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RESEARCH ARTICLE

Infusion of ICT into Nigeria's Corporate Democracy: A Proposal for a New Reform Initiative

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Abstract

This article examines the infusion of information communication technology (ICT) into Nigeria's new company legislation to promote corporate democracy. While the initiative is laudable, especially in the age of the COVID-19 pandemic, the article argues that the reform is of limited value, as only private companies are empowered to deploy ICT in the conduct of general meetings. By excluding public companies, the article argues, inter alia, that the reform overlooks the role that ICT could play in addressing the assumed passivity of latent, large groups, which typify the shareholders of public companies. In making a case for inclusive reform, the article examines the reforms already undertaken by some countries in the common law jurisdictions, whose templates on the subject may inform the changes Nigeria needs to effect in her law.

Keywords: general meeting; shareholders; participation; collective action; corporate democracy; COVID-19; Nigeria

Introduction

Intra-corporate governance goals and concerns are often discussed in the context of management's accountability to shareholders and other stakeholders, and when considering whether shareholders, being the residual claimants, are able to exercise their "ownership" rights effectively, especially the voting rights that attach to their shares. Despite robust legal frameworks that permit shareholders to hold corporate managers to account, make decisions in fundamental transactions or remove directors from office, many commentators have discounted the effectiveness of shareholders in governance.[1] This is not unconnected with the perception of shareholders as being passive and rationally apathetic, largely due to their dispersion and the diffusion in their shareholdings.[2]

On the bright side, however, advances in information and communication technologies (ICT) continue to sustain some optimism for a change in shareholders' behaviour in respect of collective actions. At the heart of the renewed hope for increased shareholder participation is the facilitating effect of ICT, which has dramatically reduced the cost of information generation, transmission and

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1 See A Berle and G Means *The Modern Corporation and Private Property* (reprint 1982, Hein); F EasterBrook and D Fischel "Voting in corporate law" (1983) 27 *Journal of Law and Economics* 395; and H Manne "Some theoretical aspects of share voting: Essay in honour of Adolf A Berle" (1964) 64 *Columbia Law Review* 1427. See generally, the discussion of the issue of shareholder passivity in I Bolodeoku "Corporate governance in the new information and communication age: An interrogation of the rational apathy theory" (2007) 7 *Journal of Corporate Law Studies* 109.

2 See M Olson *The Logic of Collective Action* (2nd ed, 1991, Harvard University Press).

dissemination, often associated with the coordination of people in diverse locations.[3] It is therefore less surprising that there is continuing engagement regarding desirable reform of the legal frameworks for corporate governance, which may produce a template on which to operationalize not only the discharge of corporate actors' responsibilities, but also the exercise of shareholders' participatory rights, already guaranteed by applicable laws.

The question may thus be asked: how may ICT foster an effective system of corporate governance in Nigeria? Asking this question 20 years into the millennium seems belated, especially as many countries have already posed similar questions and provided answers. They did this, in part, by integrating ICT into both the administration of company law and intra-corporate relationships.[4] Manifestations of the latter include how directors conduct their business in the discharge of their management responsibilities, information transmission by companies to shareholders and vice versa, the conduct of general meetings by electronic means and the participation of shareholders from remote locations in such meetings. This article focuses on this last aspect. While implementation of ICT-related reforms in corporate governance is being improved in most jurisdictions, Nigeria has, until now, inexplicably played the ostrich and rebuffed calls to reform relevant aspects of its corporate law by integrating ICT into the conduct of companies' general meetings.[5]

Fortuitously, the sudden emergence and spread of COVID-19 across the world, and the global commitment to limit its spread, seem to have forced many countries to review their policies and modalities for social, political and economic interactions, and to identify viable interactive options that might help contain further spread of the virus. For countries like Nigeria, which have not integrated ICT robustly into their corporate governance, the conduct of shareholders' general meetings, especially those of public companies, should be one area of concern in a COVID-19 era. Interestingly, as regulatory agencies and policy makers in Nigeria brainstormed the dangers posed by the new reality forged by the COVID-19 pandemic, the long-awaited company legislative reform finally arrived in July 2020, 30 years after the Companies and Allied Matters Act 1990 had been promulgated.

Many expected, justifiably, that the new Companies and Allied Matters Act 2020 (CAMA 2020) would bring about many reforms, which it did. As is often the case with new legislation, the reforms are evaluated to assess: whether sufficient frameworks are provided for their implementation; if the reforms measure up to expectations, given the state of developments locally and globally; the gaps in the reforms and thus the problems that may arise in the course of their implementation; and whether they are fit for the purposes they are meant to serve. One such reform is the integration of ICT into the conduct of general meetings. Being a long-awaited reform, it has become imperative to ascertain the pith and substance of this reform against what is generally considered to be desirable in light of the technological growth that has taken place in Nigeria. Besides, it is also pertinent to assess the adequacy of ICT-related reform, especially as the lingering COVID-19 pandemic continues to counsel against increased physical interaction between large number of persons. More importantly, there is a need to identify the gaps in the reforms, in order to articulate desirable measures that may be adopted as gap-fillers, thus making the reforms more effective and efficient. Such an approach may be helpful in setting a new agenda for the law reformers within a short period of time.

3 See DA Zetzsche "Corporate governance in cyberspace: A blue print for virtual shareholder meetings" (2005), available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=747347> (last accessed 20 October 2022).

4 See Canada Business Corporations Act 1985, RS c C-44, part XII, sec 132; Delaware General Corporation Law, title 8, sec 211(a); Corporations Act 2001, sec 249S (Australia); Companies Act 2006, chap 46, sec 301 (UK); The Companies (Model Articles) Regulations 2008 (No 3229), reg 37 (UK); Companies Amendment Act 2011, sec 41(1) (South Africa); and Companies Act 2013, sec 108 (India).

5 See I Bolodeoku "Going virtual: Using some common law world initiatives to update the Nigerian law on corporate democracy" (2007) 36 *Common Law World Review* 106.

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Given that CAMA 2020 was signed into law in July 2020, and that the full impact of COVID-19 was unknown until much later, it is fair to state that the possible impact of the COVID-19 pandemic did not drive the infusion of ICT to aid and reinforce corporate democracy in Nigeria. Rather, the infusion of ICT into the conduct of meetings appears to have been borne out of the recognition that reform was long overdue, and that its infusion into the new legislation was ostensibly to avoid the scandal of leaving ICT out of the new legislation,[6] Nigeria probably being one of the (if not the only) remaining countries in the modern world to turn a blind eye to such desirable reform. In essence, the near simultaneous infusion of ICT into the new company legislation in Nigeria and the emergence of COVID-19 appears to be pure chance.

One of the arguments this article will make is that the minimalist approach to the ICT reform in relation to corporate governance, especially in limiting the conduct of general meetings by electronic means to private companies, underscores the short-sightedness of the law reformers regarding the role ICT should play in fostering corporate democracy. Secondly, the exclusion of public companies, with a high likelihood of dispersed shareholdings, portrays a lack of appreciation of the role the reform should play in galvanizing dispersed, otherwise passive, shareholders into active participants, whose participation is crucial to making corporate democracy more effective. Thirdly, in limiting the conduct of general meetings to private companies, the reformers appear to have overlooked the increasing developments Nigeria is witnessing in the telecom sector and the country's internet penetration rate, both of which can comfortably support the conduct of public company meetings from remote locations. Fourthly, there has been prolonged experimentation with the deployment of ICT in the conduct of general meetings in other countries as well as substantial improvement in their use, from which countries like Nigeria may learn when embracing such technologies. Thus, the requisite standards set by those other countries over time can assure the Nigerian law reformer not only of the desirability of extending to public companies the use of ICT in the conduct of general meetings, but also turn the reformers' focus to ascertaining whether developments in the telecom industry in the country can support such reform.

After this introduction, this article engages the theoretical narration of shareholders' behaviour towards participation in governance, which is that shareholders, especially of public companies, are rationally apathetic. However, it makes the case that shareholders' passivity as a paradigmatic behaviour is not invariable, as most of the obstacles that compel such behaviour are largely attenuated by developments in ICT, which has the potential to motivate otherwise passive shareholders to become active and exercise their participatory rights.[7] The next part of the article examines the global trends in the infusion of ICT into the conduct of shareholders' general meetings, as a backdrop to the review of the reform made in this respect under Nigeria's new company legislation. Next, the article examines the reform effected under CAMA 2020 and concludes that, by excluding public companies from conducting general meetings by electronic means, the reform is not only inadequate, but seems uninformed, given the demography of shareholders in public companies and their ownership structures. In particular, it argues that robust reform that is all-encompassing should benefit dispersed shareholders of public companies in a COVID-19 era and beyond. To reinforce this argument, the article then examines the state of readiness in Nigeria for deploying ICT in the conduct of general meetings. It assesses the Nigerian telecom sector, highlights the series of developments in that sector and concludes that the developments can comfortably support reform that empowers public companies to hold their general meetings by electronic means. Leaning on extant reform initiatives in this area, the next section examines what sort of reform Nigeria needs to implement in order to bring her law to a par with laws in the rest of the world. A conclusion follows.

6 Note that the emphasis in this article is on the integration of ICT into the conduct of general meetings of shareholders, rather than those of directors or reform to aid filing returns with the Corporate Affairs Commission, as required by CAMA 2020.

7 See Bolodeoku "Corporate governance", above at note at 1.

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Clarifying the theoretical nexus between ICT reforms and corporate democracy

The seminal work of Berle and Means was anchored on the passivity and inability of diffused (or dispersed) shareholders with minute shareholdings to hold corporate managers to account.[8] They hinged this position on the claim that shareholders in the modern corporation were dispersed and that, individually, they held small proportions of the shares. Worse still, they presented shareholders as incapable of demanding that the corporation be run for their interest and not being in a position to force management "to do or refrain from doing any given thing".[9] To them, we are at a place where "the individual interest of the shareholder is definitely made subservient to the will of a controlling group of managers even though the capital of the enterprise is made up of the aggregated contributions of perhaps many thousands of individuals".[10] In essence, the narration of Berle and Means accentuates the claim that the transformation of the concept of ownership of property in the context of the modern corporation not only exacerbates the problem of unaccountability in the corporate system, but also underscores the need for policy makers continually to seek ways to make power more responsive and responsible.[11]

In his work on group and collective action, Mancur Olson provides a valuable insight into why a large group, to which dispersed shareholders of most public companies belong, is unable to act collectively to produce a collective good.[12] Placing shareholders in public companies in this group is, to a large extent, apt, because they are widely dispersed and the majority of them hold small proportions of their companies' shares. Members of such a large, latent group, Olson argues, are passive and not motivated to act for a collective good, because it is costly to organize the group into an effective production force.[13] Besides, none of the group members believes that they could make a difference given the level of his or her shareholding.[14] Even where some can, members in this group believe that passivity is unlikely to affect their interest and that they cannot be excluded from the benefits created for the group.[15] In these circumstances, members of such a group believe that, on a cost-benefit analysis, passivity or free-riding is a rational choice.[16]

With Olson's insight, it is hardly surprising that, in contemporary corporate governance analysis, shareholders of public, listed companies are described as rationally apathetic, a description that reinforces the thrust of Berle and Means' work on the modern corporation. Another key factor considered capable of undermining shareholders' cooperation and monitoring is heterogeneity of interests. Institutional investors appear to behave differently from individual retail shareholders, and the investment objectives of institutional investors are not necessarily the same as those of retail shareholders. Neither do institutional investors have a similar approach in their relationship with management as retail shareholders. The literature maintains that most institutional shareholders prefer to dialogue with management to address their concerns, rather than act to challenge managers' decisions openly.[17]

8 See Berle and Means *The Modern Corporation*, above at note 1 at 66.

9 Id at 277.

10 Ibid.

11 Id at 353–54. See also P Ireland, I Grigg-Spall and D Kelly "The conceptual foundations of modern company law" (1987) 14 *Journal of Law and Society* 149 at 154–59, drawing largely on the transformation of shares into "fictitious capital", which shifted shareholders' interests to return on investment, rather than monitoring.

12 See Olson *The Logic of Collective*, above at note 2 at 50–51, arguing that large, latent groups have no incentive to obtain collective good. For criticism of this approach, however, see Bolodeoku "Corporate governance", above at note 1. Note, however, that some have argued against the traditional rendering of shareholder passivity. See B Black "Shareholder passivity re-examined" (1990) 89 *Michigan Law Review* 520, arguing (at 525) that "[s]hareholder passivity, in sum, may be both legally and historically contingent. It may reflect less the inexorable logic of collective action than a combination of legal obstacles to shareholder action, shareholder conflicts of interest, managers' agenda control".

13 See Olson, id at 48.

14 Ibid.

15 Id at 14 and 16.

16 Id at 53.

17 See J Hendry et al "Owners or traders: Conceptualisations of institutional investors and their relationship with corporate managers" (2006) 59 *Human Relations* 1101; they share part of their findings (at 1103) as being that "both fund managers and company managers conceptualize institutional investors primarily as financial traders who happen, as a result

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This author, however, argues elsewhere that rational apathy among shareholders of the modern corporation is not invariable, since the behaviour of shareholders in this, or other similar groups, is largely influenced by the difficulty and cost of organizing the group into an effective governance force.[18] Organization of a large, dispersed group is not without cost, but it is often easy, although not in all situations, to bear the cost of organization if it produces comparable benefits for those who bear the cost. Besides, shareholders of such a latent group face not only the difficulty of gathering relevant information, but also the costs of its dissemination among group members. However, this writer notes the limitation of Olson's logic of collective action, which held sway before the emergence of advanced ICT, which has slashed the cost of organizing information gathering, dissemination and communication.[19] Moreover, this writer argues that, since the internet has made increased communication possible, it may now be misleading to assume without qualification that shareholders' behaviour will remain the same, uninfluenced by the opportunities that are offered by existing ICT. In particular, this author argues that the explosion of ICT has the potential to make shareholders more active, given the access to information that companies may be mandated to provide through diverse platforms.[20]

To be sure, before the emergence of the internet and the explosion of ICT, gathering at a physical location was the major, if not the only, legally recognized method by which companies, private and public, could conduct general meetings and take decisions.[21] Given the probability of passivity among many dispersed and disinterested shareholders, deployment of the proxy system remained the means through which absentee shareholders could participate and vote at general meetings.[22] For both management and dissentient shareholders, proxy solicitation was the instrument for intra-corporate battles at general meetings. However, the proxy solicitation system is not problem-free,[23] as it is, in practice, controlled by management. Shareholders who do not appoint proxies and cannot physically attend meetings are automatically disenfranchised and are, therefore, of little relevance in corporate governance.

The emergence of ICT and its exponential developments, has, inter alia, oiled the wheels of corporate law administration and governance. Not only does ICT enhance the provision and dissemination of relevant information to shareholders, it also facilitates the verification of such information by relevant stakeholders. Its infusion into corporate governance appears to enhance the prospect of transparency in governance. ICT has also proven able to reduce significantly the cost associated with information gathering, dissemination and communication among shareholders. Indeed, it is difficult not to expect the behaviours of dispersed shareholders to change in the face of the value additions ICT may bring to bear in forging communication, organization and participation in corporate governance. In other words, invocation of rational apathy as the paradigmatic response of dispersed shareholders of large public companies may now seem disputable, given the unarguable potential of ICT to galvanize collective action among a group whose passivity has long been assumed as invariable. The claim may also be made that recognition of the importance of ICT in forging and enhancing interactions in the public sphere undergirds many policies that are now in place to promote public participation, be it at general elections, social interactions, global events and e-commerce.

of their trading, to control key resources, but whose interests are effectively divorced from those of long-term share owners". See also B Black and J Coffee Jr "Hail Britannia? Institutional investors' behaviour under limited regulation" (1998) 92 *Michigan Law Review* 1994.

18 See Bolodeoku "Corporate governance", above at note 1.

19 Ibid.

20 Id at 131–36. See generally *The Rule Book of the Nigerian Stock Exchange* (2015, Nigerian Stock Exchange), chap 17 on disclosure of information to shareholders, and rule 18 on the use of an issuer portal to disclose information required by the *Rule Book*.

21 Note that private companies may have recourse to written resolutions, but such resolutions require the concurrence of all members. See CAMA 2020, sec 259.

22 See id, sec 254.

23 See Black "Shareholder passivity", above at note 12.

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ICT's infusion into contemporary corporate legislation testifies to the value it can undoubtedly add in helping shareholders to exercise their participatory rights.

Now that the world is learning to cope with the COVID-19 pandemic, a new order is in place, which de-emphasizes increased physical interaction of large numbers of people. One positive development that has, however, emerged is that the new interaction protocol the world must now embrace can only inspire exponential innovations that will improve existing methodologies for non-physical interactions. Putting the COVID-19 pandemic in the mix only reinforces the desirability of perfecting the reforms that can adequately infuse non-physical interactions in the conduct of general meetings, especially by public companies with large, dispersed memberships.

In summary, it is noteworthy, with some qualification,[24] that improved ICT has helped in no small measure to highlight the need to re-assess the traditional perception of dispersed shareholders as passive and apathetic. Those technologies appear to have helped to forge a common global understanding, by creating a sense of relevance for 21st century shareholders, in terms of the quantum of information they may access, verifiability of the information and the quality of participation they may now enjoy. To match this commitment, policymakers across the globe seem to have recognized that, unless the reform of company legislation makes room for the deployment of ICT in the conduct of general meetings and permits shareholders to participate and vote from remote locations via electronic means, their rights will remain illusory, notwithstanding the opportunity afforded by the proxy system. Indeed, while the proxy is a time-worn participatory option for absentee shareholders, it is incomparable to an option that allows in-person participation, albeit from remote locations. Above all, the COVID-19 pandemic seems to reinforce the urgency for legal reforms that promote non-physical interactions and guarantee robust participation in corporate meetings. Even for companies that combine concentrated and dispersed ownerships, minority shareholders are unlikely to feel excluded from participation, and their voice, whatever it is worth, may induce a response from corporate managers.

Global trends in the deployment of ICT for general meetings

In recognition of the value ICT can add in advancing the course of corporate governance and in lessening shareholders' challenges in participating in it, many countries have, over the years, integrated ICT into the conduct of general meetings. ICT reforms have taken several forms, each of which serves different but related purposes. These reforms range from empowering companies to extend participation in general meetings to shareholders by electronic means to empowering them to hold such meetings entirely by means of remote communication. This section examines existing legislation that permits companies to deploy ICT in the conduct of general meetings. The State of Delaware presents what may be seen as a comprehensive reform to empower the infusion of ICT into the conduct of meetings. The Delaware model is discussed, as reforms in other countries appear to adopt parts of this model; reference is also made to reforms in other countries.

The State of Delaware infused ICT reforms into its laws by a combination of mandatory, enabling and default provisions.[25] The mandatory components are to ensure standardization and integrity of the process by setting minimum standards to ensure verification of the votes cast by shareholders. The enabling provisions are designed to ensure flexibility in implementation, while the default provisions set the underlying rule, which companies may adopt, while nonetheless ensuring that applicable rules are in place to ensure that the empowerment granted is not frustrated. The enabling provisions leave it to each company to determine, through its certificate of incorporation or by-laws, where a shareholders' meeting may be held, whether within or outside the state. Failing such determination, the board of directors, for obvious reasons, is empowered to make the decision. Where, by the company's documents referred to above or by the default provisions that empower the board,

24 This relates to institutional investors' behaviour, and their disposition and methodology in engaging corporate managers.
25 See Delaware General Corporation Law, sec 211(a).

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the board is to determine where a general meeting will be held, it may decide in its sole discretion that "the meeting shall not be held at any place, but may instead be held solely by means of remote communication".[26] If the board decides in favour of conducting a shareholders' meeting by means of remote communication, then, subject to the guidelines and procedures the board puts in place, shareholders or their proxies not physically present may: participate in the meeting; and be deemed present in person and vote at such meeting, whether the meeting be held physically or solely by means of remote communication.

To ensure that a meeting so conducted is credible, the company must implement reasonable measures to verify that each person deemed present and permitted to vote at the meeting is a shareholder or proxy holder. Besides, the company is required to implement measures to provide shareholders or their proxies a reasonable opportunity to participate in the meeting and vote on matters before the shareholders. Such measures shall include an opportunity to read or hear the proceedings of the meeting substantially concurrently with the proceedings. The measures put in place shall also ensure that a record of votes or other actions at the meeting is maintained.

Canada has a variant of the Delaware model under her federal company legislation, the Canada Business Corporations Act 1985 (CBCA). The CBCA makes provision for a physical meeting of shareholders in Canada, just as it empowers that such a meeting may also be held outside Canada, if the place is stipulated in the articles or, where not stipulated, all the shareholders entitled to attend agree to the place.[27] In terms of participation at meetings, the framework adopted is a default provision, which companies may adapt, failing which the underlying rule becomes mandatory. This approach permits respective companies to stymie what would otherwise have been a one size-fits-all rule and thus reflect their individual circumstances. Thus, unless the by-laws (or articles or constitution in most other common law jurisdictions) provide otherwise, shareholders are entitled to attend a meeting and may participate in that meeting, in accordance with regulations,[28] if any, "by means of a telephonic, electronic or other communication facility that permits all participants to communicate adequately with each other during the meeting, if the corporation makes available such a communication facility".[29]

Persons participating in the meeting via the means stated are deemed to be present at the meeting. It is interesting to note that directors or shareholders calling a shareholders' meeting under the CBCA may decide in accordance with regulation, if any, that the meeting shall be held entirely by a telephonic, electronic or other communication facility that permits all participants to communicate adequately with each other during the meeting. The CBCA further provides that voting, unless the by-laws provide otherwise, may be held by means similar to those stated in section 132 of the act, "if the corporation makes available such a communication facility"[30] and that voting while participating electronically may be done by any of the above means that the corporation has made available for that purpose. Thus, if the by-laws do not prohibit the foregoing options for conducting a meeting and voting thereat, both may be done by the means provided by the corporation.[31]

Australia's framework is clear enough, as it gives a company the discretion to hold a meeting of its members at two or more venues using any technology that gives the members as a whole a reasonable

26 Id, sec 211(a)(2).

27 See generally, CBCA, sec 132.

28 The CBCA Regulations 2001, SOR 2001-512, sec 45(1) is very instructive. The communication facilities referred to in sec 141(3) of the act must: enable votes to be gathered in a manner that permits their subsequent verification; and permit the tallied votes to be presented to the corporation without it being possible for the corporation to identify how each shareholder or group of shareholders voted. For the purpose of sec 141(4) of the act on voting while participating electronically, sec 45(2) of the regulations provides, in effect, provisions similar to those of subsec (1) on the quality of the communication facility.

29 CBCA, sec 141(3).

30 Id, sec 141(3)(4).

31 Id, sec 141(4).

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opportunity to participate.[32] The UK also has an apparently easy-to-follow legal framework for how a company may conduct its general meetings. The 2006 Companies Act provides that a resolution of members is validly passed if: notice of the meeting and of the resolution is given; and the meeting is held and conducted in accordance with the provisions of the company's articles and part 13, chapter 3 of the act[33] (and chapter 4 where applicable).[34] The Companies (Model Articles) Regulations 2008 (UK Model Articles) then make provisions for attendance and speaking at general meetings. They stipulate the qualitative conditions for members' participation, in terms of speaking and voting at meetings. The articles leave it to the directors to make appropriate arrangements that meet the statutory requirements set out in the UK Model Articles. Simply, the framework anticipates that a general meeting may be conducted either physically or by means of an electronic communication facility.[35]

In 2011 South Africa amended section 63 of her 2008 company legislation by replacing the old section 63(2). The new subsection (2), a default provision, empowers a company to provide for a meeting of its members to be conducted entirely by electronic communication, or for some shareholders to participate by electronic communication where the meeting is held at a physical location.[36] This is the position unless prohibited by the Memorandum of Incorporation. Like the CBCA initiative, there is emphasis on concurrency of communication among shareholders without intermediation and that participation must be reasonably effective.[37] In India, it is the central government that may prescribe the class or classes of companies and the manner in which a member may exercise his right to vote by electronic means.[38] In the European Union, article 8(1) of the Shareholders' Rights Directive requires member states to "permit companies to offer to their shareholders any form of participation in the general meeting by electronic means".[39]

These reforms in different jurisdictions indicate that reform appears to focus on: permitting shareholders' meetings to be held simultaneously at physical and remote locations; if necessary, meetings being held solely by means of a remote communication facility; and ensuring that, in both cases, the shareholders can communicate effectively with one another in the course of the meeting, ensuring that records of the proceedings and votes are kept, and can be verified. Indeed, section 45 of the regulations made pursuant to the CBCA[40] captures the thrust of what should be in place in order to realize the essence of the policy by liberalizing the methodology for holding shareholders' general meetings.

Nigeria's legal framework for the infusion of ICT into the conduct of meetings

The framework

In 1990, when Nigeria's law reformers attempted to "breakaway" from a wholesale transplantation of English company law, infusion of ICT into the conduct of meetings was hardly foreseeable. However, since the birth of the 21st century, many countries, as shown above, have committed

32 See Corporations Act 2001, sec 249S (Australia).

33 See Companies Act 2006, sec 301 (UK).

34 Note that part 13, chap 4 relates to public companies.

35 See The Companies (Model Articles) Regulations 2008, reg 37(4). Note that the UK Model Articles are for private companies, limited by shares. Note further that the equivalent model articles for public companies also contain provisions on attendance and participation at general meetings similar to those in the UK Model Articles. See regulation 29 of the articles for public companies.

36 See Companies Amendment Act 2011, sec 41(1).

37 Id, sec 41(2).

38 See Companies Act (Act No 18 of 2013), sec 108.

39 This directive was implemented in Germany by inserting a new para 118(1)(2) into the German Stock Corporation Act (Aktiengesetz). For a discussion of this development, see C Kersting "Electronic participation in general meetings and the right to ask questions: Implementing the Shareholders' Right Directive (2007/36/EG)" (2010) *Neue Zeitschrift für Gesellschaftsrecht* 130, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1590213> (last accessed 20 October 2022).

40 See above at note 28.

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to legal frameworks that facilitate ICT infusion and have enabled companies to make provisions for its adoption. Some regulators also set standards for the qualitative aspect of the remote communication facility they consider can facilitate effective participation and ensure the credibility of the results emanating from ICT-enabled general meetings. In essence, Nigeria had sufficient antecedents to learn from when it ultimately decided to integrate ICT into the conduct of general meetings in the recent 2020 company legislation. This section evaluates the reform effected under CAMA 2020 and assesses, in light of Nigeria's circumstances, the value it adds to shareholder participation and governance.

It needs be conceded upfront that the 2020 corporate legislation infused the use of ICT into the relationship between the regulator (that is, the Corporate Affairs Commission) and registered companies in terms of registration, filing of returns with the commission and other similar communications. However, the focus, as in this article, was the reform that infused ICT into the conduct of shareholders' general meetings. Section 240(2) of CAMA 2020 provides: "[a] private company may hold its general meetings electronically provided such meetings are conducted in accordance with the articles of the company". What this provision anticipates is that affected companies (ie private companies) may make exhaustive provisions in their articles for the conduct of meetings electronically, as such meetings must be conducted in accordance with the regulations set out in the articles. The model articles for private companies made pursuant to the act (Nigerian Model Articles)[41] provide relevant guidance on what participation at meetings means and what it should afford participating shareholders. Regulation 51 provides:

> "(1) A person is able to exercise the right to vote at a general meeting when that person is in a position to communicate to all those attending the meeting, during the meeting, any information or opinions that the person has on the business of the meeting.
> (2) A person is able to exercise the right to vote at a general meeting when –
> (a) that person is able to vote, during the meeting, on the resolutions put to vote at the meeting, and
> (b) that person's vote can be taken into account in determining whether or not such resolutions are passed at the same time as the vote of all the other persons attending the meeting.
> (3) The directors may make whatever arrangement they consider appropriate to enable those attending a general meeting to exercise their right to speak or vote at it.
> (4) In determining attendance at a general meeting, it is immaterial whether any two or more members attending it are in the same place as each other.
> (5) Two or more persons who are not in the same place as each other attend a general meeting if their circumstances are such that if they have (or were to have) rights to speak or vote at that meeting, they are (would be) able to exercise them."

While CAMA 2020 merely enables private companies to conduct general meetings electronically, it leaves many ancillary issues unregulated. For instance, the act is silent on whether a general meeting may be conducted solely by means of remote communication or in combination with a physical meeting. However, from the provisions of regulation 51 of the Nigerian Model Articles, which appears to supplement the act, it is possible to make some inferences regarding the legislature's expectations on participation at a general meeting in terms of attendance and voting.

Crucially, the fact that two or more people may attend a general meeting although at different places implies that a general meeting may be hybrid in design, so that some shareholders may attend physically while other by means of a remote facility. To be sure, directors are empowered to put in place such arrangements they consider would permit attendees to speak and vote at the meeting. If such an arrangement is in place, it should ordinarily not matter whether attendees are in one

41 See Companies Regulations 2021, Model Articles for Private Companies Limited by Shares, 20th sched.

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location or diverse locations. Thus, a purposive interpretation of regulation 51(5) appears to provide a legal basis for the conduct of a general meeting solely by a remote communication facility.

It appears that the reform adopted by the legislature for the conduct of electronic general meetings for private companies in Nigeria was informed by similar provisions on the subject in the UK Model Articles. The Nigerian legislation is, indeed, a transplantation of regulation 37 of the UK Model Articles for private companies. However, while the initiative is commendable, this author is of the view that, as a standard-setting provision, more needs to be done in the Nigerian context. There needs to be further legislative guidance that specifies what companies need to put in place to achieve the goals of effective participation and verifiability of voting results, and thus the integrity of the voting process. In this respect, the initiative under section 45 of the regulations made pursuant to the CBCA (Canada)[42] is recommended as a supplement to regulation 51 of the Nigerian Model Articles. This is because setting clear standards, which will help achieve the objectives of the law on participation, is desirable for effective compliance in a country like Nigeria, which lacks a compliance culture. Such a framework will undoubtedly enable regulators to audit compliance effectively, just as it will leave little or no room for discretion, which would be the case where the stated guidance is, by and large, nebulous.

On the whole, it may be said that Nigeria has done well to liberalize the concept of shareholder participation through the type of ICT-related reform adopted in CAMA 2020. A supplement along the lines of the Canadian initiative would, however, make the legal framework for the conduct of shareholders' general meetings and participation thereat effective and efficient. It is worth noting, however, that, since the act only permits private companies to conduct general meetings electronically, the implication is that public companies are excluded from conducting their meetings in a similar manner. One is bound to ponder whether the reform is a wasted initiative, given that it is directed only at private companies. An allied question is whether the exclusion of public companies from the possibility of conducting general meetings electronically will undermine Nigeria's avowed commitment to promoting effective democratic values in corporate Nigeria.

Despite CAMA 2020's exclusion of public companies from conducting general meetings by electronic means, the Nigerian Stock Exchange (NSE) rule for the voting procedures at general meetings of listed companies is nevertheless commendable.[43] In chapter 19 of the NSE Listing Rules, rule 14 provides that voting may be conducted through the use of an electronic voting device or by any other means prescribed by law. The rule further provides that, where an issuer proposes to use an electronic voting device, voting shall not take place until proper arrangements have been made to allow all shareholders or holders of other securities in attendance to participate in the electronic voting and they have all been adequately instructed by the registrars or issuers on how to operate the device. Commendable as this rule is, it still does not provide a comprehensive rule for participation by shareholders in public companies. First, the rule only applies to listed companies. As a result, non-listed public companies are excluded. Secondly, the rules on the conduct of general meetings are still designed around the conduct of general meetings at physical locations. Thirdly, limiting deployment of electronic means to voting implies that non-voting participation is limited to shareholders who are able to attend physically. This omission belies the comprehensive rule on participation in rule 19:12. Fourthly, the rule does not set the standards and expectations regarding the "voting device" a company may deploy, with the implication that voting results may not be easily verifiable (or readily disputable) across companies and voters' identities may not remain confidential. That said, the empowerment granted by rule 19:14 to listed companies

42 Regulation 45 provides: "(1) For the purpose of subsection 143(1) of the Act, when a vote is to be taken at a meeting of shareholders, the voting may be carried out by means of a telephonic, electronic or other communication facility, if the facility - (a) enables the votes to be gathered in a manner that permits their subsequent verification; and (b) permits the tallied votes to be presented to the corporation without it being possible for the corporation to identify how each shareholder or group of shareholders voted."

43 *The Rule Book*, above at note 20, chap 19.

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to conduct voting by an electronic device can, to a large extent, remove the generational shackles that have inhibited shareholders of public (listed) companies from participating in and voting at general meetings. The NSE rules should have been seen by the Nigerian law reformers as a foundation on which to build comprehensive rules on corporate democracy. Regrettably, it appears that the law reformers did not consider listed companies in Nigeria to be ripe enough for a participation framework that is consistent with the global trend.

Evaluating the exclusion of public companies from ICT-enabled general meetings

Nigeria appears to be the only country that restricts to private companies the infusion of the ICT-enabled initiative into the conduct of general meetings. By implication, Nigeria also excludes public companies from that sphere. This approach stands logic on its head. It is not clear why this is so, as there is no policy document from which we can assess the rationale that informed the exclusion of public companies from the conduct of general meetings electronically, either solely or in a blended format. In order to inform this evaluation adequately, it is imperative to assess the relevance or otherwise of the reform to private companies relative to public companies.

It takes only one or two persons (up to a maximum of 50) to form a private company, excluding employee or former employee-members of the company. In relative terms, the number of private companies will invariably exceed that of public companies in Nigeria. While the average membership of this genre of company is not known, one may be permitted to estimate that the membership of most private companies, on average, might not exceed ten. Private companies are often formed for people closely associated with one another, who have access to each other and who would otherwise have operated as partners but for the advantage of limited liability. If the maximum number of persons who can operate as private company is 50, the question is whether reform that is aimed at creating access, bridging space and facilitating interaction of otherwise dispersed persons should be available only to this sort of company. Usually, the ownership profile of private companies is concentrated, in that one or two shareholders hold a controlling equity and are able to make decisions (pass resolutions) with little need for coordination or collective action. While the opportunity to hold virtual meetings of members of private companies is always desirable, most members are usually able to gather at a physical location for meetings with manageable and bearable costs. Indeed, private companies are, in large part, exempted from holding general meetings, since they are empowered to pass written resolution signed by all members.[44]

On the other hand, public companies (listed or unlisted) constitute latent, large groups in which the dynamics of decision-making are radically different from those of private companies. Moreover, listed companies implicate public interests, local and global, such that every country with a regulated stock exchange is keen not only on disseminating information to the public, but also on ensuring the quality of information to be disseminated and when. This is all to ensure informed investment and governance decisions. For the shareholders, however, the interest shifts to ensuring the existence of a framework that preserves shareholders' participatory rights and guarantees their effectiveness in matters that require shareholders' approval. Given the dispersed shareholding in public companies, it is pertinent that reform that induces prospective absentee shareholders to participate personally or through proxies in general meetings without physical attendance is likely to promote participatory governance. Such reform, on its face, may also reduce apathy among the shareholders of public companies.

There are reasons why public companies in Nigeria, as in other countries, should be empowered to conduct general meetings electronically, either solely or blended. The profiles of these companies reinforce why, if at all, they should enjoy a legislative empowerment priority in deploying ICT for the conduct of shareholders' general meetings. First, the ownership profile of most public

44 See CAMA 2020, sec 259.

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companies is both concentrated and dispersed.[45] It is concentrated in the sense that most of the companies have shareholders with, or nearly up to, a simple majority. It is dispersed because the remaining minority shares are held in small proportions by a large number of investors, most of whom are dispersed and are traditionally assumed to be rationally apathetic.[46] Thus, their shareholdings may only be turned into a decision tool through cooperation or collective action, which electronic participation may facilitate.[47]

Yes, it is arguable that absentee shareholders can always fall back on the proxy system. However, although the proxy system has always been a part of the legal framework for corporate law and governance, it has not solved the common problems of corporate governance. Its operations have never been smooth, and literature abounds in support of the claim that the proxy system is controlled by management and is skewed against dissident shareholders, despite increasing reforms to remove some of the problems that are associated with the system.[48] That said, the proxy system has been the best alternative shareholders have had to personal, physical participation in general meetings. In the new age of advanced communication technologies, however, it is pertinent to prioritize the option that allows personal participation in general meetings from remote locations, which also helps to avoid the problems inherent with proxy solicitation. This may only happen when the conduct of general meetings is not tied to the physical presence of shareholders or their proxies. It is therefore difficult to understand why, despite the exponential development of the telecoms sector, the rise in the internet penetration rate, and increasing deployment of ICT for public participation and decision-making in other public-oriented events, Nigeria's new company legislation excludes public companies from deploying ICT in the conduct of shareholders' general meetings.

With the COVID-19 pandemic and the protocols that were put in place to protect the public, the emphasis has been on avoiding large congregations of people in order to avert the spread of infection. Many countries, including Nigeria have, at different times, introduced regulations to this end. Although the new 2020 company legislation came at a time when the world was grappling with the nature and seriousness of COVID-19, the corporate law reform trend towards integrating ICT into the conduct of general meetings has been established and embraced. Besides, most corporate governance codes across the common law world also emphasize the desirability of making shareholder participation in general meetings more effective by permitting shareholders to exercise their rights, especially through participation in general meetings from remote locations.[49] Now that the COVID-19 pandemic is likely to persist for a while, the minimalist reform effected by CAMA 2020 in limiting electronic meetings to private companies seems poorly informed. The next section examines the readiness of Nigeria's infrastructure for integrating ICT into the conduct of general meetings, including of public companies.

Assessing Nigeria's readiness to deploy ICT for the conduct of general meetings

Apart from shareholder demography, dispersion and assumed apathy, the state of ICT and companies' readiness to deploy it are other factors that may help reinforce the need for public companies to

45 See B Ahunwa "Corporate governance in Nigeria" (2002) 37 *Journal of Business Ethics* 269 at 274. Moreover, the usual concern where ownership is both concentrated and dispersed is the exploitation of the minority. Thus, reform that induces minority participation especially by electronic means is desirable.

46 See Olson *The Logic of Collective*, above at note 2 at 55. See also Black "Shareholder passivity", above at note 12.

47 See Bolodeoku "Corporate governance", above at note 1.

48 See M Eisenberg "Access to the corporate proxy machinery" (1970) 83 *Harvard Law Review* 1489. See also I Bolodeoku "A critique of the theories underpinning proxy solicitation by the board of directors" (2001) *Journal of Business Law* 377. Note also that, although CAMA 2020, sec 260 obliges a company to circulate a resolution of qualified members to other members (at the company's expense), the conditions attached to it may be exploited by management against the members seeking the company to circulate their resolutions to other members.

49 See *Principles of Corporate Governance* (2015, G20/OECD) at 22, noting that the corporate governance framework should facilitate the use of electronic voting in absentia, including electronic distribution of materials and reliable vote validation systems.

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infuse ICT into the conduct of general meetings. Besides, consideration of the readiness of Nigeria and her public companies to deploy ICT in corporate governance may also shed light on the appropriateness or otherwise of the legislature's decision to permit only private companies to conduct general meetings electronically.

The capacity of the country to participate in the ICT world relies on the telecommunications industry. As a result, information about the industry provides a window to the level of activity of Nigerian companies in the digital space, and the level and quality of public participation in that space. According to the Nigerian Communications Commission (the industry's regulator) (NCC),[50] the telecommunications industry's contribution to Nigerian GDP increased from 10.60 per cent in the fourth quarter of 2019 to 12.45 per cent in the fourth quarter of 2020.[51] Capital inflow (FDI) into the industry in 2020 was approximately USD 417.5 million, although FDI reduced by more than 55 per cent in 2020 compared with 2019, when FDI stood at almost USD 943 million.[52] On the other hand, domestic investment stood at approximately NGN 408 billion in 2020; this also dipped, by 18.62 per cent, from the 2019 figures.[53] This decline might be as a result of the COVID-19 pandemic, which affected investment globally.

From the 2020 NCC report, infrastructural development appears substantial and notable. First, for example, a total of 33,832 towers were recorded from mobile and fixed operators as well as co-location and infrastructure companies.[54] Operators also reported a total of 36,998 base stations.[55] Secondly, microwave coverage declined from 302,036 km recorded in 2019 to just under 289,721 km as at 2020.[56] This covers mobile, fixed and other operators. Some operators recorded a decrease in microwave coverage due to the decommissioning of backbone microwave links to accommodate increased and higher volumes of traffic. Thirdly, mobile, fixed and other operators recorded a total of 194 gateways in use in the industry as at December 2020.[57] Fourthly, fibre optics deployment stood at 69,027 km (terrestrial fibre and submarine cable) as at December 2020.[58] Lastly, total microwave radio links deployed by mobile operators as at 2020 were around 289,425 km, compared with 301,740 km in 2019.[59]

While there are declines in 2020 relative to 2019 (largely accounted for by the COVID-19 pandemic), it is clear that the industry has been quite active and there has been an increasing trend in FDI as well as in local capital investment. More importantly, the infrastructural development that constitutes the backbone of the telecoms industry has also been steady and relatively impressive. So have been the cumulative net profits of the operators.[60]

In November 2021 the NCC published the Final Information Memorandum for the upcoming auction of the 3.5GHz spectrum band, as part of the 5 G Technology Deployment Plan in Nigeria. There is a ten-year roll-out plan, which obliges licensees, on commencement, to roll-out in six states of the Federation (one in each geo-political zone). Between the third and fifth year of roll-out, they are required to cover all the zones. Between the sixth and the tenth year, licensees must cover all the states of the federation. Deployment of 5 G technology is bound to increase the options available to

50 *2020 Subscriber / Network Data Report* (NCC) (*NCC Report*), available at: <https://www.ncc.gov.ng/accessible/documents/1021-2020-year-end-subscriber-network-data-report/file> (last accessed 11 January 2023). See also *NCC Strategic Management Plan 2020–2024 – ASPIRE 2024* (NCC), available at: <https://www.ncc.gov.ng/docman-main/industry-statistics/policies-reports/886-ncc-2020-2024-strategic-management-plan-aspire-2024/file> (last accessed 20 October 2022).

51 *NCC Report*, id at 3.

52 Ibid.

53 Ibid.

54 Id at 4.

55 Ibid.

56 Ibid.

57 Ibid.

58 Ibid.

59 Id at 13

60 Id at 34.

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internet users and enhance considerably the quality of service they enjoy. As it is now, all the mobile networks operate on 4 G technology. With the deployment of 5 G coming soon, there is no doubt that Nigeria is primed for quality and effective internet use.[61]

It is noteworthy that the number of data and voice mobile-broadband subscriptions increased from 65,223,080 in December 2019 to 78,844,980 as at December 2020.[62] This increase indicates an increase in access to internet use either by voice or data, and / or an increase in the public presence on the internet. Total active internet subscriptions increased from 125,979,155 as at December 2019 to 154,289,727 in December 2020,[63] an increase of 22.5 per cent. There was also a broadband penetration rate of 45 per cent in 2020 (with a total of 85,941,222 active subscription to 3 G and 4G), up from 37.8 in 2019 (with 72,153,824 total active subscriptions for 3 G and 4G).[64]

Global statistics on internet usage show that, from an estimated Nigerian population of 211,400,708 in 2021, 154,301,194 were internet users, giving a penetration rate of 73 per cent.[65] This is a growth rate of 101,484 per cent between 2000 and 2021.[66] These statistics also reinforce the NCC figures, which indicate that a large number of Nigerians have internet access. While the NCC's number of 154,289,727 internet users in Nigeria in 2020 is very similar to the 154,301,194 global statistics figure for 2021, the focus should be on the broadband penetration rate provided by the NCC, which put the number of broadband internet users in 2020 at 85,941,222. This is because it is broadband access that facilitates the effective use of the internet for participation and voting at general meetings.

From this information, it seems clear that permitting public companies to conduct general meetings electronically, be it blended or entirely from remote locations, would have been a welcome reform. All that the Corporate Affairs Commission would need to do is set standards regarding the quality of infrastructure public companies should deploy, and the sort of results that are expected from that infrastructure. There is nothing to suggest that the cost to companies in deploying any communication facility in hosting general meetings would be prohibitive. Nigeria gains nothing by excluding public companies from conducting their general meetings electronically. It is equally hard to defend this position and shut out many dispersed shareholders, who would have benefitted from participating in general meetings personally, albeit from remote locations. As a result, the exclusion of public companies from conducting general meetings by electronic means somehow undermines shareholders' right to attend, speak and vote at general meetings. That shareholders may participate through proxies does not seem to compensate adequately for being forced to turn to proxies.

Exploring further reform initiatives for Nigeria

There is sufficient guidance for Nigeria from countries that have effected reforms of their laws and infused ICT into the conduct of companies' general meetings. There also seems to be a global convergence on the conduct of general meetings by electronic means or from remote locations, especially for public companies. Granted that none of the reform styles is perfect, the policy that informed them seems indisputable: to liberalize participation, thus accommodating many shareholders who otherwise would not care much about exercising their rights in corporate governance,

61 Two operators had already emerged as winners in the 3.5 GHz spectrum auction for the deployment of the 5G network: A Adepetun, BC Onochie and N Onyedika-Ugoeze "Nigeria issues 5G licences to two operators" (14 December 2021) *The Guardian*, available at: <https://guardian.ng/news/nigeria-issues-5g-licences-to-two-operators/> (last accessed 20 October 2022).

62 See *NCC Report*, above at note 50 at 21.

63 Id at 29.

64 Id at 30–31.

65 "Internet penetration in Africa: 2020 – Q1 – March" (Internet World Stats), available at: <https://www.internetworldstats.com/stats1.htm> (last accessed 20 October 2022).

66 Ibid.

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due to the cost associated with participation. Besides, those reforms might also have been informed by reducing the control that management has over the proxy system, and the influence thus wielded on shareholders' decision-making.

Thus, any of the reforms that have a clear goal of empowering public companies to deploy electronic communication facilities in the conduct of meetings should suffice for Nigeria. In this respect, the provision of section 240(2) of CAMA 2020 only needs an amendment that permits "any company", rather than any private company, to conduct its general meeting electronically. The supplement in regulation 51 of the Nigerian Model Articles will seem sufficient as a statement of the qualitative expectation of what the electronic facility a company deploys should afford to participating shareholders, regardless of whether the meeting is conducted solely by electronic means or in a blended format. However, process integrity also requires consideration, and may be achieved where voting results are verifiable. To address this concern, this author commends section 45 of the regulations made pursuant to the CBCA to the Nigerian law reformers. The provisions of that section are worth restating. By that section, the communication facility to be deployed by a company must: enable the votes to be gathered in a manner that permits their subsequent verification; and permit the tallied votes to be presented to the corporation without it being possible for the corporation to identify how each shareholder or group of shareholders voted. In the hope that this aspect of the law will be looked into in the near future, the reform suggested here should provide a good legal template on which public companies may deploy communication facilities in the conduct of general meetings.

Conclusion

In her recent company legislation reform, Nigeria, for the first time, infused the use of ICT into the conduct of shareholders' general meetings. Sadly, the legislation limits their deployment to private companies. In interrogating the appropriateness of excluding public companies from conducting general meetings by electronic means, this article examined the theoretical basis for deploying ICT in corporate governance, and argued that public companies, given their ownership profiles, should have been allowed to deploy ICT in conducting their general meetings. It reviewed developments in other jurisdictions where such integration has been effected. Following a review of the development in the telecoms sector in Nigeria, the article concludes that the current position taken by Nigeria is misinformed and should be reversed. It recommends the sort of reform that should be undertaken in this area in order to ensure a meaningful integration of ICT that also sets minimum standards for public companies. On the whole, the article takes the position that permitting dispersed shareholders of public companies to attend and participate in general meeting by electronic means will help reinforce the exercise of their participatory rights and liberate minority shareholders, who remain passive and apathetic to participation in governance. This author believes that, by liberalizing participation, the ensuing increased participation by shareholders may induce corporate managers to be more sensitive to shareholders' needs and run their corporation with a renewed sense of accountability. More importantly, dispersed minority shareholders may incrementally become more visible and coordinated, and ultimately constitute a viable force in engendering a new culture of corporate governance that is responsive and beneficial to all stakeholders.

Competing interests. None

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