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Efficacy of single-member companies under the Nigerian companies act 2020: What lessons from other jurisdictions?

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Abstract
In jurisdictions with statutory provisions on single-member companies, the focus is on achieving the socio-economic benefits, and simplifying the formalities and operations of this form of corporate entity. This article critically examines the newly introduced concept of single-member companies in the Nigerian Companies Act 2020, with the objective of determining whether the provisions satisfy the formal features, operational scope and socio-economic purposes of the concept as recognized and practiced in other jurisdictions. Arguably the first critical analysis of the new provisions, this article determines that the efficacy of single-member companies under the provisions is bound to be constrained by a host of formalities. The formalities have no useful value other than their cost implications for single-member companies, and this can hinder entrepreneurs and sole proprietors from taking advantage of this new corporate form. The main source of the different constraints, as identified in this article, is that the Act applies to single-member companies the formalities that go with the distinction between ownership and management of a company. Such distinction is more appropriate to multi-member private limited liability companies and not to single-member companies where ownership and management are both vested in the same sole member. As single-member companies are incorporated and operated under the provisions, this article predicts that the constraints would become sufficiently evident for necessary legislative or executive remedial action.

Keywords: companies act 2020, single-member companies, multi-member company, separate legal personality, limited liability, corporate form

Introduction

The recently enacted Nigerian Companies Act 2020 provides for single-member companies [1]. This means that one person may now form and incorporate a private company in Nigeria by complying with the requirements of the Act. For centuries, the corporate form of business ownership and operation has been mostly preferred to the sole proprietorship or partnership. The distinctive features of separate legal personality and limited liability of a corporate entity endeared it to investors and business people, far more than all other forms of business which lack these features. Even one-person businesses preferred to operate under the corporate form due to ‘‘the desire to combine limited liability with the complete dominion of the sole proprietorship’’ [2].

However, by its original and essential nature, a company can only be an association of two or more persons constituted for a business purpose. Accordingly, statutory provisions for the formation and incorporation of companies in many jurisdictions had previously required a minimum of two persons to subscribe to a company's memorandum of association as a mandatory condition for the incorporation of a company [3]. The inevitable result of the general preference for the corporate form and the statutory stipulation for its formation was the evolution of *de facto* single-member companies; where an entrepreneur or a sole owner of business incorporates a company and takes up almost all the shares of the new company while allotting only a few to family members mainly to satisfy the statutory requirement as to minimum number of incorporators.

By so doing, a company is created ‘‘in legal form’’, the sole or principal shareholder effectively retains the exclusive control and full dominion enjoyed by a sole proprietor, and in addition achieves the desired privilege of limited liability [4]. The business exigencies which informed the preference for the corporate form and the increasing practice of circumventing the statutory requirement for incorporation compelled the enactment of single-member companies in modern companies' statutes. In tune with technological and commercial developments since the closing decades of the last century, there has also been need to promote national economic growth by encouraging the formation and expansion of businesses and entrepreneurships as corporate forms, due to their prospects of positive impact on employment, productivity and wealth creation.

For developing economies like Nigeria, the need for single-member companies is underscored by the increasing use of information technology and a growing service sector which require that the entrepreneurial capabilities of the people are given an outlet for participation in economic activity through the creation of a business entity in the form of a company. As noted by Pilot, ‘‘it would not be reasonable to expect that every entrepreneur who is capable of developing his ideas and participating in the market place should do it through an association of persons’’ [5]. More so, most international donors to technological and entrepreneurial business start-ups in developing countries require the registration of companies

through which to access donated funds. Even local lenders such as bank and other financial institutions prefer to offer loans and advances to corporate business entities due to documentation and verification purposes.

The provision for single-member companies in the Nigerian Companies Act 2020 is therefore long overdue, but demonstrates the awareness of government that a modern companies' statute is key to national economic growth and development. Instructively, the current statutory provisions on single-member companies in Nigeria were enacted years and decades after such provisions appeared in the companies' statutes of many jurisdictions such as the United States of America, the United Kingdom, and India [6]. Consequently, this article critically examines the provisions on single-member companies in the Nigerian Companies Act 2020 with the objective of determining whether the provisions satisfy the features, scope and purpose of the concept of single-member companies as recognized and practiced in other jurisdictions.

This article is in three parts: the first part examines the evolution of the concept of single-member companies from its common law origins in the United Kingdom and other jurisdictions; in the second part, the features, scope and objectives of single-member companies are identified within the statutory provisions of different jurisdictions; the third and final part critically analyses similar provisions in the Nigeria Companies Act 2020 so as to establish how the provisions reflect the statutory features and objectives of single-member companies.

It is of useful importance to determine whether the newly introduced concept of single-member companies in the Nigerian Companies Act 2020 can achieve the underlying objectives of its enactment. Therefore, the significance of this article is that it is arguably the first effort at critically analysing the provisions on single-member companies under the new Companies Act 2020. And since the provisions are yet to be tested and interpreted judicially, the analysis in this article are only referenced with case law and statutes of other common law jurisdictions with practical experience in single-member companies.

Evolution of the concept of single-member companies

Long before statutory interventions to formalize the concept of single-member companies, notably in the United Kingdom and the United States of America, case law had yielded sufficient support for ''one-person and family corporations'' [7]. These were businesses controlled by individuals and incorporated as limited liability companies that were separate from their shareholders with the result that the individuals, as shareholders, were protected from the claims of creditors of the companies [8]. In England, prudent sole proprietorships and partnerships had gravitated towards forming and incorporating joint stock companies pursuant to the Companies Act 1862. Under the Act incorporated companies were considered as separate legal entities from the incorporators who in turn had their liability limited to their respective contributions to the capital of the companies.

The Companies Act 1862 Act required no minimum amount of share capital and it also reduced the minimum number of shareholders to seven. Lipton notes that as a consequence of this liberalisation it became open to existing one-person businesses, family businesses and small partnerships to adopt the corporate form by registering under the Act, and thereby reducing personal financial risk by taking advantage of limited liability. This fundamental relationship between a joint stock company and its shareholders was readily recognized and affirmed by the House of Lords in the seminal case of *Salomon v Salomon & Co Ltd* [9]. This case laid the foundation from which the concept of single-member companies grew to modern statutory recognition.

For its contextual relevance, the facts of the case of *Salomon v Salomon & Co Ltd* involved one Aron Salomon, a sole proprietor who, desirous of achieving limited liability, formed a corporation with an authorized share capital of 40,000 pounds divided into 40,000 shares at 1 pound each. Mr Salomon surrendered his solvent business to the corporation. In return the corporation assumed the obligation of paying off the debts of the old business, amounting to 1000 pounds, and Mr Salomon received 20,001 shares and 1000 debentures. The debentures had a par value of 100 pounds each and represented a lien on the corporate assets. Mr Salomon's wife and five children, who served as the incorporators together with him, were allotted one share each, and no other shares were ever issued.

Mr Salomon and two of his children constituted the board of directors, while he was appointed chairman of the board and managing director. On the security of his debentures Mr Salomon borrowed 5000 pounds, which was paid into the company's account as a loan from him. As part of the transaction, the debentures held by Mr Salomon were cancelled, new debentures in the same amount were issued to the creditor, with the understanding that Mr Salomon was the beneficial owner of the new debentures, subject only to the creditor's prior security interest therein and to the extent of the loan. Barely a year later the corporation became insolvent. In the liquidation proceedings the creditor made claimed to the remaining assets of the company on the ground of fraud by Mr Solomon.

The creditor successfully argued at the trial and appellate courts that the corporation was a one-man business, an *alias* or agent of Mr Salomon, and a sham which did not qualify as a corporation under the Companies Act 1862 since the other shareholders were mere dummies for him to cloak his one-man business as a corporation. But on appeal to the House of Lords, the argument of the creditor was rejected and the decisions of the lower courts were set aside. Their Lordships held that a company incorporated in full compliance with the provisions of the Companies Act 1862 would be deemed validly incorporated even if it is in reality a ''one-man company'' in the sense of a company with one dominant shareholder and director while other shareholders merely made up the statutorily required number. The following ruling of Lord Herschell is apposite and worth reproducing *in extenso*; [10]

''It is said that the respondent company is a 'one man' company, and that in this respect it differs from such companies as those to which I have alluded. But it has often happened that a business transferred to a joint stock company has been the property of three or four persons only, and that the other subscribers of the memorandum have been clerks or other persons who possessed little or no interest in the concern. I am unable to see how it can be lawful for three or four or six persons to form a company for the purpose of employing their capital in trading, with the benefit of limited liability, and not for one person to do so, provided, in each case, the requirements of the statute have been complied with and the company has been validly constituted. How does it concern the creditor whether the capital of the company is owned by seven persons in equal shares, with the right to an equal share of the profits, or whether it is almost entirely owned by one

person, who practically takes the whole of the profits? The creditor has notice that he is dealing with a company the liability of the members of which is limited, and the register of shareholders informs him how the shares are held, and that they are substantially in the hands of one person''.

In the subsequent case of *Inland Revenue Commissioners v Sansom* [11], Younger, L.J. deprecated the terms such as ''sham'', ''cloak'' or ''simulacrum'' often used ''in connection with what are called one-man companies'', declaring that ''the indiscriminate use of such terms has, not infrequently, led to results which are unfortunate and unjust''. About this period in the late eighteenth and early nineteenth centuries courts in the United States of America had also recognised and upheld the separate legal personality and limited liability of an incorporated company, notwithstanding the ratios of shareholdings between or amongst the incorporators [12]. For instance, in *Macan v Scandinavia Belting Co* [13], it was held that a ''corporation has a separate entity or existence, irrespective of the persons who own its stock, and this rule is not altered by the fact that the greater portion or even the entire issue of stock happens to be held by one person''.

In *re John Koke Co* [14], the court declared that the ''rule is quite elementary that a corporation is an entity separate and distinct from its stockholders, with separate and distinct rights and liabilities; and this is true even though a single individual may own all, or nearly all, of the capital stock''. Similarly, the court reiterated in the case of *Commerce Trust Co v Woodbury* [15] that; ''Few questions of law are better settled than that a corporation is ordinarily a wholly separate entity from its stockholders, whether they be one or more''. Thus, the concept of single-member companies was judicially approved, but the courts were also ready to fix personal liability on the dominant and controlling shareholder or whoever was behind a one-man corporation due to its susceptibility to be used as a fraudulent scheme.

As noted by Mr Justice Douglas of the US Circuit Court in *Pepper v Litton* [16]; ''In all the experience of the law, there has never been a more prolific breeder of fraud than the one-man corporation. It is a favorite device for the escape of personal liability''. It was pointed out at the time that a down-side ''to the utility of the corporation is its peculiar susceptibility to fraudulent use when made available to an individual'' [17]. As quoted by Lipton, ''the peculiar opportunity for manipulation of assets and the superior knowledge of the sole shareholder might make it desirable to require that when he claims limited liability, he must show affirmatively that the corporation was adequately financed and that its financial identity was kept unimpaired'' [18]. Accordingly, the two main parameters by which the sole shareholder of a company was scrutinized to determine if the company was being used as a fraudulent conduit were whether the company was adequately capitalized, and how its business was operated.

Personal liability was imposed upon a sole shareholder if the corporation was established without adequate capital. The courts refused to permit a person to obtain the benefits of limited liability unless that person had honestly risked an adequate amount of money; the person must be willing to endure the hazards of business and should not be permitted to shift the burden to creditors of the company [19]. But at the same time, the sole shareholder was permitted to risk only a part of personal fortune, for otherwise, the aspect of limited liability would be meaningless. In determining what was ''adequate capital'' the type of business, its locality, its gross business and all other relevant factors were taken into consideration.

In particular, in deciding whether or not a corporation was adequately capitalized, the court determined what was a fair amount necessary to initiate the company's business; whether or not the sole shareholder had risked a substantial amount upon incorporation of the company; the sole shareholder was expected to invest a respectable sum without risking personal fortune [20].

In many situations, the manner in which the sole shareholder operated the company's business was also important in determining personal liability. A typical situation for personal liability was the failure to maintain financial identity for the company; where there was financial commingling of the assets of the company with those of the sole shareholder such that the corporate separateness had been destroyed by the shareholder.

For instance, where the sole shareholder used corporate funds for personal purposes or operated the same bank account with the company. If the commingling of funds was nominal such that it was still possible to disentangle the intertwined affairs without too much difficulty, then personal liability would not be imposed [21]. However, if the situation defied repair, especially where it was clear that the improper conduct had been so flagrant as to be a direct cause of the company's insolvency, then personal liability would be imposed. In most of the cases the sole shareholder would be held personally liable when the conduct of the corporation's business led to its insolvency.

The courts held the sole shareholder personally liable, either based on inadequate capital of the company upon incorporation or the manner of conducting the company's business, by lifting the veil of incorporation; side-stepping the separate legal personality and limited liability attributes of the company and holding the majority or controlling shareholder personally liable for the obligations of the company. The decisive criteria for lifting the veil of incorporation by courts in both the United Kingdom and the United States of America were grounds of fraud and the interest of justice. For example, in the English case of *Gilford Motor Company Ltd v Horne* [22] the court lifted the veil of incorporation after it determined that ''the main purpose of incorporating the new company was to perpetrate fraud'' [23].

Earlier in the American case of *United States v Milwaukee Refrigerator Transit Co* [24], the court had held that the separate legal personality of a corporation would be disregarded when it ''is used to defeat public convenience, justify wrong, protect fraud, or defend crime''. Also, in the American case of *Ruberoid Co v North Texas Concrete Co* [25], the court ruled that corporate legal personality would prevail ''unless the facts presented demonstrate some misuse of the corporate privilege or the need of limiting it in order to do justice''. The general judicial tendency was to hold the sole shareholder personally liable where it was necessary to serve the interests of justice.

From the brief history of the evolution of single-member companies, the concept had been properly developed by the courts on account of its social and economic justifications to the point that there were calls for it to be formally enacted. By the first half of the twentieth century when a few American States had already recognized one-man corporation in their statutes [26], the following statement by an American legal scholar captured the essence of the eventual enactment of the single-member

companies across the United States, in the United Kingdom, and in other jurisdictions.

''Inasmuch as the one-man corporation can be justified on economic and social grounds, and since it has been recognized by the courts for over half a century, it would seem advisable that the legislatures of the several states follow the lead of Michigan and Iowa and permit one man to form a corporation and eliminate the board of directors. This would simplify the entire problem and dissolve the aura of disrespectability and uncertainty which still hovers over the one-man corporation'' [27].

Consequently, in the enactment of single-member companies, as examined in the next part of this article, the focus has been on achieving the socio-economic benefits, and simplifying the formalities and operations of this form of corporate entity. Having been originally endorsed and substantially developed by the courts, statutory interventions in different jurisdictions are mainly to set formal boundaries between single-member companies and the traditional dual or multi-member companies. Due to the inherent differences in size and purpose, it is important that statutory provisions draw a clear line of formality along the operational or functional borders of the two corporate forms.

Statutory enactment of single-member companies

It should be remembered that the separate legal personality and limited liability attributes of an incorporated company are its strong attractions for the conversion of sole proprietorship to *de facto* one-man corporation, as demonstrated by the classic case of *Salomon v Salomon & Co Ltd*. Therefore, enactment of single-member companies implies that a sole proprietorship is formally clothed with a corporate garb, and a *de facto* one-man corporation is transformed to a *de jure* single-member company. The sole member and the company effectively become distinct and independent entities, with a line of demarcation between their respective assets and liabilities. The company acquires the capacity to enter contracts and discharge its obligations to third parties, including debts and other liabilities it may incur in its normal course of business operations. Limited liability means that no contractual liabilities of the company can be imposed on the single member or sole shareholder, and in case of insolvency the debts or liabilities of the company do not implicate the personal assets of its sole member. Statutory enactment of single-member companies has retained these fundamental attributes of an incorporated company in order to satisfy the desire of sole proprietors and sole shareholders to benefit from the separate legal personality and limited liability features of incorporation. The ultimate objective of statutory enactment is to encourage the establishment and expansion of micro, small and medium-sized enterprises to go corporate and reap the fruits of incorporation [28].

Enactment of single-member companies with the fundamental attributes of incorporation, and the objective of encouraging small businesses and sole proprietorships first appeared in statutes in the United States of America. The statutory provisions began to emerge from about the nineteenth century when the courts were conceptualizing the ambit of a corporation with a majority or dominant single stockholder as shown in case law such as *Button v Hoffman* [29], *Parker v Bethel Hotel Co* [30], and *United States v Milwaukee Refrigerator Transit Co* [31].

For instance, under the Delaware General Corporation Law 1899 (as subsequently amended) the corporate form – once available only to few merchants involved in large and quasi-public corporations – became automatically available to anyone who satisfied minimum capital and registration requirements [32]. Mostly referred to as Single Member Limited Liability Company (SMLLC) in the US, every State in the Union now has a statute providing for single-member companies. Generally, the SMLLC now offers small and medium-sized business owners the choice of taxation either as a corporation or as a ''disregarded entity''; where the SMLLC is disregarded for income tax purposes, and all income flows directly to the sole shareholder who reports the income and pays the tax using personal income tax returns [33].

There has been cross-national evidence indicating that the majority of businesses in the US considering the SMLLC as an alternative to a sole proprietorship are mostly motivated by the preference to be taxed as a disregarded entity [34]. Thus, statutory SMLLC in the US provides opportunity to business owners to leverage on the separate legal personality and limited liability attributes of incorporation in making appropriate decisions on taxation and business management. In the United Kingdom, statutory enactment of single-member companies did not take place until the last decade of the twentieth century following the European Union publication of the Twelfth Council Company Law Directive on Single-Member Companies in 1989.

Prior to the Directive, only a handful of European nations had enacted statutes for the incorporation and operation of single-member companies, such as Germany in 1980, France in 1985, Netherlands in 1986, and Belgium in 1987. In recognition of its social and economic benefits to the economies of European Union, the Directive was published in order to encourage Member States to enact statutes on single-member private limited liability companies to allow individual entrepreneurs limit their business liability, and also to harmonize the differences that exist in the various national laws of member states [35]. The UK adopted the Directive through its Single-Member Private Limited Companies Regulation 1992 which altered the provisions of the country's erstwhile Companies Act 1985 that required a minimum of two members to form and incorporate a company [36]. In its section 1(3)A the Regulation provided that ''one person may, for a lawful purpose, by subscribing his name to a memorandum of Association and otherwise complying with the requirements of this act in respect of registration, form an incorporated company being a private company limited by shares or guarantee''. The UK subsequently enacted the single-member companies in its current Companies Act 2006. By virtue of the provision of section 7 of the Act, a single person may now form and incorporate either a private or public company.

A single-member private company is required to have at least one director, and a minimum of two directors if it is a public company. And whether it is private or public, the company must have at least a director who is a natural person [37]. From the provisions of section 123 of the Act, a single-member company may come into existence in either of two ways: first, if the company is incorporated by a single person; and second, if the shares of the company become vested in only one person. The second way implies that any company that was originally formed by two or more persons may become a single-member company if its membership drops to only one person. The Act therefore requires in section 123(1) that if a limited company is formed with only one member there shall be entered in the company's register of members the name and address of the sole member, and a statement that the company has only one member.

Similarly, if the number of members of a limited liability company falls to one such occurrence must be entered in the company's register of members, including the date of occurrence, name and address of the sole member, and a statement that the company has only one member [38]. The Act also provides that if the membership of a single-member limited liability company increases to two or more members, such occurrence has to be entered in the company's register of members, alongside the date of occurrence, name and address of the person who was formerly the sole member, and a statement that the company has ceased to be a single-member company [39]. These provisions are instructive as they clearly set out the requirements for determining the current membership status of any company, and to establish whether a single-member company exists at any point in time.

Determining the membership status of a company is important with respect to the exercise of powers of general meeting and board of directors of the company, including compliance with statutory formalities on quorum at general and board meetings, voting and passing of resolutions, and filing of notices and annual reports. For the purpose of simplifying procedures and saving compliance costs, single-member companies are exempted from compliance with most of these formalities that apply to multi-member companies under the UK Companies Act 2006 [40]. This is also the case in the companies' statutes of other jurisdictions such as India [41]. As a common law jurisdiction with Anglo-colonial history, the Indian Companies Act 2013 draws heavily from the provisions of the UK Companies Act 2006, or its preceding European Union Twelfth Council Company Law Directive on Single-Member Companies 1989.

However, the Indian Companies Act 2013 has some innovations such as setting a minimum paid up share capital for single-member companies; requirement for a nominee of the sole member during incorporation of a single-member company; and prohibition of the incorporation of more than five single-member companies by one person [42]. It is in light of these statutory provisions on single-member companies in other jurisdictions that the provisions in the Nigerian Companies Act 2020 are critically analysed in the next part of this article.

Single-member companies under the Nigerian companies act 2020

The provision on single-member companies is a significant innovation under the Nigerian Companies Act 2020 in that it brings Nigeria up to speed with modern company law and practice in other jurisdictions such as India, the United Kingdom and the United States of America. The new provision will allow budding entrepreneurs operating as sole proprietors to form and incorporate a limited liability company for their businesses instead of registering a business name which was the only available option for sole proprietors under the repealed Companies Act 1990. According to the provision of section 18(2) of the Companies Act 2020, ''one person may form and incorporate a private company by complying with the requirements of this Act in respect of private companies''.

By necessary implication, any person that is of a sound mind, not less than 18years old, not an undischarged bankrupt, and is not disqualified from being a director of a company under the provision of section 20(1) of the Companies Act 2020 is eligible to form and incorporate a single-member company. The single-member company may only be formed and incorporated as a private company limited by shares and with only one subscriber to its memorandum of association, or its membership register contains only one member or shareholder. The sole member must hold enough shares to satisfy the minimum issued share capital requirement for a private company pursuant to the provisions of the Act [43].

There is a fundamental implication of the provision that a single-member company may be incorporated as ''*a private company by complying with the requirements of this Act in respect of private companies*'' [44]; it is that single-member companies are expected to comply with the formalities that apply to dual or multi-member private companies. Accordingly, the provisions of the Companies Act 2020 relating to ownership and management structures of multi-member private limited liability companies also apply to single-member companies. Under the Act a distinction is made between the general meeting which is the body of shareholders representing the ownership of the company, and the board of directors appointed by the general meeting and vested with the power to manage the business of the company. From the relevant provisions of the Act, this distinction equally applies to single-member companies.

For instance, the Act requires that every company that is not a small company must have a secretary and at least two directors, and any company whose number of directors falls below two must, within one month of its so falling, appoint new directors and must not carry on business after the expiration of one month, unless such new directors are appointed [45]. The Act imposes personal liability for the company debts and obligations on any director or member of such company who knows that the company carries on business after the number of directors has fallen below two for more than 60 days [46]. Although, the provisions of the Act relating to the requirements for general meetings, quorum and adjournments at such meetings do not apply to single-member companies [47], other formal requirements for meetings of board of directors of private limited liability company however apply to single-member companies.

According to the provision of section 289, the board of directors must meet together to manage the business of the company, and the first of such meetings must be held within the first six months of incorporation of any private limited liability company. During such meetings, a chairman may be appointed and decisions are to be made by simple majority of the board of directors. Subject to the the company's articles of association, section 290 of the Act requires two directors to form a quorum during the meetings of board of directors. With specific reference to single-member companies, the Act provides in section 266(4) that where the sole member takes any decision that may be taken by the company in general a meeting, and has effect as if agreed by the company in general a meeting, the sole member must provide the board with details of that decision; and failure to comply with this provision amounts to a penalty for each day the default continues.

Another formal requirement that applies to single-member companies as private limited liability companies is the provision of section 303 which mandates directors to disclose their personal interests in any contracts with the company. The provisions require that where a director is directly or indirectly interested in any contract or transaction involving the company, the director is under obligation to promptly notify the board of directors of that interest. Under section 303(3) failure to comply with this

mandatory requirement will make such director to be guilty of an offence and liable to a fine under the Act.

Similarly, as a private limited liability company a single-member company is required not to enter into an arrangement whereby a director or controlling member of a company acquires non-cash assets from the company or *vice-versa*, unless the arrangement is first approved by a resolution of the company in a general meeting after being informed of all material facts relating to the transaction [48].

There is also the formal requirement that every company must appoint an auditor at each annual general meeting to audit the financial statements of the company [49]. As evident from the provisions, only small companies and dormant companies are exempted from this requirement [50]. These salient provisions on single-member companies reflect a commendable effort at ensuring that this new corporate form under the Companies Act 2020 has similar attributes like companies with two or more members. The provisions on the formal requirements for the incorporation of a single-member company show that the only difference between it and a multi-member company is with respect to the number of incorporators.

For instance, both single and dual or multi-member private limited liability companies are subject to the same minimum share capital, and may adopt the same models of memorandum and articles of association contained in the Companies Act Regulations 2021. However, a critical analysis of the provisions of the Companies Act 2020 relating to single-member companies reveal a host of absurdities and complexities that are capable of constraining the practical viability and success of this new corporate form in Nigeria.

Practical Constraints of the Provisions on Single-Member Companies under the Companies Act 2020

A foremost point to be noted about the Companies Act 2020 is that it only inserted provisions on single-member companies in between the old provisions extracted from the repealed Companies Act 1990. There is no separate Part or Section in the Companies Act 2020 that exclusively deals with single-member companies. The problem of this method of introducing new provisions into old but re-enacted statutory provisions is that in some cases the effect of the latter invariably impinges on the former. In other cases, a few of the old provisions may have been inadvertently over-looked or not properly aligned with the new provisions. The result, as evident within the provisions of the Companies Act 2020, is that some aspects of the old provisions turn out to emasculate the new provisions on single-member companies.

For instance, in section 18(2) the Act provides that one person may form and incorporate a private company by complying with the requirements of the Act in respect of private companies. Since the requirements for incorporation of single-member companies are the same for multi-member private limited liability companies, the Act fails to provide any alternative way of forming and incorporating a single-member company. Thus, where the membership of a multi-member company falls to only one member, a single-member company does not come into existence under the Act. Unlike the provision of section 55 which spells out the conversion of one form of multi-member company to another, there is no provision for the conversion of a single-member company to a multi-member company, and *vice-versa*.

Therefore, the Act does not allow a re-structuring of a multi-member company to a single-member company, or a re-organization of a single-member company into a multi-member company. This shortcoming in the Act undermines a key reason for single-member companies such as the flexibility for small and medium enterprises to be able to move between corporate forms in response to prevailing economic and business imperatives. Understandably, therefore, the UK Companies Act 2006 and the Indian Companies 2013 both provide for the recognition of a change in status where the number of a single-member company becomes two or more, and where the members of a multi-member company falls to one [51].

In both jurisdictions, there is a seamless movement of companies between the corporate forms of single and multi-member companies. All that is required for the new status of the company to take effect is for the occurrence to be entered in the company's register of members, together with the date of occurrence, and a statement that the status of the company has changed accordingly [52]. But rather than making provisions for the recognition and regularization of conversion from a multi to a single-member corporate form, the Nigerian Companies Act 2020 prescribes the winding-up of a multi-member company if its membership falls to a single member [53]. These provisions effectively constrain the opportunity for a single-member to come into existence other than through the formal process of incorporation.

Effective operation of single-member companies is further constrained under the Act by the requirements that every company that is not a small company must have a secretary and at least two directors [54]. Since a single-member company is not expressly expected to be a small company under the Act, the requirement certainly imposes unnecessary and avoidable burden and cost on single-member companies that do not come within the category of small companies [55]. In particular, the provisions of the Act that apply the distinction between ownership and management to single-member companies present absurd and complex results in practice. In every single-member company, the ownership and management of the company rest on the sole member and shareholder of the company.

Therefore, the requirement that the board of directors of a single-member company must meet to manage the business of the company, and with a quorum of two directors during such meetings [56] is practically impossible. This is also the case with the provisions of the Act that require single-member companies to take decision in general meetings, and for the single member to provide the board of directors with details of such decision; the requirement for directors to disclosure their personal interests in contracts with the company; the provision for a single-member company not to enter into an arrangement for the acquisition of non-cash assets from the company unless the arrangement is first approved by a resolution of the company in general meeting after being informed of all material facts relating to the transaction; and the requirement that a single-member company must appoint an auditor at each annual general meeting to audit the financial statements of the company [57].

These provisions have originally applied to multi-member companies since the repealed Companies Act 1990, but they now also apply to single-member companies under the new Companies Act 2020. While the provisions make sense with respect to multi-member companies where the ownership and management of the company are mostly bifurcated between the

shareholders and appointed directors, they are however absurd and complicated for single-member companies. In practical application to single-member companies, the provisions would mean that the sole member must appoint directors, constitute a general meeting and a board meeting at different times, and act in different capacities for the purpose of passing resolutions and reporting to the two organs of the company which are actually constituted in the same sole member of the company.

These provisions cannot be dismissed as mere formalities which the sole member of a single-member company may undermine or brush aside. They are mandatory requirements under the Act and carry statutory penalty in the event of non-compliance [58]. Therefore, the provisions will constitute unreasonable cost and effectively constrain the incorporation and operation of single-member companies in Nigeria. It is noteworthy that similar provisions in the Companies Acts of other jurisdictions do not apply to single-member companies which are expressly excluded from the requirements relating to meetings of board of directors and the forming of quorum, passing of resolutions, reporting of management decisions and financial transactions between the company's general meeting and board of directors [59].

Conclusion

Although, the statutory enactment of single-member companies under the Companies Act 2020 was long overdue, it has however signified Nigerian effort at following in the foot-steps of other jurisdictions that have enacted similar provisions in their companies' statutes. Single-member companies are veritable means of enabling entrepreneurs and other small and medium-sized enterprises to corporatize and enjoy the benefit of limited liability which is key to insuring such business ventures against total commitment of their capital and assets, including the ease of doing business and raising of working capital.

It will also afford budding entrepreneurs and sole proprietors to manage their businesses as separate entities that are capable of operating independently in entering transactions and discharging obligations in their own names. The formal enactment of single-member companies under the Companies Act 2020 includes effort of the legislators to remove needless and unnecessary formalities that may increase the cost of operating business as a single-member corporate form. For instance, the requirements for general meetings, the forming of quorum and proposing adjournments during such meetings do not apply to single-member companies [60]. However, the efficacy of single-member companies under the provisions of the Companies Act 2020 is bound to be constrained by a host of formalities identified in this article. The formalities have no useful value other than their cost implications for single-member companies, and this can inhibit entrepreneurs and sole proprietors from taking advantage of this new corporate form. The main source of the different constraints is that the Act applies to single-member companies the formalities that go with the distinction between ownership and management of a company. Such distinction is more appropriate to multi-member private limited liability companies and not to single-member companies where ownership and management both converge on the same sole member. As single-member companies are incorporated and operated pursuant to the relevant provisions of the Companies Act 2020, it is expected that these constraints would become sufficiently evident for necessary legislative or executive action. In that regard, key lessons need to be drawn from other jurisdictions such as India and the United Kingdom in order to make single-member companies practically efficacious in Nigeria.

References

1. See section 18(2), the Companies and Allied Matters Act 2020; Single-Member Companies are companies formed and incorporated by only one natural or juristic person. They are also called Single Shareholder Companies or One-Person Companies. Under the new Companies Act 2020 they are both referred to as Single-Member Companies and Single Shareholder Companies. See sections 237, 240 and 421(2), amongst others. This article prefers the term ''single-member companies'' since it is membership (as contained in the Company's Register of Members) that defines the ownership of companies and not necessarily shareholding.
2. BD Catlado. 'Limited Liability with One-man Companies and Subsidiary Corporations' 18 Law and Contemporary problems, 1953, 474.
3. For instance, see 18 of the repealed Nigerian Companies and Allied Matters Act which provided that companies could only be formed and incorporated by two or more persons, 1990.
4. BD Catlado, 'Limited Liability with One-man Companies and Subsidiary Corporations', *op.cit*
5. Sachin Pilot, Indian Corporate Affairs Minister during the enactment of the Indian Companies Act which provides for single-member companies: ''One person companies to eliminate middlemen''. Available at http://articles.economictimes.indiatimes.com/2013-09-08/news/41873696_1_sachin-pilot-corporate-affairs-minister-sachin-new-companies-act. Accessed 10 October 2020
6. See the Indian Companies Act 2013, the United Kingdom Companies Act 2006, and the leading American cases of Button v. Hoffman, 61 Wis. 20, 2o N. W. 667 (884), and Parker v. Bethel Hotel Co., 96 Tenn. 252, 34 S. W. 209, 1896.
7. See the landmark case of Salomon v Salomon & Co. Ltd 1897] A. C. 22; Inland Revenue Commissioners v. Sansom, [1921] 2 K. B. 492; Macaura v Northern Assurance Co. Ltd [1925] A.C. 619; Lee v Lee's Air Farming [1961] A.C. 12; and the leading American cases of Button v. Hoffman, 61 Wis. 20, 2o N. W. 667 (1884); Parker v. Bethel Hotel Co., 96 Tenn. 252, 34 S. W. 209 (1896); Macan v. Scandinavia Belting Co., 264 Pa. 384, 391, 107 At. 750, 752 (1919); In re John Koke Co., 38 F. 2d 232, 233 (9 th Cir. 1930); Commerce Trust Co. v. Woodbury, 77 F. 2d 478, 487 (8th Cir, 1935.
8. Phillip Lipton. The Mythology of Salomon's Case and the Law Dealing with the Tort Liabilities of Corporate Groups: An Historical Perspective, Monash University Law Review,2014:40:2
9. A. C. 22, 1897.
10. At pp. 44-45, 46 2 K. B. 492 at 514, 1921.
11. See the cases of Button v. Hoffman, 61 Wis. 20, 2o N. W. 667 Parker v. Bethel Hotel Co., 96 Tenn. 252, 34 S. W. 209 (1896), 1884.
12. 264 Pa. 384, 391, 107 At. 750, 752, 1919.
13. 38 F. 2d 232, 233 (9 th Cir.), 1930.

14. 77 F. 2d 478, 487 (8th Cir.), 1935.
15. 3o8 U. S. 295, 313, note, 1939.
16. Note. One Man Corporations-Scope and Limitations, 100 U. OF PA. L. REv 853 (1952). Available on https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=8006&context=penn_law_review. Accessed 10 October 2020, 1952.
17. Phillip Lipton, The Mythology of Salomon's Case and the Law Dealing with the Tort Liabilities of Corporate Groups: *op.cit,* 2014.
18. Courts in the United States of America were foremost in setting this safeguard of ''adequate capital''. See the USA cases of Shea v. Leonis, 14 Cal.2d 666, 96 P.2d 332 (1939). Mosher v. Salt River Valley Water User's Ass'n, 39 Ariz. 567, 8 P.2d 1077 (1932); Dixie Coal Min. v. Williams, 221 Ala. 331, 128 So. 799, 1930.
19. See the classic case of Arnold v. Phillips 117 F.2d 497 (5th Cir.), cert. denied, 313 U.S. 583, 1941.
20. See the America cases of Great Oak Bld. Ass. v. Rosenheim, 341 Pa. 132, 19 A.2d 95 (1941); Quaid v. Ratkowsky, 183 App. Div. 428, 170 N.Y. Supp. 812, aff'd, 224 N.Y. 624, 1918.
21. 121 N.E. 887, 1918.
22. Ch. 935 (CA), 1933.
23. See also the English case of Jones v Lipman l WLR 832, 1962.
24. 142 Fed. 247, 255 (C. C. E. D. Wis, 1905.
25. 193 F. 2d 121, 122 (5 th Cir, 1951.
26. Such as Delaware, Iowa, New York, Massachusetts, Michigan
27. Note, "One Man Corporations"-Scope and Limitations, op.cit
28. Dr. Jamshed J. Irani, 2005. Expert Committee Report on the Inclusion of One-Person Company in the Indian Companies Act 2013. Available at http://corporatelawreporter.com/2013/10/17/analysis-one-person-company-companies-act-2013-karandeep-makkar/. Accessed, 2021.
29. 61 Wis. 20, 2o N. W. 667 – based on separate legal personality of the corporation the sole shareholder was unsuccessful in an action brought in his individual name to recover corporate, 1884. assets from one wrongfully in possession of them.
30. 96 Tenn. 252, 34 S. W. 209 – in this case, on the principles of separate legal personality and limited liability the court held inoperative the sole shareholder's attempt to alienate corporate property in his individual name, 1896.
31. 142 Fed. 247, 255 (C. C. E. D. Wis.) – the court held that the law would not sanction a perversion of the status of incorporation, and that a perversion would clearly be perceived when the notion of corporate entity is used as a device to perpetuate fraud, to evade the law, or to escape legal obligations (the doctrine of lifting the veil of incorporation), 1905.
32. See generally, Joel Seligman. A Brief History of Delaware's General Corporation Law of 1899, Delaware Journal of Corporate Law,1976:1:2.
33. IRS, 'Single Member Limited Liability Companies' (2016). Available at https://www.irs.gov/Businesses/SmallBusinesses-&-Self-Employed/Single-Member-Limited-Liability. Accessed, 2021.
34. Liu S, Li Z. Study on the Outward FDI in the USA of Chinese Enterprises Open Journal of Social Sciences,2015:3:7.
35. Vincent JG Power. "Twelfth EC Company Law Directive" 1 (3) ICCLR 44, 1990.
36. From the Joint Stock Companies Act 1844 that first introduced the registration of companies, through those of 1856, 1862, 1867, 1877 and to the Consolidated Companies Act 1907, the required minimum number of persons to form and incorporate a company in the UK moved from 23 to three, and was further reduced to two under the Companies Act See Phillip Lipton, 2014, The Mythology of Salomon's Case and the Law Dealing with the Tort Liabilities of Corporate Groups: op. cit, 1985.
37. See sections 154 and 155
38. Section 123(2)
39. Section 123(3); Section 123(4) provides that if a company makes default in complying with the provisions of this section, an offence is committed by the company and every officer of the company who is in default.
40. See generally sections 270, 271, 281, 284, 301, 302, 318, 336, and 238, amongst others
41. See the Indian Companies Act 2013; For instance, see section 100 on general meeting, section 101 on notice of meeting, section 103 on quorum for meetings, section 107 on voting, section 111 on resolutions, etc.
42. See section 2 (62); the Act refers to single-member companies as ''one-person companies''.
43. See sections 27(2)(a) and 105; According to the section, the minimum capital requirement for a private limited company is N100,000.00. In effect, the single-member must hold at least N100,000.00 shares divided into one or more shares in order to satisfy the provisions of the Companies Act 2020 on capital requirement and number of shareholdings for a private company limited by shares
44. Section 18(2); emphasis added
45. See sections 330(1), 271(1) and 271(2) respectively
46. Section 271(3)
47. See sections 237, 256 and 264 respectively
48. See sections 310 and 311
49. Section 401(1)
50. Section 402(1)
51. See section 123 of the UK Companies Act 2006 and section 18(1) of the Indian Companies Act 2013
52. See generally section 123 of the UK Companies Act 2006, and sections 18 and 122 of the Indian Companies Act 2013
53. See section 571(c); Also, under section 573(1) and (2) the company, a director, a creditor, a receiver, a contributory, the Corporate Affairs Commission or any of their authorized representatives may file a petition before the Federal High Court for a winding-up of the company on the grounds that the number of its members has fallen below two.
54. Sections 330(1) and 271(1) respectively
55. According to section 394(1) and (3), a company qualifies as small a company in a year in which it satisfies the following requirements— (a) it is a private company; (b) its turnover is not more than N120,000,000 or such amount as may be fixed by the Commission from time to time; (c) its net assets value

is not more than N60,000,000 or such amount as may be fixed by the Commission from time to time;(d) none of its members is an alien; (e) none of its members is a government, government corporation or agency or its nominee; and (f) in the case of a company having share capital, the directors between themselves hold at least 51% of its equity share capital.

56. Sections 289 and 290 respectively
57. See generally sections 264, 303, 310, 311, and 401
58. For example, see sections 266(4 and 303(3)
59. See section 231 of the UK Companies Act 2006, and sections 173(5) and 193 of the Indian Companies Act 2013
60. See sections 237, 256 and 264