

THE BUSINESS FACILITATION ACT, 2023 – THE NEW WAY TO INCREASE SHARE CAPITAL

The Business Facilitation (Miscellaneous Provision) Act, 2023 (the "Act") was signed into law on 8 February 2023. The Act aims to promote transparency and the ease of business in Nigeria. To achieve this purpose, the Act amended twenty-one (21) pieces of legislation aimed at fostering collaboration within Nigeria's business environment. One of these laws is the Companies and Allied Matters Act, of 2020 ("CAMA"). We will discuss the effect of the amendment to the procedure for an increase in share capital.

Section 127 of CAMA provides that "a company having a share capital may only increase its issued share capital by allotment of new shares in a general meeting."

The Act amended section 127 of CAMA to provide that "in addition to the allotment of new shares in a general meeting, a company may also increase its issued share capital by the allotment of new shares through a resolution of the Board of Directors, subject to the directions imposed in the Articles of such company or by the company in general meeting."

By virtue of this amendment, minority shareholders would no longer have a say when a private or public company amends its Articles of Association ("AoA") to authorise the Directors to increase its issued share capital. The implication of this is that the Directors would unilaterally make decisions that can dilute the shareholding of shareholders, and in a situation where the AoA also authorises the Directors to allot shares pursuant to section 149 of CAMA as amended by the Act, there would be reduced checks and balances over the exercise of directors' powers. This could mean that the directors can increase the share capital when they desire and immediately allot to any person they desire.

The consolation that minority shareholders still have the protection of their pre-emptive rights enshrined in section 142 (1) of CAMA has also been eroded because the Act amended section 142 (1) of CAMA by restricting the application of pre-emptive rights to private companies. Section 142 (1) now provides that "a private company shall not in any event allot newly issued shares unless they are offered in the first instance to all existing shareholders of the class being issued in proportion as nearly may be to their existing holdings."

The changes introduced by the Act that we have discussed above, raise some serious concerns about the amount of power that has been placed in the hands of directors, particularly directors of public companies, which typically have thousands of shareholders. You might say, 'But the shareholders need to authorise the directors to amend the AoA to authorise them to carry out these acts, i.e., increase or allotment of shares,' and you would be correct, but in a situation where the majority shareholder has an interest in these amendments, and the voting is carried out by poll, the resolution would be passed.

Of course, there are positives about this amendment. For instance, it eliminates unnecessary administrative bottlenecks for small private companies, i.e., start-ups, who require a quick turnaround of approvals to meet strict deadlines for capital raising exercises. Nonetheless, while the Act has good intentions in authorising directors to increase the share capital of a company, subject to the alteration of the AoA to permit this, the power given to directors, particularly of public companies, to allot shares could raise some concerns as these powers may be abused to the detriment of minority shareholders.



Jumoke Lambo
jumoke.lambo@uubo.org



Oyindamola Ehiwere
oyindamola.ehiwere@uubo.org



Bernice Anya
bernice.anya@alsecnominees.com

