Going Further Beyond:

Corporate Restructuring Reflections on the Companies and Allied Matters Act 2020 Single Shareholder Company Regime

Thought Leadership by
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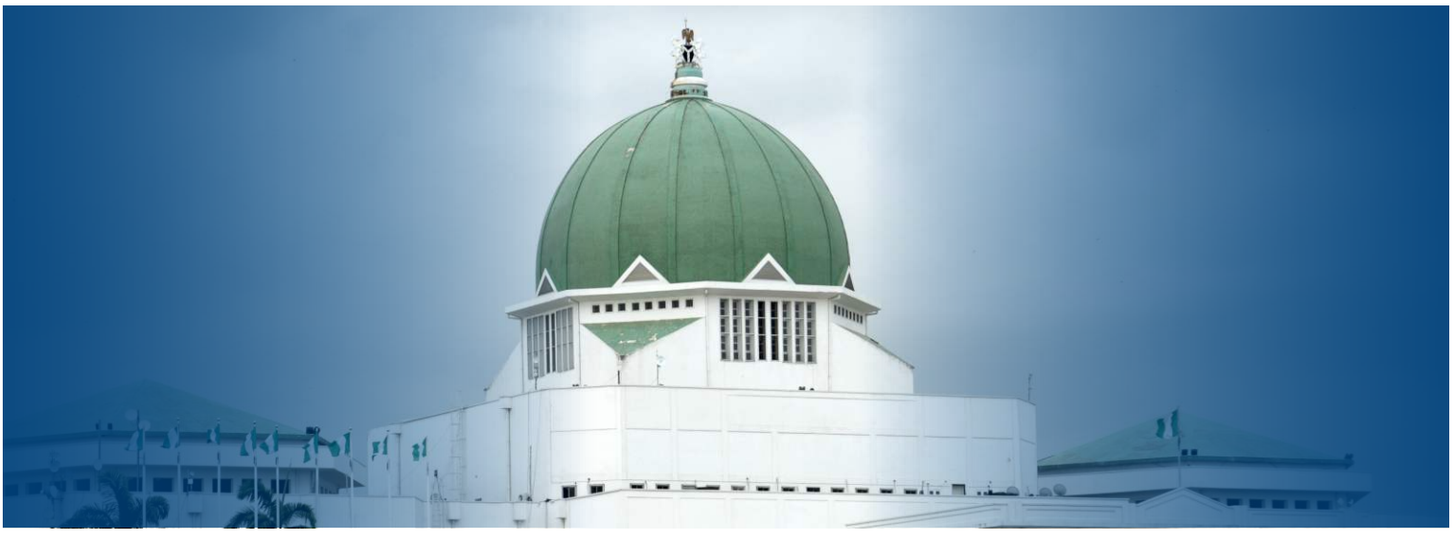

Introduction

One of the innovations birthed by the ***Companies and Allied Matters Act No. 3 of 2020 (CAMA)*** is the single shareholder company (SSC); vide ***section 18(2) CAMA 2020*** provision that: "*… one person may form and incorporate a private company by complying with the requirements of this Act in respect of private companies.*"[1]

The interregnum between its predecessor legislation (originally enacted in January 1990) and enactment of ***CAMA*** (in August 2020),[2] together with the width and breadth of ***CAMA*** innovations or gaps therein, as the case may be, has expectedly resulted in a lot of commentary, including from the ***LeLaw Thought Leadership*** stable.[3]

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[1] *Cf.* ***section 18, Companies and Allied Matters Act Cap. C20, Laws of the Federation of Nigeria (LFN) 2004 (CAMA 2004)*** which provided that: "*As from the commencement of this Act,* ***any two or more persons*** *may form and incorporate a company by complying with the requirements of this Act in respect of registration of such company.*" *Cf.* commentary that "*The law permits* ***any two persons to form a private company*** *but not less than 7 members are required to form a public company (section 377 of 1968 [Companies] Act).*" Emphasis supplied. See Kunle Aina, ***'Company Law 1 (Law 533) Course Material'****, NOUN, p.42:* https://nou.edu.ng/coursewarecontent/Law533%20CompanyLawandBusinessAssociation%201.pdf (accessed 30.07.2023). Aside from the fact that ***section 36(1)(a) CAMA 2004*** only obliges the Corporate Affairs Commission (CAC) to *incorporate companies that meet prescribed statutory requirements*, ***section 93 CAMA 2004*** *exposes every director or officer of any company carrying on business for more than six months after membership falls below two shareholders, to joint and several personal liability for the debts of the company contracted during such period.* The successor ***CAMA*** provision, ***(section 118)*** now excludes private companies: "***If a public company or a company limited by guarantee carries on business or its objects, without having at least two members and does so for more than six months****, every director or officer of the company, during the time that it so carries on business with only one or no member, is liable jointly and severally with the company for the debts of the company contracted during that period*".

[2] ***CAMA 2004*** was originally enacted as the ***Company and Allied Matters Decree No. 1 of 1990 (CAMD 1990)*** and subsequently codified into the ***LFN 1990*** as ***Cap. 59 (CAMA 1990)***. The interval between ***CAMD 1990*** and its predecessor, the ***Companies Act 1968*** (originally enacted as the ***Companies Decree No. 51 of 1968***) generally shows that the development pace of Nigerian companies' legislation was slow. There seem to be some positive change with such slow trend now, given that ***CAMA*** was amended by the ***Business Facilitation (Miscellaneous Provisions) Act No. 5 of 2022*** – within two (2) years of ***CAMA's*** enactment. For a discussion of earlier Nigerian corporate law development, see Hon. Dr. Justice Olakunle Orojo, ***'Company Law and Practice in Nigeria'****, (5th ed. LexisNexis 2008), pp. 15-21*; and Prof. Joseph E.O. Abugu, ***'Principles of Corporate Law in Nigeria'****, (MIJ Professional Publishers, 2014), pp. 68-77.*

[3] Some *LeLaw Thought Leadership* contributions to ***CAMA 2020*** related discourse, include: Afolabi Elebiju and Ejiro Eferakeya, ***'What's in a Name?: Issues in Conflict of Corporate Names in Nigeria'****, June 2021:* https://lelawlegal.com/add111pdfs/AEEjiro_-_Corporate_Name_Conflict_Article_Rev.pdf*;* Afolabi Elebiju, ***'Synchronisations: Size Categorisations under Nigerian Companies and Tax Legislation'****, August 2021:* https://lelawlegal.com/add111pdfs/AE_-_Synchronisations_Companies_Size_3.pdf; Afolabi Elebiju, ***'Relationships and Scrutinisations: The Companies and Allied Matters Act 2020 and Transfer Pricing in Nigeria'****, April 2021:* https://lelawlegal.com/add111pdfs/AE_-_Synchronisations_%20Companies%20_Size_3.pdf; Afolabi Elebiju and Samuel Ngwu, ***'Anomalies: The Illogics of Section 283(c) and 20(1)(d) Companies and Allied Matters Act 2020 Directors' Removal/Disqualification Overkill'****, March 2022:* https://lelawlegal.com/add111pdfs/AESam_-_Director_Removal_Final_Review.pdf; Afolabi Elebiju, et al, ***'Validity Questions: Nigeria's Companies and Allied Matters Act 2020 (CAMA) and Limited Partnerships (LPs)'****,* February 2023: https://lelawlegal.com/add111pdfs/Validity_Questions_CAMA_updated.pdf; and Afolabi Elebiju, et al, ***'Choices and Preferences: Corporate Versus Partnership Vehicles Under the Companies and Allied Matters Act 2020 – What Are the Relevant Business Considerations?', April 2022:*** https://lelawlegal.com/add111pdfs/Validity_Questions_CAMA_updated.pdf (all accessed 01.07.2023).

Traditionally, most countries had a minimum two shareholders' incorporation and operating requirement, for limited liability companies. Even "*the model law of the UN Commission on International Trade Law in the past required more than one shareholder to incorporate a limited company, as companies were established by contractual relationship.*"[4] However, in line with the corporate regulatory evolutionary changes reflective of business landscape developments, SSCs have been globally recognised; and early adopters include the United Kingdom,[5] Canada,[6] the European Union,[7] Australia,[8] the United States of America,[9] Malaysia,[10] Singapore,[11] and Hong Kong.[12] Apparently, Nigeria came late to 'the SSC party', even behind some African countries

[4]See Napat Siri-Armart, ***'The Single-shareholder Companies Law and its Expected Impact on SMEs'***, *Bangkok Post, 16.10.2015:* https://www.tilleke.com/wp-content/uploads/2015/10/2015-oct16-the-single-shareholder-companies-law.pdf (accessed 08.07.2023).

[5]See for example, ***The Companies (Single Member Private Limited Companies) Regulations 1992***. Its ***Regulation 2*** provides in part that: "*2(1)* ***Notwithstanding any enactment or rule of law to the contrary, a private company limited by shares or by guarantee within the meaning of section 1 of the Companies Act 1985 may be formed by one person (in so far as permitted by that section as amended by these Regulations) and may have one member****; and accordingly - (a) any enactment or rule of law which applies in relation to a private company limited by shares or by guarantee shall, in the absence of any express provision to the contrary, apply with such modification as may be necessary in relation to such a company which is formed by one person or which has only one person as a member as it does in relation to such a company which is formed by two or more persons or which has two or more persons as members; and (b) without prejudice to the generality of the foregoing,* ***the Companies Act 1985 and the Insolvency Act 1986 shall have effect with the amendments specified in the Schedule to these Regulations****."* https://www.legislation.gov.uk/uksi/1992/1699/made#fo0003. The provisions of the ***Schedule*** include the following: *"****1. In section 1 of the Companies Act 1985 (mode of forming incorporated company), after subsection (3) insert – '(3A) Notwithstanding subsection (1), one person may, for a lawful purpose, by subscribing his name to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company being a private company limited by shares or by guarantee.' Minimum membership for carrying on business 2.*** *In section 24 of the Companies Act 1985 (minim um membership for carrying on business), after 'company' where it first occurs insert ', other than a private company limited by shares or by guarantee'. Contracts with sole members. 3(1) In Part X of the Companies Act 1985, after section 322A insert –* ***'Contracts with sole members who are directors' 322B.*** *- (1) Subject to subsection (2), where a private company limited by shares or by guarantee having only one member enters into a contract with the sole member of the company and the sole member is also a director of the company, the company shall, unless the contract is in writing, ensure that the terms of the contract are either set out in a written memorandum or are recorded in the minutes of the first meeting of the directors of the company following the making of the contract."* Prior to that, ***section 1(1) Companies Act (CA) 1985*** originally provided that "***Any two or more persons associated for a lawful purpose*** *may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability*": https://www.legislation.gov.uk/ ukpga/1985/6/section /1/enacted. ***Section 7(1) CA 2006*** continues in that mode by stating: "*A company is formed under this Act by* ***one or more persons*** *- (a) subscribing their names to a memorandum of association (see section 8), and (b) complying with the requirements of this Act as to registration (see sections 9 to 13).*" Several other ***Section 123 CA 2006*** provisions also recognises SSCs and states post incorporation compliance requirements if the company ceases to be a one shareholder company: https://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en. pdf (all web links accessed 30.07. 2023).

[6]As at 1978, ***section 5(1) Canada Business Corporations Act (CBCA)*** stated that: "***One or more persons****, being a body corporate or an individual, may incorporate a corporation by signing and delivering to the Director articles of incorporation.*" The same provision of the most current version of the ***CBCA 1985*** provides that "*One or more individuals or bodies corporate may incorporate a corporation by signing articles of incorporation and complying with section 7*".

[7]"***The 12th Company Law Directive (2009/102/EC of 16 September 2009)*** *provides a framework for single-member private limited liability companies where all shares are held by a single shareholder.*" Emphasis supplied. See Mariusz Maciejewski and Udo Bux, 'Fact Sheets on the European Union, ***Company Law'***, *European Parliament, May 2023*: https://www.europarl.europa.eu/factsheets/en/sheet/35/company-law#:~:text=The%2012th%20Company%20Law%20Directive,held%20by%20a%20single%20shareholder. For example, in Estonia, "*A company is considered a single shareholder if it has only one founder. This is usually the case for freelancers, consultants, digital nomads and other forms of digital solopreneurs. If, however, a company has several co-founders, it is a multi-shareholder company.*" See ***'Single vs. Multi-Shareholder Company'***, *Republic of Estonia E-Residency, 27.07.2023*: https://learn.e-resident.gov.ee/hc/en-us/articles/360000866837-Single-vs-multi-shareholder-company#:~:text=A%20company%20is%20considered%20a,is%20a%20multi%2Dshareholder%20company (accessed 30.27.2023). It is further stated that: "*The registration process of a single-shareholder OÜ is simple and straightforward. … With an e-Residency digital ID card, you can register your company online from anywhere in the world.*"

[8]In Australia, "***All companies must have at least one member****. … ASIC may apply to a court to have a company wound up if it does not have any members.*" Emphasis supplied. See Australian Securities & Investment Commission, ***'Company Shareholders'***, *Information Sheet 47 (INFO 47)*: https://asic.gov.au/for-business/running-a-company/company-shareholders/ (accessed 30.07.2023). ***Section 20, Corporations Act 2001 (CA 2001)*** provides that "*A reference in this Act to a person carrying on a business, or a business of a particular kind, is a reference to the person carrying on a business, or a business of that kind, whether alone or together with any other person or persons.*" The ease of doing business mindset is exemplified by ***section 1.5.4 CA 2001*** in part as follows: "*The operators of small businesses can either buy 'shelf' companies [companies that has already been registered but has not traded] or set up new companies themselves. … The operator of a small business may find it more convenient to buy a 'shelf' company but … To set up a new company themselves, the operator must apply to ASIC for registration of the company.* ***A*** *proprietary company limited* ***by shares must have at least 1 shareholder****.*" Emphases supplied. This is suggestive that everything is geared towards making life easier for seamless start-up of companies, particularly SSCs; the Nigerian corporate regime must borrow a leaf from such mindset.

[9]See Nellie Akalp, ***'Party of One: Setting Up Your Single-Person Corporation'***, *Entrepreneur, 14.12.2016*: https://www.entrepreneur.com/starting-a-business/party-of-one-setting-up-your-single-person-corporation/283918#:~:text=However%2C%20all%20states%20do%20allow,and%20officer%20for%20your%20company. According to her, "*However, all States do allow corporations to have just one owner. You can be the sole shareholder, director and officer for your company.*" Also, "*A Single Member LLC definition is a limited liability company with one member. It's a type of entity that has caught on across the United States. It was created to satisfy emerging needs from the rapidly changing business world. One example of this is the owner/member requirements of limited liability companies. The owners are often not required to be individuals, citizens, or a specific type of business. This gives more flexibility to single member limited liability companies as well as conventional limited liability companies.*" See ***'Single Member LLC Definition', Strategic CFO,*** *24.10.2018*: https://strategiccfo.com/articles/management-ownership/single-member-llc-definition/. According to the IRS, "*For income tax purposes, an LLC with only one member is treated as an entity disregarded as separate from its owner, unless it files Form 8832 and affirmatively elects to be treated as a corporation. However, for purposes of employment tax and certain excise taxes, an LLC with only one member is still considered a separate entity.*" See IRS, ***'Single Member Limited Liability Companies'***: https://www.irs.gov/businesses/small-businesses-self-employed/single-member-limited-liability-companies (both accessed 22.07.2023).

[10]***Section 9 Companies Act 2016 (Act 777, Laws of Malaysia 2018)***: https://www.ssm.com.my/Pages/Legal_Framework/Document/Act%20777%20Reprint.pdf, which introduced SSCs provides that: "*A company shall have - (a) a name; (b)* ***one or more members****, having limited or unlimited liability for the obligations of the company; (c) in the case of a company limited by shares,* ***one or more shares****; and (d)* ***one or more directors****." Per* ***section 209(6)****,* "***Where a sole director who is also the sole shareholder of a company*** *is unable to manage the affairs of the company by reason of his mental incapacity, the committee appointed under the Mental Health Act 2001 to manage his estate may appoint a person as a director.*" Emphases supplied. *Cf.* ***section 14(1) Companies Act 1965 (Act 125, Laws of Malaysia)***: "*Subject to this Act any two or more persons associated for any lawful purpose may by subscribing their names to a memorandum and complying with the requirements as to registration form an incorporated company.*" https://www.ssm.com.my/bm/acts/a125pdf.pdf. For highlights of other changes introduced in the 2016 legislation, see ***'Malaysia New Company Act 2016 Introduced by CCM'***, *Malaysia Biz Advisory*: https://www.malaysiabizadvisory.com/malaysia-new-company-act-2016/ (all accessed 30.07.2023).

[11]***Section 17(1) Companies Act 1967, Cap. 50*** provides: "*Subject to the provisions of this Act,* ***any person may, whether alone or together with another person****, by subscribing the person's name or their names to a constitution and complying with the requirements as to registration, form an incorporated company.*" https://sso.agc.gov.sg/Act/CoA1967. The SSC innovation seem to have been introduced in 2014. According to an update, the ***Companies Act 1967*** has been further amended by the "*Singapore's Companies, Business Trusts and Other Bodies (Miscellaneous Amendments) Act 2023 (the 2023 Act) came into effect on 1 July 2023.*" See ***'Singapore Companies Act Amendments Now in Place'***, *STEP, 06.07.2023*: https://www.step.org/industry-news/singapore-companies-act-amendments-now-place#:~:text=The%202023%20Act%20expands%20the,computation%20of%20the%20acceptance%20threshold (both accessed 30.07.2023).

[12]***Section 67(1) Companies Ordinance 2014 (Cap. 622)*** stipulates that "***Any one or more persons*** *may form a company by - (a) signing the articles of the company intended to be formed; and (b) delivering to the Registrar for registration - (i) an incorporation form in the specified form; and (ii) a copy of the articles.*" https://www.elegislation.gov.hk/hk/cap622?xpid=ID_1438403540805_001 (accessed 30.07.2023).

like Ghana (1963),[13] Tanzania (2012),[14] Kenya (2015),[15] South Africa (2008),[16] Mauritius (2001),[17] Egypt (2018),[18] and Rwanda (2018).[19]

Traditionally, most countries had a minimum requirement of two shareholders to register a limited liability company. For example, according to a commentator, "*the model law of the UN Commission on International Trade Law in the past required more than one shareholder to incorporate a limited company, as companies were established by contractual relationship.*" The authors view it as a bit of anti-climax for ***CAMA*** to introduce SSCs, but yet restrict existing multi-shareholders companies from taking advantage of the innovation by converting into SSCs.

'Analysis and Viewpoints': CAMA's Restrictive SSC Regime

Some ***CAMA*** provisions seem to make clear that *the SSC corporate vehicle is only available on a go forward basis, and therefore a previous multi-shareholder company cannot 'restructure' into an SSC*. For example, a 'nominee shareholder' (holding one share), in a two-member company, cannot transfer his shares to the other (main) shareholder, even though in substance the main shareholder is the *alter ego*, and effectively the "sole shareholder" of the company.[21]

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[13]See ***section 8 Companies Code 1963 (Act 179)*** which provided as follows: *"Any one or more persons may form an incorporated company by complying with the provisions of this Code in respect of registration."* https://new-ndpc-static1.s3.amazonaws.com/CACHES/PUBLICATIONS/2016/09/04/COMPANIES+CODE,+1963+(Act+179).pdf, whilst ***section 6 Companies Act 2019 (Act 992)*** is *in pari materia*, that *"One or more persons may form an incorporated company under this Act."* https://rgd.gov.gh/docs/Act%20992.pdf. *"A Ghanaian LLC can be formed by a single shareholder, who must appoint two directors. While all can be foreigners, one of the directors must be ordinarily resident in Ghana."* See ***'Business Entities in Ghana in 2023'***, *Healy Consultants*: https://www.healyconsultants.com/ghana-company-registration/setup-llc/. *"… The Companies Act, 2019 has been in the works since 2018 and replaces the Companies Act, 1963 (Act 179). At a very high level, the new Act seeks to introduce improved corporate governance standards for companies operating in Ghana. The Act draws on the experience of more developed jurisdiction[s] and specifically incudes international best practices from jurisdictions such as the United Kingdom, New Zealand, South Africa and Mauritius."* See also, ***'Ghana's New Companies Act Passed!'*** *Audrey Grey, 02.08.2019*: https://audreygrey.co/home-grid-slider/ghanas-new companies-act-passed/ (all websites accessed 30.07.2023).

[14]SSCs was introduced in Tanzania by virtue of ***section 18 Business Laws (Miscellaneous Amendments) Act 2012 (BLA 2012)*** which amended ***Companies Act No. 212 of 2002.*** See Bowmans, ***'Doing Business in South Africa, Zambia, Tanzania, Kenya and Uganda'***, (undated): https://bowmanslaw.com/article-documents/Doing-business-in-Zambia-Tanzania-Kenya-and-Uganda.pdf. According to Bowmans (at *p.3*), *"Where a single shareholder company contravenes any provision of the Companies Act, this single shareholder is, however, personally liable and can be sued personally and in his own name"*. See also Fatma Haruna Songoro & Hemed Kaniki, ***'The Law on Single Shareholder Companies in Tanzania'***, *Victory Attorneys & Consultants, 15.03.2022*: https://victoryattorneys.co.tz/the-law-on-single-shareholder-companies-in-tanzania/#:~:text=The%20laws%20in%20Tanzania%20allow,its%20shareholder%20to%20one%20person (both accessed 24.07.2023). According to them, *"A further step was taken in the year 2014 when the Minister for Trade enacted* ***The Companies (Limited Liability Single Shareholder Company) Regulations (hereinafter the Regulations)*** *to provide for, among others, the establishment and management of a [SSC]*. For example, on *"**Perpetual succession**: It is a requirement under **Regulation 13(1)** of the Regulations to appoint a nominee director and alternative director to manage the company in case of death of a sole member who is also a sole director. The alternative director is to handle the affairs of the company where the nominee director is not available. As the position stands in India, the law requires a single shareholder to state a name of a person who, in the event of death of a single shareholder, shall become a subscriber (member) of the company."* Also, regarding *"**Lifting Corporate Veil:** A single shareholder member of a company shall be personally liable for all unlawful act[s] committed in relation to the company as specified under **Regulation 10** of the Regulations. This means that the corporate veil can be lifted and a single member can be held liable for all illegal acts committed in the conduct of company's business."* Also, ***section 279(1)(c) CA 2002*** which listed membership of a company falling below two as one of the grounds for winding up was amended by ***Section 27 BLA 2012*** to exclude limited liability SSCs.

[15]In Kenya, the ***Companies Act No. 15 of 2015*** (which received presidential assent on 11th September 2015), introduced SSCs, *vide* its ***section 11:*** http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/2015/TheCompaniesAct_No17of2015_RevisedCompressed.pdf. Also, ***section 424(1)(d) Insolvency Act No. 18 of 2015*** states that one of the circumstances in which a court may liquidate a company is where the number of members reduced below two, *"except, in the case of a private company limited by shares or by guarantee"*: http://www.kenyalaw.org:8181/exist/rest/db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/I/Insolvency%20Act%20-%20No.%2018%20of%202015/docs/InsolvencyAct18of2015.pdf. This meant that the latter ***Act*** was in tandem with SSC regime of its corporate peer legislation, in effect permitting the restructuring of erstwhile multi-shareholder private companies to SSCs. See also Capita Registrars, ***'Summary of the Companies Act 2015 (Commencement)'***, *16.12.2015:* https://capitaregistrars.co.ke/summary-of-the-companies-act-2015-commencement/; and ***'You Can Now Register a Sole Shareholder and Director Company in Kenya'***, *12.01.2016:* https://capitaregistrars.co.ke/you-can-now-register-a-sole-shareholder-and-director-company-in-kenya/ (all accessed 23.07.2023).

[16]***Section 13(1) Companies Act No. 71 of 2008*** provides in part that: *"**One or more persons** may incorporate a profit company, or three or more persons may incorporate a non-profit company…"*: https://www.gov.za/sites/ default/files/gcis_ document/201409/321214210.pdf. See also ***section 162(10)(d)(iii)*** which empowers the Court to *"order, as conditions applicable or ancillary to a declaration of delinquency or probation, that the person concerned in the case of an order of probation be limited to serving as a director of a private company, **or of a company of which that person is the sole shareholder**." Cf.* ***section 13(1) Companies Act (as amended by section 8 Companies Amendment Act No. 3 of 2011)***: *"**One or more persons**, or an organ of state, may incorporate a profit company, and an organ of state, a juristic person, or three or more persons acting in concert, may incorporate a non-profit company…"* Emphases supplied. https://www.justice.gov.za/legislation/acts/2008-071amended.pdf (both accessed 27.07.2023). Meanwhile, ***section 81 CA 2008*** lists the grounds for winding up solvent companies by court order, and it not does include if the membership falls below two.

[17]Whilst ***section 2(1) Companies Act No. of 2001*** describes that a *" 'one person company' - (a) means a private company in which the only shareholder is also the sole director of the company; and (b) does not include a company in which the only shareholder is a corporation*; ***section 22*** prescribes that: *"**Any person** may, subject to the other provisions of this Act, apply for incorporation of a company under this Act."* By ***section 23(2)(h)***, the application for incorporation of a company shall include *"**in the case of a one person company**, the full name and residential address and occupation of the person nominated by the proposed director to be the secretary of the company pursuant to section 140 in the event of the death or mental incapacity of **the sole shareholder and director**." Per* ***section 140(3)-(5):*** *"(3) **Every company which for a continuous period of 6 months has been a one person company shall, if it has not already made the nomination at the time of incorporation, file with the Registrar a notice nominating a person to be the secretary of the company in the event of the death of the sole shareholder and director.** (4) A notice under subsection (3) shall state the full name, residential address and occupation of the person nominated and shall be accompanied by the consent to act in writing signed by that person. (5) The person nominated by a one person company pursuant to subsection (3) shall assume office as secretary of the company upon the death of the sole shareholder and director with the responsibility of calling as soon as practicable a meeting of the heirs or other personal representative of the deceased for the purpose of appointing a new director or directors."* Emphases supplied.

[18]*"For the first time, the law allows the incorporation of single-shareholder companies, or what is known as the sole proprietorship. Subject to certain variations, all provisions applying to limited liability companies will apply to the single-shareholder companies. There is no restriction on the nationality of the single-shareholder. A requirement to have one Egyptian manager may however apply."* See ***'Substantial Amendments to Egypt's Companies Act'***, *Riad & Riad Law Firm, 01.02.2018*: https://riad-riad.com/substantial-amendments-egypts-companies-act/ (accessed 30.07.2023).

[19]***Article 3 (Incorporation) of Rwanda's Law N°17/2018 of 13/04/2018 (Law Governing Companies)*** stipulates that: *"**One or more persons** may form a company by pooling together resources or services for business purposes and filling out an appropriate form or by complying with the provisions of this Law. … "*: https://rwandalii.africanlii.org/sites/default/files/gazette/OG%2BNo%2BSpecial%2Bof%2B18%2B-04-2018.pdf (accessed 30.07.2023). Note that ***Article 160*** on the resignation of company's sole director presumes that such sole director is also not a sole shareholder: *"Where a company has only one director, that director shall not resign until that director has called a general meeting of shareholders to receive notice of the resignation and one or more new directors are appointed. The resignation by the sole director of a company takes effect as of the date on which the general meeting of shareholders is held and approves the resignation."*

[20]Napat Siri-Armart, ***'The Single-shareholder Companies Law and its Expected Impact on SMEs'***, *Bangkok Post, 16.10.2015:* https://www.tilleke.com/wp-content/uploads/2015/10/2015-oct16-the-single-shareholder-companies-law.pdf (accessed 08.07.2023).

[21]In such scenario, the nominee shareholder might just have 'lent' his name to be a nominee shareholder in order to enable the main shareholder incorporate the company, because of the erstwhile two minimum shareholder rule. Note however, that the individual circumstances are important, thus there may not be a general rule that a controlling shareholder is ipso facto the alter ego of such company: ***Williams v. Adold/Stamm Int. Nig. Ltd [2022] 5 NWLR (Pt. 1822) 23, at 96F-G.***

The clearest ***CAMA*** provision in this regard is ***section 571(c) CAMA*** which lists amongst the circumstances under which a company may be wound up, ***"if the number of members is reduced below two in the case of companies with more than one shareholder."***[22] This, coupled with the fact that ***section 18(2) CAMA*** speaks in terms of *"one person may form and incorporate a private company"* only, conclusively shows that the ***CAMA*** precludes the potential conversion of two or multi-shareholder companies into SSCs.[23] Unsurprisingly, there has been quite some commentary on the issue, mostly criticising the short-sightedness behind limiting the benefits of the SSC innovation.[24]

Consequently, this article argues that the combined provisions of ***sections 18(2)*** and ***571(c) CAMA***, requires legislative amendment to

give full vent to the reform objectives that informed those provisions in the first place: *to facilitate the ease of doing business, lighten regulatory burden vis a vis conferring benefits of separate legal personality*, since these could in turn further catalyse economic prosperity through improved operating efficiencies.[25]

We argue that the inability of existing companies with nominee shareholders to convert to SSCs is impermissible *cum* unfair discrimination, and should therefore attract immediate legislative attention.[26] According to the ***Nigerian Judicial Dictionary***,[27] citing ***Lawal v. FRN***,[28] *"discrimination includes differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured".*

This is particularly because it is unreasonable that *the only basis why shareholders are exposed to different treatments, will boil down to the time when their companies were incorporated*. A review of some other jurisdictions with SSC regimes show that they permit restructuring of extant companies into SSCs.[29] Furthermore, an

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[22]Emphasis and underlining supplied. *Cf.* the predecessor provision (in ***section 408(c) CAMA 2004***): *"A company may be wound up by the court if the number of members is reduced below two"*.

[23]For some discussion, see Anuoluwapo Balogun *et al*, ***'Mergers & Acquisitions, Private Equity 2022 Wrap-Up|2023 Outlook'***, *Olaniwun Ajayi, 17.03.2023, pp. 19-20* (***Implications of the CAMA 2020 Provisions On Single Member Companies On Corporate Restructurings***): https://www.olaniwunajayi.net/blog/wp-content/uploads/2023/03/2022-MAPE-Wrap-Up-2023-Outlook.pdf; Unini Chioma, ***'Import of Section 571(c) of CAMA on CAMA's Single-Shareholder'***, *The Nigerian Lawyer, 24.11.2022*: https://thenigerialawyer.com/import-of-section-571c-of-cama-on-camas-single-shareholder/ (both accessed 08.07.2023).

[24]See for example, Tayo Fabusiwa, ***'Single Member Companies and the Restriction to Convert'***, *BusinessDay, 18.01.2023*: https://businessday.ng/opinion/article/single-member-companies-and-the-restriction-to-convert/ (accessed 30.07.2023). According to him, *"While section 18(2) itself does not proscribe conversion from a multiple-member structure to a single-member structure, section 571(c) stipulates that one of the circumstances whereby a company may be wound up by the court is where 'the number of members is reduced below two in the case of companies with more than one shareholder'. **Moreover, there is no provision outlining a process for the conversion or reregistration of a multiple-member company to a single-member company. A combined reading of sections 18(2) and 571(c) of CAMA 2020 suggests that conversion from a multiple-member structure to a single-member structure is not permitted**, as such is a ground for winding up – and this, in the writer's view, is quite problematic."* The learned commentator stated elsewhere in the same article that: *"It is worthy of note that section 408(c) of CAMA 1990 also provided for the reduction of members to one as a ground for winding up, however, such provision was relevant then given that under the old law, companies were ordinarily required to be incorporated with at least two members. **The retention of this ground for winding up in CAMA 2020 and the inclusion of the phrase '… in the case of companies with more than one shareholder' suggest that the intendment of the drafters was to preclude multiple-member companies from converting to a single-member structure. This is however not in line with international best practices, especially within jurisdictions that recognise single-member company structures**."* Emphases supplied.

[25]Note that SSCs are not necessarily small companies (SCs) as defined by ***CAMA***, albeit most may be. For example an SSC may choose to, but is not obliged to have, only one director: ***section 271(1) CAMA***.

[26]***Section 42 Constitution of the Federal Republic of Nigeria 1999 (as amended) (1999 Constitution)*** guarantees as a fundamental human right to Nigerian citizens, freedom from discrimination. However, the question may be asked whether multi-shareholder companies are *"citizens"* capable of being discriminated against, given the provisions of ***Chapter III 1999 Constitution (Citizenship)*** that equates *"citizens"* to individuals or natural *"persons"*? This is because of references such as *"every person born in Nigeria"*, *"born outside Nigeria"*, *"whose parents"*, *"any of whose grandparents"*, *"person of good character"*, *"his desire"*, *"he has taken"*, *"any woman"*, *"every person of full age and capacity"*, etc. On its part, ***section 42(1)*** talks about "A citizen of Nigeria of a ***particular community, ethnic group, place of origin, sex, religion or political opinion*** shall not, by reason only ***that he is such a person*** …", whilst ***section 42(2)*** states that *"No citizen of Nigeria shall be subjected to any disability or deprivation merely **by reason of the circumstances of his birth**."* Emphases supplied. Although ***CAMA*** regards a company as a "person" in law (with separate legal personality, perpetual succession, etc *per* ***section 42***), and indeed endows it with *"all the powers of a natural person of full capacity"* ***(section 43(1))***, our reluctant view is that a strict reading of ***Chapter III and section 42 1999 Constitution*** disregards Nigerian companies as citizens for this purpose. *However, there may be a window for sympathy if shareholders can cast their narrative that discrimination against their company essentially amounts to discrimination against them, qua shareholder/citizens*. Furthermore, that the registration of the company is equivalent to its birth, so it would therefore be a breach of ***section 42 1999 Constitution*** to discriminate a company. This is further reinforced by ***section 18 Interpretation Act, Cap. I23 LFN 2004's*** definition of *"person"* that *"includes any body of persons, corporate or incorporate"*. Note however that ***section 14(a) Cap. I23*** on gender refers to only males and females. In ***Standard Chartered Bank Ltd v. Adegbite [2019] 1 NWLR (Pt. 1653), 348 at*** 368F-H, the Court of Appeal affirmed the constitutional nature of the right to freedom from discrimination. In ***Mbonu v. Wakama [2022] 14 NWLR (Pt. 1849), 191 at 208B-C***, the SC held that any breach of the fundamental human rights provisions of ***1999 Constitution*** renders any subsequent act, a nullity. For a scenario in England, see Jeremy Cook, ***'Can a Company be Discriminated Against?'***, *Stephen Scown LLP, 20.11.2015*: https://www.stephens-scown.co.uk/employment/can-a-company-be-discriminated-against/ (accessed 24.07. 2023). The author reviewed ***EAD Solicitors LLP & Ors. v. Abrams UKEAT/0054/15/DM*** where the Employment Appeal Tribunal held that limited companies can also be discriminated against. According to the author, *"In reaching its decision, the EAT rejected the EAD's argument that since only individuals can have the protected characteristics listed in the Act, only individuals can be protected from discrimination. The EAT held that the purpose of the Act is not to protect individuals on the basis of their own protected characteristics but to guard against discrimination caused by, or related to, a protected characteristic. Further, the EAT noted that it is well established that a discriminator can be a corporate body and it did not believe there was any reason why the "person" on the receiving end of the discrimination must necessarily be an individual."*

[27]B. P. Ishaku, ***'Nigerian Judicial Dictionary'*** *(2017, Ritpank), p. 122.* See also similar reference in ***'Sasegbon's Judicial Dictionary of Nigerian Law'***, *(1st ed. (2019), DSC Publications), Vol. 3, p.215.*

[28]***[2013] 3 NWLR (Pt. 1342) 451 at 467-468.***

[29]For example, in the United Kingdom, ***section 123 CA 2006*** provides that: *"**If the number of members of a limited company falls to one**, or if an unlimited company with only one member becomes a limited company on re-registration, there shall upon the occurrence of that event be entered in the company's register of members, with the name and address of the sole member- (a) a statement that the company has only one member, and (b) the date on which the company became a company having only one member."* Emphasis supplied. Furthermore, the erstwhile ***section 122(1)(e)*** ***Insolvency Act 1986*** (***IA 1986***) which listed the membership of a company falling to below two as a possible ground for winding up, was deleted by ***Para 6(4) Companies Act 2006 (Consequential Amendments and Transitional Provisions) Order 2011 (CAO 2011)***. https://www.legislation.gov.uk/uksi/2011/1265/made/data.pdf *Cf.* also the predecessor legislative actions discussed in *Footnote 5* herein. See also ***section 465(1)(d) Malaysia's Companies Act 2016*** which makes fall of company's membership to zero, as a ground for winding up.

unintended drawback is that *the current provisions can have a chilling effect on M&A transactions because prospective (sole proprietor) acquirers of a multi-shareholder company may be reluctant to do so, if the company cannot be restructured or converted to an SSC.*

The same inefficiency will be imposed where a current main shareholder - whose nominee shareholders are willing to transfer 'their' shares to so that the company can become an SSC - will be forced to first liquidate the company and then incorporate an SSC; or incorporate an SSC and then have the current company with nominee shareholders undertake a merger or scheme of arrangement with the SSC; with the SSC as the surviving entity.[30] *Aside any doubts whether this is even possible is the fact that this is a longer, tortious and more costly route to achieving SSC status for existing companies.*

We will preface our discussions with the rationale/benefits of SSCs that made them an attractive innovation for the ***CAMA*** to include in its provisions, because they also underpin ***CAMA's*** current SSC regime shortcomings.

'Benefits': Rationale for SSCs

Obviously, the introduction of SSCs is meant to improve the ease of doing business by dispensing with the minimum two shareholder rule, whereby individuals who, to all intents and purposes are sole shareholder/proprietors, have to 'laden' their business with at least a nominee shareholder, who in many instances may hold just one share (and also often, in trust).[31]

The advent of SSCs ushered in an era where a 'sole proprietor' could carry on business with the toga of separate legal personality; in other words, he could enjoy the benefit without the great risk of unlimited personal liability inherent in sole proprietorship, thus having the best of both worlds.[32]

Aside from the greater operational flexibility, the lighter compliance burden of SSCs (relative to small companies which also enjoy lighter burden *vis a vis* medium, large and/or public companies), is noteworthy. For example, by ***section 237 CAMA***, SSCs (like small companies), are not mandated to hold Annual General Meetings (AGMs),[33] whilst ***section 421*** relieves SSCs of the requirement to file annual returns. Essentially, other

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[30]Arguably, such should be possible given that the combined provisions of ***sections 183(1)(e), Chapter 27 (Arrangements and Compromise, sections 710 to 717), section 92 Federal Competition and Consumer Protection Act No. 1 of 2019 (FCCPA),*** etc do not preclude schemes or mergers with SSCs. ***Section 92(1)(a) FCCPA*** declares that *"For the purposes of this Act* ***a merger occurs when one or more undertakings*** *directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking".* ***Section 711(1) CAMA*** provides in part that *"Where under* ***a scheme proposed for a compromise, arrangement or reconstruction between two or more companies or the merger of any two or more companies, the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as "the transfer of company") is to be transferred to another company****, …"* *Cf.* that the erstwhile ***section 118(2) Investment and Securities Act, Cap. I 24 LFN 2004*** even applies merger provisions to partnerships, and arguably ***Part XII FCCPA (Mergers, sections 92 – 103)*** also applies to partnerships. This is moreso as ***CAMA's Chapter 7*** only has provisions for mergers of associations and not partnerships. See for example, ***section 849****: "Two or more associations with similar aims and objects may merge under terms and conditions as the Commission may prescribe by regulation."*

[31]According to some commentators, *"But this idea [of 2 minimum shareholders] was rendered cosmetic when it became possible for one person to own a business and merely invite another person just to meet the statutory requirement of two. He or she takes 99.9% of the shares and gives the other "figure head" 0.1%. The Figure Head has no idea about the business and contributes nothing to the running of it. In some cases, the individual who ordinarily owns the business is left inviting some other person who might even be unsuitable just to comply with the compulsory requirement of two. Interestingly, it is worthy of note that some of these one-man (or one-woman) companies have been thriving for years."* See Stephen Azubuike, ***'One-person Company in the New CAMA: A Bow to an Existing Practice'****, Infusion Lawyers, 25.08.2020:* https://infusionlawyers.com/one-person-company-in-the-new-cama-a-bow-to-an-existing-practice/ (accessed 30.07.2023).

[32]See for example, Salah Mohammed N Almasabia, *et al,* ***'Single Shareholder Company in Africa, America and Australia: A Comparative Analysis'****, Sriwijaya Law Review, Vol. 7 Issue 1, January 2023, pp. 47-61:* http://journal.fh.unsri.ac.id/index.php/sriwijayalawreview/article/view/2142/pdf (accessed 30.07.2023). According to the authors (at *pp. 48-49*): *"OPC, as the literal meaning of it connotes, is a company owned by one person. It is also defined as a company which has one corporate shareholder entity, where legal & financial liability is limited to the company only. Being a private company, the laws regulating other private companies also affect the operation of OPCs. … … OPC is a revolutionary concept and a hybrid of sole proprietorship and company forms of business. An OPC resembles a sole proprietorship but differs from it. The distinguishing feature between them is that a person could operate and function like a proprietary enterprise for all intents and purposes while enjoying the status and advantages of a company. This feature of the OPC is seen as the right law to harness the talent pipeline of developing global business people, particularly start-up ventures. Additionally, due to the company's status, the business has additional opportunities to raise capital due to its improved creditworthiness. It broadens the company's financial foundation. OPC is a corporation. Hence the owner's liability is constrained because it is a distinct legal entity. For the owner, this is unquestionably the most significant benefit. Moreover, the company would not be dissolved in the event of the death or incapacity of the lone member. As a result, many profitable businesses would be able to continue operating even in the event that their owner died or became incapable of managing the business. The incorporation of OPC into the legal system is a step that would promote the corporatisation of micro-businesses and entrepreneurship with a less onerous legal framework so that the small business owner is not required to spend much time, energy, and money on intricate legal compliances. Individuals will be able to contribute to economic progress owing to this, and it will also create job. Regulations relating to OPCs are lenient, considering most of them are small companies. … "*

[33]It has been observed that: *"While filing annual returns for companies as prescribed by Form CAC 19 (Annual Returns Form), there is a requirement to fill the date of the AGM. Since single member companies are not required to hold AGMs, what date should be provided during the filing process? This suggests that the exemption of single member companies from holding meetings was not contemplated in drafting Form CAC 19. We, however, suggest that the date of the notification to the board may suffice for this purpose."* See Ezinne Ukwu and Ijeoma Asiana, ***'Recognition Of Nigerian Single Member Companies: How Does This Really Work?'****, Mondaq, 06.04.2023:* https://www.mondaq.com/nigeria/shareholders/1302156/recognition-of-nigerian-single-member-companies-how-does-this-really-work (accessed 30.07.2023).

waived or 'relaxed' post-incorporation requirements mean less operating costs.[34]

SSCs also represent a desirable frontier facilitating easing of the informal sector into the formal, so for example they could be part of the targeted improvement in tax collections.[35] SSC status could improve sole proprietorship business' access to funding, whilst the separate personality could often be a significant advantage in structuring real estate transactions.[36]

Overall, an optimal (light but effective) regulatory framework for SSCs help them function more efficiently, increasing the potential for more taxable profits from which the government, as the provider of the requisite enabling environment will benefit, *vide* its share of taxes. Because the government and the wider economy are also beneficiaries of an enabling business environment, is why the ***CAMA*** SSC restructuring should be as all-encompassing as possible.

The preclusion of existing private companies from restructuring as SSCs was brought into stark relief as those that had the wrong impression that they could advantage of ***CAMA's*** innovation were informed by the CAC that the provision is only forward looking and therefore, inapplicable to pre-existing companies.[37]

Can Foreigners Incorporate SSCs?

The question of whether foreign owned SSCs are permissible in Nigeria has also been asked. Since ***section 18*** does not introduce any nationality distinctions (or for that matter, ownership of any company type), the answer must be in the affirmative.[38] However, Nigerian companies with foreign participation have higher minimum capital thresholds than their Nigerian wholly owned peers, essentially because of the requirement for Business Permit registration and if applicable, application for investment incentives through the Nigerian Investment Promotion Commission (NIPC).[39]

Considerations: Downsides of Section 571(c) Chokehold on CAMA SSC Regime

The legislator having demonstrated business realities' awareness by providing for SSCs, ought to go the full hog. Because circumstances change, companies must have full flexibility to adapt accordingly or take advantage of opportunities as the case may be. For example, a closely held company owned by four shareholders may have the need to become an SSC because three shareholders want to exit or 'retire', and are happy to transfer their shares to the fourth shareholder on mutually agreeable terms.[40]

It beggars logic why such transaction and resultant restructuring into an SSC cannot be

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[34] *Cf*. Note to ***section 20(2) Australia's Corporations Act 2001***: *"*A small proprietary company *generally has* ***reduced financial*** reporting requirements *(see* subsection *292(2)).*" Emphasis supplied. http://www5.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s45a.html (accessed 30.07.2023).

[35] This is without prejudice to the fact that most SSCs are likely to be *"small companies"* as defined by the ***Companies Income Tax Act, Cap. C21 LFN 2004 (as amended) (CITA)*** *viz* with annual turnover of N20 million or less and which are exempted from CIT (subject to 0% CIT), and VAT compliance reporting obligations. Nonetheless, fact of company registration may then put the sole shareholder of an SSC into the personal income tax (PIT) net, whilst the SSC itself if a medium or large company may now contribute more tax revenue than previously. Note that CIT exemption does not relieve small companies of CIT filing obligations, and breach exposes them to sanctions. See Afolabi Elebiju ***'Synchronisations'*** article (***supra***, at *pp.2-7*); Afolabi Elebiju and Chimezirim Echendu, ***'Boundaries: Taxation of Nigerian Residents Providing Varying Services Remotely for Non-Residents'***, *LeLaw Thought Leadership Perspectives, 08.2021*: https://lelawlegal.com/add111pdfs/Boundaries_edited.pdf (both accessed 08.07.2023). On the importance of widening the tax net to catch the informal sector given their significant contribution to GDP, see Afolabi Elebiju and Ayoluwatunwase Fadeyi, ***'Value Added Tax and the Informal Sector'*** in Samagbeyi and Otusanya *(eds.)*, ***Value Added Tax in Nigeria: Policy, Legal Administrative Issues and Options for Reform*** *(CITN, July 2021) pp. 170-179.*

[36] For example, transfer of properties held by SSCs will not require Governor's consent, thereby saving time and transaction costs; instead of such. For further discussion, see Afolabi Elebiju and Oluwaseyi James, ***'Factors: A Discussion on Property Tax Delinquency and Allied Issues in Nigeria'***, *October 2021*, https://lelawlegal.com/add111pdfs/Elebiju_James_-_Property_Tax_Deliquency_in_Nigerian_and_Allied_Issues_(Final)_(1).pdf. (Originally published as ***'Tax Delinquency and Allied Issues in Nigeria'***, in *Journal of Commercial Law (JCL), Vol.8, No. 1 July 2022, pp 1094 – 1131*).

[37] See for example, Anuoluwapo Balogun *et al*, ***'Mergers & Acquisitions, Private Equity 2022 Wrap-Up/2023 Outlook'***, *Olaniwun Ajayi LP, 17.03.2023, p.20*: https://www.olaniwunajayi.net/blog/wp-content/uploads/2023/03/2022-MAPE-Wrap-Up-2023-Outlook.pdf (accessed 08.07.2023). According to the publication, *"In 2022, we witnessed existing companies, seeking to benefit from the sole shareholder construct, undergo some form of restructuring which resulted in the transfer of shares of the company to a single shareholder. However, the Corporate Affairs Commission (CAC) soon picked up on the filings by companies with multiple shareholders with the aim of changing form into single shareholder companies, and pushed back on such filings on grounds that CAMA does not provide for the restructuring of an existing company into a single shareholder company. The CAC based its rationale for rejecting these applications on the fact that the reduction in the number of shareholders in an existing company, to a number below 2 (two), is a ground for winding-up under section 571 of CAMA."*

[38] See also, Felicia Mosuro, ***'Does the Concept of Single-Shareholding Apply to Foreign-Owned Entities in Nigeria?'***, *Dentons-ACAS Law, 06.12.2021*: https://www.dentonsacaslaw.com/en/insights/articles/2021/december/6/does-the-concept-of-single-shareholding-apply-to-foreign-owned-entities (accessed 22.08.2023). According to her, *"There have been arguments that the concept of single-shareholding does not apply to foreign-owned entities registered in Nigeria as they are not considered small companies as defined under the Act. It is important to note that the requirements for qualification as a small company as provided for in Section 394(3) (a-f) of the Act does not include the number of shareholders. As such, any private company in Nigeria whether foreign-owned or indigenous can register as a single-shareholder company. However, foreign-owned entities registered in Nigeria cannot operate as small companies."* The learned authors further stated: *"… CAMA does not contain any express provision which vests on existing companies or a company with two or more members the right to restructure into a single member company, neither does it outline the process or steps for undertaking this restructuring. The effect of the foregoing is that the legal regime for single member companies under CAMA is narrow and very limited and every company in Nigeria, save companies incorporated as a single member company, will always consist of two or more members."*

[39] See Mosuro ***(supra)***: *"Accordingly, a foreign-owned company registered in Nigeria can operate as a single-shareholder company, provided it complies with the registration requirements of the CAC and NIPC on foreign participation in Nigeria."* For a more detailed discussion, see also generally Afolabi Elebiju, ***'Musings II: Is Business Permit under the Immigration Act Still Tenable in Nigeria?'*** *December 2020.*

[40] Note that exit by nominee shareholders may be desirable, because of the continuing exposure (for example reputation and other risks), that remaining in the company as shareholder and/or director brings. Under ***section 316 CAMA***, (previously ***section 290 CAMA 2004***), a nominee director may find himself personally liable for actions that the controlling took in the name of the company. It reads: *"Where a company - (a) receives money by way of loan for specific purpose; (b) receives money or other property by way of advance payment for the execution of a contract or project; or (c) with intent to defraud, fails to apply the money or other property for the purpose for which it was received,* ***every director or other officer of the company who is in default is personally liable to the party from whom the money or property was received for a refund of the money or property so received and not applied for the purpose for which it was received and nothing in this section affects the liability of the company itself."*** Emphasis supplied.

The current CAMA SSC regime detracts from the business regulatory reform strides that the Federal Government has made towards improving ease of doing business in Nigeria...

possible? This is moreso that ***CAMA*** specifically provides amongst others, for conversion of public into private companies, and *vice versa*.[41] If private-public status conversion and *vice versa* is permissible - ostensibly because of business exigencies - why is multi-shareholder conversion into SSCs prohibited?[42]

Unfettered ability to convert or restructure means that multi-shareholder companies with 'marginal' nominal shareholders are able to align their shareholding structure with reality, since the nominal shareholders are just there because of the erstwhile minimum shareholder requirement. Restricting conversion means ***CAMA*** is forcing such extant companies to continue *"living a lie"* or like its predecessor Nigerian companies' legislation, an endorser of same.[43]

It also means that nominal shareholders that are no longer desirous of just making up the numbers do not have a convenient exit route; since their exit could pose existential risk to the company, they or the *alter ego* would be forced to source for potential share transferees to take their place in the company. This may be easier said than done, depending on the circumstances of such company and the prospective nominal shareholders. Furthermore, the entry of the new nominal shareholders is also not without risks given that the right "chemistry" may not be achieved, or group dynamics may deteriorate.

It would appear that *the anti-trust considerations of the restructuring restriction has not been considered: is the inability of existing companies to restructure into SSCs not likely to confer competitive advantage on SSCs in same line of business, or be a competitive burden to a multi-shareholder company whose business realities now require that it become an SSC?*[44] *Is* ***CAMA*** *not thereby breaching the regulatory neutrality or equal treatment rule?*

It would have been different if there were transitional provisions in ***CAMA 2020*** laying out steps that for desiring existing private companies to restructure to single-shareholder companies.[45] If, as it appears, that an SSC can become a multi-shareholder company by issuing shares to additional shareholders, it defies logic why the reverse cannot be possible.[46]

The current ***CAMA*** SSC regime detracts from the business regulatory reform strides that the Federal Government has made towards improving ease of doing business in Nigeria, championed by the establishment of the Presidential Enabling Business Environment Council (PEBEC),[47] and enactment of legislation such as the ***Business Facilitation (Miscellaneous***

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[41] See for example, ***sections 30(3)*** and ***55 CAMA***. The latter provides that: "***A company may by re-registration under this Part alter its status*** *from - (a) a private company to a public company; (b) a public company to a private company; (c) a private limited company to an unlimited company; (d) an unlimited company to a limited company; or (e) a public limited company to an unlimited company.*" Emphasis supplied. The need for flexibility can be gleaned from the definition of "private company" in ***section 2(1) Malaysia's Companies Act 2016***. It "*means - (a) any company which immediately prior to the commencement of this Act was a private company under any corresponding previous written law; (b) any company incorporated as a private company under this Act; or (c) any company converted into a private company under section 41, being a company which has not ceased to be a private company under section 42*".

[42] See Tayo Fabusiwa, *(op. cit): "The Companies Act 2006 of the United Kingdom, one of the statutes after which CAMA 2020 was modelled, recognises and permits instances where one person may form a company (Sections 7(1)) or where the number of members in a limited company (private or public) may fall to one (Section 123(2)). In South Africa, section 13(1) of the Business Corporation Act 2008 (as amended) permits single-member companies and in practice, by agreement, other members in a multiple-member company may transfer their shares to a single shareholder. Elsewhere, the European Union in its Directive 2009/102/EC provides that* ***a company may have a single member upon formation or where all its shares come to be held, by a single person****. Under the Companies Act 2016 of Malaysia, companies may have a single member structure and section 466(d) stipulates that circumstances in which a company may be wound up by court is where the company comes to have no member."* Emphasis supplied.

[43] See Prof. Emeka Chianu, ***'Company Law'*** *(2012, Law Lords), at p. 177: "In truth, the rewards of incorporation, chief of which is attainment of limited liability – are [as] attractive to individual business persons as to groups of persons. Rather than seat back, a business person usually contrives a compliance with CAMA by enlisting the aid of friends, relatives and lawyers. The requirement for a board of directors is met in much the same way. It is understood that the assisting parties are to be nominal directors, who, if they perform any duties at all, would take orders from the real owners of the business. Actually this process involves an attempt at formation of a company through the use of dummy directors, all part and parcel of a scheme to avoid inconvenient provisions of CAMA."*

[44] This is particularly important because of the policy underpinnings of the ***FCCPA*** (referred to in *fn 30* herein). See its ***section 1 (Objectives)***: "*The objectives of this Act are to - (a)* ***promote and maintain competitive markets in the Nigerian economy****; (b)* ***promote economic efficiency****; (c)* ***protect and promote the interests and welfare of consumers by providing consumers with wider variety of quality products at competitive prices****; (d) …; and (e)* ***contribute to the sustainable development of the Nigerian economy***." Furthermore, by ***section 2(1) and 2(2)(c): "Except as may be indicated otherwise, this Act applies to all undertakings and all commercial activities within, or having effect within Nigeria***"; and "***This Act also applies to and is binding upon all commercial activities aimed at making profit and geared towards the satisfaction of demand from the public.***" Emphases supplied. We respectfully submit that the current restrictive ***CAMA*** SSC regime is antithetical to the intendment and objectives of the ***FCCPA***, and therefore not in the overall interest of the economy.

[45] Many legislation introducing sweeping changes to the old order typically provides in details for transitional arrangements either directly in the statute itself, or in subsidiary legislation. See for example, specific instances for Hong Kong as discussed in ***'Key changes under the 2014 Hong Kong Companies Ordinance'***, *Charltons*, https://www.charltonslaw.com/legal/company/Key-changes-under-the-2014-Hong-Kong-Companies-Ordinance.pdf (accessed 30.07.2023).

[46] Ezinne Ukwu and Ijeoma Asiana, ***'Nigeria: Recognition Of Nigerian Single Member Companies: How Does This Really Work?'***, *Mondaq, 06.04.2023:* https://www.mondaq.com/nigeria/shareholders/1302156/recognition-of-nigerian-single-member-companies-how-does-this-really-work (accessed 08.07.2023).

[47] PEBEC was established in July 2016 by the Buhari administration to create and implement strategic initiatives that would help improve the ease of doing business levels in Nigeria. See Office of the President of the Federal Republic of Nigeria, ***'Presidential Enabling Business Environment Council'***: https://statehouse.gov.ng/policy/councils-committees/presidential-enabling-business-environment-council/ (accessed 08.07.2023).

Provisions) Act 2022[48] and the ***Nigeria Start-Up Act 2022***,[49] amongst similar initiatives.

Instead of ***pre-CAMA*** (operating) companies whose membership for one reason or the other fell below the legal minimum to be scrambling because of the risk of being struck off from the Companies Register by the CAC; ***CAMA's*** *SSC regime should represent a lifeline to them*. It bears repetition that the effect of ***section 571(c) CAMA*** is to deprive them of possible restructuring options.

For example, where there is deadlock in a 2-member company (because shares are held 50%:50%), it should be possible for one to shareholder to approach the Court to buy-out the other, and thereby transmute the company into an SSC. That way, its business operations can continue with minimal disruption to, or impact on, other stakeholders: employees, vendors and other contractual counterparties.

Conclusion

Clearly, ***section 571(c) CAMA 2020*** constitutes a clog in the government's business landscape reform efforts, especially in relation to SMEs. Some multi-shareholder companies' quick embrace or futile attempt to take advantage of ***CAMA's*** SSC provisions to restructure into SSCs, is sufficient evidence of the incongruity of, or the misnomer that ***section 571(c) CAMA*** represents.

If the policy rationale behind that provision is to obviate an 'over-flooding' of the CAC with restructuring applications (which we doubt), that is a reason that pales into insignificance when compared with the potential benefits of the opposite scenario. In any event, the busier the CAC is as a result of ease of doing business improvements, the better for the economy!

Next Steps: Amendments Required

To rectify this error, we propose the following legislative amendments:

- A new ***section 571(c):***

  "A company may be wound up by the court if... the number of members is reduced below two in the case of public companies and one in the case of private companies".[50]

- A new ***section 18(2)***:

  "(2) Notwithstanding subsection (1), one person may form and incorporate a private company by complying with the requirements of this Act in respect of private companies. Provided that nothing shall prevent private companies having two or more shareholders as at the date of this Act from becoming a company with one shareholder howsoever arising, whether through share transfer by other shareholder(s) to a single shareholder or otherwise."

Indeed, a new ***section 18(2)*** might actually be unnecessary, once ***section 571(c)*** is amended.

The above proposed amendments will ensure that extant companies enjoy the full purport of ***section 869(6) CAMA*** that: *"Nothing in this Act shall affect the incorporation of any company registered under any enactment repealed."* It may also be prescient to have consequential new ***CAMA*** provisions specifically for SSCs especially regarding resignation/ death/incapacity of sole shareholder/directors, secretary and the like.[51] As shown herein, ***CAMA's*** SSC's regime when compared with global models elsewhere, reinforces the view that ***section 571(c)*** is indeed a draftsman's error.

The above amendments would not only bring the relevant sections of ***CAMA*** in line with current realities; they would also potentially scale the benefits of the SSC innovation to all private companies. Thus, the current provision's attendant inequities - which is against the equal treatment regulatory-neutral approach that is the touchstone of optimal regulation – can be eradicated.[52]

Such is not only consistent with the clear non-discriminatory bent of the ***1999 Constitution***, but also in

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[48] ***Act No. 5 of 2022.***

[49] ***Act No. 32 of 2022.***

[50] Such amendment would be giving effect to ***section 18(2)***, the same way that some other ***CAMA*** provisions like ***sections 118; 256(1) and (2); 264(5); 266(4);*** and ***421(2)*** did. See also ***section 16(3)(a) 1999 Constitution***: *"A body shall be set up by an Act of the National Assembly which shall have* ***power to review, from time to time, the ownership and control of business enterprises operating in Nigeria and make recommendations to the President on same***".

[51] Alternatively, the SSC administrative provisions can be incorporated into the ***Companies Regulation 2021***, albeit the former approach might be preferable. *Cf.* the equivalent statutory provisions or comparative approach as highlighted herein, for example: the United Kingdom *(footnote (fn) 5);* Ghana *(fn 13);* Mauritius *(fn 17);* United Kingdom *(fn 29);* Tanzania *(fn 14);* Kenya *(fn 15);* South Africa *(fn 16)*, etc.

[52] See for example, Gary E. Bacher, *et al*, ***'Regulatory Neutrality is Essential to Establishing a Level Playing Field for Accountable Care Organizations'***, *Health Affairs 32, No. 8 (2013): 1426 - 1432:* https://www.healthaffairs.org/ doi/pdf/10.1377/hlthaff.2012.0360. According to the OECD, *"It is a fundamental principle of competition law and policy that firms should compete on the merits and should not benefit from undue advantages for example due to their ownership or nationality. Government actions can sometimes prevent, restrict or distort competition within a market. … Ensuring a level playing field is, therefore, key to enabling competition to work properly and deliver benefits to consumers and the wider economy."* See ***'Competitive Neutrality in Competition Policy'***; and the more detailed ***'Recommendation of the Council on Competitive Neutrality', OECD/Legal/0462*** *(adopted 31.05.2021)*: https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0462 (both accessed 30.07. 2023).

tandem with wisdom in the aphorism of *"what is good for the goose should also be good for the gander"*.[53]

Can Litigation Be An Option?

In the event that amendment is not forthcoming, maybe shareholders of multi-shareholder companies can bring declaratory actions that ***section 571(c)*** is unconstitutional and should therefore liable to be read to produce the result outlined above.[54] Whilst some will say such position is aggressive, and potentially aims at *"judicial law making"*, we believe that the current provision is so repugnant that Courts should find argument towards reading it to produce a non-absurd result, attractive.[55]

This is especially as every statute must be construed according to its intendment and tenor: ***Orakul Resources v. NCC***.[56] Whilst conceding that there might be an unwillingness to take the judicial option, but as they say, *"no venture no gain"*, so shareholders lose nothing by testing the law or asking for judicial intervention regarding ***section 571(c)***.[57] Such action may make even make the National Assembly pass the requisite amendment legislation.

If the policy rationale behind that provision is to obviate an 'over-flooding' of the CAC with restructuring applications (which we doubt), that is a reason that pales into insignificance when compared with the potential benefits of the opposite scenario. In any event, the busier the CAC is as a result of ease of doing business improvements, the better for the economy!

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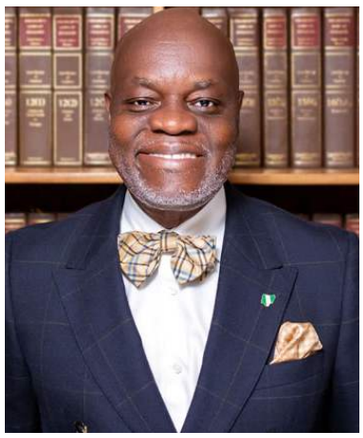
[53] In addition to the previous constitutional law discussions herein, (the non-justiciable provision of) ***section 16(1)(b) 1999 Constitution*** also provides that***: "****The State shall, within the context of the ideals and objectives for which provisions are made in this Constitution,* ***control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity***". Furthermore, by ***section 16(2)(a)***: *"The State shall* ***direct its policy towards ensuring: the promotion of a planned and balanced economic development***". Emphases supplied. For a discussion on how to enforce non-justiciable provisions of the ***1999 Constitution*** (such as ***section 16***), by tying them to enforceable provisions, (such as ***section 42***), see Afolabi Elebiju and Gabriel Fatokunbo, ***'Transformations: Impact Investment Potentials for Private Equity in Nigeria's Healthcare Industry'***, *LeLaw Thought Leadership Insights, October 2018, p.1 and footnote 1:* https://www.lexology.com/library/detail.aspx?g=4633e670-fda1-4c26-b490-d1eb4ea42a70. See also, Afolabi Elebiju and Daniel Odupe, ***'Cessations and Destinations: Issues in Gas Flare Commercialisation in Nigeria'***, *LeLaw Thought Leadership Reflections, February 2021, fn 31 at p.6:* https://lelawlegal.com/add111pdfs/TLR-Cessations_and_Destinations_3.pdf (both (accessed 30.07.2023).

[54] Such action can be filed by both shareholders of multi-shareholder companies wishing to restructure into SSCs, and will have the CAC and maybe Attorney-General of the Federation as respondents. It is trite that any law or provisions thereof that is inconsistent with the provisions of the ***1999 Constitution*** is void. See ***section 1(1) and (3)***: *"(1) This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria"*, and *"(3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void."* In ***Uyo LG v. Akwa Ibom State Government [2021]11 NWLR (Pt. 1786) 1 at39-40H-E***, the Court of Appeal held that ***section 1(1)*** of the ***Taxes and Levies (Approved List for Collection) Act, Cap. T1 LFN 2004*** (originally enacted as a military ***Decree***), and which purported to confer a supremacy clause in the following terms: *"Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria 1999, as amended, or in any other enactment or law"*, was unconstitutional, given its conflict with ***section 1(3) 1999 Constitution***. For a detailed discussion, see Chimezirim Echendu, ***'Impacts: Issues Arising from Invalidation of The Taxes And Levies (Approved List For Collection) Act in Uyo Local Government Council v. Akwa Ibom State Government & Anor (2020) LPELR-49691 (CA)'***, *March 2021:* https://www.mondaq.com/nigeria/tax-authorities/1049470/impacts--issues-arising-from-invalidation-of-the-taxes-and-levies-approved-list-for-collection-act-in-uyo-local-government-council-v-akwa-ibom-state-government--anor-2020-lpelr-49691-ca (accessed 30.07.2023). Also, for an argument that ***CAMA's*** LP provisions are unconstitutional, see Afolabi Elebiju, *et al*, ***'Validity Questions'*** article (*op. cit, fn 3* herein).

[55] On another note, it would seem that the company's inability to pay debts (***sections 571(d) CAMA and 408(d) CAMA 2004***) has been the more frequently used ground in winding up petitions. For a recent case on winding up, see ***Unidam Ind. Ltd v. Ecobank Nig Ltd [2019] 1 MWLR 187 (SC)***.

[56] ***[2022] 6 NWLR (Pt. 1827], 539 at 594F.*** Note also the holding therein (at ***589D-E***) that the right to challenge any decision or action of the NCC under the ***NCC Act, Cap. C28 LFN 2004*** is not vested in an aggrieved person under or *vide* fundamental human rights provisions of the ***1999 Constitution***, but by the provisions of the ***NCC Act***.

[57] In ***Abacha v. A-G Federation [2023] 4 NWLR (Pt. 1874) 401, at 417B-C***, it was held that since the implication of incorporation of a company is that its property is thereby in perpetual succession different from its members, it was impermissible for the Appellants to sue in their own names to protect the interest of their companies listed for investigation. Furthermore, by ***section 299 CAMA 2004*** (now ***section 341 CAMA***), only a company can sue for any wrong done to it or ratify any irregular conduct. Another question is whether the claim can be framed as if ***section 571(c)*** is almost 'expropriatory' against multi-shareholder companies wishing to become SSCs? This is akin to, but not necessarily falling within ***section 44 1999 Constitution*** which sets the boundaries and prescribes citizens' rights on compulsory acquisition, given the 'penal' nature of acquisition.



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