

# The New Practice (TNP)

## - An Andersen Collaborating Firm



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A few weeks ago, the Corporate Affairs Commission (the "CAC") issued guidelines to public companies on how to hold their Annual General Meetings ("AGM") in light of the outbreak of the COVID-19 pandemic. To be specific, these guidelines were issued to encourage social distancing at AGMs and ensure those meetings do not have more than 20 people in attendance. In addition, the CAC also asked that public companies seek its approval before any AGM is held during the lockdown.

Shortly after these guidelines were issued, one of Nigeria's first tier banks, announced it had obtained the CAC's approval to hold its AGM with majority of its shareholders willing to attend using proxies. The Bank's AGM was subsequently held in Lagos in compliance with the guidelines issued by the CAC. Close to 500 shareholders representing over 50% of the Bank's issued share capital were present. Of this number, less than 10 shareholders were physically present, whilst the remaining members were represented by proxies. Key resolutions were passed, including the resolution to pay a dividend for 2019.

The question which comes to mind, is whether and to what extent, the CAC could validly compel public companies who wish to hold AGMs to insist their shareholders must appoint proxies? This to us would appear to be a denial or limitation of a shareholder's rights to attend the general meeting in person. Whilst there is still a bill for the amendment of the CAMA, it does not have any provision in its present form authorizing the CAC to make these guidelines. We ask another question, what if a shareholder, Mr Buraimoh (not a real name) wanted to participate personally in the deliberations at the Bank's AGM? Would the CAC guidelines have fettered Mr Buraimoh's right as a shareholder? If this is the case, can Mr Buraimoh validly challenge the decisions taken at the Bank's last AGM? Assuming the Bank had been advised by its lawyers to disregard the CAC's guidelines, what options could the bank use to ensure it holds its AGM according to the letters of the law?

As interesting as these times are, the President, in light of the Quarantine Act, made the COVID-19 2020 Regulations on 30<sup>th</sup> March 2020, and imposed a total lockdown in Lagos State, Ogun State and the Federal Capital Territory, Abuja ("FG lockdown"). This was further extended by two weeks through Regulations No.2. On 27<sup>th</sup> April 2020. However, the President in his national broadcast approved a phased and gradual easing of the FG lockdown measures in the affected states. Based on the President's speech, selected businesses and offices could open from 9am to 6pm effective, Monday, 4th May 2020. Overnight curfew was also imposed from 8pm to 6am but this would not apply to essential services.

This FG lockdown has further impeded companies from holding any form of physical meetings. Consequently, many businesses whether registered as a public limited liability company, private limited liability company or otherwise, are currently beset with the singular challenge of putting physical meetings on hold

## Company Meetings Under the Current Circumstances

during the FG lockdown or arranging virtual meetings (where their Articles of Association allow the same) to ensure business continuity, hold pre-scheduled board or annual general meetings, to take decisions that will shape the future of their respective undertakings.

Faced with these current realities, for the first time in Nigeria, the High Court of Borno State held a virtual court session through video-conferencing facilities on 27<sup>th</sup> April 2020 and delivered judgment in a criminal matter. Similarly, the Chief Judge of Lagos State has issued Practice Directions for the remote hearing of cases, as a measure to curtail the widespread of the Covid-19 pandemic.

Acknowledging that we are all about to go into a new normal, we have reviewed the relevant provisions of the CAMA to give our comment on how companies may legally and effectively meet during the FG lockdown to support business continuity and preserve the interests of their stakeholders during and after this pandemic.

### Meetings Under the CAMA

Most companies we have interacted with, hold four board meetings, on an average in any given year. These meetings are regulated by the provisions of each company's Articles of Association (the "Articles") as well as the CAMA – prescribing when and how these meetings as well as other meetings may be held, including shareholders' meetings. With the FG lockdown, many businesses have found themselves in a situation where they may have to hold meetings remotely.

In opting to hold meetings remotely, it is critical to ensure that decisions taken at these meetings are not invalidated on the basis that the company ran foul of the law or took steps outside the provisions of its Articles in how a meeting was held.

To ensure directors or shareholders of a company validly hold meetings remotely through video or teleconferencing facilities (Zoom, Skype, Microsoft Teams, etc.), Articles regulating a company's affairs must at a minimum authorise it to do so. Consequently, it is critical for companies to review their Articles to ensure they contain provisions enabling them to hold board and or shareholders meetings virtually. In this light, a provision in a company's Articles requiring all meetings to be held at a specific physical location may limit that company to physical meetings only.

In the event that a company's Articles do not permit it to hold virtual meetings, the company can only do one of the following:

- delay holding its annual or extra-ordinary general meeting as the case may be. If the notice for the meeting has not already been circulated, the company may wish to change the proposed date for the meeting to later in the year (hopefully the solution to the pandemic would have been found by then);
- in the event the postponed date for an AGM exceeds the timeframe stipulated by the CAMA, the company will have to seek an extension<sup>1</sup> from the CAC to hold the AGM beyond this time. However, this cannot extend beyond 3 months after the stipulated timeframe under the CAMA.

Now we ask, what will happen if the effect of the pandemic creates a lockdown longer than 3 months after the timeframe stipulated by the CAMA to hold

AGMs? Surely the CAC by statute cannot grant another extension. Consequently, it is imperative on the government, the legislature and the executive to find solutions to this issue. Waivers may need to be granted and laws may need to be amended. Unprecedented times truly call for unprecedented measures.



**In light of the position of the law, certain questions arise as to the validity of utilizing teleconferencing/ video-conferencing facilities to hold general meetings. Accordingly, will Nigerian IP addresses for each shareholder (sitting in their respective local Nigerian locations) suffice as justification that a general meeting was held in Nigeria? These are issues that an amended and revised CAMA certainly needs to address, to ensure business continuity in times like these and otherwise.**

### Place of Meetings

Whilst we have considered how companies may hold virtual meetings above, the CAMA says all AGMs must be held in Nigeria and Nigeria is a physical location. The fact that it says meetings must be held in Nigeria presupposes that the meeting should be held physically, bearing in mind that at the time the CAMA was enacted, teleconferencing or video conferencing were not envisaged. Consequently, the draftsman's intention at that time evidently was to ensure that Nigerian companies held their shareholders' meetings physically in Nigeria.

To further accentuate the point above, section 218(1) of the CAMA provides that "the notice of a meeting shall specify the place, date and time of the meeting, and the general nature of the business to be transacted thereat in sufficient detail to enable those to whom it is given to decide whether to attend or not, and where the meeting is to consider a special resolution, shall set out the terms of the resolution". The phrase "specify the place" as used in section 218(1) further presupposes that the meeting should be held physically.

The Supreme Court also interpreted "place" to include "any part of an enclosure or structure, whether separated from the rest of the enclosure or structure by a partition, fence, rope, or any other means, or not".

In light of the position of the law, certain questions arise as to the validity of utilizing teleconferencing/ video-conferencing facilities to hold general meetings. Accordingly, will Nigerian IP addresses for each shareholder (sitting in their respective local Nigerian locations) suffice as justification that a general meeting was held in Nigeria? These are issues that an amended and revised CAMA certainly needs to address, to ensure business continuity in times like these and otherwise.

This remains an unanswered question, as there is presently no judicial pronouncement on whether a company can hold a meeting remotely using technology such as Skype, Zoom, Microsoft Teams, etc.

### Conclusion

We are of the view that if a company's Articles permit its board to hold meetings remotely using teleconferencing/video-conferencing facilities, decisions taken at such meetings should not be invalidated. As such, it is instructive to all companies to ensure their Articles give them the power to hold board meetings remotely and virtually using any present or future technology to ensure business continuity.

The COVID-19 pandemic and how it affects the continued operation and decision-making process of companies is a wake-up call to our lawmakers to urgently overhaul the CAMA. The CAMA must ensure companies continue to exist and that their decision making processes, whether by the board or its owners are effective, lawful and legal. An amended CAMA must consequently acknowledge current and future technology.

<sup>1</sup> Section 213(1)(b) of the CAMA empowers the Corporate Affairs Commission to extend the time within which any AGM may be held. It provides that "except for the first annual general meeting, the Commission shall have power to extend the time within which any annual general meeting shall be held, by a period not exceeding three months".  
<sup>2</sup> See Okotie-Eboh & Ors v Director of Public Prosecutions (1962)LPELR – 25138 (SC)

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