# Nigerian Law Reform Commission, investors' protection and amendment of CAMA: An appraisal

*By Ibe Uwaleke*

**I**N 1990, the Company and Allied Matters Decree (now Act) (CAMA) was promulgated by the then military government of General Ibrahim Babangida. That Act, which revolutionalised the nation's company law was and is still commonly acclaimed to be one of the best laws ever passed by a military regime.

First, it created the Corporate Affairs Commission (CAC) to implement the provisions of the company law. The CAC replaced the Companies' Registry System, which made incorporation an extremely difficult and chaotic venture.

Secondly, it created audit committee, an independent body to keep an eye on the directors of companies. The aim of the creation of the audit committee was to ensure transparency in the operation of public companies.

Thirdly, prior to the promulgation of CAMA, the 1968 Companies Act did not make provisions for minimum share capital but CAMA provided for N10,000 and N500,000 for private limited companies and public limited companies respectively.

The idea then was to stop fraudsters from incorporating companies indiscriminately and curb the incorporation of what is popularly known as briefcase companies.

CAMA, as at the time it was incorporated, was an ambitious law with a view to helping the development of companies in the country. Some principles of common law and equity were also integrated into the law.

Moreover, for the first time, regulation of companies , business names and incorporated trustees was contained in a single enactment.

Looking back, however, some loopholes can be identified in the law. Operators of companies are smarter than policy makers. They always look for ways to circumvent even the best of laws. Take for instance, the issue of minimum share capital. Most analysts agreed that N10,000 minimum share capital for private company is no longer a deterrent to those who want to float brief case companies. To bid for a project, the same set of people now incorporate up to 40 companies using fictitious names as directors.

Everyday, CAC is inundated with applications to register mushroom companies. Even when the commission knows there is nothing it can do under the current statutory regime.

The Nigerian Law Reform Commission, which had attempted a review of the law, has found that the provisions of CAMA no longer reflect current socio-economic policies of government.

"However, 19 years after it has been observed in various quarters, some provisions of CAMA are inadequate to deal with the unanticipated challenges that arose after its promulgation.

"The directors of the failed finance and other companies were alleged to be responsible for their distress.

"The unprecedented springing up of mushroom companies and wonder banks was generally attributed to the low incorporation amount required by the CAMA as minimum share capital", the commission observed.

As the agency with responsibility for amending obsolete laws, the commission had carried out a research on the law and had identified the areas of the law that needs amendments. It has also consulted with stakeholders after which it prepared a draft company law.

Justice Olukayode Somolu, the immediate past chairman of the commission, summed up the recommendations for making CAMA a better law thus: "The increase in the minimum share capital to curb or eliminate brief case companies as vehicle for fraud; strengthening of the CAC and giving it more teeth to bite; strengthening of the audit committee to enable it perform its watchdog functions; ensuring that unclaimed dividends are safe and invested properly on behalf of the owners; and ensuring that directors are prevented from putting themselves in a situation that will jeopardize their fiduciary duties to the companies they are serving".

The commission in the draft law wants an enlargement of the grounds under which a director of a company can be disqualified from holding the office. Whereas Section 254 (1) of CAMA restricts disqualification of directors to when they are convicted in connection with promotion, formation or management or has been found guilty of any offence in the course of winding up a company, the commission has suggested that anyone who has been convicted of any offence involving fraud whether it is in connection with a company or not should be disqualified from being a director in a company.

This implies that anyone convicted under the Advanced Fee Fraud and other related Offences Act or Money Laundering Act or any other law is disqualified from holding office as a director in a company.

Related to the above is the question of when the period of 10 years for which anyone convicted of fraud should take effect.

Section 254 (1) of CAMA says the court shall make an order that a person shall not be a director of any or in any way, whether directly or indirectly, be concerned with or take part in the management of a company for a period not exceeding 10 years. The commission has suggested that the disqualification should start after the person so convicted has served the sentence. It justified the recommendation thus: "If disqualification starts after conviction, such a person may simply go back to the boardroom after a short period of time to continue with his nefarious activities".

Still on directors, Section 280 forbids a director from accepting any 'unnecessary gift'. Why should gift be qualified? Which gift is necessary? The commission has rightly suggested that the word, 'unnecessary' be deleted from the section. In addition, the commission suggests that a new duty of care on company not to appoint a disqualified person as director.

The issue of conflict of interests arising from a director holding multiple directorships in companies also calls for concern. Section 281 allows a person to be a director in as many companies as he wishes, and at the same time, the law requires him to maintain his fiduciary duties to these companies. Such fiduciary duties include not using information obtained in the course of managing a company for the benefit of another.

The argument is that such leeway given to directors will be abused and had indeed been abused. After so much debate, the commission has recommended that a director should only be allowed to be a director in not more than five companies at the same time. To that, a condition is attached; the director must disclose in writing of any directorship in another company held by him at a meeting in which he is being considered for a director in a new company.

Another vexed issue is who should have custody of unclaimed dividends, the company or government? Section 382 (1) and (2) allow a company to invest any unclaimed dividends for its own benefit at the expiration of a three months' notice to the members, and no interest shall accrue on the dividends against the company.

However, where the unclaimed dividends are as a result of the fault of the company in omitting to send the dividends, members shall earn interest at the current bank rate from three months after the date on which they ought to have been posted. More often than not, members do not get their dividends not necessarily as a result of an omission by companies but because postal system is unreliable. Sometimes shareholders change addresses without notifying the registrar of the companies where they have shares. Today, unclaimed dividends have ballooned into billions of naira, a situation that has forced government to show interest in who keeps the money.

After a very hot debate among stakeholders, the commission has resolved that unclaimed dividends should be managed within the company. It further recommends that a list of unclaimed dividends be published in two national dailies, and at the expiration of six months after the publication, and the dividends remained unclaimed, it should be vested in the Federal Government as bona vacanta under a law promulgated specifically for that purpose.

Recently, getting appointed into audit committee has become a fierce battle among shareholders' associations. Section 359(3)-(6) of CAMA provides for the mandatory establishment of an audit committee by every public company and its functions. The committee is to, among others, examine the auditors report and make recommendations thereon to the annual general meeting.

Even though the purpose of creating the committee appears to be to checkmate directors there is no way the committee can perform this function effectively when it must be constituted by an equal number of directors and representatives of shareholders. Directors have also designed ways of making sure that only people who are favourably disposed to them are appointed into the committee among shareholders. To serve the purpose for which it was created, directors should not be members of audit committee. This is contained in the draft law prepared by the Nigerian Law Reform Commission. The commission has further suggested that members of the audit committee should be paid out-of-pocket expenses.

Section 359 (4) of CAMA prohibits payment of remuneration to members of the audit committee. In practice, shareholders see membership of audit committee as a big job and they jostle for appointment into the committee. No sooner have they been appointed into the committee than they started pestering directors for contracts. The commission took the view that paying members of audit committee some allowances will reduce pressure on directors.

Many of the fees, fines and penalties in the Act are ridiculously low and should be reviewed upward. For instance, the fee payable by a non-member to inspect a company's register of members is N1.

Similarly, the requirement of the consent of the Attorney General of the Federation before the Memorandum and Articles of Association of a company limited by guarantee are registered should be discarded. Experience has shown that it takes between two to three years before such consent is given. This makes doing business in Nigeria very difficult.