

# Accountability during the Incorporation of Public and Private Limited Companies under Ohada Law

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**Abstract:** This work sets out to evaluate the OHADA Uniform Act's laws on accountability in Private and Public Limited Companies. Normally, laws which provide for effective accountability, guarantee the smooth functioning and stability of companies since its rules work at averting all forms of mismanagements. The inspiration of this work stems from the realization that, levels of accountability in these companies are still wanting. Hitherto, companies are plagued with vices of obscured activities, fake transactions, non-transparent reporting and acute dishonesty by its organs. It is therefore baffling that, these are still prevalent despite the existence of the Uniform Act's laws which contains accountability mechanism aimed at dispelling all these forms of corporate transgressions. From this arose lingering doubts as to how these laws are.

This leads one to the assumption that, these laws are not efficacious in guaranteeing the effectiveness of this aspect of corporate governance. What then are these techniques and how effective are they? This work highlights and analyses these mechanisms and evaluates the extent of their efficacy. We therefore propose that, these mechanisms be reviewed and amended to be more authoritative, unequivocal, specific, realistic and punitive such that, they will ensure better levels of rendering accountability. In consequence, these companies shall flourish, achieve their desired objectives, experience maximum productivity and generate more profit.

## I. INTRODUCTION

The OHADA uniform Act (OUA) contains several provisions which pass as control mechanisms regulating the affairs of public and private limited companies. These elements are geared towards providing means of rendering accountability. They ensure that avenues for verifying whether company executives have performed their duties or not are available to shareholders and other such authorities of interest. It shall also provide a means by which members of the company and the company itself are accountable for their acts. These mechanisms cannot be complete without consequences provided if not scrupulously followed. Therefore, this article will elaborate on the early stages of the company's creation.

To wit, accountability is an instrument of controlling the company and its executives. The smaller the company's power to render proper accountability the bigger the risk of managers only seeking to serve themselves and their

interests.<sup>1</sup> Likewise, public and private limited companies being of public interest dictates that the public company as well as some third parties and stakeholders demand a certain degree of accountability from them.

Notwithstanding, our laws have not out rightly established a unified doctrine, as to what accountability consists, it can be extrapolated from various principles of transparency, due financial reporting and compliance with certain efficiency indicators provided in the uniform Acts.<sup>2</sup> It is therefore important that these mechanisms be examined at different stages of the company's exercise.

### 1.1 *The early stages of the company's formation*

According to the OHADA Uniform Act and under the OHADA law the formation of a company is contained in one document, known as the Article of Association. The English refer to this document as the "Memorandum of Association and Articles of Association"<sup>3</sup>. Under the OHADA Uniform Act the memorandum of Association and Articles of Association are the same. The articles of association of companies under OHADA law vary with the type of company<sup>4</sup>.

According to law no.017/011 of 12 July 2017 governing incorporation of public corporations in Cameroon, chapter II of this law, from sections 10-14, throws more light on the incorporation of public corporations which shall be incorporated as a limited liability company in accordance with the OHADA uniform Act, relating to the law on commercial companies and economic interest groups, as well as the provisions of this law<sup>5</sup>. The shares held by the state, public enterprises and / or

<sup>1</sup>Natalya MOSUNOVA, (2014) "the content of accountability in corporate Governance", Russian law Reform, Vol. 2 University of East Anglia, <https://www.researchgate.net/publication/28160660>, Accessed on the 5<sup>th</sup> of August 2021

<sup>2</sup>Ekome, E., (2017), "Company law", first semester lecture notes, FSMS, University of Buea.

<sup>3</sup>Njeufack R, T., (2006), "La Règle de la majorité en droit des sociétés commerciales OHADA", Annales de la faculté de Science Juridique et Politique, Université de Dschang, Tome 10, Pp 81-96.

<sup>4</sup>Refer Oumar SAMBE et Mamadou Ibra Diallo, (1998), "Guide pratique des sociétés Commerciales et Groupement d'Interet Economique (GIE) OHADA" Dakar Editions Comptables et Juridiques.

<sup>5</sup>Law No. 2017/11 of 12 July 2017 to Lay down the General Rules and Regulations Governing public corporations.

regional and local authorities in public corporations shall be registered shares. The shares owned by the state in public corporations shall be held on behalf of the state by the minister in charge of finance. The shares owed by a public enterprise or a regional or local authority in a limited liability company shall be held by executive organs of the public enterprise or local authority concerned. The shares in a public limited liability company jointly owned by the state, public enterprises and/or regional and local authorities shall be held by the organ specified in the Articles of incorporation<sup>6</sup>.

In addition, the managers will be accountable to the public corporation because they owned the property and shares of the company. The managers in the public corporations are accountable to the public enterprise. Property owned by a public limited liability company shall be public property with regards to the accountability of managers. And lastly, section 14 (1-3) states that public; public corporations shall be subject to registration in the Trade and Personal Property Credit Register. Any modifications in the configuration of the management organs, in particular the appointment or designation, resignation or dismissal of managers shall be registered in the Trade and Personal Property Credit Register. Any amendment to the articles of association well as the transfer of head office shall be advertised according to ordinary law rules. Following sections 125 of this law, this law which reflects the OHADA Uniform Act relating to the law on commercial companies and economic interest groups repeals Law No.99/16 of 22 December 1999<sup>7</sup> on General Rules and Regulations Governing Public Establishments and enterprises of the public and semipublic sector. Most of the provisions of this law applies mutatis mutandis to public and private limited companies.

### 1.1.1 Issuing a Notarized Statement of Subscription

Furthermore, the Articles of Association governs both the internal and external regulations of the company. The Articles of association governs the rights of the members and set out the manners in which a company should function. Meanwhile, under the company's ordinance, the Articles of Association must at least contain the company's name, the registrar's office, form of company, corporate objects, the identity of the founding share holders and the amount of their respective contributions, the share capital, the procedure on the transfer of shares, the powers conferred on its directors<sup>8</sup>. There are some aspects which are not included in the Articles of

Association, for example, the identity of the directors.<sup>9</sup> His identity is decided in a general meeting by the members of the company.<sup>10</sup> The difference between the Memorandum and the Articles of Association under the company's ordinance and the uniform Act is that, under the Uniform Act, mention is made of the duration of companies which is not the case with the company's Ordinance. According to the uniform Act, still under the Articles of Association, companies must not exceed 99 years.<sup>11</sup> The date of birth of a company must be stated and when such a company will come to an end.<sup>12</sup>

Generally, companies have a lifespan of 99 years which is renewable once. The existence of the company may be extended after expiration of its terms<sup>13</sup>. The OHADA uniform Act did not give any reasons for the limitation of the life span of a company. We would have preferred the system that existed in west Cameroon where a company could function forever. Limiting the lifespan of a company is disadvantageous because it may lead to the winding up of the company. The OHADA Legislator has however changed this provision by extending the lifespan of the company. Strictly speaking, our focus here is on a public and private limited company.

A public limited company can only come into existence when it has been incorporated and for this to happen, it must go through the phase of registration fulfilling to the latter, all the formalities prescribed by the uniform Act. The uniform Act on General commercial law has provisions on company formation requirements, and the most important of them all is that the company must be registered in the Trade and Personal Property credit Register or Register of commerce and security (TPPCR) or what we refer to as Registre du Commerce et du Credit Immobilier (RCCM) in French, within one month of

<sup>9</sup>(Article 13 of the UACCEIG) adopted on January 3<sup>rd</sup>, 2014.

<sup>10</sup>**The articles of association shall state forth:** the type of the company; its name followed, where applicable, by its acronym; the nature of its business and area of its activity, which constitutes its purpose; its headquarters; the duration of the company's existence; the identity of contributors of cash, and for each of them, the amount of their contribution, the number and value of securities allocated in exchange for each contribution; the identity of those that made contributions in kind, the nature and assessment of the contribution made by each of them, the number and value of securities allocated in exchange for each contribution; the identity of those who contribute services, the nature and duration of services provided by each of them, the number and value of securities allocated in exchange for each contribution; the identity of beneficiaries of special benefits and the nature thereof; the amount of stated capital; the number and value of securities issued, stating, where appropriate, the different categories of securities created; provisions relating to distribution of profits, constitution of reserves and distribution of liquidation surplus; its operational procedures

<sup>11</sup>Dickson, BRICE., (1994), "Introduction to French Law," London, Pitman, p.177.

<sup>12</sup>Boris MARTOR., et al, (2002), "Business Law in Africa: OHADA and the Harmonization process", London, Eversheds, Kogan page LTD P. 98.

<sup>13</sup>**Tabé Tabe, S.,** (2018), Understanding OHADA Company Law in Cameroon, 1st Ed, Bamenda, Ultratnet, 258 Pages.

<sup>6</sup>Law No. 96/06 of 18 January 1996 amending the Constitution of 2nd June 1972 revised by

Law No. 2008/001 of 14 April 2008.

<sup>7</sup>Law No. 99/16 of 22nd December 1999 as amended by Law No. 2017/011 of 12 July 2017 laying down general rules governing Public establishments and para-public companies.

<sup>8</sup>Ordinance No. 81/02 of 29th June 1981 relating to the Civil Status Registration Ordinance.

their formation<sup>14</sup>. This Register shall be kept by the court clerk of the competent court or the competent body in the state party and overseen by the judge of the court. A company being a virtual being depicts that such procedures and formalities relating to its formation be carried out by human agents. Additionally, certain contracts which are important to the realization of the company's formation must be entered into even before the company actually comes into existence<sup>15</sup>.

### 1.1.2 Evaluating Non-Cash Contributions

Nevertheless, because it has not acquired legal personality yet, it is void of the capacity to enter these contracts. An example of such contracts is when the company needs to acquire a realty (immovable property) to locate its headquarters or open its bank account it will be unwise and detrimental if the company must wait until full registration before it enters in these contracts<sup>16</sup>. In both cases, such procedures can only be carried out by persons whom the UA refers to as the company's founders or first members of its management<sup>17</sup>. Whatever the case, it is expected that they be held accountable for their actions in performing the duties expected of them during formation since it has huge impacts on the company<sup>18</sup>. In this light, the uniform act throws more light on this as seen below.

Public and private limited companies are commercial companies. These companies come after members individually or collectively raised the share capital as prescribed by the uniform Act. The minimum share capital for public and private limited companies are ten million francs and one million francs which are subject to any national laws to the contrary. Three types of contributions have been provided which are in cash, kind, and service. When the contributions are by cash, they must be fully subscribed for before the signing of the Articles of Association. A subscription bulletin is then issued by the founders of the company through allotment letters to each subscriber. This document is document serves as evidence of cash contribution to each subscriber. It also contains pertinent information

regarding the company, its shares, and the subscribers. The subscribers in a public limited company, have the obligation to pay at least one quarter of the value of their shares while those of a private limited company must pay at least 50 percent of the value of their shares at the time of subscription and then complete payment within three years. These funds must be deposited with the notary or held in a special account opened in the name of the company by a bank located in the member state where the company's registered office is located. It is only after these funds have been paid that a bank issues a certificate to a depositor to confirm his transaction.

Furthermore, the notary must also issue a notarized statement of subscription of payment to attest that the amount declared corresponds to that appearing in the subscription bulletin and also corresponds to that appearing in the subscription bulletin and also corresponds to that paid to the bank or that paid to him in case where payment was made to his office. The uniform Act refers to this certificate as a Notarized statement of subscription and payment. It must be appended with the deposit certificate of the bank and made available for examination by subscribers. This will go a long way at holding the founders and subscribers accountable since irregularities or inconsistent figures aimed at misleading on amounts paid or shares subscribed will be exposed for other subscribers to evaluate and examine. Granting of the depositor certificate and notarized subscription bulletin will also ensure that persons who subscribed for shares actually pay up the amount respecting the minimum quantum and through the right channels following the prescribed procedures<sup>19</sup>.

Furthermore, public and private limited companies share capital are raised through contributions by shareholders. The Uniform Act provides three methods of contributions which are either in kind, cash, or service. This begets that, non – cash contributions be evaluated to know their exact value since they cannot be quantified. Contributions in services are paid through effective provision of technical or professional knowledge even though this does not apply in public limited companies. This has gone a long way to encourage entrepreneurship since persons with sufficient skills can become part of a company even without having funds to contribute towards raising the share capital. However, the uniform Act does not categorically state how this form of contribution is evaluated. All that has been mentioned is that the OHADA Uniform Act will describe the contributions in the form of service and outline the terms and conditions of the payment. The uniform Act fails to provide means of effective evaluation given that, such contributions are being allocated shares that confer voting rights and the rights to share in the company's profit. An undervalued service contribution is a gateway for some of its contributors to escape accountability for the requirement of sufficient value for the shares they

<sup>14</sup>Modi Koko, D., (2018) "Company Law", first semester lecture notes, FSJP, University of Dschang

<sup>15</sup>Rose, F., (2009), *Nutshells, Company Law*, 7th Ed., London, Sweet and Maxwell, 136 Pages

<sup>16</sup>Nah Thomas, F., (2002), "Pre-Incorporation Contracts and the Impossibility of ratification under the Common Law- The Salutary Jettison of a Satisfying Principle by the Civil Law Inspired Uniform Act relating to Commercial Companies and Economic Interest Groups enacted by OHADA" *Annales de la Faculte des Science Juridiques et Politiques* Tome 6, Presse Universitaires d'Afriques (PUA), Pp 69-76.

<sup>17</sup>Martor, B. et al., (2002), *Business Law in Africa, OHADA and the Harmonisation Process*, 1st Ed, London, Eversheds, 356 Pages.

<sup>18</sup>Nah Thomas, F., (2020), "Corporate Criminal Responsibility" first semester lecture notes, FSJP, University of Dschang.

<sup>19</sup>Cozam, M Viandier. A et Deboissey F.L., (1999), *Droit des Societes*, 12th Ed., Paris, Litec, 485 Pages.

subscribed for. It is invidious with respect to other shareholders who must pay in cash. Contributions in kind refer to those non-cash contributions made by shareholders either by transferring to the company a real or personal property or granting the company a physical asset. They must, just like contributions in service be appraised for their cash value to be determined. The Uniform Act has obliged that, these contributions be made in full at the time of subscription. However, members shall assess contributions in kind, a good initiative that the Uniform Act has provided is the use of an in-kind contributor appraiser appointed by the competent court or by future members to crosscheck these evaluations by members. The assessment report produced by the appraiser shall be included in the uniform Act as an Appendix in the Articles of Association. As such, by doing this, they will be held responsible if it is discovered by other members that, they may have overvalued a contribution. The fact that they cross check evaluations made by the members will hold the members accountable if the value from their evaluation is not accurate or reflect the amounts pledged by subscribers. That notwithstanding, the uniform Act limits the appointment of an in-kind contributor in the case of a private limited company to only when the amount is more than five million francs, this is because it can give room to inaccurate evaluations. Members who believe that such an overvalue on the contribution will not be cross checked by an expert since the company's nature is that which doesn't oblige such appointment. This will have nefarious effects on raising the share capital and will be unfair to other shareholders who have to pay up the complete amount of their pledges.

#### *1.1.3 Authenticating Signatures of the Articles of Association by the Notary*

More so, the formalities of the uniform Act must be complied with and all-important information of Article 13 of the Uniform Act relating to Commercial Companies and Economic Interest Groups (UACC) must be enshrined in the Articles of Association for it reveals details of the company such as its object, its structure, its organs, and its objectives. To ensure transparency, all who have an interest in the company's formation must be aware of such essentialities, the Articles of Association must be established by notarized deed or by an act of private contract which must be certified and authenticated as true. The law also makes it imperative for all the subscribers or shareholders or their proxies to sign this document after the notarized statement of subscription and payment has been drawn up. It is from the date of the signature of this Article that the law recognizes that all conditions for a valid contract to form a company exist. The notary will have to authenticate the document to ensure that all the members have signed with consent. The document should, if drawn by private deed be made in many original copies and deposited for confirmation if various formalities required by the legislation in force have been met.

#### *1.1.4 Declaring Regularity and Conformity*

In addition, Founders declare regularity and conformity with respect to transactions entered into and with respect to rules and procedures of company formation.

##### *1.1.4.1 The Origin of Pre-Incorporation Contracts*

Moreover, Pre-incorporations contracts are the inevitable features of every new company. The fate of pre-incorporation contracts will depend on whether the contract was made on behalf of the company under formation or a fully formed company prior to registration. The starting point of the law which ensures accountability for such contracts in Article 106(2) which states that, "Acts and Commitments entered into by the founders of a company under the formation before it is incorporated shall be brought to the attention of the partners before they sign the Articles of Association. Such contracts shall be detailed in a statement referred to as Statement of Acts done and commitments made on behalf of the company under formation". This will enable the partners to know whether such contracts entered into by the founders were on behalf of the company or not. In which they shall hold the founders responsible for a breach of their duty to work in the best interest of the company.

##### *1.1.4.2 Compliance with Provisions of the Uniform Act*

Subsequently, In order to hold the founders accountable, they must file to the Trade and Personal Property Credit Registrar a declaration referred to as the Declaration of Regularity and Conformity, signed by all its authors. In the event of an amendment of the Articles of Association, it shall be signed by members of the management body. This declaration shall state all acts carried out by them and shall be verified if they are in conformity with the Uniform Act. If this document is not deposited and approved, the application for registration shall be rejected. It is however, unfortunate that this declaration is not required when the founders have already drawn and filed a statement of subscription and payment. Even though it could be inferred that, this was to promote bureaucratic flexibility, it still leaves room for manipulation by unscrupulous founders to hide their failure of performing a duty within the ambit of the law. A statement of subscription only shows financial records of funds deposited it is unwise to equate this to a document which carries information of general acts of founders.

Moreover, A company which makes public offerings is defined as one, in which to obtain funds, seeks investments from the public. Only a public limited company is allowed to issue securities and offer them to the public. They must also have a minimum share capital of fifty (50) million francs and must be administered by a Board of Directors. Subject to fulfillment of the procedural agreements and the three main conditions which are required as guarantees, the company making public offerings must prepare notices or circulars and publish in legal journal in the member state concerned. They must also

prepare a prospectus to inform the public by distributing to every country where the public offering is made if the total value of the public offering exceeds fifty (50) million FCFA. The prospectus should include information regarding the structure of the issuer, its financial standing, its activities and prospects for developments as well as any information relating to the securities offered to the public. This document must be signed by the statutory auditor and/by auditors appointed in the member states where the transaction is being made. It is submitted to the competent stock exchange supervisory body in the member state in which the issuer is registered and in each of the member states where securities are being offered to the public or to the Ministry of Finance of the state concerned if there is no such body. The supervisory body may call for further investigation by the auditors or may require further amendments or require the company to make appropriate guarantee if the public offering is made in a state other than the state where the company has its registered office. Approval may be granted or refused by the supervisory authority and once it is granted, it must be published in a legal journal. A brochure must be made available to any interested person at the registered office of the issuing company. This provision which requires for this document to be subjected to vetting and examination by the supervisory authority before approval ensures accountability. During this examination any irregularities in the requirement for publication or any such requirement which might have been circumvented shall be discovered and until such irregularity is corrected, an approval for public offerings will not be granted.

However, When all formalities have been complied with and the company has actually been formed, the Trade and Personal Property Credit Registrar is expected to play a major role at collecting and making available information to the various actors in business transactions. This is why declarations in the Trade and Personal Property Credit Registrar must be published. Article 261 of the Uniform Act relating to Commercial Companies and Economic Interest Groups (UACC)<sup>20</sup> is to the effect that, where the formalities for the formation of a company have been accomplished within a period of fifteen (15) days following the registration of the company, a notice shall be published on a newspaper authorised to publish legal notice in the contracting state in the registered office of the company<sup>21</sup>. Similarly, even when it is with regards to amendment of the Articles of Association it must be published on the newspaper, empowered to publish legal notices in the contracting state of the company's registered

office. Unfortunately, the Uniform act did not define or designate any person or judicial authority to be in charge or responsible for the publication of this legal notice. It could only be inferred from the French Decree No 67-236 of 23rd March 1967 on Commercial Companies<sup>22</sup> which states that, the publications are carried out under the responsibility and diligence of the registrar who received the declaration.

## II. CONCLUSION

This work in appraising the rules of accountability has cut across various principles of laws governing Private and Public limited companies. Since this concept is not tied down to a specific area, we have evaluated the legal and institutional frame work related with accountability. The various organs of the company have been analyzed as well since a company is an artificial entity and can only be functional by its organs who are responsible for ensuring and issuing accountability. Furthermore, the principles of supervision and control which aims at enabling accountability have also been highlighted and evaluated. More so, these mechanisms could not be grasped in totality without knowledge of the impediments for failure to respect these rules of accountability hence why the liabilities and punishments were also appraised. The OHADA UA though so properly drafted is not void of imprecise and unequivocal provisions. Such provisions should be revised to be more specific and authoritative.

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<sup>20</sup>Uniform Act on Commercial Companies and Economic Interest Groups adopted on 17th April 1997, revised on 30th January 2014.

<sup>21</sup>Uniform Act on General Commercial Law adopted in 1998 and revised on 15th December 2010

<sup>22</sup> Decree No 67-236 of 23rd March 1967 on Commercial Companies

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