on ordinary shares. For dividends distribution, deferred shares rank first in priority before ordinary and preferences shares.[70]

[67] Ibid SS 201-213
[68] CAMA No. 124, 2020
[69] Ibid
[70] D Nelson, The Dilemma of the Shareholders under the Nigerian Company Law *(Journal of Law, Policy and Globalization 2015)* ISSN 222403259

Similarly, almost every person or legal entity including non-Nigerians can own shares under Nigerian law. Nonetheless, it is worthy to note following category of persons who are either restricted or prohibited from owning shares.[71]

i) A person below 18 years old except the company already has two other eligible shareholders;
ii) A person of unsound mind as declared by a court in Nigeria or elsewhere;
iii) An undercharged bankrupt;
iv) A person disqualified from being a director of a company under sections 281 and 283 of CAMA.[72]

A shareholder is only recognized as a member if the shareholder either subscribed to the company's memorandum of association at the point of incorporation or subsequently has their name entered in the company's register of member[73]. This distinction is important as section46(1) of CAMA, which provides the foundation for the rights enjoyed by shareholders, refers to "members" and not "shareholders". It is therefore important that every shareholder confirms that their names are on the company's register of members.

1.5 Rights and Obligations of Corporate Investor

The Law is that, section 46(1) of CAMA is the general provisions on the subject of rights of shareholders[74]. It provides thus:

> ''Subject to the provisions of this Act, the memorandum and articles, when registered, shall have the effect of a deed between the company and its members and officers and between the members and officers themselves whereby they agree to observe and perform the provisions of the memorandum and articles, as altered in so far as they relate to the company, its members, or officers.

Based on the above, shareholders have the right to:

i) Earn dividends: Dividend is the payment made from a company's profits to its shareholder[75]. Accordingly, this right only arises when a company declares dividends[76]. Where the company defaults, they become special debts for which the shareholder may institute action for recovery within 12 years from the declaration date[77].

[71]Section 20 (1) CAMA No. 124, 2020.
[72] Ibid,
[73] Ibid, Section 105
[74] Ibid,
[75]Kotoye Vs Saraki (1994) NWLR (pt. 357) 414 at 467.
[76] Section 432 (1) CAMA 2020
[77] Ibid

ii) Exercise of proprietary rights over owned shares: Shares constitute part of shareholders' properties. They can therefore deal with their share as they would other personal properties via transfer or otherwise subject to the provisions of the company's Articles[78].
iii) Receive meeting notices, attend and vote at meetings: Shareholders are entitled to receive notices of all general meeting[79] and vote at same. Section 140(1) of CAMA guarantee the right to at least one vote per share. With this voting right, shareholders can decide on key issue like appointment and removal of directors, approval for transfer of shares, amongst others.
iv) Apply for a court ordered meeting of the company: Section 247(1) of CAMA[80] confers this right to any shareholder who is entitled to attend and vote at such meeting. It should be noted that this right only arises where it is impractical for the company to call for meetings[81].
v) Institute action on company's behalf: Sections 343-346 of CAMA entitle minority shareholders to institute action in court (either in the shareholder's name, on behalf of other shareholders or the company) for protection against illegal and oppressive conducts against them[82]. This is an exception to the general rule in *Foss v. Harbottle*[83] which identifies the company as the proper plaintiff to institute an action where it wishes to seek redress for any wrong suffered by it. However, shareholders need to seek leave of court before instituting an action in the company's name or on its behalf[84].
vi) Participate in sharing of the liquidated assets of the company after winding up: This is subject to the order of priority listed in section 657 of CAMA.

Other rights of shareholders include the right to:

i) Receive copies of the company's memorandum and articles of association upon payment of expenses for same;
ii) Inspect the company's register of members[85], books of account and accounting records[86];
iii) Receive share certificate except this is contrary to the conditions upon which the shares were issued[23]; and any other right enshrined in the Articles.

Obligations of Shareholders includes

[78]Ibid, Section 139 CAMA
[79]Ibid, Section 247 (1), See also Re Wada (2000) FWLR (pt. 18) 214
[80]Ibid, S. 343 (1)
[81]Ibid
[82]Ibid, this position was confirmed in SPDC Nig. Ltd V Nwaka (2000) LPELR 55819 (CA).
[83](1843) 67 ER 189
[84]S. 346 (1) CAMA No. 120, 2020.
[85] Ibid, S. 112 See also, Nelson Op cit.
[86] Ibid

i. Paying for shares subscribed to: This arises when the company makes calls for payment for shares which not been fully paid[87] failing which the shareholder could be forced to forfeit the shares in line with section 165 of CAMA.
ii. Contributing towards winding up purpose: In the event of winding up, shareholders are obliged to pay any outstanding dues on shares they own[88].
iii. Disclosing substantial shareholding in a public company (PC): A person who can exercise at least 5% of the unrestricted voting rights at any general meeting of a PC is required to notify the PC of this development. The notice should state the shareholder's name, address, the full particulars of shares held by the shareholder or their nominee and the name of such nominee. The notice should be given within 14 days after the shareholder becomes aware of this development. Similarly, the shareholder is also obliged to notify the company within 14 days of their ceasing to be a substantial shareholder[89].
iv. Confirmation of remittance of withholding tax payable on dividends: Companies are obliged to deduct 10% withholding tax (WHT) on dividends and remit same to the Federal Inland Revenue Service (FIRS)[90]. Thus, shareholders should confirm the remittance status of any applicable WHT and request for credit notes issued by the FIRS, in evidence, from the company.

Other obligations include the obligation to:

i. Notify the company of any change in the shareholders' name, address, mandate or signature. This would assist the company in modifying its records and filing any necessary return at the Corporate Affairs Commission;
ii. Keeping safe custody and proper records of all documentation in connection to shares owned e.g. share certificates, copies of share transfer documents. This would minimize the risk of such documents being used for fraudulent transactions;
iii. Actively participate in general meetings; and
iv. Report any illegal activity of the company to the relevant authorities.

1.6 Conclusion and Recommendations

It is pertinent to note that, regardless of the different methods of becoming member, a corporate investor has common interests and responsibilities in the overall running of the company. In fact, they are collectively referred to as 'members in general meeting' because they collectively constitute an important organ of the company. It is clear that investors are the legal and beneficial owners of the shares of a company vested with certain legal rights against the company and obligation towards it. These rights and obligations may however,

[87] Ibid S. 158 (1)
[88] Ibid S. 565.
[89] Ibid, S. 121
[90] Section 80 Companies Income Tax Act, Cap C21 LFN 2004.

vary depending upon the terms of issue as well as the provisions of the articles and the existing company regulatory instruments in Nigeria. In functional terms, the variations of their rights may also depend upon the types and classes of the shareholders recognized in a particular company.

It is apparent that the enactment of CAMA 2020 has come with provisions that address certain challenges and uncertainties for the private equity industry, which is a welcome development for the legal and business communities as it is expected to further enhance the ease of doing business in Nigeria and open opportunities for more corporate investments. However, this paper recommend the amendment of section 27 (2) of CAMA 2020 which redefined and/or increased the minimum issued share capital thresholds of companies to Hundred Thousand and Two Million Naira respectively in the case of private and public company to Fifty Thousand and One Million Naira respectively. This will further reinforce the ease of doing business which is the hallmark of the new legislation.