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Division of Powers Between Corporate Organs in Public Companies: A Comparative Perspective

Dr. Felix C. Amadi
LLB, LLM, BL, PhD (Nigeria), ACIArb (Nigeria), Lecturer, Faculty of Law, Rivers State University, Port Harcourt, Nigeria; Solicitor and Advocate of the Supreme Court of Nigeria

Gogo G. Otuturu
LL.B, LL.M, B.L, ACIArb (Nigeria), PhD Candidate (Rivers State University); Lecturer, Faculty of Law, Niger Delta University, Wilberforce Island, Bayelsa State, Nigeria

Abstract
An incorporated company has neither body nor mind of its own. It can only exercise such powers as it possesses through the directors and other organs empowered by the articles to act on its behalf. This paper examines the division of powers between corporate organs in public companies in three jurisdictions, namely, Nigeria, the United States of America and Germany. It states that the German model has marked differences from the Nigerian and American models. It concludes that German corporation law shows more concern for workers as the principle of codetermination demonstrates. However, the management board which is the organ responsible for formulating corporate policy and transacting corporate business is responsible only to a supervisory board rather than to account directly to the shareholders for its conduct as in Nigeria and the United States. It suggests more participation of shareholders and workers in corporate governance in Nigeria.
Keywords: directors, corporate organs, corporate powers, shareholders, supervisors

I. Introduction

An incorporated company has been aptly described as a mere "abstraction."[1] If so, the legal personality enjoyed by an incorporated company is a legal fiction. This is because an incorporated company has neither body nor mind of its own. It can only exercise such powers as it possesses through the instrumentality of human beings who constitute the organs, officers and agents of the company.[2]

In the case of a private company, the shareholders and the directors are usually the same persons.[3] However, in a public company, the directors may have few shares in the company or they may not have any shares in the company, so that management of the company is divorced from its ownership.[4] It is to be noted, at this juncture, that the public company in English law is the equivalent of the publicly owned corporation in American law and the AG (*Aktiengesellschaft*) in German law.[5]

The separation of ownership from management of a company has brought into sharp focus the fundamental divergence between the interests of the shareholders and the interests of the board of directors. In the shareholder's case, these interests include his desire to receive dividends and to have some power of decision over the activities of the company. These interests necessarily conflict with those of the board of directors, which encompass retaining a sufficient part of the annual profits for expansion, investment and other business purposes. Moreover, most boards of directors do not welcome shareholder participation in corporate management.[6]

This paper examines the division of powers between corporate organs in public companies. Three models of corporate management are examined. The first is the English/Nigerian model which derives mainly from the common law. The second is the American model which deviates slightly from the English model. The third is the German model which has marked differences from the English and American models.

The paper states that German corporation law shows greater concern for workers as the principle of codetermination demonstrates. However, the management board which is the organ responsible for formulating corporate policy and transacting corporate business is responsible only to a supervisory board rather than to account directly to the shareholders for its conduct as in Nigeria, England and the United States. It suggests more participation of shareholders and workers in corporate governance in Nigeria.

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1 *Lenard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd* (1915) A.C. 705 at 713 [Lord Haldane]
2 *Ayodele James v. Mid-Motors (Nig) Co. Ltd* (1975) 11-12 SC 31
3 AR Agom, "Shareholders Activism in Corporate Governance" (2000) 4(1) *Modern Practice Journal of Finance and Investment Law* 252, 255
4 GG Otuturu, "Legal Framework for the Management of Modern Companies" (2010) 1(2) *Business Law Review* 50, 51
5 LCB Gower, "Some Contrasts between British and American Corporation Law" (1956) 69 *Harvard Law Review* 1369, 1376; Ernest C. Steefel and Bernhard von Falkenhausen, "The New German Stock Corporation Law" (1967) 52 *Cornell Law Quarterly* 518.
6 D. Berger, "Shareholder Rights under German Stock Corporation Act of 1965" (1970) 38 *Fordham Law Review* 687, 688.

II. The Nigerian Model

The Nigerian model derives principally from the common law of England. At common law, the agency theory was applied to the management of partnerships and incorporated companies. In the case of a partnership, each partner was presumed to be an agent of the others in the management of the business. In the case of an incorporated company, it was presumed that the general meeting was the company itself and that the directors were mere agents subject to the control of the members in general meeting.[1]

Thus, in *A-G v. Davy*[2] Hardwicke LC said, "It cannot be disputed that whenever a certain number are incorporated a major part of them may do any corporate act; so if all are summoned, and part appear, a major part of those that appear may do a corporate act." This principle is said to be at the root of the rule in *Foss v. Harbottle*[3] where Wigram V-C referred to the members in general meeting as "the supreme governing body."[4]

Accordingly, in *Isle of Wright Railway v. Tahourdin*[5] the Court of Appeal refused the directors of a statutory company an injunction to restrain the holding of the general meeting aimed at appointing a committee to reorganize the management of the company. Cotton LJ said:

> ***It is a very strange thing indeed to prevent shareholders from holding a meeting of the company when such a meeting is the only way in which they can interfere if the majority of them think that the cause taken by the directors in a matter intra vires the directors is not for the benefit of the company***.[6]

However, in *Automatic Self-Cleansing Filter Syndicate v. Cuminghame*[7] where the articles vested the power to manage the company in the board of directors, the Court of Appeal rejected the contention by the members in general meeting that the articles are subject to the general rule that agents must obey the direction of the their principals and held that where powers of management had been vested in the board of directors, the general meeting could not interfere with their exercise. The court explained that in such a case, the articles constitute a contract by which the members had agreed that the "directors and directors alone shall manage."

The decision in the *cuminghame case* marked the beginning of the departure from the old concept which regarded the members in general meeting as constituting "the company" itself and the directors as their "agents."[8] This new approach, which appears to have been generally accepted at the end of the nineteenth century, is that where the relevant articles vest the general management of the company in the board of directors, the general meeting cannot interfere with a decision of the board of directors unless they are acting contrary to the provisions of the Act or the articles.[9]

The modern position of the law was brilliantly formulated by the Court of Appeal in *Shaw & Sons (Salford) Ltd v. Shaw*[10] where Geer LJ said:

> ***A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors; certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors usurp the powers vested in the general body of shareholders.***[11]

The Nigerian *Companies Act 1968*, like the English *Companies Act 1948*, did not reflect the development in the common law. Article 80 of Table A in the First Schedule to the *Companies Act 1968*[12] provides to the effect that "the business of the company shall be managed by the board of directors ... who may exercise all such powers of the company as are not, by the Act or by these regulations required to be exercised by the company in general meeting, subject, nevertheless, to any of these regulations, to the provisions of the Act and to such regulations, not been inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting ..."

However, the developments in the common law were adopted and applied by the appellate courts in Nigeria[13] and

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1 PL Davies, *Gower and Davies' Principles of Modern Company Law* (7ed, Sweet &Maxwell, 2003) 300
2 (1971) 2 Atk 212
3 (1943) 2 Hare 461
4 Ibid 493
5 (1883) 25 Ch. 320
6 Ibid 329
7 (1906) 2 Ch. 34
8 LS Sealy, *Cases and Materials in Company Law* (6ed, Butterworths, 1996) 211
9 *Quin & Axtens v. Salmon* (1909) 1 Ch. 311 [CA]; (1909) AC 442 [HL]
10 (1935) 2 KB 113 [CA]
11 Ibid 134
12 Article 80 of Table A of the Nigerian *Companies Act 1968* is in *pari materia* with Article 80 Table A of the English *Companies Act 1948*.
13 *Ukpilla Cement Factory Co. Ltd v. Ugiekhume* (1979) 1 FCA 63 [CA]; *Okeowo v. Migliore* (1979) 11 SC 138 [SC]

were codified in the *Companies and Allied Matters Act*.[1] Section 63 of the Act now provides as follows:

> ***(1) A company shall act through its members in general meeting or its board of directors or through its officers or agents, appointed by, or under authority derived from, the members in general meeting or the board of directors.***
>
> ***(2) Subject to the provisions of this Act, the respective powers of the members in general meeting and the board of directors shall be determined by the company's articles.***

Thus, in line with the position in England,[2] the Act empowers a company, by its articles, to create two main organs for the purpose of exercising its powers. These are the board of directors and the members in general meeting. It has been stated, quite correctly, that what the Act has done is to codify the relevant common law principles and also the relevant articles in Table A allowing each organ independent rights to exercise its powers in accordance with the Act.[3] It is intended to examine the respective powers of the board of directors and the members in general meeting.

A. Board of Directors:

The *Companies and Allied Matters Act,* like its English *Companies Act*, provides that "except as otherwise provided in the company's articles, the business of the company shall be managed by the board of directors who may exercise all such powers as are not required by the Act or the articles to be performed by the members in general meeting."[4] Thus the powers of the company are shared between the members in general meeting and the board of directors.

The Act also provides that "when acting within the powers conferred on them by the Act or the articles, the board of directors shall not be bound to obey the directions or instructions of the general meeting: provided that they acted in good faith and with due diligence."[5] This proviso invariably gives the majority of shareholders in general meeting some supervisory powers or control over the activities of the board of directors so long as such supervision or control is not contrary to any provisions of the Act or the articles of association.

However, the board of directors are not bound to obey the directions or instructions of the general meeting when they are acting in good faith and with due diligence. In other words, the general meeting cannot interfere in the management of the business of the company when the board of directors are acting in good faith and with due diligence.

Thus in *Automatic Self-Cleansing Filter Syndicate Co. Ltd. v. Cunninghame (supra)* the members in general meeting directed the sale of the assets of the company by an ordinary resolution contrary to a special resolution required by the articles. It was held that the board of directors were not bound to obey the directions. The Court of Appeal stated that the division of powers between the board of directors and the general meeting depended entirely on the construction of the articles and that where powers had been vested in the board of directors, the general meeting could not interfere with their exercise.

Although board members are elected by the members in general meeting to represent them as a group, legally speaking, they are not agents required to carry out the direct orders of the members in general meeting. They are more akin to elected members of parliament who represent their constituencies but make decisions according to their own best judgement.[6]

In practice, the specific matters for which the board of directors has responsibility include the following:

(a) Defining the company's strategic goals and ensuring that its human and financial resources are effectively deployed towards attaining those goals;

(b) Overseeing the effective performance of the management in order to protect and enhance shareholder value and to meet the company's obligations to its employees and other stakeholders;

(c) Ensuring that the company carries on its business in accordance with its Articles and Memorandum of Association and in conformity with the laws of the country;

(d) Defining a framework for the delegation of its authority or duties to Management specifying matters that may be delegated and those reserved for the Board;

(e) Observing the highest ethical standards and on an environmentally sustainable basis.[7]

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[1] Cap C20*, Laws of the Federation of Nigeria, 2004* (hereinafter simply referred to as CAMA).

[2] See the English *Companies Act 1985* (as amended by the *Companies Act 1989*), Article 70 of Table A, which contains similar provisions. The *Companies Act 1985* has been replaced by the *Companies Act 2006,* which makes the powers of the directors only "subject to the articles"; see Article 4 of the Model Articles.

[3] EM Asomugha, *Company Law in Nigeria under the Companies and Allied Matters Act* (Tona Micro Publishers Ltd, 1994) 50; ; EO Akanki (ed), *Essays on Company Law* (University of Lagos Press, 1992) 116; JO Orojo, *Company Law and Practice in Nigeria* (5ed, LexisNexis, 2008) 99.

[4] CAMA, s. 63(3)

[5] Ibid, s. 63(4).

[6] Otuturu (n4) 52

[7] *Code of Corporate Governance for Public Companies in Nigeria* (Securities and Exchange Commission 2011) 10; see also OA Osunbor, *The Bank Director and the Law* (Financial Institutions Training Centre, 2008) 90.

B. General Meeting:

The powers reserved to the members in general meeting by the Act are enormous.[1] The shareholders participate in management of the company through the annual general meetings of the company where they exercise their right to vote and to have a say in major strategic decisions of the company. For example, decisions of the board of directors on mergers and acquisitions,[2] declaration of dividends,[3] capitalization of profits and reserves[4] and voluntary winding up[5] are subject to approval by the members in general meeting.

The shareholders also elect the directors of the company[6] at the annual general meeting. This power to elect directors also carries with it the power to remove[7] or refuse to re-elect directors with whose performance they are not satisfied.[8] This power of the members in general meeting to control the exercise of directors' powers was succinctly stated by Greer LJ in the English case of *Shaw & Sons (Salford) Ltd v. Shaw (supra)* in the following words:

> ***[T]he only way in which the general body of shareholders can control the exercise of the powers vested by the articles in the directors is by altering the articles, or if the opportunity arises under the articles, by refusing to re-elect the directors whose action they disapprove.***[9]

However, the power of the members in general meeting to alter the articles[10] is subject to section 63(6) of the Act which provides that "no alteration of the articles shall invalidate any prior act of the board of directors which would have been valid if that alteration had not been made." The effect of this subsection is that an alteration cannot be retroactive. Thus, the general meeting cannot alter the articles so as to invalidate what was valid at the time it was done.[11] Also the power of the general meeting to remove a director is without prejudice to the director's right to sue for damages.[12]

In addition, section 63 provides specific instances where the members in general meeting may exercise their supervisory powers over the activities of the board of directors. It provides as follows:

> ***Notwithstanding the provision of subsection (3) of this section, the members in general meeting may –***
>
> ***(a) Act in any matter if the board of directors are disqualified or are unable to act because of a deadlock on the board of directors or otherwise;***
>
> ***(b) Institute legal proceedings in the name and on behalf of the company, if the board of directors refuse or neglect to do so;***
>
> ***(c) Confirm or ratify any action taken by the board of directors; or***
>
> ***(d) Make recommendations to the board of directors regarding actions to be taken by the board.***[13]

The first instance is where the board of directors are disqualified or unable to act because of a deadlock on the board. This is a codification of the decision in the English case of *Barron v. Potter*[14] where the articles gave the directors power to appoint an additional director and, owing to differences between the directors, no board meeting could be held for that purpose. It was held that the general meeting could appoint additional directors.

The second instance is where the board of directors refuse or neglect to institute legal proceedings in the name or on behalf of the company. In *Ladejobi v. Odutola Holdings Ltd*[15] one of the issues that came up for determination was who, as between the board of directors and the general meeting, had the power to authorize the company to commence action in court in the light of section 63 of the Act. The Court of Appeal held that although by virtue of subsection (2) of section 63, the power to manage the business of the company is vested in the board of directors, by virtue of subsection (5) all the same or nevertheless, the general meeting retains the power to determine whether legal proceedings may be instituted in the name of the company. Ademola JCA (as he then was) said:

> ***In construing the whole of section 63 of CAMA, the irresistible conclusion is that the powers of management or control of the company in so far as they affect the institution of litigation***

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1 See generally, RR Pennington, *Company Law* (2ed, Butterworths, 1967) 481.
2 *Investment and Securities Act 2007*, s. 121(5); see also *Regulation of Mergers, Takeovers, Acquisitions and Combinations*, rule 228(g).
3 CAMA, s. 379
4 Ibid, s. 383
5 Ibid, s. 457
6 Ibid, s. 248
7 Ibid, s. 262
8 KB Omidire, "The Rights and Responsibilities of Shareholders at Annual General Meetings" (1999) 1 *Modus International Law and Business Quarterly* 18, 19
9 Supra 464
10 CAMA, s. 48
11 Orojo (n22) 101
12 *Southern Foundries Ltd v. Shirlaw* (1940) AC 701
13 CAMA, s. 63(5)
14 (1914) Ch. 895
15 (2002) 3 NWLR (Pt. 753) 121

in the company's name are vested in the general meeting.[1]

The third instance is to ratify or confirm any action taken by the board of directors. In the case of *Bamford v. Bamford*[2] the directors of Bamford Ltd allotted 50, 000 unissued shares of the company to F & H Company to avoid a takeover by JC Bamford (Excavators) Ltd. The articles gave the directors power to make allotment. A director who voted against the resolution sought a declaration that the allotment had not been made for the company's benefit. Before the action was heard, the action was ratified by the general meeting.

The English Court of Appeal held that the allotment was valid and had been properly ratified by the general meeting. The court stated that, provided the directors' act is not *ultra vires*, even if in breach of duty, it may, after full disclosure, be ratified by the company in general meeting.

The final instance is to make recommendations to the board of directors regarding action to be taken by the board of directors. However, as the term "recommendations" suggests, and in view of section 63(4) of the Act, the board of directors are not bound to obey such recommendations provided they are acting in good faith and with due diligence unless the resolution is by a special resolution of the in general meeting which will amount to an alteration of the articles.[3]

It has also been argued that the power to remove directors[4] overlaps with the power to give instruction. This is because the disgruntled shareholders can say to the directors, "If you choose not to follow our ways, we will by ordinary majority seek to remove you from office." This, in effect, can induce the directors to follow the instructions of the general meeting.[5]

III. The American Model

American corporation law, unlike its Nigerian and English counterparts, vary from one State to another. Most state statutes follow closely the English model by providing that the business of the corporation "shall be managed by a board of directors." These provisions have been interpreted to mean that the directors must become involved in the detailed administration of the corporation's affairs.[6]

However, recent developments have made such an expectation unreasonable in modern corporations. Notable among these developments is the advent of outside directors, who are individuals from outside the corporate management and not otherwise involved with the corporation.[7]

A. Board of Directors:

The *Revised Model Business Corporation Act*[8] seeks to clarify board responsibility and bring it into accord with the realities of modern corporations, particularly large corporations. Section 18.01(b) now provides as follows:

> ***All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation shall be managed under the direction of a board of directors, subject to any limitation set forth in the articles of incorporation.***

The new provisions have eliminated any ambiguity regarding the role of the board of directors in formulating major management policy as opposed to direct day to day management of the corporation. Generally, the board's responsibility includes the following:

(a) Financial decisions such as declaration and payment of dividends to shareholders or the issue of authorized shares or bonds;

(b) Authorization of major corporate policy decisions such as the sale or lease of corporate assets outside the regular course of business, the determination of new product lines and the overseeing of major contract negotiations and labour-management negotiations;

(c) Appointment, supervision and removal of corporate officers and other managerial employees and the determination of their remuneration.[9]

Apart from the initial directors who may be named in the articles, directors are elected at the annual shareholders' meeting and usually hold office until the next annual meeting. However, section 8.06 of the RMBCA now allows corporations with nine or more members to set staggered two or three year terms for directors.

Most state statutes required a minimum of three directors. However, section 8.03(a) of the RMBCA now allows a corporation to appoint only one director. This eliminates the need for single-shareholder corporations to

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1 Ibid 158-159
2 (1970) Ch. 212
3 PL Davies and SE Worthington, *Davies and Gower's Principles of Modern Company Law* (9ed, Sweet & Maxwell, 2012) 389
4 The power to remove directors by ordinary resolution is contained in the English *Companies Act 2006*, s. 168.
5 Davies and Worthington (n44) 389
6 TW Dunfee, *et al, Modern Business Law and the Regulatory Environment* (McGraw-Hill Inc., 1996) 784
7 Ibid
8 *Revised Model Business Corporation Act* (*1985 Revision*) hereinafter simply referred to as RMBCA
9 KW Clarkson and others*, West's Business Law: Text, Cases, Legal and Regulatory Environment* (5ed, West Publishing Company 1991) 787

enlist superfluous directors.[1] The RMBCA in section 8.01(c) also permits small corporations with fewer than fifty shareholders to dispense with the board of directors.

B. General Meeting:

In large corporations, shareholders have no direct control over a corporation's operations. They cannot command the board of directors to undertake an activity or decide a matter in any particular way.[2]

Although ultimate control resides with the shareholders, they usually do not participate actively in corporate affairs. Under the RMBCA, the shareholders' participation in corporate management is confined to the following areas:

(a) The annual election or removal of directors;[3]

(b) The approval of certain extraordinary transactions such as amendment of the articles of incorporation,[4] mergers and acquisitions,[5] sale of all or substantially all of the corporation's assets[6] and voluntary dissolution of the corporation.[7]

Apart from these statutory roles, shareholders do not participate actively in corporate management. If they are dissatisfied with their investment, they may sell their shares. However, if the directors have violated the articles or otherwise incurred a liability towards the investors, the shareholders may bring a derivative suit against the directors to recover any loss on behalf of the corporation or to recoup any loss to their investment.[8]

IV. The German Model

A board of directors in the English and American sense, which directs the affairs of a company, is unknown to German law.[9] Under the German *Stock Corporation Act (Aktiengesetz)*[10] the power to manage the company is divided among three institutions. These are the management board (*Vorstand*), the supervisory board (*Aufsichtsrat*) and the shareholders' meeting (*Hauptversammlung*).[11]

The power to manage the day to day business of the company and to represent the company, in and out of court, in its dealings with third parties is exclusively vested in the management board. The functions of the supervisory board, as the name clearly suggests, are restricted to the supervision of the management board. The supervisory board are in turn dependent on the shareholders, who usually act through resolutions passed at the shareholders' meeting.[12]

Members of the management board may not simultaneously sit in the supervisory board and vice versa.[13] The supervisory board may appoint one or more of its members to the management board if necessary to fill a vacancy there. However, such appointment may not last longer than one year.

It is necessary to examine the composition and powers of the management board, the supervisory board and the shareholders' meeting. This will help to bring out the major differences between the management structure of companies under English and American law on the one hand and the management structure of companies under German law.

A. Management Board

The effective power to formulate corporate policy and to conduct corporate business is vested in the management board, an institutionalized counterpart to the officers of the American corporation. The German management board, however, has far greater authority than its American counterpart.

The members of the management board are appointed by the supervisory board for a maximum term of five years, after which they may be reappointed for unlimited, five-year successive periods.[14] The articles of association of most large companies, however, have a mandatory retirement clause for members of the management board, effective after they have reached their sixty-fifth birthday.

It is permissible to have only one manager for the corporation instead of a whole board. If a board is appointed,

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1 Davies and Worthington (n44) 785
2 Ibid 775
3 RMBCA, s. 8.08
4 Ibid, s. 10.03
5 Ibid, s. 11.03
6 Ibid, s. 12.02
7 Ibid, s. 14.02
8 Davies and Worthington (n44) 775
9 Under German law, the term "director" always designates, contrary to English and American practice, a person who holds a leading managerial position, who may or may not belong to the management board.
10 *Aktiengesetz of 1965* (*Stock Corporation Act of 1965*) hereinafter simply referred to as AktG.
11 Berger (n6) 691
12 Ernest C. Steefel and Bernhard von Falkenhausen, "The New German Stock Corporation Law" (1967) 52 *Cornell Law Quarterly* 518, 526-527
13 AktG, s. 105(1)
14 Ibid, s. 84(1)

a chairman may be selected from among its members by the supervisory board. He cannot, however, be elected by the managers themselves.

Managers may be dismissed by the supervisory board for "important reasons" among which the statute expressly includes serious violations of duty, and incompetence.[1] The statute also classifies a lack of confidence vote as an important reason for dismissal, unless the vote is arbitrary.[2]

The power of the management board to represent the corporation is practically unlimited. Unlike many American corporation statutes, the German *Stock Corporation Act* has no provision making the validity of certain transactions subject to shareholder approval. There are only two exceptions. The first is the so-called "enterprise contract" by which a corporation, in effect, renounces its independence and submits itself to the domination of another enterprise, which must be approved by seventy-five per cent of the share capital represented at the shareholders' meeting.[3] The second exception applies to transactions between the corporation and individual board members. In such transactions, as well as in civil litigation between board members and their corporation, the latter can be represented by the supervisory board.[4]

However, the articles may provide that transactions of a certain magnitude such as the grant or acceptance of loans beyond a certain sum should be executed only with the approval of the supervisory board. Such restrictions bind the management board, however, only with regard to the corporation but they are unenforceable against third parties. In other words, there is no *ultra vires* doctrine in German law.[5]

B. Supervisory Board

The supervisory board must consist of at least three members and at most twenty-one members as may be provided in the articles.[6] However, the total number of members must be divisible by three, since one-third of the members of the supervisory board must be elected by the labour force. Members comprising the other two-thirds of the supervisory board are elected by the shareholders.[7]

Before the principle of codetermination was introduced into German law, all the members of the supervisory board were elected by the shareholders. Now this is true only in "family corporations" all the shares of which are exclusively held by one natural person or the members of the same family. In addition, no labour representatives are required where a corporation has fewer than five employees. In other corporations, one-third of the members of the supervisory board must consist of labour representatives who are elected by the employees of the corporation. Employees with managerial functions are disqualified from serving as labour representatives on the supervisor y board.[8]

The position is different in corporations with more than 1, 000 employees which are engaged in coal mining or iron and steel corporations. In such corporations, the supervisory board consists of an equal number of shareholder and labour representatives and one additional member mutually agreed upon by the two groups. If the two groups cannot agree upon a mutually acceptable person, then the additional member is elected by the shareholders' meeting.[9]

Members of the supervisory board may not be elected for a period longer than four years. Renewals are both possible and customary. Even before the expiration of his term, a member of the supervisory board elected by the shareholders may be removed by them with or without cause by a vote of at least seventy-five percent of the shares represented at the meeting. Labour representatives can also be recalled without cause by a vote of seventy-five percent of the labour force. This percentage may be reduced to a simple majority by the articles of association but cannot be increased.[10]

The supervisory board is not permitted to participate actively in the management of the corporation. Its two main functions are the appointment or removal of the members of the management board and the supervision of the management board.[11] The duty of the supervisory board to supervise the activities of the management board corresponds to the duty of the management board to supply the supervisory board with complete and correct information.

The supervisory board has the right to inspect fully corporate books, records and inventories.[12] It has the statutory duty to call a shareholders' meeting whenever the corporation's welfare requires it. It also has two further

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1 Ibid, s. 84(2)
2 Ibid, s. 84(3)
3 Ibid, s. 293(1)
4 Ibid, s. 112
5 Steefel and Falkenhausen (n62) 520
6 AktG, s. 95
7 Ibid, s. 101(1)
8 Eckert "Shareholders and Management: A Comparative View of Some Corporate Problems in the United States and Germany" (1967) 46 Iowa L R. 12 at pp. 25-26
9 Ibid
10 AktG, s. 103(1)
11 Ibid, s. 111(1)
12 Ibid, s. 111(2)

statutory duties. The first is to represent the corporation in transactions and suits between the corporation and the management board. The second is the appointment and dismissal of members of the management board.

C. Shareholders' Meeting

A typical shareholders' meeting under English and American law has been described as a kind of ancient meaningless ritual, like some ceremonies that go on with the mace in parliament, at which management paints a rosy picture and delivers panegyrics to itself and the shareholders.[1] However, the position under German law is quite different in that the shareholders' meeting in German corporation is an institution with statutory powers and restrictions.

There are a number of important transactions for which shareholder approval is required by statute. Thus approval by seventy-five percent of the shares represented at the meeting is necessary to amend the articles of association, to dissolve or reorganize the corporation, to merge it with another corporation, to transfer corporate assets, and to purchase assets within two years after incorporation, the value of which exceeds ten percent of the capital stock.[2]

Other functions allocated to the shareholders' meeting which require only a simple majority of votes actually cast are the declaration of dividends, appointment and dismissal of the supervisory board, the appointment of auditors for the preparation of the annual report or for a special investigation, and the annual exoneration of managers and supervisors.[3] Questions of business management are outside the jurisdiction of the shareholders' meeting and may be decided by it only upon the request of the management board.[4]

There are both regular and special shareholders' meetings. Regular meetings take place once a year. The agenda of such a meeting is normally within the discretion of the management board. However, the agenda must contain two mandatory items, namely the disposition of the final profits of the financial year concerned, and the vote of confidence or denial of such vote for the management board and the supervisory board.[5]

In addition, shareholders representing five percent or more of the stated capital of the corporation may compel the management board to put additional items on the agenda and to submit them to the shareholders' meeting. Special meetings are called either by the management board or the supervisory board whenever the body concerned, in its discretion, considers such a meeting necessary for the benefit of the corporation. Shareholders representing five percent or more of the corporate capital may also demand the call of a special meeting at any time.[6]

In general, the chairman of the supervisory board is also the chairman of the shareholders' meeting. He has the right and the duty to preserve the proper function of the meeting, and he may exclude shareholders from the meeting who disturb its proper conduct.[7]

Unlike the practice under English and American law, German law does not have any requirements as to quorum, unless the articles of association expressly provide for them. Thus a duly convened meeting may pass binding resolutions, even if only a minority of the shares are represented therein.[8]

However, shareholders' resolutions must be set forth in a record certified by a judge or a *notar*.[9] The record must state the location and the date of the meeting and the name of the judge or *notar*. Shareholders' resolutions which are not so certified are void.[10] After the meeting, the management board must file a certified copy of such record with the Commercial Registrar.[11]

V. Suggestions for Reform

A modified version of the German model is recommended for Nigeria and other Commonwealth jurisdictions. Under this model, companies regulations should make it mandatory for all public companies and multinational corporations to provide for a two-tier board in their articles of associations, like the German model, but the supervisory board should be made to account directly to the general meeting, like the English model.

The proposed regulations should ensure that membership of the management board and the supervisory board does not overlap and it should determine the functions of the management board and the supervisory board. The regulations could borrow a leaf from the European Community (*Societas Europaea*) SE Regulations with respect

1 Berger (n6) 698
2 AktG, s. 52
3 Ibid, s. 119(1)
4 Ibid, s. 119(2)
5 Ibid, s. 120
6 Ibid, s. 122(2)
7 Steefel and Falkenhausen (n62) 540
8 Ibid 541
9 The position of a *notar* in German law is not comparable with that of a Nigerian notary public. His functions go beyond the mere authentication of signatures. The German *notar* is responsible for the validity of the documents executed in his office, and he must give advice to the parties regarding the legal effects of their transactions.
10 AktG, s. 241
11 Ibid, s. 230(4). The Commercial Registrar is the equivalent of the Registrar of Companies under English law and the Corporate Affairs Commission under Nigerian law.

to European Companies.[1]

Under the SE Regulations, an SE (European Company) has the option to choose in its articles whether to have a one-tier board or a two-tier board, consisting of a management organ and a supervisory organ.[2] If not for the withdrawal of the United Kingdom from the European Union, the implementation of the SE Regulations in Britain could possibly trigger corporate law reforms in Nigeria and other Commonwealth countries.

It is also suggested that there should be more participation of shareholders in corporate management other than merely participating in annual general meetings. In this regard, the recommendation of the joint committee of the Securities and Exchange Commission and the Corporate Affairs Commission that shareholders holding more than 20% of the total issued capital of a public company should have a representative on the board of directors[3] should be given statutory reinforcement. This will give minority shareholders the opportunity to have a say in the management of public companies.

VI. Conclusion

The German Stock Corporation Act (*Aktiengesetz*) makes it mandatory for all public companies (*Aktiengesellschaft*) to have a two-tier board known as the management board with managerial functions and the supervisory board with supervisory functions. By contrast, public companies in England and America have a one-tier board of directors with both managerial and supervisory functions. Nigeria and other Commonwealth jurisdictions follow the English model.

German corporation law shows greater concern for workers as the principle of codetermination demonstrates. Under the *Aktiengesetz*, one-third of the members of the supervisory board are representatives of the workforce. By contrast, there is no recognition of the workforce in the organic structure of public companies under English and American laws, although the board of directors may consider their interests in making decisions.[4]

However, under the *Aktiengesetz*, the management board which is the organ responsible for formulating corporate policy and transacting corporate business is responsible only to the supervisory board rather than to account directly to the shareholders for its conduct. This is the paradox in German corporation law.

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[1] Davies (n7) 317-318

[2] Council Regulations 2157/2001/EC, Article 38

[3] *Code of Best Practice on Corporate Governance in Nigeria* (Securities and Exchange Commission and Corporate Affairs Commission, 2003) 20

[4] CAMA, s. 279(4); see also JH Farrar and BM Hannigan, *Farrar's Company Law* (4ed, London: Butterworths, 1998) 303.

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