THE TENURE OF DIRECTORS OF PUBLIC COMPANIES IN NIGERIA: WHO SHOULD REGULATE, THE CORPORATE AFFAIRS COMMISSION OR THE SECURITIES AND EXCHANGE COMMISSION? [*1]

Abstract

Companies Directors are, no doubt, central to the policy formulation and overall management of a company. They are seen as the controlling mind of the artificial legal entity called a company. The significance of their central role in the life of a company accounts for the fiduciary status imposed on them by law. The Companies and Allied Matters Act is the principal statute regulating the formation, management and winding up of companies in Nigeria. The Act made provisions, among other things, relating to the determination of the tenure of office of Directors of Companies in Nigeria. The Code of Corporate Governance issued by the Securities and Exchange Commission, in 2011, pursuant to the Investment and Securities Act, among several innovative and far reaching provisions, equally seek to regulate the tenure of office of Directors of public companies. This paper seeks to examine both provisions relating to the tenure of Directors in Nigeria and properly resolve the obvious conflict in their provisions. This is imperative as the prevailing multiplicity of the provisions relating to tenure of directors can only result in chaos and anarchy.

Introduction

The lawful pursuit of the objects of any company, private or public, registered in Nigeria under the Companies and Allied Matters Act[2] is wholly dependent on the existence of at least two Directors[3]. To this extent the importance of Directors in the life of any company is akin to the function of blood to the human being. It is also safe to say that the quality of the corporate image of any company can be deduced from the quality of the members of its Board of Directors.

The significance of the office of Directors in a company can therefore not be over emphasized. It is on account and in recognition of this vital

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[2] Cap. S. 20 Laws of the Federation 2004. Herein after, referred to as CAMA.

[3] See S. 246 (2) CAMA. The section prohibits a company from doing business if the number of Directors falls below 2, unless additional Directors are appointed after the expiration of one month.

position occupied by company Directors that the CAMA has made elaborate provisions relating to their number, appointment, duties, vacation of office, removal, quorum, meetings of the board, remuneration and disqualification among other matters.[4]

CAMA established the Corporate Affairs Commission[5] and defined its function to include, in mandatory terms, the regulation and supervision of the formation, incorporation, registration, management, and winding up of companies.[6] From these standpoints regulating and supervising the management of companies is within the statutory purview of the functions of the CAC. Since the CAMA defines a Director as a person appointed by the company to direct and manage the business of the company,[7] it invariably established a nexus between the functions of the office of the Directors of a company and brings them within the larger template of the management function of the CAC.

It must be pointed out that the provision of CAMA, in relation to Directors and the functions of the CAC, makes no discrimination between Directors in private and public companies. Thus it applies in equal weight and measures, except where expressly prohibited, to Directors in both private and public companies.

The Securities and Exchange Commission[8], in 2011 issued a consolidated code of corporate governance for public companies[9]. The code is specifically directed at public companies and all companies seeking to raise funds from the capital market.[10] The code, among other things prescribes the responsibilities of the board and also the tenure.

The central position occupied by Directors in the scheme of affairs of a company makes it very imperative that nothing should by any means create any confusion as to the certainty of their term of office. It is the quest to clear this, seeming gloomy position on their tenure that is basis for this paper.

This paper seeks to undertake a calm consideration of the provision of CAMA and the Code in relation to the tenure of Directors of public companies. The paper will attempt to resolve the apparent conflict in both provisions in the light of judicial and statutory provisions. We shall also argue that the code can not override the provisions of CAMA, with specific regard to the provisions relating to the tenure of directors of public companies.

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[4] See, Sections 244- 292 of CAMA.
[5] Herein referred to as the CAC. See S.1 of CAMA
[6] See, S. 7 (1)(a) of CAMA
[7] See S. 244(1) of CAMA
[8] Herein after referred to as SEC
[9] Herein after referred to as the Code
[10] See S.1.1 of the code

Clarification of Terms

To properly keep in focus our perspective in this paper, we shall define Director(s), public companies and tenure.

Director

A Director includes any person occupying the position of director by whatever name called; and includes any person in accordance with whose directions or instructions the directors of the company are accustomed to act.[11] This definition, to our mind, is capable of creating serious doubt as to who actually are directors in a company. A person, by the definition, need not be formally appointed or elected to come within the meaning of this definition as a director, provided the directors of the company are accustomed to act on his instructions. The fact of directorship can therefore arise merely by a consistent deference to the instructions of another person by the directors appointed to act by the company. This definition can therefore not satisfy our purpose in this paper. This is more so as a person not formally appointed cannot be subject to any regime of tenure of office.

CAMA [12] offers another definition of directors as persons duly appointed by the company to direct and manage the business of the company. This definition is more consistent with common sense and logic. A person must be appointed before he can, lawfully, function to bind the company by his actions unless under circumstances provided under section 244[13]. The section further recognizes directors as either executive or otherwise (non-executive).

The Investments and Securities Act[14] does not offer any definition of who a director is. It merely adopts the position in CAMA. It provides that a director has the same meaning as is assigned to it in the CAMA[15]. The Black's Law Dictionary[16] defines a director as: 1. one who manages, guides, or orders; a chief administrator. 2. A person appointed or elected to sit on a board that manages the affairs of a corporation or other organization by electing and exercising control over its officers.

From the above dictionary definition, especially the second arm, it is clear that directors may either be appointed or elected. Thus, the definition covers both executive and non-executive directors who are, respectively, appointed or elected by the relevant organs of the company.

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[11] S. 567 of CAMA. This definition encompasses a shadow director who will automatically cease to peddle any influence once the directors begin to disregard his instructions. He thus cannot enjoy any tenure. The fact of his existence is not readily known to persons outside the scope of his influence.

[12] S. 244(1)

[13] CAMA. That is where a person holds himself out or he is held out by the company as a director.

[14] Herein after referred to as ISA.

[15] S. 315 of the ISA

[16] Bryan A. Garner(ed) Thomson West, 8th edition p.492

Public Company

The CAMA defines a public company as follows: "any company other than a private company shall be a public company and its memorandum shall state that it is a public company"[17]. Two conditions stand out from this definition as necessary to qualify a company as public company. Firstly, it must not be a private company and its memorandum must proclaim it as public company.

This definition clearly makes it imperative to understand what a private company is before the true meaning of a public company can be deduced or inferred. We must therefore seek to know what a private company is.

The CAMA[18] defines a private company as one which is stated in its memorandum to be a private company. This definition does not in any way illuminate our path to ascertaining what a public company is.

The section[19] however, goes further to state some peculiar features of a private company. These features may be construed to lead us to what a public company is. They are:

- Every private company shall by its articles restrict the transfer of its shares,[20]
- The total number of members of a private company shall not exceed 50, not including persons who are bona fide in the employment of the company, or were while in that employment and have continued after the determination of that employment to be, members of the company.[21]
- A private company shall not, unless authorized by law, invite the public to-
    1. Subscribe for any shares or debentures of the company; or
    2. Deposit money for fixed periods or payable at call, whether or not bearing interest.

From the features of a private company listed out above, a public company must therefore be one which has no inhibition on the transfer of its shares and debentures. Also its membership, in terms of maximum number, is not pegged at 50 members and is permitted to solicit public patronage for the acquisition of its shares and debentures.

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[17] S. 24 of CAMA
[18] S. 22(1) of CAMA
[19] S. 22 of CAMA
[20] S. 22(2) of CAMA
[21] S. 22(3) of CAMA

Tenure

Tenure has, simply, been defined as occupation of an official position, or the length of time an official position is occupied.[22]

Appointment of Directors

The CAMA makes provision for the appointment of Directors under three different circumstances. The first is appointment of first or initial directors; the second is appointment of subsequent directors and lastly appointment to fill casual vacancies.

Appointment of first or Initial Directors

This is governed by S. 247[23] which provides "subject to section 246 of this Act, the number of directors and the names of the first directors shall be determined in writing by the subscribers of the memorandum of association or a majority of them or the directors may be named in the articles".

The section allows for only two ways for the appointment of the first directors. They are either appointed, in writing by all the subscribers to the memorandum of association of the company or a majority of them, or they may be named in the articles of association of the company.

These modes of appointment apply, without discrimination to both private and public companies.

Can this power of appointment vested in the subscribers to the memorandum of association be delegated? The section does not expressly permit or forbid its delegation. Applying the elementary principle of interpretation of statute, that is, anything not expressly prohibited is permitted, we submit that in appropriate cases the subscribers may delegate such power to any person or institution they consider better placed. This is particularly so, in view of the important responsibilities imposed on directors by CAMA and the significance of expertise, knowledge and experience to any human endeavor. Thus, where these factors become relevant to any appointment and the subscribers are not equipped with the needed criteria for identifying persons with requisite knowledge, expertise and experience, it becomes needful to resort to delegation of this power.

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[22] Encarta Dictionary.
[23] Of CAMA

Subsequent Appointment of Directors

This is provided for under S. 248[24]. The section in the first instance vests the members at an annual general meeting the power to re-elect or reject directors and appoint new ones.[25] The forum for the appointment of subsequent directors is the annual general meeting. This power of appointment is confirmed by the fact that election of directors in place of those retiring is one of the ordinary businesses of the annual general meeting.[26]

It may be permissible for the appointment to be made outside the annual general meeting. However, where that is the case, the annual general meeting reserves the right to reject or ratify such appointment.

The annual general meeting is, thus, central to all appointments of subsequent directors.

In the very extreme cases of all existing directors and the shareholders dying, any of their personal representatives shall apply to the court for an order to convene a meeting of all personal representatives of the shareholders entitled to attend and vote at a general meeting to appoint new directors to manage the company, and if they fail to convene a meeting, the creditors, if any shall be able to do so.[27]

The personal representatives of member entitled to attend general meetings or the creditors may, upon application to the Federal High Court, and on the death of all the members of the company, appoint subsequent directors at a court ordered meeting for that purpose. The right of the creditors to appoint subsequent directors can only arise where there is default on the part of the personal representatives of all the deceased members to initiate the process of appointment.

Where the creditors appoint subsequent directors, the integrity and impartiality of those appointed may be compromised, as their allegiance may be more to the creditors than the company. The general duties placed on directors and the provisions relating to conflict of interest may, however, be invoked to examine the actions of such directors and render them accountable for any contravention of those provisions of CAMA.[28]

Appointment of Directors to fill casual vacancies

The board of directors is vested with the power to appoint person(s) to fill vacancies arising in its composition on account of death, resignation, removal or retirement.[29] Any appointment made on account of these circumstances may be approved by the next annual general meeting, and if not approved, the appointment shall cease forthwith.[30]

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[24] CAMA
[25] S. 248(1) CAMA
[26] S. 214 CAMA
[27] S. 248(2) CAMA
[28] See Ss. 277, 279, 280 and 282.
[29] S. 249(1) CAMA
[30] S. 249(2) CAMA

The apparent reason for this power, conferred on the board, is to ensure that the affairs of the company is not grounded on account of insufficient number of existing directors to form a quorum for purposes of transacting businesses of the board.
The circumstances for the invocation of this residual power of the board, does not include terminal illnesses or permanent deformity. In fact, these factors do not constitute disqualifying factors under CAMA.[31] They may, however, be valid grounds for the removal of directors by the general meeting, pursuant to section 262 of CAMA.

Tenure of Directors under CAMA

The tenure of directors under CAMA is subject to the rule of rotation of directors prescribed under section 259 CAMA. The entire section is reproduced below;[32]

(1) *Unless the articles otherwise provide, at the first annual general meeting of the company all the directors shall retire from office, and at the annual general meeting in every subsequent year one third of the directors for the time being, or if their number is not three or a multiple of three, then the number nearest one third shall retire from office.*

(2) *The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.*

(3) *The company at the meeting at which a director retires in the manner mentioned in subsection (1) and (2) of this section, may fill the vacated office by electing a person to that office and in default, the retiring director shall, if offering himself for re-election, be deemed to have been re-elected, unless at such meeting it is expressly resolved not to fill such vacated office or unless a resolution for the re-election of such director shall have been put to the meeting and lost.*

(4) *No person other than a director retiring at the meeting shall, unless recommended by the directors, be eligible for election to the office of director at any general meeting unless not less than three nor more than 21 days before the date appointed for the meeting there shall have been left at the registered office or head office of the company notice in writing, signed by a member duly qualified to attend vote at*

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[31] S. 257 CAMA

[32] For emphasis and ease of reference.

the meeting for which such notice is given, of his intention to propose such person for election, and also notice in writing signed by that person of his willingness to be elected.

The provisions reproduced above, is made subject to the prescriptions of the articles of association. Therefore, if the articles prescribe a regime of tenure different from the above positions the articles will prevail. Where the article of association of a company, is silent on tenure same shall be determined in line with the rules prescribed by CAMA, reproduced above. We shall proceed to analyze the position of CAMA, in relation to tenure of directors pronto.

In the first instance, at the first annual general meeting of a company all the directors are to retire from office. The tenure of office of the first or initial directors of the company must, therefore, terminate at the first annual general meeting. The first annual general meeting of a company is required to be held within 18 months of its incorporation.[33] The 18 months time line is rigid and cannot be extended.[34] By implication, the tenure of office of all the first directors is 18 months maximum. This is so as their tenure is tied to the holding of the first annual general meeting.

The subsequent directors are expected to retire, by a fraction of one third or the number closest to it, at every subsequent annual general meeting. The annual general meeting is a yearly ritual by companies, not more than 15 months is to elapse between one annual general meeting and the next[35]. The CAC is, however, empowered to extend the 15 months time line, for the holding of subsequent annual general meetings, by a period not exceeding 3 months.[36] In effect the tenure of the subsequent directors may not exceed 18 months. That is to say, their tenure may be tied to the period and the holding of the annual general meetings. However it may not all expected to retire at such meetings, as only one third or the number nearest to it must retire.

The determination of the fraction of one third to retire shall be done bearing in mind their length of service on the board. That is, those appointed first shall be first to retire. But where more than one third where appointed the same time, they (the directors) shall agree on those to retire failing which it shall be determined by lot.[37]

We are submitting that, bearing in mind the fact that only one third or the number closest to it, of the members of the board, are expected to retire,

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[33] S. 213 (1) (a) CAMA
[34] S. 213 (1) (b) CAMA
[35] S. 213(1) CAMA
[36] S. 213(1)(b) CAMA
[37] S. 259(2) CAMA

the remaining members not constituting the statutory fraction may have an elongated tenure until subsequent annual general meeting(s) where they will be captured by the statutory fraction for retirement. This should be construed as an implied exception to the general statutory prescription on tenure of directors, expressed above. Any other interpretation will be contrary to the general intention of the framers of CAMA. A regulation from the CAC will be appropriate to ultimately resolve this issue.

Once the tenure of office of directors are determined in the manner discussed above, the company may conduct elections to fill the vacancy created thereby, otherwise if the director(s) retiring offers himself or themselves for re-election, he or they shall be deemed re-elected, unless at such meeting it is expressly resolved not to fill such vacated office or unless a resolution for the re-election of such director shall have been put to the meeting and lost.[38]

A retiring director may be re-elected by positive act of re-election at the annual general meeting where he retires or by default, where he offers himself for re-election and there is no adverse reaction from the annual general meeting. However, the fact of re-election cannot be construed to mean a continuation of his previous tenure, as he takes a fresh turn on the line for fractional retirement from the board.

The section under immediate and direct analysis has no prescription as to the number of times a director may undergo this re-affirmation of tenure. The implication is that the annual general meeting can, as often and as long, as it pleases, continue to perpetuate a director by continuously re-electing him to the board save the director becomes unwilling to serve. One advantage of this position is that experience, expertise and knowledge may be retained to the advantage of the company. However, it may have the disadvantage of not allowing for fresh ideas to be injected into the board thereby denying room for innovations in the policy direction of the board.

For directors appointed to fill casual vacancies, their appointment is subject to approval by the meeting at the next annual general meeting, and if not so approved, he shall forthwith cease to be a director.[39] The tenure of directors, under this circumstance, can only arise for determination if, and only if, the appointment is confirmed by the meeting at the annual general meeting holding immediately after such appointment. Once the appointment is confirmed or approved, is the effective date of appointment to be reckoned from the date of his appointment by the board or the date of the annual general meeting where the appointment was confirmed or approved? For purposes of ranking for fractional retirement from the board, the length of time served on the board is the determinant factor.[40] That being the case, it may be safe to conclude that

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[38] S. 259 (3) CAMA
[39] S. 249(2) CAMA
[40] S. 259(2) CAMA

his tenure will be determined from the moment of his appointment to fill the casual vacancy by the board of directors.

Tenure and re-election of Directors under the code of corporate Governance for public companies

The code[41] provides as follows:

1. Subject to satisfactory performance and the provisions of CAMA, all directors should be submitted for re-election at regular intervals of at least once every three (3) years. In order to guide the decision of shareholders, names and sufficient biographical details of directors nominated for re-election should be accompanied by performance evaluation results and any other relevant information.

2. Non-executive directors of public companies should serve for reasonable periods on the Board. However, it is necessary to reinforce the Board by continually injecting new energy, fresh ideas and perspectives. The Board should ensure the periodic appointment of new directors to replace existing non-executive directors.

It is apparent from this provision that directors are expected to face re-election, at least, once in three years as against the position under CAMA which prescribe period ranging from 15 month to 18 months. The code gives some measure of latitude on the issue of tenure. The code also requires directors to submit performance evaluation report before facing the shareholders for re-election.

How the performance evaluation is made and by whom is not stated. If the contemplation of the code is self assessment, then it may not serve any useful purpose, as it is very unlikely for any director to rate himself or herself low. If assessment is to be done by the shareholders, what standard is to be applied and who draws such standard and who supplies the information to be used as basis of assessment? All these are by the way.

The basic fact, as pointed out above, is that the prescriptions of the code are not exactly in line with CAMA. The provisions of the code, though, expressed to be subject to the provisions of CAMA, which should ordinarily mean that CAMA takes precedent over it, but as we shall demonstrate shortly, the enabling Act[42] from where the powers to issue the code was derived, and the wordings of the code amply suggest the contrary. We shall now attempt to consider the application of the code,

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[41] Ss 19.1 and 19.2
[42] ISA

status of the code, the power of SEC to issue the code and how superiority is to be determined between the code and the CAMA.

Application of the code

The code[43] offers a guide on its application in the following words:

> The code is not intended as a rigid set of rules. It is expected to be viewed and understood as a guide to facilitate sound corporate practices and behavior. The code should be seen as a dynamic document defining minimum standards of corporate governance expected particularly of public companies with listed securities.

This provision is clearly self limiting as to the intendment of the code. The code is expressed to be merely a guide. However, if read alongside, other provisions of the code[44] this simplistic interpretation may not suffice. We reproduce the relevant provisions as follows:

The code of Corporate Governance shall apply to the following entities

(a) *All public companies whose securities are listed on a recognized securities exchange in Nigeria;*

(b) *All companies seeking to raise funds from the capital market through the issuance of securities or seeking listing by introduction;*

(c) *All other public companies;*

The above reproduced portion of the code, particularly (c) above makes the code all encompassing, in terms of its application to all public companies. The word "shall 'which qualifies the provision, when used in an enactment, has been judicially interpreted as follows 'it is crystal clear that the real intention of the legislature in these articles where the word "shall" was used, was to make those provisions mandatory'[45]. If the import of the code is mandatory as shown above, then it negates the earlier position that the code should be seen, as merely a guide. Otherwise 'may' which is a permissive word should have been employed by the framers of the code.

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[43] S. 1.3

[44] Particularly S. 1.1

[45] C.N. ONUSELOGU ENTERPRISES LTD. V. AFRIBANK (NIGERIA) PLC (2005) 12 N.W.L.R (PT.940) P.577 at 587.

The compulsive intendment of the code as shown above is the cause of the apparent conflict between the CAMA and the code in relation to tenure of directors of public companies.

Status of the code of Corporate Governance 2011

The power of the SEC to make rules and regulations is provided under S.313 (1)[46]. The section provides:

The commission may, from time to time, make rules and regulations for the purpose of giving effect to the provisions of this Act and may in particular and without prejudice to the generality of the foregoing provisions, make rules and regulations:

(1) Without prejudice to the provisions of CAMA specifying for the protection of investors.

It is, in the exercise of these powers that the SEC issued the code of corporate governance for public companies.

Generally, where an Act confers a power to make a subsidiary instrument, proclamation or notification, the power shall include-

1. Power make different provision for different circumstances;[47]

Flowing from the above, it is wholly legitimate for the SEC to have issued the code with specific contemplation of public companies and companies seeking the patronage of the public for its securities. But the provisions relating to the tenure of directors of public companies are not directly linked to capital market operations for which the power of SEC cannot be called to question.

Does the code qualify as an enactment? An enactment means any provision of an Act or subsidiary instrument.[48]

A subsidiary instrument means any order, rules, regulations, rules of court or bye-laws made either before or after the commencement of this Act in exercise of powers conferred by an Act.[49]

These provisions of the Interpretation Act should qualify the code as an enactment with the force or weight of law by dint of S.10 (2) of the Interpretation Act.

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[46] ISA
[47] S. 12 of the Interpretation Act
[48] S.37 Interpretation Act.
[49] S.37 of the Act in Note 25 above.

The code by section 1.3 clearly suggests another intention, other than the implied strength of the code in the light of the Interpretation Act. It provides that the code is not intended as a rigid set of rules. It is expected to be viewed and understood as a guide to facilitate sound corporate practices and behavior. The code should be seen as a dynamic document defining minimum standards of corporate governance expected particularly of public companies with listed securities.

Part A of CAMA, which deals with companies, makes its provisions binding on:

1. All companies formed and registered under this Act;
2. All existing companies;
3. All companies incorporated, formed or registered under other enactments;
4. Unregistered companies.[50]

We have traced the power of the SEC to issue the code to the Investments and Securities Act. We have also shown that the code ought to be placed on the same pedestal with the ISA. The question we shall attempt to resolve now is, as between the ISA and CAMA which should prevail.

The ISA recognizes the CAMA as part of existing enactments[51], It however, commands that its provisions shall be read with such modifications as to bring them into conformity with its provisions in relation to capital market matters.

The ISA further dignifies itself as superior to the CAMA in so far as it provides that, apart from the constitution of the Federal Republic of Nigeria, if the provisions of any other law, in relation to capital market matters are inconsistent with its provision, its provision shall prevail and such other inconsistent provisions shall be void.[52]

The extent, over which the SEC can take precedent over the CAC, is over matters relating to capital market.

The Court of Appeal expressed the following views on capital market, in the words of J. O. Bada JCA[53], as follows:

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50 S. 541 of CAMA.
51 S. 312(1) ISA
52 S. 312 (3) ISA
53 Securities And Exchange Commission v Osindero Oni & Lasebikan (2009) 5 NWLR(Pt 1134) p377at399.

It is clear to both parties in this appeal that the capital market is a place where people buy securities such as shares, debentures, and bonds.

From the above, to qualify as capital market matter, the issue must of necessity, directly touch on the sale and purchase of shares, debentures and bonds. Can the tenure of directors be one of such?

The CAMA on its part expressly donates power to the SEC to make rules pursuant to its (CAMA) provisions. It defines rule to include those made by the Chief Judge of the Federal High Court for the purpose of section 453 or 516, and includes rules of court made or deemed to have been made under section 552 and all incidental forms; and also rules made by the CAC and SEC.

It is clear that the SEC can, equally, resort to its power to make rules recognized by CAMA, as source of the code. Can such rule or code stand in competition with a substantive provision of the enabling Act? The simple answer will be that the code cannot re-enact, abridge, modify, expand, amend or even explain the extent and express provisions of CAMA.

From the discussions above it may be very tempting to argue that, after all, the ISA is to prevail over the CAMA in the face of any conflict and by extension the code issued, based on it provision. It is our view that it is not intended to be so for all purposes. The ISA in its provisions clearly limits its superiority over other enactments in specific relation to capital market matters, therefore it cannot assume any superior posture over other enactments in other areas including determination of the tenure of directors which are matters within the statutory functions of the CAC and expressly provided for in the CAMA, and which, also, has no direct bearing with capital market matters.

To the extent that tenure of directors, are not directly relevant to capital market operations, the code of corporate governance for public companies in Nigeria, issued by the SEC cannot be the prevailing regime for the determination of the tenure of directors of public companies in Nigeria. The CAC should rise up to its statutory responsibilities and take the driver's seat and not allow this invidious infraction of its powers by SEC.