Shareholder Protection: A Comparative Review of the Corporate Legal / Regulatory Regimes in the UK and Nigeria

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Abstract

Foreign investment is a major source of the capital that Nigeria and other developing markets need to promote economic activities and drive economic development. While profit mainly drives the decision to invest abroad, such decisions are also influenced by the safety of any actual investments made. Thus, investors are interested in the laws and regulations that offer them protection against corporate insider opportunism. In Nigeria, the relationship between corporate actors is mainly regulated by the Companies and Allied Matters Act (CAMA). This article investigates the corporate legal and regulatory protection for corporate shareholders in Nigeria and the UK. Comparing the corporate regulatory regime in the two jurisdictions, this article argues that the identified weaknesses in the Nigerian regulatory framework negatively impact the growth of foreign investment in the country. In view of these weaknesses, the article suggests a major review of CAMA and other regulatory instruments with a view to addressing the protection of small investors and "outsiders", such as foreign investors.

Keywords

Corporations, corporate law, regulations, shareholder protection, investment

INTRODUCTION

Corporations are of great consequence in the world today because they play a fundamental role in wealth creation[1] as the main vehicles through which economic activities are undertaken. Finance is the main source of corporate power, and an important source of finance for corporate entities is provided through the equity investments of shareholders.[2] Shareholders will, however, only invest where their rights are protected by the law.[3] Hence, it is necessary to investigate

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[1] A Keay *The Enlightened Shareholder Value Principle and Corporate Governance* (2014, Routledge) at 3.

[2] Creditors are the other group of investors that provide corporate finance (debt finance). However, the major difference is that the terms for the finance they provide are clearly specified and they take priority during insolvency. This is unlike shareholders, who are always last in the value distribution chain. See SM Bainbridge *The New Corporate Governance in Theory and Practice* (2008, Oxford University Press) at 6.

[3] R La Porta et al "Investor protection: Origins, consequences, reform" (1999, Harvard Institute Economic Research discussion paper number 188) at 2.

the existing frameworks for investor protection in developing countries. Before proceeding with this investigation, it is perhaps important to note the different classes of shareholders, as this will help put this investigation into perspective.

There are two basic categories of shareholder investors: majority and minority shareholders. Globalization and integration of the world economic market has created a third and important shareholder investor class, generally referred to as foreign investors. Foreign investment has become an important source of capital for many developing countries, including Nigeria. This article focuses on Nigeria as one developing country that has shown a clear desire to attract international investment through various developments in its legal / regulatory environment. The country has opened its economy to foreign investment since the 1990s with various legislative and regulatory reforms.[4] The Nigerian Stock Exchange underscores this fact in its Listing Rules (LR).[5] For instance, rule 1.2 states that "[t]he Exchange through the Premium board aims to provide a platform for greater global visibility for eligible Nigerian entities, which will make it easier for them to attract global capital flows and reduce the cost of borrowing".

Given the importance of the corporation as the major driver of economic activities and the importance of shareholders as an important source of corporate finance, it is not surprising that investor protection has become a topical issue in international and national socio-political and economic discourse since the 1990s. This is because of the dual nature of the corporation as both an association of its members and a person separate and distinct from the shareholders or investors. This person is, however, an artificial person, "invisible, intangible and existing only in contemplation of law".[6] As an artificial person, it cannot perform its own acts. It requires human organs to represent it and act on its behalf. In many jurisdictions these human organs are embodied in the company's directors acting collectively as a board. This article focuses on how the activities of the human organs (involved in the governance of the company) affect the interests of different corporate shareholder / investor groups, and how far legal protection for investors in the Nigerian corporate environment guarantees those interests.

At this stage it is important to put the corporation, the governance of which is at issue in this article, in perspective. Although investigating how large and small firms are governed is equally important,[7] the focus here is on large corporations: the "public" companies with numerous and constantly changing owners whose shares are traded in a public market. They are the main vehicles for raising finance from the public and thus the main source for the importing of the external investment capital[8] needed by most developing markets to improve their economies. Apart from the fact that shareholdings in public companies are atomized and dispersed, ownership is separate from management.[9] As a result, separation of ownership and management has been identified as a core issue in corporate governance. This makes the distinction between public and private corporations imperative in this article, because the separation of ownership and control provides the basis for the pivotal role that directors play, especially in public companies. This is not always the situation with private companies, where "it is often the same people who are the owners and the controllers so that those same individuals have management and shareholder roles".[10]

[4] Nigeria's current corporate legal regime is set out in the Companies and Allied Matters Act cap C20 Laws of the Federation of Nigeria 2004, which has undergone several reviews since it was enacted in 1990 and is currently under further review with a view to promoting economic activity. This is in addition to the plethora of other investor-friendly legislation, including the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act and Nigerian Investment and Promotion Commission Act, designed to attract foreign investment.

[5] Listing Rules of the Nigerian Stock Exchange, available at: http://www.nse.com.ng/regulation-site/IssuersRules/Rules%20for%20Listing%20on%20the%20Premium%20Board.pdf (last accessed 6 August 2020).

[6] Per Justice Marshal in *Trustees of Dartmouth College v Woodward* (1819) 17 US (Wheat) 518 at 636.

[7] Keay *The Enlightened Shareholder*, above at note 1 at 5.

[8] M Giofré "Financial education, investor protection and international portfolio diversification" (2017) 71 *Journal of International Money and Finance* 111 at 112–14; LE Enrique et al "Corporate law and securities markets" in R Kraakman et al *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd ed, 2017, Oxford University Press) 243 at 243.

[9] AA Berle and GC Means *The Modern Corporation & Private Property* (10th print, 2009, Transaction Publishers) at 66–111.

[10] J Birds et al *Boyle & Birds' Company Law* (9th ed, 2014, Jordan Publishing Limited) at 353.

Some commentators argue that investor protection is crucial because, in many countries, expropriation of minority shareholders and other corporate outsiders[11] by the human organs who act for the company is extensive.[12] To protect themselves against expropriation by corporate insiders, outside investors rely to a large extent on a set of mechanisms referred to as corporate governance.[13] Although the development of corporate governance is a global matter, there is no universal set of basic concepts, dimensions or conceptual framework for it.[14] As a result, its theory and practice at the national level reflect legal, cultural, ownership and other structural differences. These factors have influenced the classification of corporate governance in various ways by different corporate governance theorists.[15] One important classification relevant to the analysis in this article is that which categorizes corporate governance according to the interests that the corporation serves.[16] This is because of the distinction it makes between a corporate governance system that emphasises shareholder supremacy (classified as the shareholder model) and the other end of the scale, namely a system that accounts for a wider group of constituents (classified as the stakeholder model).[17]

The assumptions underlying this, admittedly important, classification are outside the scope of this article, the focus of which is on the shareholder model represented by the US and the UK. This focus is based on two main reasons. First, the vision of shareholder primacy and, thus, the UK corporate governance model is the model that has spread around the world and been embraced by many developing markets, including Nigeria.[18] This model is highlighted by separation of ownership and control of the corporation. This separation created the potential for shareholder and managerial interests to diverge.[19] It is based on the perception that these two interests could collide and that, given the importance of shareholders as providers of capital, corporate law focused on the duties of managers to protect the property of the owners and maximize profits in their interest.[20] This is the beginning of what some authors have termed “the central problem of corporate governance”.[21] This is because, although shareholders (as the residual claimants on the corporation’s assets and earnings) are entitled to the corporation’s profits, “it is the directors and managers, not the shareholders, who decide how to spend the firm’s earnings”.[22]

Secondly, since this article primarily concerns the protection of investors (shareholders), it is justified that it adopts insights from the shareholder model. The limited economic development in developing markets, including Nigeria, has been attributed in part to a dearth of foreign investment.[23] This raises some fundamental questions, since Nigeria operates the shareholder model (common law), which is acclaimed to provide better access to investment capital because

[11] La Porta et al classify those who manage the company (managers and controlling shareholders) as corporate “insiders” and others engaged in sundry relationships with the company as “outsiders”: La Porta et al “Investor protection” above at note 3 at 1.
[12] Ibid.
[13] Ibid.
[14] B Horrigan “Comparative corporate governance developments and key ongoing challenges from Anglo-American perspectives” in S Tully (ed) *Research Handbook on Corporate Legal Responsibility* (2005, Edward Elgar Publishing) 20 at 20; AN Licht, C Goldschmidt and SH Schwartz “Culture, law, and corporate governance” (2005) 25 *International Review of Law and Economics* 229 at 231; D Griffin et al “National Culture: The missing country-level determinant of corporate governance” (2017) 48 *Journal of International Business Studies* 740 at 740.
[15] See, for example, the excellent classification in Bainbridge *The New Corporate Governance*, above at note 2 at 8–9.
[16] Ibid.
[17] D Millon “New directions in corporate law: Communitarians, contractarians, and the crisis in corporate law” (1993) 50 *Washington & Lee Law Review* 1373; B Sheehy “Scrooge - The reluctant stakeholder: Theoretical problems in the shareholder-stakeholder debate” (2005–06) 14 *University of Miami Business Law Review* 193.
[18] L Talbot *Progressive Corporate Governance for the 21st Century* (2013, Routledge) at 162–63.
[19] Berle and Means *The Modern Corporation*, above at note 9.
[20] R Parry “Directors’ duties within the United Kingdom” in Tully (ed) *Research Handbook*, above at note 14, 73 at 87. See also Companies and Allied Matters Act, sec 283(1).
[21] Bainbridge *The New Corporate Governance*, above at note 2 at 6; DK Denis and JJ McConnell “International corporate governance” (2003) 38/1 *Journal of Financial and Quantitative Analysis* 1 at 1.
[22] Bainbridge, ibid.
[23] See the excellent discussion by Peter Muchlinski on the major factors responsible for the dearth of foreign investment in developing markets: PT Muchlinski *Multinational Enterprises and the Law* (2nd ed, 2007, Oxford University Press) at 22. See also LA Bebchuk and MS Weisbach “The state of corporate governance research” (2009, National Bureau of Economic Research working paper no 15537) at 21, available at: <http://www.nber.org/papers/w15537> (last accessed 15 July 2020).

of the protection it offers investors.[24] This article compares the corporate legal protection for shareholders in the UK and Nigeria. Since Nigeria's corporate legal framework is modelled on that of the UK, it is reasonable to compare these jurisdictions. This comparative analysis will help to identify the deficiencies in the Nigerian legal / regulatory regime. This will provide the basis for suggesting the reforms required to enhance shareholder protection in the Nigerian corporate legal / regulatory environment, which will in turn make the country's business environment more attractive to foreign investment.

In the UK and Nigeria, primary legislative instruments[25] supported by corporate governance codes[26] provide the source of regulatory rules for companies. As a result, this article focuses on the UK Companies Act 2006 (UK CA) and the Nigerian Companies and Allied Matters Act 2004 (CAMA). Reference is also made to Nigeria's draft National Code of Corporate Governance 2016 (NCCG 2016) to highlight some of the inadequacies under the current 2018 code. The next section of this article discusses the corporate legal environment in the UK, with references to the US for emphasis. The article then discusses the Nigerian corporate legal environment, before undertaking a comparative review of the corporate governance systems in the two jurisdictions. The next section discusses the relevance of enforcement to compliance with laws and regulations and why it is imperative to depart slightly from the UK corporate model in the Nigerian corporate environment. A conclusion follows.

SHAREHOLDER PROTECTION AND CORPORATE REGULATION IN THE UK: ORIGIN AND PRACTICE

Any meaningful discussion about UK corporations and issues concerning their role in the country's economy will necessarily begin with a review of the UK corporate legal regime, which is said to reflect a shareholder-centred structure.[27] In fact, some commentators argue that "UK company law has paid little attention to how anyone other than the members and creditors of the company may be affected by it".[28]

The focus on shareholders in the UK system has its roots in the 19th century industrialization era that triggered the demand for greater capital to promote economic activities, which was unaffordable to a small group of individuals or a family.[29] The need to attract investors necessitated the development of the two guiding principles of modern company law (the legal personality and its close cousin, limited liability) to support the promotion of the corporation as a vehicle for promoting economic activities.[30]

On the one hand, the legal personality principle created the capacity for companies to act as an individual entity in law: to sue and be sued, to hold and transfer title to real or personal property and to act with legal effect under a common seal.[31] The result is that the enterprise is able to continue undisturbed in law by a change of shareholders or a change in their fortunes because, by virtue of the principle, corporate assets are shielded from both the shareholders and their creditors.[32] On the other hand, the limited liability doctrine encouraged contributions from diverse investors by limiting the risk to their personal wealth, as limited liability provides a statutory assurance that "nobody risks more than he chips

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[24] R La Porta et al "Legal determinants of external finance" (1997) 52/3 *The Journal of Finance* 1131 at 1149.
[25] The UK Companies Act 2006 is the principal act in the UK; CAMA is the principal act in Nigeria.
[26] Including the UK Corporate Governance Code (2016, Financial Reporting Council); UK Corporate Governance Code 2010 and Combined Code 2008; and the Nigerian Code of Corporate Governance 2018.
[27] C Villiers *Corporate Reporting and Company Law* (2006, Cambridge University Press) at 5.
[28] D French, S Mayson and C Ryan *Mayson, French & Ryan on Company Law* (34th ed, 2017, Oxford University Press) at 30. See also Griffin et al "National culture", above at note 14 at 743.
[29] JW Hurst *The Legitimacy of the Business Corporation in the Law of the United States 1780–1970* (1970, The University Press of Virginia) at 4.
[30] Id at 22.
[31] Id at 19.
[32] John Armour and his colleagues termed the legal personality doctrine an "entity shielding" device "to emphasize that it involves shielding the assets of the entity – the corporation – from the creditors of the entity's owners": J Armour et al "What is corporate law?" in R Kraakman et al *Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd ed, 2017, Oxford University Press) 1 at 5–8.

in".[33] Since industrialization and economic development were the focus during this era and the business corporation is the vehicle for achieving that purpose, it became imperative to protect those who contributed the capital[34] and who were not part of the day-to-day running of the business.

As noted above, those who manage a company are different from its owners or shareholders. The UK CA and sundry corporate governance regimes in the UK recognize the separation of ownership and control. In fact, the UK Corporate Governance Code explicitly provides for directors to head UK companies, especially public companies.[35] Section 154 of the UK CA makes it mandatory for every private company to have at least one director and for every public company to have at least two. In addition, section 160 of the act makes elaborate provision for the appointment of directors of public companies. Arguably, this demonstrates statutory recognition of the separation of ownership from control in public companies.

Directors play a central role in the governance of UK companies. Their role has been linked to the underlying purpose of a registered company, which is to provide a legal form that enables investors to put their money into a business without being responsible for managing it.[36] This was the basis for the judicial recognition of the primary role of directors in the management of business as long ago as the 19th century.[37] According to Lord Wensleydale in *Ernest v Nicholls*, "for the purpose of contract, the company exists only in the directors and officers acting by and according to the deed [the deed of settlement, equivalent in those days to the articles of association]".[38] The implication of such judicial pronouncements is the evolution of a system by which the two functions of ownership and control of the enterprise have been separated.[39] Charlotte Villiers argues that this divergence of interests between those in control of the firm and those who own it "could encourage the managers or controllers to direct the firm in their own interest rather than in the interest of the owners".[40]

The UK recognizes the implications of this divergence of interests and has since developed a number of legal and regulatory controls to ensure that directors and managers of companies act within their powers and run the company efficiently. These controls are provided for in the UK CA and the various corporate governance regulations, such as the corporate governance codes and standards set by City institutions, such as the Financial Reporting Council (FRC), the London Stock Exchange and the Financial Conduct Authority as the UK listing authority.

The UK CA assumes a shareholder-centred model for the company, giving priority to shareholders over other constituents. This is achieved in the act by what Mary Stokes describes as two mechanisms for ensuring that the directors of the company are subject to the control of the shareholders: first by structuring the internal division of power within the company; and secondly by treating directors as fiduciaries.[41] To ensure the internal division of power within the company, the act grants voting rights to shareholders,[42] including the right to vote on the appointment[43] and removal[44] of directors. The UK CA then provides for a number of legal controls that seek to ensure that directors and managers act within their powers, through a broad range of directors' general duties based on equitable principles relating to fiduciary duties, and

[33] FH Easterbrook and DR Fischel *The Economic Structure of Corporate Law* (1996, Harvard University Press) at 40.
[34] It is important to note that there are two ways through which a corporation is financed: equity finance and debt finance. Investors provide equity finance while creditors provide debt capital.
[35] See the UK Corporate Governance Code (2016), above at note 26 at 5.
[36] French, Mayson and Ryan *Mayson, French & Ryan*, above at note 28 at 26.
[37] See Lord Cairns in *Ferguson v Wilson* (1866) LR 2 Ch App 177 at 89–90.
[38] *Ernest v Nicholls* (1857) 6 HL Cas 401 at 432.
[39] Villiers *Corporate Reporting*, above at note 27 at 21.
[40] Ibid.
[41] M Stokes "Company law and legal theory" in W Twining (ed) *Legal Theory and Common Law* (1986, BB Blackwell) 155 at 165.
[42] UK CA, secs 281–87. See also, in Nigeria, CAMA, secs 224-32.
[43] UK CA, sec 160. CAMA, secs 247–49
[44] UK CA, sec 168. CAMA, sec 262.

the common law duties of care and skill.[45] Even though section 170(1) of the UK CA provides that the duties "are owed by a director of a company to the company", section 172(1) underscores the primacy of shareholders. It provides that "[a] director of a company must act in a way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole". It is worthy to note the gradual shift away from the "shareholder primacy" view in the UK, especially with adoption of the "enlightened shareholder value" approach. This is achieved in the UK CA through the high-level "statement of directors' duties" set out in the act.[46]

However, the idea behind section 172 of the UK CA is "that laws that promote shareholder primacy can simultaneously protect interests of other stakeholders if shareholders (or those representing shareholders) are properly empowered, informed or enlightened".[47] The "enlightened shareholder value" concept still maintains that the interest of shareholders is the principal obligation of directors and requires that directors pursue shareholders' interests but, in doing so, they are to have regard to the interest of other stakeholders.[48] As a result, the UK CA provides certain safeguards and control mechanisms for shareholders to rein in directors to ensure adequate protection for their class.[49] For instance, the UK CA provides that a shareholder has the power to petition for relief against unfairly prejudicial conduct of the company's affairs.[50] To reinforce shareholder protection, the act gives the courts wide-ranging jurisdiction to remedy conduct of a company's affairs "that is unfairly prejudicial to the interest of its members generally or of some part of its members".[51]

It is obvious from the above that shareholder protection is the main focus of shareholder rights and powers in the UK CA. However, these powers and rights may be of no consequence where the beneficiaries have no knowledge of company activities, because it is such knowledge that can trigger action on their part. As a result, the UK CA provides that the accounts and annual report for each financial year disclose information on many of a company's activities.[52] To enhance members' access to adequate information about a company's activities, the annual report, which had generally been referred to as the directors' or management report, has been renamed the Strategic Report and Directors' Report.[53] As a result, a new chapter 4A requiring the directors of all companies to prepare a strategic report for each financial year[54] now applies. Section 414C states that the purpose of the report is to inform members of the company and help those members assess how the directors have performed their duty under section 172.

In addition to the exclusive focus of the UK CA on the interests of shareholders,[55] the UK Corporate Governance Code also sets out the principles of corporate governance in the interest of shareholders. The code sets standards of good practice for the board of directors and is concerned with issues of accountability and the integrity of the financial markets. Adoption of the code is not mandatory. However, because the code is connected to the listing rules of the London Stock

[45] UK CA, secs 170–77.
[46] Id, sec 172.
[47] Talbot *Progressive Corporate Governance*, above at note 18 at 169.
[48] UK CA, sec 172.
[49] Protection for creditors also exists under the UK CA and Insolvency Act 1986. See Insolvency Act 1986, secs 213 and 214 with regard to directors' responsibility to the company's creditors for ensuring that the company is not involved in fraudulent or wrongful trading. See also sec 172(3) requiring directors, in certain circumstances, to consider or act in the interest of the company's creditors. However, it is important to note that these sections are only applicable when a company has entered formal insolvency proceedings and therefore differ from provisions that give control rights to shareholders; they are remedial rather than directional. See also *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250.
[50] UK CA, sec 994(1).
[51] See id, part 30 (secs 994–99). The court sometimes permits members to bring "derivative claims" in the name of the company. A "derivative claim" by a member of a company may be brought under UK CA, part 11, chap 1 (secs 260–64). Relief on the grounds of unfairly prejudicial and oppressive conduct, derivative actions and court powers are also contained in CAMA, secs 310–33.
[52] UK CA, sec 415.
[53] Amendment to id, part 15.
[54] The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, SI 2013/1970.
[55] The authors acknowledge that UK CA also deals with the interests of other stakeholders, especially under sec 172(1) and the reform under the Companies (Miscellaneous Reporting) Regulation 2018. However, as discussed above, compliance with sec 172 is ultimately intended to enhance shareholder value.

Exchange, it is mandatory for premium listed companies in the UK to report on how they have complied with the standards in the code or explain where they have not and the reasons for non-compliance.[56] This is known as the "comply or explain" philosophy.

Even though adoption of the code is not mandatory, its significance lies in the fact that it is a requirement for those companies whose shares have a premium listing on the official list, which is now held by the Financial Conduct Authority[57] in its capacity as the UK Listing Authority.[58] In itself, official listing imposes extra responsibilities on issuers of securities so as to provide a lower risk for investors,[59] because one of the criteria for admission to premium listing in the UK is that the company must meet the continuing obligations of listed companies set out in chapter 9 of the UK LR. The continuing obligations require extra information to be provided in a premium listed company's accounts and reports, as well as compliance with the UK Corporate Governance Code. Every company with premium listed shares is subject to listing rules, which require an annual statement of how it has applied the main principles of the code.[60]

Notwithstanding all the rights and powers granted to members in corporate statutes and sundry regulations, many commentators still doubt that shareholders could exercise meaningful control over corporate boards, because of their dispersion.[61] Although there are concerns, especially about the effectiveness of a standard-based regulation (which underpins the "comply or explain" philosophy approach to UK corporate governance),[62] such doubts have not affected its spread around the world: India, South Africa and Nigeria (discussed below) are some of the jurisdictions that have adopted the UK approach to corporate governance. The remainder of this article addresses how a corporate governance regime that leaves corporate managers with so much discretion could promote the interests of investors in a country like Nigeria.

SHAREHOLDER PROTECTION AND CORPORATE REGULATION IN NIGERIA: ORIGIN AND CURRENT PRACTICE

In the preceding section, it was observed that corporate law developed in England as a deliberate policy in response to changing commercial realities. The aim was to promote the use of the corporation to drive economic development. This is one of the reasons that the UK CA focuses on protecting those who provide finance for corporations (investors / shareholders). Nigeria is different, because corporate activities in Nigeria started with English corporations, which were subject to English company law[63] by virtue of Nigeria's colonization by the British. The first Nigerian corporate statute was the Companies Ordinance of 1912, which is based on the UK Companies (Consolidation) Act 1908. The amendments to Nigeria's Companies Ordinance in 1922, 1929 and 1954 also followed the review of the legislation pertaining to companies in England in those years.[64] The 1954 ordinance later became Nigeria's Companies Act of 1963.

The first indigenous companies act in Nigeria was the Companies Act of 1968 (1968 Act), which repealed the 1963 act. One of the major highlights of the 1968 Act was the requirement that foreign companies intending to do business in the country had to incorporate in Nigeria. The 1968 Act did not depart from the principles of common law as it

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[56] UK LR 9.8.6R(6)
[57] < https://www.fca.org.uk/markets/primary-markets > (last accessed 06 August 2020).
[58] Official listing is an optional additional regulatory regime for securities markets, aimed at ensuring market integrity. Under the EU regulation, Directive 2001/34/EC provides minimum standards for official listing but individual members are granted the authority to add their own requirements. The UK has developed more extensive additional "super equivalent" requirements as an option and any company that chooses to comply is said to have a premium listing. See French, Mason and Ryan *French, Mason and Ryan*, above at note 28 at 212–15 for a more detailed discussion of official listing in the UK.
[59] For obligations imposed on issuers, see https://www.handbook.fca.org.uk/handbook/LR/9.pdf (last accessed 06 August 2020).
[60] UK LR 9.8.6R(5)].
[61] Berle and Means *The Modern Corporation*, above at note 9 at 4–10; Bainbridge *The New Corporate Governance*, above at note 2 at 4.
[62] B Hannigan *Company Law* (2016, Oxford University Press) at 127.
[63] HY Bhadmus *Bhadmus on Corporate Law Practice* (4th ed, 2017, Chenglo Limited) at 2.
[64] Ibid. Applicable legislation passed in the UK during the relevant period included the Companies Act 1929 and the Companies Act 1948.

incorporated the main principles in English company law, recognizing the separation of ownership and control as a basis for its focus on shareholder protection. The enhanced position of shareholders under the 1968 Act was based on the safeguards and control mechanisms it provided for them to rein in directors to ensure adequate protection for their class. CAMA replaced the 1968 Act. CAMA provides a more comprehensive body of legal principles and rules for the operation of businesses in Nigeria.

The separation of ownership is well encapsulated in CAMA. For example, CAMA provides for the directors of a Nigerian company to exercise management power in the company.[65] This received judicial approval in *Baffa v Odili*[66] where the court stated that, by virtue of section 244, directors of a company are the persons duly appointed by the company to direct and manage the business of the company.[67] Thus, section 244 of CAMA puts directors at the centre of corporate governance in a Nigerian company.

As a consequence of the separation of ownership and control and the pivotal role that directors play in corporate governance in a Nigerian company,[68] CAMA places an emphasis on shareholder protection. For instance, section 283(1) provides that directors are trustees of the company's money and property, and that they are required to exercise their powers honestly in the interest of the company and all shareholders. As with the UK CA, CAMA provides a number of legal controls to ensure that directors and managers act within their powers and run the company efficiently through a broad range of directors' general duties (set out in section 279), based on equitable principles relating to fiduciary duties. Section 279 provides that company directors have a fiduciary relationship towards the company and that they are to observe utmost good faith towards the company. This might explain why CAMA grants shareholders of a Nigerian company extensive powers to control the board of directors or review its activities as a basis to ensure that directors always act in the interests of the company.

CAMA grants shareholders the right to attend general meetings and vote at such meetings,[69] including the right to vote on the appointment[70] and removal[71] of directors. In addition, CAMA provides certain safeguards and control mechanisms for shareholders to rein in directors to ensure adequate protection for their class.[72] As provided in section 310(1)(a), a member has powers to petition for relief if the company's affairs are being conducted in an illegal or oppressive manner, based on the grounds provided under section 311. To reinforce shareholder protection in this regard, section 312 gives the courts a very wide-ranging jurisdiction for giving relief against the illegal or oppressive conduct of a company's affairs.

Since directors are expected to promote the company's interest for the benefit of its shareholders, the power of control CAMA grants to shareholders is the primary means by which they can ensure that the directors focus on promoting their interests. Their ability to exercise this power depends upon the information they have about board activities. As a means of providing information to shareholders, CAMA requires companies to keep accounting records to show and explain the company's transactions.[73] In addition, directors are required to prepare a "directors' report", "containing a fair view of the development of the business of the company".[74] The accounting records are the basis for the annual accounts

[65] CAMA, secs 63(3) and 244.
[66] (2001) 15 NWLR (pt 737) 709.
[67] Id at 737.
[68] CAMA, sec 63(3).
[69] Id, secs 224–32
[70] Id, secs 247–49
[71] Id, sec 262.
[72] Protection for creditors also exists under CAMA by virtue of secs 310(1)(c) and 410(b).
[73] Id, sec 331.
[74] Id, sec 342(1)(a).

(financial statements) that directors are required to prepare each year.[75] The purpose of the directors' report is to "enable the directors to ensure that any financial statements prepared under this Part [part XI] comply with the requirements of this Act as to the form and content of the company's financial statements".[76] Directors have a duty to lay and deliver financial statements before the company in general meeting,[77] and CAMA grants shareholders the right to obtain copies of such financial statements.[78]

The importance to shareholders of financial statements cannot be overemphasized, given that the "true and fair view of the state of affairs of the company"[79] that they embody will provide shareholders with the information they need to assess how the directors are promoting their interests, as mandated by the act. It is on the basis of such information that shareholders can effectively exercise their rights of supervision and control over the directors, including the power under section 310 to petition for relief if the affairs of the company are being conducted in an illegal or oppressive manner.

In addition to the protection CAMA grants to shareholders, the Nigerian Corporate Governance Code 2018 (CGC 2018) also focuses on protecting the shareholder class. The code recognizes the responsibility of the board of directors to exercise management powers in a Nigerian company.[80] However, the fact that part C of the CGC 2018 is dedicated to board relationships with shareholders underscores the "shareholder primacy" vision of the code. As a means for shareholders to protect their statutory rights effectively, principle 21 of part C requires the board to "provide shareholders with an opportunity to exercise their ownership rights and express their views to the board on any areas of interest". Companies of varying sizes and complexities operating in Nigeria are required to adopt the CGC 2018 and explain how they have applied its principles in their operations.[81] The code covers a wide range of issues concerning the office of directors: executive, non-executive, independent non-executive directors and other principal officers, such as the chairman of the board and company secretary. It also effectively covers their functions and issues of risk management,[82] as well as how the board should engage with shareholders in a manner that will provide shareholders with an opportunity to exercise their ownership rights.[83]

One may therefore argue that CAMA and the CGC 2018 make effective provision for the shareholders of Nigerian companies. However, the existence of three groups of investors / shareholders (majority, minority and foreign investors) makes further investigation necessary to understand the vulnerability of these different groups and how protection for shareholders in the Nigerian legal environment addresses the interests of different shareholder groups. This is especially so with respect to minority and foreign investors as this will form the basis for determining whether the protection offered in CAMA and the CGC 2018 is adequate to engender investor confidence, because poor investor protection discourages foreign investors from considering specific countries when diversifying their investment portfolio.[84] As a result, the next section undertakes a comparative review of the legal / regulatory regime for investor / shareholder protection in the UK and Nigeria. This is with a view to identifying the possible deficiencies in Nigeria's corporate legal / regulatory regimes, and thus provide a basis to suggest improvements necessary to engender investor confidence in Nigeria.

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[75] Id, sec 334(1).
[76] Id, sec 331(2)(b).
[77] Id, sec 355.
[78] Id, sec 349.
[79] Id, sec 335(2).
[80] CGC 2018, part A, principle 1.
[81] Id, part C at v.
[82] Id, principles 1–20.
[83] Id, principle 21.
[84] DK Denis and JJ McConnell "International corporate governance" (2003) 38/1 *Journal of Finance and Quantitative Analysis* 1 at 21; Giofré "Financial education", above at note 8 at 137.

LEGAL PROTECTION FOR INVESTORS / SHAREHOLDERS IN THE UK AND NIGERIA: A COMPARATIVE REVIEW

Even though recognition of other stakeholders is growing, especially in the UK, discussion so far shows a legal and regulatory focus on investor and shareholder rights, in both the UK and Nigeria. However, some commentators argue that simply writing shareholder rights into the law is not enough, because legal protection for shareholders includes the rights prescribed by laws and regulations and the effectiveness of enforcement.[85] They emphasize the place of effective enforcement because legal strategies are relevant only to the extent that they help to induce agents to act in the principal's interest: what has been termed "agent compliance".[86] Securing agent compliance depends on the existence of other legal institutions, such as courts, regulators and procedural rules.[87] This makes enforcement fundamental to the decision to invest in a corporation[88] because the probability of enforcement operates to prevent fraud; as Charlotte Villiers argues, "the close connection between fraud prevention and investor protection is self-evident".[89] This supports the view that enforcement is most directly relevant as regards regulatory strategies such as rules and standards, because they operate to constrain the agent's behaviour,[90] thereby promoting accountability as a strategy for fraud prevention. Therefore, even though the main focus of this review is on legal protection for investors, the next section addresses issues concerning enforcement as a strategy for securing compliance with laws and regulations, and how enforcement capacity or the lack of it can promote or deter foreign investment.

The current scholarship view is that the leading shareholder model jurisdictions of the US and the UK address the conflicts between shareholders and corporate managers with different strategies.[91] The US strategy (characterized as law-oriented) depends on strong regulatory and enforcement mechanisms, while the UK strategy (characterized as governance-oriented) depends on corporate governance rules and sophisticated, well-informed institutional shareholders who are able to oversee and control management.[92] The UK strategy seeks to facilitate the principals' control over their agent's behaviour.[93] This is dependent on the governance rules in the CA 2006, the UK Corporate Governance Code, listing regulations and the activities of institutional investors.

The UK adopts a compliance mechanism that largely relies on intervention by principals.[94] However, both the formal enforcement (of regulatory strategies) and intervention (by governance strategies) have been identified as substitutes, although they both impose penalties on agents in a bid to secure compliance.[95] Because the focus here is on how the corporate governance regimes in the UK and Nigeria protect the interests of shareholders, the remainder of this article reviews the strategies adopted by both countries to facilitate the control of corporate managers by shareholders, as well as the enforcement strategy through which they seek to generate compliance.

The UK has adopted three basic strategies to enhance shareholders' exercise of control over corporate managers. The first is the extensive disclosure requirements that seek to enhance the quality of information available to investors /

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[85] KCW Chen, Z Chen and KCJ Wei "Legal protection of investors, corporate governance, and the cost of equity capital" (2009) 15 *Journal of Corporate Finance* 273 at 275; Licht, Goldschmidt and Schwartz "Culture" above at note 14 at 230.
[86] J Armour, H Hansmann and R Kraakman "Agency problems and legal strategies" in R Kraakman et al *The Anatomy of Corporate Law* (3rd ed, 2016, Oxford University Press) 29 at 39.
[87] Armour, Hansmann and Kraakman, ibid; La Porta et al "Investor protection", above at note 3 at 6.
[88] La Porta et al, id at 3.
[89] Villiers *Corporate Reporting*, above at note 27 at 19.
[90] Armour, Hansmann and Kraakman "Agency problems", above at note 87 at 39; Licht, Goldschmidt and Schwartz" Culture", above at note 14 at 232.
[91] J Armour and JN Gordon "The Berle-Means corporation in the 21st century" (working paper, 2008) at 3 cited in CM Bruner 'Power and Purpose in the Anglo-American Corporation" (2010) 50Va J Int'l L 579, 617-8.
[92] Ibid.
[93] Armour, Hansmann and Kraakman "Agency problems", above at note 87 at 31; Griffin et al "National culture", above at note 14 at 741–44.
[94] Armour and Gordon "The Berle-Means corporation", above at note 91 at 3.
[95] Armour, Hansmann and Kraakman "Agency problems", above at note 87 at 39; Griffin et al "National culture", above at note 14 at 740.

shareholders. Second is the introduction of a Stewardship Code that seeks to promote shareholder participation in corporate governance. Third is the adoption of a Corporate Governance Code, with a view to promoting accountability by corporate managers. This article now compares these strategies with the strategy operated in the Nigerian system to highlight the weaknesses in the Nigerian corporate environment.

Corporate disclosure as a corporate governance strategy

The separation of ownership of the corporation from control is the basis for the disclosure philosophy that underpins corporate governance in the UK and those countries that operate the UK model, including Nigeria. However, the frequency and scale of corporate financial crises,[96] which commentators attribute to corporate governance failure, has intensified the ongoing debate about the role that shareholders should play in corporate governance.[97] This ongoing debate is an indication that improving the current regimes has become imperative if we are to achieve effective shareholder protection. Since 2006 when the current UK CA was enacted, the UK has responded to corporate governance challenges with several amendments to the act, with the primary aim of improving the disclosure philosophy. The objective is to enhance the quality of information the board makes available to investors and shareholders so they can be better informed to make effective decisions. The first such reform was the introduction of the Business Review (BR) by section 417, which came into operation on 6 April 2008. The issue that section 417 seeks to address, as stated in the act, is that:

> "The Government believes that companies work best … where there is effective communication and engagement between directors and shareholders, and where there are efficient mechanisms for taking decisions critical to the running of the company … Shareholders have a key role to play in driving long-term company performance and economic prosperity. Informed, engaged shareholders – or those acting on their behalf – are the means by which the directors are held to account for business strategy and performance."[98]

This is the basis for the elaborate shareholder engagement procedures in the UK governance system. As some authors argue, shareholders' rights (including the rights to review corporate board activities) under various laws and regulations can only be exercised effectively when the shareholders have the necessary corporate information.[99] Andrew Keay has noted that "one major cause of the financial crises was that companies embraced excessive risk".[100] According to him, the requirement in section 417(3)(b) of the UK CA that companies include in the business review a description of the principal risk and uncertainties that the company is facing might provide a basis for shareholders to address the issues that lead to those crises.[101] It is on this basis that some authors have submitted that the BR is an integral element of the directors' duty of loyalty to shareholders, because the effect of section 417 will "focus the minds of the directors on shareholder interests".[102]

The new chapter 4A Strategic Report (SR) that became applicable from October 2013 replaced the BR. It incorporates the provisions of the BR, and requires the directors of all companies to prepare a strategic report for each

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[96] B Tricker *Corporate Governance: Principles, Policies, and Practices* (3rd ed, 2015, Oxford University Press) at 10–17; Bebchuk and Weisbach "The state of corporate governance", above at note 23 at 6.
[97] Tricker, id at 15; Villiers *Corporate Reporting*, above at note 27 at 7;; Bebchuk and Weisbach, ibid.
[98] Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) SI 2007/2194, art 6 and sched 1, para 16.
[99] La Porta et al "Investor protection", above at note 3 at 5; Bebchuk and Weisbach "The state of corporate governance", above at note 23 at 8.
[100] Keay *The Enlightened Shareholder*, above at note 1 at 176.
[101] Ibid.
[102] J Lowry "The duty of loyalty of company directors: Bridging the accountability gap through efficient disclosure" (2009) *Cambridge Law Journal* 607 at 621.

financial year.[103] As Keay observed regarding the implication of the requirement in section 417 (which is now contained in section 414C(2) in respect of the new SR), it "might be seen as empowering small investors and 'outsiders' who do not share the privileged 'insider' relationships".[104] The FRC has issued its Guidance on Strategic Report as a means of enhancing the quality of information directors are to provide. In its consultation draft, the FRC states that the Guidance on Strategic Report "encourages companies to experiment and be innovative in the drafting of their annual reports, presenting narrative information in a way that allows them to 'tell their story' to investors concisely".[105]

Many authors argue that increased disclosure makes a company more attractive to investors, and this is especially important in attracting foreign investors.[106] This is because disclosure rules help to enhance the quality of information that investors need to make informed investment decisions. The UK relies on disclosure to enhance the quality of shareholder oversight over corporate boards. This article focuses below on the Nigerian system to determine how well its disclosure rules provide corporate shareholders with the information needed to enhance their ability to exercise their rights under CAMA and other regulations.

Unlike in the UK, where concerted efforts have been made to improve the quality of information to be provided by directors by the introduction of SR among other regulations, CAMA appears to be the major source that provides for meaningful corporate disclosure under the Nigerian system. This is provided for in part XI of CAMA, which is dedicated to financial statements and audit, and generally requires every company to keep accounting records that show and explain the company's transactions. In addition, the directors are also required to prepare a Directors' Report each year, containing a fair view of the development of the company's business. The board presents these financial statements (which mandate sundry disclosures) to the shareholders.[107]

The major problem with the disclosure rules under CAMA is how investors can extract meaningful information out of this model of auditors' and directors' reports mandated by CAMA. As Charlotte Villiers has observed, "[a] poorly designed disclosure system could also lead to information overload by which the participants are unable to process the information effectively".[108] She notes that, while interrogating the Greenbury Committee Report, Ernst and Young saw "sheer volume of information" as "a barrier to effective communication"[109] and suspected that "all but the most determined readers, when faced with a page or more of dense figurework simply skip to the next paragraph of narrative".[110] She concludes that "[t]hese shortcomings in the disclosure system could result in poor decisions, causing loss to participants or, perhaps in extreme cases, even failure of the company".[111]

This may explain why the UK has engaged in rigorous modification of disclosure requirements under the CA 2006 with the development of the BR, and now the SR that aims to inform shareholders adequately and help them to assess effectively how the corporate board has performed its responsibility of promoting the corporation's interests for the benefit of shareholders.[112] This is unlike in Nigeria, where the major modifications focus on the ease of business registration and foreign exchange regulations,[113] without a corresponding modification of the rules that could enhance shareholder oversight over corporate boards. Providing adequate information to shareholders is important, as it helps them

[103] The Companies Act 2006 (Strategic Report and Directors' Report) Regulation 2013, SI 2013/1970.
[104] Keay *The Enlightened Shareholder*, above at note 1 at 177.
[105] Birds et al *Boyle & Birds*, above at note 10 at 504–05.
[106] Chen et al "Legal protection of investors", above at note 85 at 286; Bebchuck and Weisbach "The state of corporate governance", above at note 23 at 21.
[107] CAMA, secs 331–56.
[108] Villiers *Corporate Reporting*, above at note 27 at 4.
[109] Id at 4, citing Ernst & Young, "Corporate Governance: Greenbury Implementation" (Ernst & Young, London, 1996) paragraph 2.2 &6
[110] *Ernst & Young*, id, paragraphs 2.2 & 6-7
[111] Villiers *Corporate Reporting*, above at note 27 at 5.
[112] UK CA, sec 414C.
[113] See above at note [4 – please confirm if this is the correct cross-reference].

to make the decisions required to address directors' irresponsibility before the event. The absence of adequate information, as observed above, would result in poor decisions, which could lead to corporate board misbehaviour and insider opportunism that could only be addressed after the event.

This article has identified foreign investment as an important source of corporate finance. It has also identified the "public" companies as the main vehicles for the importing of external capital. Given Nigeria's desire for foreign capital, one would expect the country to develop a disclosure system that focuses on providing adequate access to information for small investors and "outsiders" who do not share the privileged "insider" relationships. The UK achieved this through section 414C(2) of the CA. This is important for a country like Nigeria, since investor protection has been linked to economic development as it is said to influence the real economy through its effect on financial markets.[114] Thus, the relatively undeveloped disclosure rules in CAMA pose a major challenge to economic development in Nigeria because of their role in investment decisions.

Dominic Baidaki observes that disclosure enables shareholders to make investment decisions.[115] He argues that the devices cannot be an effective and proper way of subjecting the activities of corporate boards to the control of shareholders because, "[p]ossession of information per se is meaningless without an adjunct active shareholder to crystallize the information into [is there a word missing here from the original?] active supervisory check on the directors".[116] The discussion below shows how the UK provides for an active shareholder group to achieve this purpose, as well as the lack of an active group in the Nigerian corporate environment.

Shareholder engagement and shareholder protection

The discussion above shows a clear intention to provide adequate information to shareholders and investors with a view to promoting the accountability and integrity of the financial market, thereby making the UK corporate environment investor-friendly. Although "traditionally shareholders have not been either ready or able to engage with the affairs of companies",[117] the introduction of Stewardship Codes[118] in the UK is a clear attempt to change the way shareholders engage with a company's affairs by making them active participants in corporate governance. For instance, the 2012 Stewardship Code "sets out the responsibilities of institutional investors as shareholders and provides them with the guidance for meeting those responsibilities".[119] The 2012 code had seven key principles, but the one relevant to shareholder participation in corporate governance, and thus important to the discussion here, is the requirement that "they should be willing to act collectively with other investors where appropriate".[120]

The Stewardship Code is one of the initiatives that has been developed as a strategy for bringing institutional investors on board, and making them effective participants in corporate governance. According to Talbot, the aim of the Stewardship Code is to "improve dialogue between the multifarious persons or firms that manage and advise institutional funds and institutional shareholders, so that they can promote the long term responsible investment which may curtail future crises".[121] The active participation of a shareholder group in corporate governance will no doubt be beneficial to

[114] La Porta et al "Investor protection", above at note 3 at 18.
[115] DA Badaiki *Corporate Law Shareholders Control of Corporate Management in Nigeria* (2015, Lambert Academic Publishing) at 175.
[116] Ibid.
[117] Keay *The Enlightened Shareholder*, above at note 1 at 77.
[118] Since the introduction of the first Stewardship Code in 2010 (https://www.frc.org.uk/getattachment/e223e152-5515-4cdc-a951-da33e093eb28/UK-Stewardship-Code-July-2010.pdf) the FRC revised the Code in 2012 (https://www.frc.org.uk/getattachment/d67933f9-ca38-4233-b603-3d24b2f62c5f/UK-Stewardship-Code-(September-2012).pdf> and 2020 (https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Dec-19-Final-Corrected.pdf (last accessed 6 August 2020)
[119] Birds et al *Boyle & Birds*, above at note 10 at 369.
[120] 2012 Stewardship Code, principle 5.
[121] Birds et al *Boyle & Birds*, above at note 10 at 182, citing FRC "Consultation on a Stewardship Code for Institutional Investors" (January 2010) at 10, available at: <https://www.frc.org.uk/getattachment/58c79137-d436-4882-9eda-f4e23fa939fe/-;.aspx> (last accessed 06 August 2020]).

all (especially minority) shareholders because the monitoring they provide through their participation will help to reduce corporate board misbehaviour.

The community of institutional investors plays a critical role in the UK corporate governance system. This key shareholder group is in its infancy in Nigeria, where institutional shareholders are an emerging group consisting mainly of pension funds. Pension funds are regulated by the Pension Funds Act 2014. There is no law or regulation that provides for their participation in corporate governance except that the CGC 2018 provides that the board should encourage institutional investors to influence the standard of corporate governance positively.[122] In the absence of a functional and active body of institutional shareholders and a regulatory framework, it is doubtful that Nigerian institutional shareholders are in any position to take effective advantage of the disclosure provisions provided in CAMA to check the activities of Nigerian corporate boards.

Adopting the UK stewardship approach may pose a different challenge because, unlike in the UK where the major conflicts are between shareholders and management, the major conflicts in the Nigerian environment are between majority shareholders and the minority. However, there is the need to provide opportunities through which shareholders, especially minority and "outsider" shareholders, can access corporate information as well as oversee the activities of corporate boards. This is important for a country like Nigeria, because dissipating control among several large minority groups is said to be a credible method to limit expropriation when legal protection is weak.[123] This article now examines the corporate governance codes in the two jurisdictions under review to assess how the codes address issues of shareholder risks.

Corporate governance codes and shareholder engagement in the UK and Nigeria

This article has identified the UK Corporate Governance Code as one of the strategies adopted to promote the accountability and integrity of the financial market in the UK corporate environment. The connection of the UK code to the London Stock Exchange LR provides further grounds to ensure compliance with the code's provisions as well as the extra responsibilities imposed by the LR on issuers of securities, which aim to reduce the risk for investors. This shows a deliberate policy by the UK to address issues regarding investor protection with a view to preventing economic crises, thereby promoting economic development.

Under the Nigerian regulatory regime, although CAMA and other corporate governance regulations focus on investor and shareholder protection, there is no comprehensive legal or regulatory procedure for achieving that protection. For example, unlike in the UK where the corporate governance code is connected to the LR of the London Stock Exchange as a strategy for enhancing compliance, the Nigerian Corporate Governance Code is a stand-alone regulation. It is not connected to the LR of the Lagos Stock Exchange or other legal and regulatory regimes in a way that will promote compliance with the code. In fact, the only reference in the CGC 2018 to the statutory rights of shareholders is in principle 23, which requires "[e]quitable treatment of shareholders and the protection of their statutory rights, particularly the interest of minority shareholders".

The major problem with the CGC 2018 as a stand-alone regulation is that it is a standards-based regime that depends on the board of directors for its implementation. Implementation itself is monitored by the Nigerian FRC through sectoral regulators and registered exchanges.[124] There are two major problems with this. The first is that the procedure for monitoring by the sectoral regulators is without reference to any statute. Thus, unlike in the UK where the LR require

[122] CGC 2018, sec 22.3.
[123] Chen et al "Legal protection of investors", above at note 85 at 275.
[124] CGC 2018 at v.

listed UK companies to apply the principles of the UK governance code, there is generally no obligation on a Nigerian company to adopt the code. Secondly, the sanctions provided under the sectoral codes principally involve the payment of fines.[125] This makes the CGC 2018 a weak instrument for corporate governance in Nigeria. It is difficult to see how the sectoral regulators can monitor compliance with the code without any guidelines set out in a statute or regulation to which companies are subject.

A brief comparison of the CGC 2018 and the NCCG 2016 is important here to highlight some of the major weaknesses in the current regime (ie the CGC 2018). The CGC 2018 does nothing to drive so-called corporate accountability, which is its major aim.[126] The Steering Committee (Nigeria) for the NCCG 2016 made two important observations that shaped the focus of the NCCG 2016. First, the committee observed that the sectoral multiplicity of governance codes in Nigeria is a major source of confusion for corporate governance in the country and thus harmonized the various codes into the NCCG 2016.[127] Having harmonized the country's corporate governance codes, the NCCG 2016 made compliance with its provisions mandatory.[128]

Secondly, the committee observed the mismatch between Nigeria's ownership structure and corporate governance. As noted above, ownership structure and national culture influence corporate governance in different jurisdictions.[129] This committee acknowledged this fact.[130] Thus, even though Nigeria's corporate governance system mirrors the Anglo-American model based on its dispersed shareholding and unitary board structure in which the dominant conflicts are between the shareholders and corporate managers, the committee considered the Nigerian investment environment to be "replete with ownership concentration, in which the dominant conflicts are usually between the controlling shareholders and minorities".[131]

The CGC 2018 would therefore be expected to address the major corporate governance challenges in Nigeria's corporate environment by reference to the statutory protection for small investors and "outsiders" under CAMA. However, unlike the NCCG 2016 (many of the principles of which are subject, or without prejudice, to CAMA),[132] as noted above the CGC 2018 made no reference to CAMA or any other statutory instruments to guide the operation of the code. This is a major challenge for a governance regime that depends on the corporate board for its implementation, especially given that the CGC 2018 did not prescribe mandatory compliance as had been prescribed in the NCCG 2016.[133]

In view of the peculiarity of the Nigerian investment environment, the focus on shareholders as a single class poses a special challenge. It is argued that such a focus disadvantages minority shareholders, since members take decisions by a majority.[134] Consequently, the tenuous provisions for minority protection under CAMA are not sufficient to address the implications of majority rule in the Nigerian corporate environment. This has a major implication for foreign investment because, as some argue, investor protection is "particularly important for investors considering purchasing securities issued by a company from another country".[135] Thus, the Nigerian government's promotion of ease of

[125] Financial Reporting Council of Nigeria Act, 2011, principle 65.
[126] CGC 2018 at iv.
[127] NCCG 2016 at 4.
[128] Id at 6.
[129] See "Introduction" above.
[130] NCCG 2016 at 5.
[131] Ibid.
[132] See for example id, principles 6.4.1, 8.14 and 14 on the appointment of the company secretary, establishment of audit committee and tenure and re-election of directors.
[133] Id, principle 2.3.
[134] PL Davies *Gower and Davies' Principles of Company Law* (7th ed, 2003, Sweet & Maxwell) at 481.
[135] Bebchuk and Weisbach "The state of corporate governance" above at note 23 at 18.

investment, which has helped the country to rise 24 places on the World Bank ease of doing business index for 2018,[136] is not sufficient to promote investor confidence.

Commentators have identified laws and regulations relevant to foreign investors as corporate disclosure rules, in addition to simplifying and concentrating investment approval in [“one-stop” investment agency, i.e. a single agency responsible for all investment-related matters, as major factors that influence investment decisions.[137] This may be the case, but it is argued that such corporate disclosures will need to be designed in such a way that will allow those for whose benefit they are made to be able to process the information that they provide. In addition, providing investors with the information they need will enable them to exercise their legal rights, which are generally protected through enforcement.[138] In many countries, laws and regulations are enforced partly by courts, and partly by corporate participants themselves.[139] The discussion so far shows that corporate governance in Nigeria is weak. This is a major issue for the Nigerian corporate environment because strong corporate governance is the first line of defence for vulnerable groups, such as small investors and “outsiders”. Therefore, in the absence of strong corporate governance, corporate minority shareholders have to rely on the courts to enforce their rights prescribed in laws and regulations.

Three things are clear from this discussion. The first is that disclosure rules in Nigeria are largely undeveloped. Secondly, legal / regulatory regimes for investor protection in Nigeria did not provide adequate opportunities for vulnerable groups, such as small investors and other “outsiders”, to participate in corporate governance in the Nigerian corporate environment. Finally, the Nigerian Corporate Governance Code did not address these weaknesses, as it failed to address the protection of minority shareholders specifically. This leaves minority shareholders with only one channel of enforcement: recourse to the courts. The next section discusses the capacity of the courts to deal with issues concerning corporate misbehaviour by the controlling majority, to underscore the need for a new approach to corporate governance in Nigeria.

MINORITY PROTECTION AND MINORITY RIGHTS ENFORCEMENT: A CASE FOR A NEW APPROACH TO CORPORATE GOVERNANCE IN NIGERIA

This article has noted that shareholder protection in the Nigerian corporate environment is weak. Meanwhile, strong corporate governance is said to make a company more attractive to foreign investors.[140] This may account for the limited foreign investment in Nigeria, and underscores the need to address the peculiar corporate governance challenges identified in the country’s corporate environment. The corporate governance problem in Nigeria has been identified as the conflict between majority and minority shareholders. This makes it imperative to depart to some degree from the UK corporate governance model by granting some control rights to minority shareholders as a credible method to check opportunism by the controlling majority before the event. This would reduce the need to rely on the weak legal enforcement infrastructure in the country.

Addressing corporate board misbehaviour in a country like Nigeria after the event poses a significant challenge, because of the weak and inefficient legal enforcement infrastructure. In fact, this infrastructure is a major challenge in developing markets and this is more apparent in Nigeria in cases involving high profile defendants such as corporate board executives. A case is point is the failure of five Nigerian banks in 2005, attributed to fraud by their board executives.

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136 The World Bank “Doing business: Measuring business regulations: Nigeria”, available at: <http://www.doingbusiness.org/data/exploreeconomies/nigeria> (last accessed 15 July 2020).
137 Muchlinski *Multinational Enterprises*, above at note 23 at 216.
138 La Porta et al “Investor protection”, above at note 3 at 6; Chen et al “Legal protection of investors”, above at note 85 at 275.
139 La Porta et al, ibid.
140 Bebchuk and Weisbach, above at note 23 at 21.

The managing directors of the banks were charged with fraud in 2005. Apart from Cecilia Ibru, who pleaded guilty to the charges, the other cases are still pending in court 15 years later.[141] The immediate past chief justice of Nigeria, Walter Onnoghen, had the opportunity to discuss the weakness of Nigeria's justice system and its implication for foreign investment at the opening ceremony of the 2018 National Seminar on Construction Law for Judges on 30 May 2018. He expressed concern over the effect of delay in justice delivery on foreign investors.[142] Since dissipation of control among several large minority groups has been identified as a credible method to limit expropriation when legal protection is weak, creating the opportunity for small investors and "outsiders" to be represented effectively on corporate boards will help to address corporate governance issues before they arise.

The suggestion of addressing insider opportunism in advance is not entirely novel. The UK already operates a system that aims to achieve the same result with the introduction of the Stewardship Code and section 414C(2) [of – the CA. However, unlike in the UK where institutional shareholders are empowered to participate actively in corporate governance, the alternative suggested for Nigeria is aimed at empowering small investors and "outsiders" who do not share the privileged "insider" relationship. The purpose is to put their protection in their own hands. This approach will help to address the peculiar governance challenges in the Nigerian corporate environment, especially the problem of monitoring the majority shareholders. It will provide small investors and "outsiders" with the inside knowledge about how the board and majority shareholders[143] exercise their powers to manage the company. There are two ways that this could be achieved: developing comprehensive disclosure rules; and creating a special role for independent non-executive director to represent the interests of small investors and "outsiders" on Nigerian corporate boards.

Available research indicates that "an important, and necessary, condition for directors (in this case independent non-executive directors) to be able to be effective is the amount and nature of information that they have".[144] This makes comprehensive reform of Nigeria's disclosure rules necessary to support the suggested new role for independent non-executive directors. Research on corporate governance also indicates that director independence is associated with an improvement in some specific types of decisions, and has actually had an impact in critical areas, such as the turnover of chief executives, the incidence of fraud and other forms of insider abuse.[145] Thus, rather than have all the directors represent the interests of all shareholders, what is required in a country like Nigeria is a corporate governance model that mandates a specific function for independent non-executive directors to focus on the interests of minority shareholders.

It may be argued that CAMA and the CGC 2018 already provide for independent non-executive directors. This may be true of the CGC 2018, but is untrue regarding CAMA. CAMA makes no express provision for the office of independent non-executive directors. The reference to non-executive directors relates to the duty of care and skill under section 282 of CAMA, which appears to generalize the duty for all types of directors. According to section 282(4), "the standard of care in relation to the director's duties to the company shall be required for both executive and non-executive directors". Without defining the office and the duties of non-executive directors under CAMA, it remains to be seen how their duty of care is to be measured.

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[141] See the detailed discussion on corporate fraud and the effect of delay in justice delivery in O Akanmidu "Collapsed bank CEO cases point to weaknesses in Nigeria's justice system" (5 July 2018) *The Conversation*, available at: <http://www.theconversation.com/collapsed-bank-ceos-cases-point-to-weaknesses-in-nigerias-justice-system-99236> (last accessed 15 July 2020).

[142] I Nnochiri "Delay in justice delivery scaring away investors (CJN)" (31 May 2018) *Vanguard Newspapers* (Apapa, Lagos) at 8.

[143] The board of directors and members in general meeting share the power of management in a Nigerian company by virtue of CAMA, sec 63. However, because members take decisions by majority by virtue of CAMA, sec 233, this power is in reality shared between the majority shareholders and the board of directors.

[144] Bebchuk and Weisbach "The state of corporate governance", above at note 23 at 8.

[145] Ibid.

The position of independent non-executive directors is not mentioned in CAMA but the CGC 2018 makes copious provisions for both non-executive and independent non-executive directors.[146] However, there is no provision as to how they may be appointed under the code. It is argued that they may not be in any position to look after the interests of small investors and "outsiders" if their appointment is to be regulated by the provisions of CAMA.[147] This is because the appointment of directors under CAMA depends on the approval of the majority of members, and they may also be removed by a simple majority of members by virtue of section 262. This will obviously make them beholden to those that control the majority of shares, thereby exposing small investors and "outsiders" in a Nigerian company to the dangers of insider opportunism. This makes a review of CAMA and other corporate governance regulations imperative to promote investor confidence.

CONCLUSION

The importance of the business corporation to the economic life of a nation cannot be overemphasized. However, the importance of the corporation derives from its economic power. This makes investors important stakeholders, since their contribution is the basis for a corporation's economic power. Corporate law recognized this as long ago as the 19th century and provided for control of corporate managers. This article has addressed how that control can be made more effective with a view to preventing corporate misbehaviour and promoting economic development in a country like Nigeria.

The comparative analysis of corporate regulation in the UK and Nigeria shows that corporate governance in Nigeria is undeveloped and thus deficient, especially regarding the disclosure requirements under CAMA. This makes a functional legal enforcement system imperative to address corporate misbehaviour after the event. However, because of the weak and inefficient legal enforcement infrastructure associated with countries like Nigeria, this article suggests a more comprehensive disclosure system and clear provisions for the participation of independent non-executive directors dedicated to the interests of small investors and "outsiders" under CAMA. This will provide them with a statutory guarantee of access to corporate boards. A review of CAMA is therefore suggested, with a special focus on how this group of shareholders could play a major part in the appointment and the discipline of independent non-executive directors.

In addition, a major review of the CGC 2018 is also required to address the issue of linking the code to CAMA and other statutory instruments. This is with a view to providing a basis for small investors and "outsiders" to monitor the implementation by boards of the principles of the code. This review should aim to place the protection of small investors and other "outsiders" in their own hands. This would promote trust and confidence in the management of Nigerian companies and better access to corporate finance.

CONFLICTS OF INTEREST

None.

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[146] CGC 2018, principles 6 and 7.
[147] CAMA, sec 247.