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A case for rethinking the prohibition of issue of shares at a discount under the companies and allied matters Act 2020

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Abstract
The Nigerian Companies Act 2020 represents the latest reform of the country's company law. In the last two years since the enactment legal scholars have continued to unpack its provisions and determine its comparative significance in terms of scope, innovation, and strength, including its retrogression and inherent weakness. One provision of the Act which has not been examined is the prohibition of issue of shares at a discount as provided in section 146. In this article, we interrogate the provision, identify its rationale and functional basis, and determine its usefulness in contemporary corporate and business practices.

Keywords: Companies act 2020, share capital, shares at discount, capital maintenance

Introduction

In the last two years since the enactment of a new Companies Act in Nigeria [1], legal scholars have continued to unpack its provisions and determine its comparative significance in terms of scope, innovation, and strength, including its retrogression and inherent weakness [2]. The overarching objective of the new Companies and Allied Matters Act 2020 (the CAMA 2020) is to promote the ease of doing business in Nigeria, particularly in light of commercial trends and developments in corporate law and practice in this 21st century. Consequently, the CAMA 2020 contains some novel provisions and the amendments or reformulations of erstwhile provisions in the repealed Companies Act 1990.

One provision of the CAMA 2020 which is an amended version of the repealed statute is the prohibition of issue of shares at a discounted rate. Under the repealed statute, it was lawful for a company to issue its shares at a discount provided it was authorized by a resolution passed in a general meeting of the company and sanctioned by the court [3]. Provided also that such resolution must have specified the maximum rate of discount at which the shares were to be issued; and the shares to be issued at a discount were issued within the month after the date on which the issue was sanctioned by the court or within such extended time as the court allowed [4].

In contrast, however, the CAMA 2020 pithily provides in section 146 to wit; ''It is unlawful for a company to issue shares at a discount''. The prohibition of issue of shares at a discount under the provision is absolute and without any exceptions. This exclusive provision excites curiosity because allowing companies the power to issue shares at a discount has its compelling business benefits as discussed in subsequent sections of this article. Any potential abuse of such power is restrained by the exceptional conditions under which the power may be exercised as provided in the repealed statute [5]. In this article, we interrogate the provision of section 146 of the CAMA 2020 which prohibits the issuance of shares at a discount. We identify the rationale and functional basis of the provision and determine its usefulness in contemporary corporate and business practices.

1. Shares of a Company

The concept of the limited liability company implies the possibility of people to be associated for the purpose of a business in which they are able to limit their personal liability for the debts of the business enterprise. This is achieved through the incorporation of a company with limited liability in which the personal liability of the members of the company is limited to the amount that they have subscribed or agreed to subscribe to the capital of the company. The capital of an incorporated company consists of the company's nominal shares, and this constitutes a significant part of the definition of a limited liability company under the CAMA 2020.

According to section 21(1)(a), a company is limited by shares if the liability of its members is ''limited by the memorandum of association to the amount, if any, unpaid on the shares respectively held by them''. Thus, shares represent the capital of a company and reference to a company's capital implies the nominal shares value of the company, hence in some usage it is referred to as ''share capital''. Long ago in *Hilder v Dexter* [6] Lord Davey clarified the terminologies to the effect that for a company to ''apply its shares or capital'' means to ''apply its capital, either in the form of shares before issues or in the form of money derived from the issue of its shares''.

The shares issued by a company must have a fixed nominal value, and after allotment the nominal value of the shares constitutes the company's stated capital. At a unit level share represents a degree of ownership by the shareholder of the company. Subject to any limitation in the articles of a company with respect to the number of shares which may be issued, and any pre-emptive rights prescribed in the articles in relation to the shares, a company has the power to issue shares at any time and under any consideration as it may decide [7].

A company issues shares to raise capital for its business expansion or to discharge any subsisting or immediate

financial obligations. While issue of shares is an effective way for a company to raise capital, it however increases the level of ownership of the share allottees or the number of memberships of the company. As shareholders and co-owners of the company, members of the company are entitled to claim dividends from the profits made by the company according to the value of their shareholdings. This underlies the statutory definition of shares of a company as ''a share in the share capital of a company'' [8].

2. Issue of Shares at a Discount

The CAMA 2020 provides that a company having a share capital may in a general meeting increase its issued share capital by the allotment of new shares of such amount as it considers expedient [9]. The amount of such allotted shares may be paid for in money or money's worth such as good-will and technical know-how [10]. Shares may also be allotted upon part-payment where the allottee only paid a percentage of the nominal value of the shares but is liable to pay the full value when the company makes a call-up.

According to the provisions of the CAMA 2020, the shares of a company may be issued at a premium, which means that the share is issued at a price higher than its nominal value [11]. However, the CAMA 2020 declares it as unlawful for a company to issue shares at a discount [12]. Shares are issued at a discount when they are issued at prices lower than their nominal value. It is also the case with the allotment of paid-up shares at prices less than their nominal value.

According to Lewison LJ in the case of *Chalcot Training Ltd v Ralph* [13], in order to determine whether shares are issued or allotted at a discount the ''critical question is whether the investor remains liable up to the limit represented by the nominal value of a share''. Where the shareholder remains liable for the full amount of the nominal value, the shares will not be considered to have been issued at a discount. Therefore, shares are not issued or allotted at a discounted rate simply because the shareholder makes part-payment with a commitment or obligation to pay up the balance in the future. Shares at a discount arises from an agreement that the shareholder should pay less to the company than the nominal value of the shares. As noted by Lord Davey in *Welton v Saffery* [14];

> Let us ask, what is really meant by the issue of a share at a discount? It means that although less than the nominal amount, or even (as in the case of the bonus shares) nothing whatever, has been paid up on the share, it is to be treated for all purposes of the company, and to be placed on the same footing as regards the rights of the shareholders, as if it had been fully paid up in cash.

Thus, issue of shares at a discount implies ''a rebate on what would justly be due from the subscriber on his shares'' [15]. The CAMA 2020 does not state the rationale for the prohibition of issue of shares at a discount. But in its common law origin, the prohibition was linked to the concept of limited liability of a company with share capital [16].

In effect, shareholders' liability in such company is to be limited by the amount unpaid on their shares. And this renders it impossible for a company to agree with its shareholders that they shall not be liable for the amount unpaid on their shares. Any such agreement with shareholders to pay less or nothing for their shares potentially reduces the share capital of the company.

Generally, any reduction in the capital of a company is contrary to the common law doctrine of capital maintenance which requires the company to refrain from transactions that would dissipate its capital as stated in its memorandum of association. The rationale for the prohibition of issue of shares at a discount may therefore be identifiable within the common law doctrine of capital maintenance.

3. Common Law Rationale against Issue of Shares at a Discount

At the time of incorporation, a limited liability company with share capital is required to deliver a statement of initial issued share capital and initial shareholdings. The statement must state the total number of shares of the company taken by the subscribers to its memorandum of association and the aggregate nominal value of those shares, including the amount paid and unpaid on each share [17].

Under common law, the 19th century case of *Ooregum Gold Mining Co of India Ltd v Roper* [18] established that because a company's memorandum of association disclosed the full nominal value of the shares, creditors were entitled to rely on the fact that the company would receive that full value in respect of its issued share capital, therefore an issue of shares at a discount was *ultra vires* or beyond the legal power of the company.

The facts of the case were that a company ran into financial difficulties and the value of its shares plummeted. In an effort to raise new capital, an extraordinary general meeting approved a resolution for the issue of 120,000 preference shares of £1 each, to be credited in the capital and books of the company as having the sum of 15s. per share paid thereon. Thus, the liability of each shareholder to contribute to the capital of the company was only 5s. The 15s was neither paid nor payable.

The House of Lords held that the allotment of shares on those terms was unlawful. According to Lord Watson, ''every member who takes shares from the company in return for cash shall either pay or become liable to contribute their full nominal value'' [19]. And Lord Macnaghten noted that: ''Nothing but payment, and payment in full, can put an end to the liability'' [20].

In the subsequent case of *Metropolitan Coal Consumers' Association v Scrimgeour* [21] the company had agreed with a firm of brokers to pay commission for procuring applications for its shares. When the company was in the process of winding up, the liquidator applied to recover the amount of the commission arguing that the shares had been issued at a discount. That argument received a short shrift before the court. Lindley LJ stated thus [22];

> The law is clear that limited companies cannot issue shares at a discount. What is the meaning of that? The meaning of that is that shares cannot be issued upon terms which are inconsistent with the provisions of the statutes relating to limited companies; or, in other words, the statutes having said that every holder of a share shall pay so much for it, the company cannot issue the share upon the terms that the shareholder shall pay less. That is the whole of the theory of issuing shares at a discount.

In *Ooregum Gold Mining Co of India Ltd v Roper* the House of Lords justified the rationale for the prohibition of issue of

shares at a discount on the grounds that the capital of a limited liability company as disclosed in its memorandum needs to be maintained and always protected. In the opinion of Lord Halsbury; ‘‘I recognise the wisdom of enforcing on a company the disclosure of what its real capital is, and not permitting a statement of its affairs to be such as may mislead and deceive those who are either about to become its shareholders or about to give it credit’’[23].

The prohibition of issue of shares at a discount is one of the ways that lead to a reduction of the capital of a company, hence it is in breach of the common law doctrine of capital maintenance. Under the doctrine, the share capital of a company is held to belong to the company itself and not to the shareholders [24]. As a result, the return of capital to shareholders in the form of issuing or allotting shares to them at a discount is not permissible and is beyond the legal power of a limited liability company with shares capital.

The common law doctrine of capital maintenance developed centuries ago from the case of *Trevor v Whitworth* [25] in which a company bought back almost a quarter of its own shares. During liquidation of the company, one shareholder applied to court for the balance of amount owed to him after the share buy-back. The House of Lords held that the company acted outside its power and the purchase of its own shares was void hence the shareholder’s claim for the balance failed. The case became authority for the restriction of company from reducing its share capital by any means except if statutorily authorized.

The fundamental rationale underlying the decision in *Trevor v Whitworth* is that the capital of limited liability companies should be maintained to satisfy creditors’ claims. This is because creditors assume risk in their financial outlay associated with business transactions and as such they are ranked ahead of shareholders when the company’s capital is to be returned under any circumstances, especially during winding up.

In *Trevor v Whitworth* Lord Herschell noted that what is described in the memorandum as the capital cannot be diverted from the objects of the company but liable to be spent or lost in carrying on its business, but that ‘‘no part of it can be returned to a member so as to take away from the fund to which the creditors have a right to look as that out of which they are to be paid’’ [26]. In the opinion of Lord Watson [27];

> Paid-up capital may be diminished or lost in the course of the company's trading; that is a result which no legislation can prevent; but persons who deal with, and give credit to a limited company, naturally rely upon the fact that the company is trading with a certain amount of capital already paid, as well as upon the responsibility of its members for the capital remaining at call. They are entitled to assume that no part of the capital which has been paid into the coffers of the company has been subsequently paid out, except in the legitimate course of its business.

The doctrine of capital maintenance is therefore a way of protecting creditors' interests against unfair and unauthorized distribution or dissipation of a company’s capital in favour of its shareholders and members. Thus, under common law, any transactions by a company, including the issue of shares at a discount, are void because such transactions reduce the share capital of the company and the value of the investments or financial entitlement of the company’s creditors.

Issue of Shares at a Discount and the Doctrine of Capital Maintenance

Under the CAMA 2020

From the foregoing, the common law doctrine of capital maintenance requires that a company must receive fair consideration for the shares it issues, and it cannot repay shareholders or give discount for such shares. It also includes the prohibition of a company from purchasing its own shares with its capital [28], giving financial assistance from its capital to any person for the purpose of acquiring its shares [29], and paying dividends to shareholders from its capital other than distributable profits [30].

The doctrine of capital maintenance has been codified in the CAMA 2020 which provides in section 130(1) that a company having a share capital shall not reduce its issued share capital except as authorised under the statute. Accordingly, it provides exceptions to the doctrine in that the capital of a company may be reduced in any way by a special resolution if so, authorized by the company’s articles of association, and subject to confirmation by the court [31].

In particular, the CAMA 2020 further provides in section 131(2) that a company may extinguish or reduce the liability on any of its shares in respect of share capital not paid up and the company may, if and so far, as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly. The implication of these provisions is that a Nigerian company may reduce its share capital in different ways.

A company may enter into an agreement to deal with its shares in a manner that reduces the value of its shares; and if it articles authorizes, it may reduce its capital by a resolution subject to the confirmation of the court. In addition, either with or without extinguishing or reducing liability on any of its shares, a company may cancel any paid-up share capital which is lost, unrepresented by available assets, or in excess of the company’s wants [32].

As already noted, the original rationale for the prohibition of issue of shares at a discount is because it breaches the doctrine of capital maintenance which prevents the reduction of the capital of a company through giving payment or refusing payment relating to the company’s capital. Curiously, while the CAMA 2020 has provided for the doctrine and its above exceptions, it totally prohibits without any exception the issue of shares at a discount.

The only provision that appears to dilute the prohibition may be gleaned from the provision which permits a company to issue shares at different amounts. According to section 163 of the CAMA 2020, where it is authorised by its articles a company may decide to issue shares at different amounts and times of payment of calls on the shares. By necessary implication, this provision allows a company to issue shares of the same class and with the same nominal value to different shareholders at different prices payable at different times. It is submitted that such a difference in prices may be higher (at a premium) or lower (at a discount) than the shares’ nominal value.

It should be noted that the provision of section 163 is only an implied way to potentially circumvent the prohibition of issue of shares at a discount under the CAMA 2020. The provision does not constitute a clear and express statutory exception to the prohibition like the case under section 121 of the repealed Companies Act 1990.

Even the vague exceptions to the doctrine of capital maintenance in section 131 are subject to confirmation by the court. The exceptions are vague because other than a special resolution the provisions do not contain procedural conditions to be observed by the company and the decisive factors to be considered by the court before a reduction in the capital of a company.

The provisions of the CAMA 2020 relating to the prohibition of issue of shares at a discount radically depart from similar statutes in other common law jurisdictions which informed and influenced the CAMA 2020 in substantial respects. In those comparatively advanced jurisdictions such as Australia, Canada, and the United Kingdom, statutory prohibition of issue of shares at a discount is not absolute, exclusive, or free-standing but narrowly circumscribed by detailed exceptions to the doctrine of capital maintenance and the procedure for the reduction of the capital of a company.

Statutory Provisions in other Common Law Jurisdictions

The prohibition of issue of shares at a discount is not original to the CAMA 2020 or the repealed Companies Act 1990. Soon after the prohibition was clearly established in the case of *Ooregum Gold Mining Co of India Ltd v Roper* in 1892, it had been codified in successive Companies Acts of the United Kingdom beginning with the Companies Act 1900 and through the Companies Acts 1980, including the Companies Act 1985 from which the current Companies Act 2006 substantially derived it provisions.

Under the Companies Act 2006, there is a general prohibition against a company allotting its shares at a discount. Section 580 of the UK Companies Act 2006 provides that a company's shares must not be allotted at a discount and if shares are allotted in contravention of this provision the allottee is liable to pay the company an amount equal to the amount of the discount, and with interest at the appropriate rate. In the recent case of *Chalcot Training Ltd v Ralph* [33] which turned on the interpretation and application of this section, the UK Court of Appeal echoed the view of Lord Davey in *Hilder v Dexter* [34] to the effect that the section implicates the prohibition of a company from using its capital in the payment of any outstanding share capital due from a shareholder [35].

The case also reaffirmed the rationale for the prohibition which is to prevent any reduction in the capital of the company in order to protect the interest of the company's creditors. Thus, the court held in the case that where the shareholder remains liable for the full amount of the nominal value of the allotted shares, such shares will not be considered to have been issued at a discount. Instructively, though the UK Companies Act 2006 generally prohibits the issue of shares at a discount, it however makes extenuating provisions on the circumstances and requirements for which a company may reduce its share capital.

The UK companies Act 2006 provides that a company may reduce its share capital by a special resolution supported by a solvency statement [36]. Essentially, a solvency statement is a written statement that each of the company directors has formed the opinion, as regards the company's financial situation at the date of the statement, that there is no ground on which the company could then be found to be unable to pay or discharge its debts [37]. If it is intended to commence the winding up of the company within twelve months of that date, the solvency statement will state that the company will be able to pay or discharge its debts in full within the period of the commencement of the winding up.

In any other case, the solvency statement is to declare that the company will be able to pay or otherwise discharge its debts as they fall due during the year immediately following the date on the statement. In making the solvency statement, all that is required is for the directors to faithfully take into account all of the company's liabilities, including any contingent or prospective liabilities [38]. This solvency test is entirely based on the proof of solvency; if the company can prove to be able to pay its debts as and when due within a certain period after any transaction or process leading to a reduction of its capital, then the company is permitted such process or transactions like the issue of shares at a discount.

Prior to the enactment of the UK Companies Act 2006, Australia had already made far-reaching exceptions to the doctrine of capital maintenance, providing for companies to be able to reduce their share capital when necessary. According to section 256B of Australia's Corporation Act 2001, even if ''not otherwise authorized by law'' a company has the general power to reduce its share capital, provided three requirements are satisfied: (a) the capital reduction is fair and reasonable to the company's shareholders as a whole; (b) it does not materially prejudice the company's ability to pay its creditors; and (c) it is approved by shareholders.

These provisions are in addition to situations in which reductions of share capital are authorized in share buy-back and the redemption of redeemable preference shares [39]. Though these statutory exceptions to the doctrine of capital maintenance do not expressly authorize issue of shares at a discount, however, the reduction of a company's capital which inevitably results from such discount falls within the scope of the exceptions. This is because from the provisions of section 256B of the Corporation Act, an Australian company has the power to reduce its capital consequent upon any transaction such as issue of shares at a discount which is ''not otherwise authorized by law''.

Similarly, under the Canadian Business Corporation Act 2002 a company does not need to be authorized for it to engage in transactions that reduce its share capital. Section 75 of the Business Corporation Act 2002 permits a company to deal with its shares in ways that reduce its share capital but without the need of changing its authorized share capital. For example, a company may redeem, purchase or otherwise acquire its own shares; accept a surrender of its shares by way of gift or for cancellation; convert fractional shares into whole shares through a subdivision or consolidation of its shares.

Even in section 74 of the Business Corporation Act 2002 which requires a court order and special resolution to reduce the capital of a company, the decisive consideration is that there are no reasonable grounds for believing that the realizable value of the company's assets would, after the reduction, be less than the aggregate of its liabilities. This provision is equivalent to the requirement of solvency statement under section 641 of the UK Companies Act 2006, and the requirement that a reduction in a company's capital ''does not materially prejudice the company's ability to pay its creditors'' as provided in section 256B of the Australian Corporation Act 2001.

In effect, issue of shares at a discount in these three leading common law jurisdictions is no longer ''prohibited''. This is

because the statutory exceptions to the doctrine of capital maintenance have effectively emasculated the provisions against reduction of a company's capital. Since the beginning of this 21st century, the approach in common law jurisdictions has been the statutory circumvention of the doctrine of capital maintenance and the overhauling of hitherto cumbersome procedures for reduction of a company's share capital. Statutory provisions have also weakened and diminished to a vanishing point the prohibition of issue of shares at a discount.

For instance, statutory exceptions under the Indian Companies Act 2013 have rendered ineffectual the provision against issue of shares at a discount. Section 53 of the Indian Companies Act 2013 is a direct adoption of section 580 of the UK Companies Act 2006 as it prohibits issue of shares at a discount and an allottee in contravention of the prohibition to be liable to pay the company an amount equal to the amount of the discount together with interest. However, the exceptions to the prohibition as provided in the Companies Act 2013 permit the issue of most classes of shares at a discount, including sweat equity shares, rights issue, initial public offering, and offer for sale shares [40].

In addition, by a subsequent amendment to the Companies Act 2013, an Indian company may now issue shares at a discount to its creditors when its debt is converted into shares under a debt restructure plan [41]. The combined effect of these exceptional provisions is that the ''prohibition'' of issue of shares at a discount does not preclude Indian companies from making such transaction. The statutory provisions in all these common law jurisdictions relating to capital maintenance and the reduction of capital indicate the current approach to prohibition of issue of shares at a discount.

Current Approach to Issue of Shares at a Discount

At common law the doctrine of capital maintenance considered a company's share capital ''as a promise offered by the shareholders, or trust fund raised by the shareholders in order to protect creditors, so the law should set up standards to achieve this objective'' [42]. It was for the protection of creditors that rules were established to prohibit the reduction of company's share capital. The common law rules were eventually codified in provisions restricting shareholders from withdrawing or distributing the capital of the company and prohibiting share buy-back, including the prohibition of issue of share at a discount.

However, after more than a century these statutory provisions aimed at maintaining the capital of a company have been ''found to have imposed unreasonable restrictions on corporate capital usage'' [43]. As noted by Gao, the understanding of capital maintenance doctrine has evolved beyond prohibiting shareholders form taking undue priority in securing their interests, to becoming outdated and resulting in low efficiency of usage of corporate capital [38]. Therefore, the doctrine as contained in case law and statutes serves no useful purpose but creates inefficiency when shareholders intend to deal with the shares or assets of the company [45].

In practical terms, the doctrine imposes unreasonable costs and restrictions on the company management without providing benefits that justify the costs [46]. More so, a company's capital is no longer the only factor for creditors to assess the credibility of the company, and the notion that capital maintenance doctrine provides meaningful protection to creditors is a delusion in the contemporary business context [47]. Gao argued that the protection offered to creditors by the doctrine of capital maintenance was only hypothetical, because creditors no longer consider the size of a company's share capital as the only relevant factor for determining the credit worthiness and risk of default of a company [48].

Also, the doctrine limits corporate autonomy and reduces the effectiveness and efficiency of deployment of the company's assets. According to the analysis of Gao, net assets of a company may be diminished or lost in the course of the company's trading, even if the registered share capital remains constant. If the company performs well, the net assets may exceed its registered capital.

Conversely, if the business performs poorly, net assets may be less than the company's registered capital. Therefore, when creditors judge company's ability to perform, they are more concerned with the net assets rather than the share capital. If shareholders have better investment opportunities, it may make more economic sense to trade with the company's capital as it will increase the company's net assets without putting the interest of creditors at risk.

The argument that creditors are no longer concerned with the share capital of a company finds support in the reality that the price paid to the company for shares issued at some previous time may no longer represent the monetary value at a later date. Also, if shares are issued for a consideration other than cash it is possible that the value of the assets transferred to the company may never be as much as the value of the share capital [49]. In many cases, the assets of the company and the value of its business operations are significantly higher than its issued and paid-up share capital.

The UK Company Law Review Steering Group which was commissioned in 1998 to reform the UK Company Law and whose work culminated in the Companies Act 2006, acknowledged the reality of the shift of focus of creditors away from company's share capital and towards other more significant parameters when considering whether or not to extend credit to it. The Committee noted that creditors pay much more attention to the company's financial strength as indicated by its financial ratio, its business prospects, and the overall economic environment within which the company operates [50].

This explains the approach of the UK Companies Act 2006 which has made the solvency of a company as the decisive factor for consideration in the reduction of a company's capital. Collectively, the statutory provisions in the UK, Canada, and Australia have made the solvency of a company as the general exception to the doctrine of capital maintenance. In Indian the amendment to the Companies Act 2013 provides a flexibility to creditors to convert their debt into shares issued at a discount. This amendment addresses the problem of erosion of a company's equity value where it is no longer viable to convert loan into shares at face value due to the company going into insolvency.

These statutory provisions in these common law jurisdictions represent the current approach to the issue of shares at a discount and the reduction of share capital. The provisions of the Nigerian CAMA 2020 prohibiting issue of share at a discount and prescribing procedure for the reduction of share capital fail to reflect the Australian and the UK statutes from which it derived in substantial parts. Assertions that the share capital of a company does not constitute the decisive factor for prospective creditors and

investors in this 21st century is true in Nigerian corporate world as it is in other common law jurisdictions.

For instance, most companies in Nigeria with multi-millionaire businesses have their issued and paid-up share capital in the statutory minimum of one million shares of equal monetary value. Institutional creditors and lenders such as commercial banks are more interested in a company's long-term assets and cash flow rather than the mere figure of the stated share capital in the company's memorandum of association. The reason is that practical protection of creditors' investments lies more in the visible assets and turn-over of a company than in the company's share capital. Consequently, prohibition of issue of shares at a discount which was rationalized on the basis of capital maintenance is no longer useful and relevant.

Conclusion

The CAMA 2020 represents Nigeria's latest reform of its company law. Surprisingly, the provision of section 146 which prohibits the issue of share at a discount is more of a throw-back than a reform. Retaining the erstwhile provisions of section 121 of the repealed Companies Act 1990 would have served a more useful purpose in contemporary business context because it included sufficient exceptions, in similar form with section 54 of the Indian Companies Act 2013. It is difficult to make sense of the decision of the drafters of section 146 of the CAMA 2020 to strip off the exceptions to the prohibition as contained in the repealed statute.

The CAMA 2020 is a total departure from the current approach that is prevalent in common law jurisdictions, including those from whom it borrowed most of its provisions. For instance, the provision of section 146 of the CAMA 2020 is a direct adoption of section 580 of the UK Companies Act 2006. However, the CAMA 2020 failed to adopt the provisions of section 641 of the UK Companies Act 2006 which effectively circumscribed the doctrine of capital maintenance and by necessary implication, undermine the prohibition of issue of shares at a discount.

In particular, the CAMA 2020 failed to include the solvency test which has become the most important statutory standard for determining the financial status of a company. This is irrespective of how the company deals with its shares, such as buying back its shares or issuing its shares at a discount, which can reduce its share capital. The prohibition of issue of shares at a discount is a retrogressive provision in the CAMA 2020 because it lacks any functional basis and does not serve any useful purpose towards the ease of doing business in Nigeria.

To the contrary, the provision has the counterproductive effect of discouraging creditors and investors from providing needed funds to businesses in Nigeria, especially start-ups with viable business plan and potential for growth. For example, the provision will prevent investments in convertible debts or bonds which are usually contracted to be converted into shares at a discount rate when the business start-up becomes fully established. It is therefore recommended that at the earliest opportunity, the provision needs to be expunged or amended to become an exception rather than an absolute rule, as presently the case.

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9. Section 127(1) of the CAMA 2020
10. See section 582(1) of the UK Companies Act 2006
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12. Section 146
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18. [1892] AC 125
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20. At p. 144, para. 49
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34. [1902] AC 474, at p. 479
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