



## Appraising the role of the administrative proceeding committee in Nigerian corporate governance

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### Abstract

In line with the government's desire to improve the ease of doing business, the CAMA 2020 introduced commendable provisions such as the replacement of authorized share capital with minimum issued share capital, the introduction of single-member companies, among others. In addition, The Administrative Proceedings Committee (APC) was established. The APC was introduced by Section 851 of the new CAMA as an administrative tribunal for resolution of disputes or grievances arising from the operation of CAMA. It is expected to be a vital tool for the Corporate Affairs Commission in ensuring compliance with the provisions of the Act. The APC, though laudable, is not without challenges and drawbacks.

This work critically examined the composition of the APC and its roles and underscored the fact that there is likelihood of bias and parties may not be guaranteed fair hearing given the composition of the APC. Another troublesome issue considered is that the APC in carrying out its roles may be encroaching into the exclusive jurisdiction of the Federal High Court, conferred upon it by Sec 251 of the Nigerian Constitution 1999 (As amended).

Recommendations for the effective performance of the roles of the APC were highlighted.

**Keywords:** appraisal, role, administrative proceedings committee, corporate affairs commission Nigeria

### Introduction

The signing into law of the Companies and Allied Matters Act, 2020 (the "CAMA 2020") has been lauded as a remarkable feat, a game changer in the corporate regulatory framework, and described as Nigeria's most revolutionary piece of business legislation in decades. The CAMA 2020 repealed and replaced the outdated Companies and Allied Matters Act of 1990 (the "CAMA 1990")<sup>[1]</sup>.

In tune with the government's desire to improve the ease of doing business, the CAMA 2020 introduced commendable provisions such as the replacement of authorized share capital with minimum issued share capital, the introduction of single-member companies, the disclosure of persons with significant control, the introduction of electronic filing, the recognition of electronic share transfers, and the holding of virtual annual general meetings by private companies.

Another significant innovation in the CAMA 2020 is the establishment of the Administrative Proceedings Committee (APC)<sup>[2]</sup>. The Corporate Affairs Commission (CAC) issued the Companies Regulations 2021 which provides for the set-up and operation of the APC. The APC is empowered to resolve disputes or grievances arising from the operation of CAMA 2020 or its regulations and impose penalties for any contraventions. The decisions of the Committee are subject to confirmation by the CAC and may be the subject of an appeal to the Federal High Court.

### The role of the administrative proceedings committee

The CAMA<sup>[3]</sup> provides that the Commission shall establish an Administrative Proceedings Committee comprising—

- a. the Registrar-General who shall be the Chairman of the Administrative Committee;
- b. five representatives from the operational departments of the Commission, not below the grade level of a

- director, one of whom shall be from the Compliance Department of the Commission; and
- c. a representative of the Federal Ministry of Industry, Trade and Investment not below the grade level of a director.

The Administrative Committee may co-opt persons, at any of its meetings, as observers, representatives of relevant associations, including associations of shareholders, registrars or trustees, as are considered necessary, and members so co-opted shall not count towards a quorum or have the right to vote in respect of any decision taken by the Administrative Committee<sup>[4]</sup>.

The Commission shall designate an officer of the Commission with at least 10 years post-call experience in the legal profession who shall be the secretary of the Administrative Committee<sup>[5]</sup>.

The functions of the committee are clearly stated in the CAMA.

The Administrative Committee<sup>[6]</sup> shall—

- a. provide the opportunity of being heard for persons alleged to have contravened the provisions of this Act or its regulations;
- b. resolve disputes or grievances arising from the operations of this Act or its regulations; and
- c. Impose administrative penalties for contravention of the provisions of this Act or its regulations in the settlement of matters before it.

The chairman shall preside at every meeting of the Administrative Committee and in his absence the members present at the meeting shall select one of their numbers to preside over the meeting.

The quorum at a sitting of the Administrative Committee is four members present while the determination of issue shall be by simple majority of members present and where there is equality of votes, the chairman or the member presiding shall be entitled to a casting vote.

Parties shall attend the sitting of the Administrative Committee in person or be represented by a legal practitioner. Proceedings of the Administrative Committee shall be recorded on audio or visual tape or such other electronic device.

Decisions reached on any matter before the Administrative Committee shall be forwarded to the parties not later than 14 days after the confirmation by the Board <sup>[7]</sup>. The sanctions that may be imposed by the Administrative Committee, include <sup>[8]</sup>;

- a. Imposition of administrative penalties;
- b. Suspension or revocation of registration; or
- c. Recommendation for criminal prosecution if matters brought before it reveals any criminal act or conduct.

Decisions of the Administrative Committee are subject to confirmation by the Board. Parties dissatisfied with decisions of the Administrative Committee may appeal to the Federal High Court. Subject to the above provision, the Administrative Committee to regulate its proceedings <sup>[9]</sup>.

The Administrative Proceedings Committee may adjudicate on non-criminal disputes arising from the operations of the Companies and Allied Matters Act, and in particular relating to –

1. Names of companies, limited liability partnership, limited partnerships, business names and incorporated trustees.
2. Shares in private companies, and
3. Appointment or removal of directors, partners or trustees <sup>[10]</sup>.

Complaints on any matter for the adjudication of the Committee shall be forwarded to the Registrar-General of the Commission in the form prescribed by the Committee from time to time. Where, upon receipt of the complaint, the Registrar-General is of the opinion that the provisions of the Act with respect to the matters set out in Regulation 38 have been or is about to be violated, he shall refer the complaint to the Committee for adjudication <sup>[11]</sup>.

Regulation 40 provides that upon receipt of a complaint, the Secretary of the Administrative Proceedings Committee shall within two working days schedule the complaint for hearing on a date as may be directed by the Chairman of the Committee. The Secretary shall within five working days of receipt of the complaint send to the parties the notice of hearing. The notice shall contain the names of the parties, particulars of claim and details of the alleged violations. The notice shall also specify the date, place and time of hearing. The notice may be sent to the parties personally or by registered post to their physical or electronic addresses on the Commission's record or to any physical or electronic address supplied by them. Where for any reason, notice cannot be served on any party, the Chairman may direct that such notice be served by any substituted means <sup>[12]</sup>.

Parties shall file briefs (electronically or otherwise) with the Administrative Proceedings Committee and serve each other notice of same not later than 10 working days from service of the hearing notice. Parties may file and serve each other

further documents not later than five working days from filing and service of the initial pleadings on each other <sup>[13]</sup>.

Based on the prescribed time lines for filing and service of processes by the Secretary and the parties, the APC can conclude its adjudication within 40 days of receiving a party's complaint;

Hearings by the APC may be conducted physically at the CAC's Head Office in Abuja, or virtually. The APC is to be guided by the principles of fair hearing, equity and natural justice, rather than the strict rules of evidence <sup>[14]</sup>.

The APC's decisions are subject to confirmation by the Board of the CAC, and any party to a complaint at the APC who is dissatisfied with the APC's decision has a right of appeal to the Federal High Court (FHC) <sup>[15]</sup>.

### **Analyzing the effectiveness of the execution of the roles of the APC**

According to CAMA 2020, the Registrar-General of the CAC is the Chairman of the Committee whilst five (5) of its members are to be representatives of the operational departments of the CAC. The membership of the Committee also includes a representative of the Federal Ministry of Industry, Trade and Investment (the CAC's supervising ministry). What this essentially means is that of the seven (7) voting members of the Committee <sup>[16]</sup>, six (6) are employees of the CAC while the seventh is a representative of its supervising ministry. In other words, There is a likelihood of bias in the composition of the committee.

Secondly, given that the functions of the CAC include administering and ensuring compliance by companies with the provisions of the CAMA 2020, the registration of companies and the maintenance of the companies registry <sup>[17]</sup>, it is inevitable that the CAC will be a party to most of the disputes or grievances that will come before the Committee (either as an accuser or a defendant). The question that arises is whether a party in a dispute with the CAC will get a fair hearing before the Committee which is made up almost entirely of employees of the CAC?

It is an established principle of law that a party cannot be the accuser and judge at the same time. Likewise, one cannot be a judge in a dispute in respect of which it is a party. This principle is embodied in the maxim *nemo iudex in causa sua* and in Section 36 of the Constitution. The composition of the Committee will lead to a breach of the constitutional right to a fair hearing where the CAC is a party to the dispute. The principles of natural justice and fairness are at the foundation of decision making. Natural justice requires that a person receives a fair and unbiased hearing before a decision is made that will negatively affect them. The three main requirements of natural justice are adequate notice, fair hearing and no bias. The bedrock for establishing the Administrative Proceedings Committee (CAC) is to provide the opportunity of being heard for persons alleged to have contravened the provisions of the Companies and Allied Matters Act 2020 or its regulations. Thus, the principles of natural justice and fairness are at the foundation of APC's decision making but could the composition of the committee could defeat the aim of justice and fairness in the duties of the committee. Any decisions arrived at under such circumstances are liable to be set aside on appeal <sup>[18]</sup>.

As noted earlier, all decisions of the APC (CAC) are subject to the final confirmation by the Board of the CAC who may also be members of the APC. One of the requirements of

natural justice is that the person making the decision must act impartially when considering the matter and must not have any relationships with anyone that could lead someone to reasonably doubt their impartiality. A reasonable person evaluating the constitution of the APC (CAC) will immediately doubt their impartiality. Whilst noting their efforts towards achieving impartiality by involving the general public, they prove futile as the persons invited cannot vote and, in the end, the Commission determines the decision of the APC(- CAC). When the person who contravened the provisions is the CAC, can an aggrieved person be assured that the governing board of the CAC will not be biased in reaching its decisions?<sup>[19]</sup>

In addition, another issue the Committee may have to contend with is the exclusive jurisdiction of the Federal High Court (the "FHC"). Section 251(1)(e) of the Constitution gives the FHC exclusive jurisdiction to adjudicate disputes arising from the operation of the CAMA 1990 (or any enactment replacing it). The section provides that: Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters – (e) arising from the operation of the Companies and Allied Matters Act or any other enactment replacing the Act or regulating the operation of companies incorporated under the Companies and Allied Matters Act. On the other hand, Section 851(4) of the CAMA 2020 gives the Committee the power to "resolve disputes or grievances arising from the operations of this Act or its regulations". It is probable that this power may be construed by the FHC as encroaching on the exclusive power given to it by Section 251(1)(e) of the Constitution.

As the voting members of the Committee are either employees of the CAC or of the Ministry of Industry, Trade and Investment which are both part of the executive arm of government, it is doubtful that they can validly exercise the power conferred on the Committee to impose "administrative penalties" for contravention of the provisions of CAMA 2020. This is because the courts have held that penalties, being criminal in nature, can, by virtue of Section 6 of the Constitution, only be imposed by a court of competent jurisdiction. Specifically, the Court of Appeal in *NOSDRA v ExxonMobil*<sup>[20]</sup> has held that "penalties or fines are imposed as punishment for an offence or violation of the law. The power as well as competence belongs to the Courts." In light of this, there is a possibility that administrative penalties imposed by the Committee may be set aside for being unconstitutional and a usurpation of the judicial powers vested in the courts by Section 6 of the Constitution.

### Conclusion

Although the establishment of the Committee is a welcome development as it is likely to provide a speedy means of resolving disputes relating to companies, it is obvious that the Committee will face different constitutional challenges ranging from nature of its composition, to its ability to validly impose administrative of penalties.

### Recommendations

The provisions of the Companies and Allied Matters Act 2020 does not succinctly cover all necessary parts of the

Committee and its proceedings. Regulations guiding its proceedings should be set out.

Secondly, it is noteworthy that while Regulation 38 of the Companies Regulations restricts the disputes for adjudication by the APC to only three matters (namely, issues relating to names of corporate entities and other businesses, shares in private companies, and appointment or removal of principal officers), APC is broadly empowered by Section 851(4)(b) to "resolve disputes or grievances arising from the operations of this Act." The CAC might want to revisit this inconsistency so as not to unduly constrain the APC.

In addition, the level of independence and impartiality of the APC should be reconsidered. We have a situation where members of the governing board may also be members of the committee. Also, the interested persons invited only have right of attendance limiting the general public's involvement in decision making. These issues should be looked into to ensure the impartiality and independence of the Committee.

### References

1. B Ayorinde, D Sarumi, The Administrative Proceedings Committee Under CAMA 2020 – Matters Arising <<https://www.mondaq.com/nigeria/constitutional-administrative-law/1002054/>> Accessed on November 18 2022.
2. Section 851(1) of the CAMA 2020
3. *Ibid.*
4. Sec 851 (2) CAMA 2020
5. Sec 851 (3) CAMA 2020
6. Sec 851 (4) CAMA.
7. Sec 851 (5)-(9).
8. Sec851(10)CAMA 2020
9. Sec 851 (11)-(13) CAMA 2020
10. Rule 38 Companies Regulations 2021
11. Regulation 39 *Ibid.*
12. Regulation 40 (1)-(6) *Ibid.*
13. Regulation 41 *Ibid.*
14. Regulations 44 and 45 *Ibid.*
15. Section 851(12) CAMA
16. Section 851 (2) of the CAMA 2020 permits the Committee to co-opt other persons as members but such persons shall not count towards a quorum and shall not have a right to vote on any decisions of the Committee.
17. Section 8 (1) of the CAMA 2020
18. A Critique of The Administrative Proceedings Committee, Strachan Partners obtained from [https://strachanpartners.com/wp-content/uploads/2020/08/accessed May 11, 2023.](https://strachanpartners.com/wp-content/uploads/2020/08/accessed%20May%2011,%202023)
19. *Ibid.*
20. (2018) LPELR-44210 (CA)