

# **CAMA 2020: COMPULSORY DISPOSAL OF UNISSUED SHARE CAPITAL BY EXISTING COMPANIES**

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## Introduction

After 30 years, Nigeria finally undertook the most significant legislative review of its primary company law. The Companies and Allied Matters which was initially passed as a decree in 1990 (“**CAMA 1990**”) and was the principal legislation regulating the operation of companies in Nigeria, was repealed and replaced by the Companies and Allied Matters Act 2020 (“**CAMA 2020**”).

Lauded as a tool to enhance the ease of doing business in Nigeria, the CAMA 2020 made extensive changes to several critical areas of company law, in order to reposition corporate practice to achieve greater efficiency, benefit from technological advancement and aspire to comply with international best practices. One of the key changes introduced by the CAMA 2020 to improve the administration of companies was the elimination of the concept of ‘authorised share capital’ that existed in the CAMA 1990.

## Share capital under CAMA 1990

Under the CAMA 1990, a company was required to have an authorised share capital which was not to be less than the specified minimum amounts. A company’s authorised share capital was made up of shares and represented the maximum amount of shares that a company could allot to its shareholders at any time. A private company was required to have a minimum authorised share capital of ten thousand Naira while for public companies, the minimum was five hundred thousand Naira<sup>1</sup>. The shareholders of a company could, however, increase the company’s authorised share capital from time to time to enable the company to raise more capital by issuing more shares in line with the company’s needs at the time. A company was required to issue not less than a quarter of its authorised share capital while the balance could remain unissued. This meant that companies could, within their authorised share capital, have a portion of issued shares (known as the ‘issued share capital’) and a portion of unissued shares (known as the ‘unissued share capital’), both of which comprised the authorised share capital. In relation to the issued share capital, the shares could either be paid up (known as the ‘paid up share capital’) or not, because there was no requirement that the shares had to be paid up, which meant that the company could issue all its shares but not have received any payment from its shareholders in respect of the shares held by them. For this reason, it was felt that the company’s authorised share capital could provide a misleading impression of the level of capitalisation of the company especially in relation to private companies.

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<sup>1</sup> Section 27 (2)(a) CAMA 2004



## Share capital under the CAMA 2020

Adopting the approach taken by certain other jurisdictions, such as England, which had transitioned from the era of 'authorised share capital', the CAMA 2020 omitted all references to the term 'authorised share capital' and only refers to the issued share capital of companies. The effect of this is that the concept of authorised share capital has been eliminated from the CAMA. This might not be immediately apparent from a review of the legislation because there is no provision of the CAMA 2020 that expressly states that the concept of authorised share capital has been abolished.

Under the CAMA 2020, a company's only share capital is the capital it has issued to its shareholders i.e., the company's issued share capital. The CAMA 2020 requires that the memorandum of association of every company to state the amount of the issued share capital of the company (under the CAMA 1990, the memorandum was required to state the authorised share capital). The CAMA 2020 also specifies that the minimum amount of issued share capital that a company should have, which must not be less than ₦100,000 for private companies and ₦2,000,000 for public companies<sup>2</sup>. This is an increase over the minimum authorised share capital required in the CAMA 1990 and is aimed at ensuring that the share capital of companies is more reflective of economic realities, given the devaluation of the Naira over the past three decades.

Our understanding is that the rationale for the elimination of companies 'authorised share capital' is that the authorized share capital was perceived as being misleading, since a company did not have to issue more than 25% of its share capital and there was no requirement that any amount had to be paid up on the shares that had been issued. Although the CAMA 2020, like its predecessor, does not require any part of the initial share capital of a company to be paid up at the point when the company is being incorporated, it requires that whenever the company increases its share capital, at least one quarter or the company's issued share capital (including the amount by which it is increased) must be paid up.

### **Illustration**

To illustrate, it was possible under the CAMA 1990 for a company (Company X) with an authorised share capital of N100 million (made up of 100 million ordinary shares) to issue 25 million shares, on which no amount was required to be paid up by the shareholders. Thus, while the company had an authorised share capital of N100 million, its paid up capital would be nil. Under the CAMA 2020, a company's share capital comprises only the shares issued.

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<sup>2</sup> Section 27 (2)(a) of CAMA 2020





Going back to the illustration above, Company X's total share capital under the CAMA 2020 would be N25 million because that is the amount of share capital that has been issued to the shareholders of Company X. At incorporation, there is no requirement for any amount to be paid up by the shareholders of Company X, but if Company X ever seeks to issue new shares, it would have to demonstrate to the CAC that at least 25% of its issued share capital (including the increase) has been paid up. The CAMA 2020, therefore, aims to address the disconnect between the share capital of the company as stated on paper, and reality.

The CAMA 2020 does not provide any guidance on how companies are to transition out of the regime of 'authorised share capital' under the CAMA 1990. This has led to differing views on this issue. The questions that have arisen include what to do with the unissued shares that companies have carried over from the CAMA 1990 era, and, in the absence of 'authorised share capital' under the CAMA 2020, and on the understanding that the CAMA 2020 only recognises issued shares as comprising the share capital of a company, what is the framework for unissued shares under the CAMA 2020?

The CAMA 2020 does not expressly require the disposal of the unissued shares neither does it implement a framework or timing for doing so. In response to this gap in the law, the Corporate Affairs Commission ("**CAC**" – the Nigerian companies' registry) issued the Companies Regulations 2021 (the "**Regulations**") and, in Regulation 13, sought to provide some guidance on this point.

### - **Regulation 13**

Regulation 13 of the Regulations provides that any company with unissued shares in their share capital must issue such shares by 30<sup>th</sup> June 2021. The CAC subsequently revised this timeline to 31<sup>st</sup> December 2022.

The incentive for complying with this regulation within the stipulated timeline is that the company will not be required to pay any filing fees to the CAC for filing a return of allotments in respect of the allotment of its unissued shares, as the CAC would recognise the fact that such companies had earlier paid the relevant fees to the CAC under the CAMA 1990 when they initially created the existing unissued shares. Where, however, a company does not issue all its unissued shares by the specified date, the company and every officer of the company shall be liable to a daily penalty prescribed by the Commission. The Regulations state that the daily penalty payable by public companies is ₦1,000 (one thousand Naira) while the daily penalty for private companies (other than small companies) is ₦500 (five hundred Naira) and for small companies is ₦250 (two hundred and fifty Naira).



The directive by the CAC in Regulation 13 has been criticised because companies are being compelled to issue their existing unissued shares by a specified date or risk being liable to daily penalties. The argument against the CAC's directive is that the CAMA 2020 does not require companies to issue all their unissued shares, and as such, the CAC has exceeded the requirements of the law by seeking to compel companies to issue their unissued shares.

### Regulation 13 – alignment or misalignment with CAMA 2020?

Section 868 (*Interpretation*) of the CAMA 2020 defines the term, “*share capital*” to mean “the issued share capital of a company at any given time.” This makes it clear that the CAMA 2020 regards a company's share capital to mean only its issued share capital. This being the case, there is no longer a framework within which a company can have unissued shares. Under the CAMA 1990, unissued shares were a part of a company's authorised share capital because companies were permitted to create their authorised share capital, issue a portion of it, and reserve the rest as unissued share capital for future use. Under the CAMA 2020, however, there is no longer a concept of authorised share capital and all a company can have is its issued share capital. As a result, no provision has been made for a company to have unissued shares; companies are required to create new shares only at the time when they intend to issue those shares.

In terms of costs, the removal of the concept of authorised share capital means that, at incorporation, a company is only required to pay the applicable stamp duty and CAC filing fees in relation to the share capital that it actually issues to its subscribers. Thereafter, whenever the company wishes to issue more shares, it would simply pass the appropriate resolution to create and issue the new shares and pay the applicable stamp duty and CAC filing fees in respect of the newly created shares issued by it. This means that companies can no longer ‘front-load’ costs associated with having additional share capital that the Company is not immediately prepared to issue, as was the case under the CAMA 1990.

There have been several debates regarding the legality of regulation 13 of the Regulations and whether the CAC acted *ultra vires*. Section 867 of CAMA 2020 authorises the Commission, with the approval of the Minister in charge of trade, to make regulations generally for the purpose of the CAMA 2020. This means that the Commission may make regulations generally to give effect to the CAMA 2020. In accordance with the principle of hierarchy of laws, however, the regulations issued by the Commission, should not conflict with, or exceed the scope of the substantive law, the CAMA 2020. A subsidiary legislation will be **invalid** where it is inconsistent with its principal legislation.<sup>3</sup>

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<sup>3</sup> Mobil Producing (Nig.) Unltd v. Johnson (2018) 14 NWLR



On this basis, the Regulations have been criticised for exceeding the ambit of the CAMA 2020 as the latter only requires companies to increase their issued share capital to the prescribed minimum without stating that all unissued shares must be issued.

In our view, the argument that Regulation 13 extends beyond the scope of the CAMA 2020 is flawed, as Regulation 13 seeks to put into operation the intent of the CAMA 2020, which is the elimination of a framework of authorised share capital under which it was possible for a company to create and hold unissued shares in its capital. Under the CAMA 2020, a company's only share capital is the capital it has issued to its shareholders (i.e., its issued share capital). It stands to reason, therefore, that companies can no longer have unissued shares. What this means for existing companies is all of what used to be their authorised share capital must be fully issued because the companies can no longer have shares that have not been issued. Companies may also choose to eliminate their unissued shares through a process of share capital reduction. The CAMA does not, however, specify a timeframe within which this must be done, but this has been dealt with by the CAC in the Regulations.

### **Options available to companies for complying with Regulation 13**

To ensure compliance with the CAMA 2020 and the Regulations, existing companies with unissued shares may either allot or cancel their unissued.

Where the company chooses to allot its unissued shares, a company may conduct a bonus issue or a rights issue of the shares to existing shareholders, or an offer of the shares to potential new investors. Where the company does not wish to issue the unissued shares, it may cancel the unissued shares by complying with the process for reduction of share capital section 130 – 136 of the CAMA 2020.

Companies will need to begin taking steps to comply with Regulation 13. For public companies, where the process for issuing any unissued might require the approval of several regulators, immediate action is required to ensure that the process of issuing the shares is concluded before the deadline of 31<sup>st</sup> December 2022.



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