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Liabilities in Relation to Company Formation Under the OHADA Uniform Act Relating to Commercial Companies and Economic Interest Groups

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Abstract

The OHADA company law strives to ensure that the rules relating to the formation of a company are scrupulously respected. If a company is not well formed it cannot function. The reason for this is aimed at protecting the interest of those who never took part in the constitution of the company. Liability of company administrators can result from mistakes which can either be international or unintentional, that can be seen through the disrespect of the rules relating to the formation of companies. The rule here is that those in charge of accomplishing the formalities of the creation of a company must ensure that no prejudice is cause to the shareholder or third party. This article examines the liabilities of persons involved in company formation under OHADA Company Law. Through content analysis of the OHADA Company law, it recognizes the civil liabilities of promoters/founders, directors, auditors and all those who are involved in the creation of a company. It also recognizes corporate criminal responsibility. In the domain of corporate criminal responsibility, the UA has assembled all the corporate offences relating of companies in one of its parts entitled "offences relating to companies" making it easier to access. However, a major difficulty is that these offences are not followed by their penalties in the same section. The acts merely state the offences and relate the punitive sanctions to the criminal law of the member states without any harmonization of penalties. In these light penalties for offences relating to the formation of companies under OHADA law varies from one country to country. We, therefore, recommend harmonization of penalties relating to OHADA Company Law.

Keywords: Liability, OHADA, uniform act, company, formation

INTRODUCTION

The OHADA Uniform Act Relating to Commercial Companies and Economic Groups, like the Companies Ordinance, provides for two sorts of liability for company establishment, namely civil and criminal [1]. The Uniform Act contains provisions both civil and criminal which apply to all forms of companies provided by the Act. In the penal domain, the Act unlike the Companies Ordinance has the merit to have attempted a codification of the acts and omission, which could be considered as criminal offences within the company law of the OHADA Zone. The Act in its Part 3 contains penal provisions of a general nature applicable to all forms of companies to which Member States may attach penalties depending on the gravity of the offence. The Uniform Act, unlike the Companies Ordinance, merely states that parties will be liable to punitive sanctions for offences relating to the formation of companies without stating any

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punishment. The Act does not say what is meant by "punitive sanctions" [2]. It does not specify whether the sanctions are civil or criminal, or both [3]. On the contrary, the Companies Ordinance, which was applicable in Anglophone Cameroon imposed sanctions and provided remedies. The Ordinance carried the offences and prescribed the relevant punishment in the same Section stating the offence. So, unlike the Companies Ordinance, the Uniform Act has not laid down any penalties for acts or omission characterized as business offences. The implication of the above is that the Member States have the discretion to determine the quantum of punishment of the offences stated in the Act. Punishment for these violations will thus differ from one Member State to the next, as these punishments are established by each Member State's own criminal legislation [4].

The Companies Ordinance unlike the Uniform Act has laid down offences relating to company formation with their attendant penalties, which are fines, imprisonment or both imprisonment and fines. In addition to the criminal penalties, the Ordinance unlike the Uniform Act, clearly stated the civil remedies. These included the common law remedies of rescission and damages and the statutory remedy of compensation contained in some provisions of the Ordinance [5]. The Uniform Act does not equally state any particular civil remedy. It also allows criminal sanctions to be determined by the laws of the different Member States. However, unlike the Companies Ordinance, all the acts and omissions considered as offences are contained in a part of the Act. This makes identification of these offences easier in the Act.

Civil Liability in Relation to Company Formation under the Uniform Act

The Uniform Act Relating to Commercial Companies and Economic Interest Groups catalogues civil liabilities related to the formation of companies in its Articles 161–172. Similar provisions relating to public limited companies are contained in Articles 738–743, and to private limited companies in Articles 330–332. These are generic liabilities that do not seek to describe any specific activities that may give rise to responsibility, but are written extremely generally, referring simply to defects in the execution of tasks or failure to comply with the law or the Articles of Association [6]. This is in keeping with Article 1382 of the French Civil Code, which is to the effect that any act of a person, which causes damage to another, obliges the one by whose fault it occurred to compensate it [7]. Every person is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence [8].

So, a person involved in company formation under OHADA Law will be liable not only for the damage caused by his conduct but also for damage caused by the conduct of persons under his responsibility, or by things under his custody [9]. However, the owner of a building or moveable property in which a fire has originated is not liable towards third parties for damage caused by the fire unless it can be shown it was his fault or the fault of persons under his responsibility [10].

Civil Responsibility of Founders and First Directors

Pursuant to Article 738(1) of the *UACC*, the founders of the company who are responsible for the nullity of the company and the directors in office at the time when the nullity of the company declared may be held jointly and severally liable for damage suffered by shareholders or third parties as a result of the nullity of the company.

In this regard, such liability regarding the company or third parties may be for violations of the laws and regulations applicable to public limited companies, for violations of the provisions of the Articles of Association, or for violations committed during the company's formation period [11].

In addition to suing a founder or director for damages, the shareholders have further options for bringing legal action in the company's best interests against the founders, directors, or managing director, as applicable. These options include bringing individual or group legal actions against the founders, directors, or managing director [12]. In such a case, the shareholders may, where they represent at least one-twentieth of the registered capital, entrust, in their common interest and at their expense, one or more shareholders to represent them in institute and defending the action in the company's interest [13]. Withdrawal of one or more of the said shareholders in the course of the action either voluntarily or because of loss of their status as shareholders has no effect on the continuation of the said action [14].

In general, any provision of the articles of association that requires prior notification, the approval of the general meeting, or the imposition of an advance renunciation of the right to take an action in the company's interest is regarded as unwritten [15]. So, no decision of the general meeting may extinguish an action against the directors or the managing director, as the case may be, for an offence committed in the performance of their duties [16]. An action against the directors or the managing director, both in the company's interest and in the interest of an individual, lapses after 3 years from the date of commission of the tort or, the date it was discovered [17]. However, where the act is a crime, the action lapses after 10 years [18].

Civil liability for Non-Compliance with the Articles of Association

OHADA Law demands that in the process of company formation, the Articles of Association must stipulate all the information stipulated in Article 13 of the *UACC*. So, where the Articles of Association does not contain all the said information or where a formality prescribed by the Act for the formation of the company is neglected, overlooked or is improperly fulfilled, any interested party may petition the competent court within whose jurisdiction the company's registered office is located to order, under financial compulsion, the proper formation of the company [19]. In this regard, the company's founders and the first directors or managing directors are jointly and severally liable for torts resulting from the omission of a requirement in the Articles of Association or from the improper performance of a requirement during the company's formation [20]. Additionally, in the event that the Articles of Association are amended, the directors or managing directors in office at the time will be held accountable for the same obligations as those listed above [21].

However, such actions for the regularization or amendment of the Articles of Association shall lapse after a period of 3 years from the date of registration of the company or from the date of publication of the deed amending its Articles of Association [22]. In the same light the liability action provided for in Articles 78 and 79 of the *UACC* shall lapse only after 5 years from the date of registration of the company or of publication of the act to amend the Articles of Association, as the case may be [23].

Civil Liability in Case of Nullity of the Company

By the provisions of Article 256(1) of the *UACC*, the partners and company executives responsible for the nullity of the company may be held jointly and severally liable for any damage suffered by third parties consequential upon such nullity. Article 413 of the *UACC* further provides that the founders of the company responsible for the nullity and the directors or the managing director, as the case may be, in office at the time when nullity was pronounced, may be declared jointly liable for damage suffered by third parties as a result of the nullity of the company.

As a result of the aforementioned provisions, the partners and business executives may be held vicariously accountable for the actions or inactions of other company members that cause the firm to be dissolved. However, 3 years after the day the annulment judgement became official, any vicarious responsibility action based on the nullity of the corporation or of the acts and decisions made after its establishment will be precluded [24]. In this regard, the elimination of the triggering event shall not preclude the filing of a civil liability claim for damages resulting from the company's mistake, acts, or decisions [25]. After 3 years have passed since the day the nullity was fixed, this action will expire [26].

Generally speaking, nullity of a company or of all acts, decisions or deliberations amending the Articles of Association under OHADA Law, may only result from an express provision of the Uniform Act Relating to Commercial Companies and Economic Interest Groups or from the laws governing the nullity of contracts in general and the Articles of Association of companies in particular [27]. Where information in the Articles of Association is not complete because founders fail to do so, this would not entail nullity of the company [28].

The Uniform Act in its Article 251 states that an action for the nullity of the company shall lapse after 3 years following registration of the company or publication of the instrument amending its Articles of Association unless the nullity is founded on the unlawfulness of the company's object. The last entry in the Trade and Personal Property Credit Register required by a merger or scission transaction must be made six months prior to the expiration of an action for annulment of the transaction.

Liability for Torts

Persons involved in the formation of a company under OHADA Law may be liable for any torts they commit. The *UACC* indicates in Article 330(1) that even managers shall be liable, jointly or severally as the case may be, to the company or third parties for violations of legal or statutory provisions applicable to private limited companies or for violations of the Articles of Association, or for mistakes made during their management. So, where several mangers or persons involved in the formation of the company jointly performed the acts, the court shall determine the contribution of each in the award of damages [29].

Apart from an action for damages suffered by individuals as a result of the torts of the persons involved in the formation of the company, partners representing one-quarter of the company shares may individually or as a group, bring a tort action in the company's interest against the persons involved in the formation of the company or the mangers [30]. In such a case, the plaintiffs shall be empowered to seek redress for the totality of the damage suffered by the company [31]. Any provision in the articles of association that requires the general meeting's approval in advance of taking a decision in the company's best interests, or that implies a waiver of the right to do so, is regarded as unwritten [32]. Furthermore, no resolution adopted by the general assembly shall have the effect of barring legal action from being brought against anybody who participated in the company's creation for wrongs committed while performing their obligations [33].

After 3 years from the date of the tort's commission or from the date it was discovered, actions for torts committed by those engaged in the company's establishment or managers are forbidden [34]. However, where the act is to a felony, the time lapse for the initiation of proceedings is 10 years [35].

Liability to Third Parties

Individuals involved in the establishment of a business may be held accountable to third parties for errors made in the course of their tasks, or for failing to follow the legislation that applies to their specific kind of company or the Articles of Association [36]. Shareholders of the company are considered "third parties" in this context if they may have experienced harm separate from that which the corporation may have experienced [37]. If many of the company's founders were engaged in the conduct of the error, they would be responsible to third parties jointly and severally. However, in their relations with each other, the court may apportion the damages to be borne by each of them [38].

Typically, each partner enters into a contract in his or her own name and is responsible for paying any debts to third parties [39]. However, each person who acted is responsible for the other's actions when the partners expressly engage in their position as partners towards third persons [40]. Any bonds subscribed in joint capacity by the partners, commit them indefinitely jointly and severally [41]. This is also true of a partner who, by interference, led the other contractual parties to believe that he meant to work on their behalf, even when it was later discovered that he had financial interests in the venture [42]. Co-contractors and other parties must abide by any agreements that the ordinary general meeting has accepted or rejected, unless they are revoked due to fraud [43]. However, even where fraud cannot be established, the harmful consequences on the company of contracts disapproved of by the general meeting may be borne by the persons concerned and, possibly, by the other members of the company, who may include the directors or the board of directors [44].

An action for liability to third parties must be brought within 3 years following the commission of the fault or, within 3 years following its discovery [45].

Liability for Gross-Over-Valuation of Contributions in Kind

Under OHADA Law, the Articles of Association normally contain the evaluation of each contribution in kind and a stipulation of special benefits [46]. The evaluation usually is carried out by a shares auditor where the contribution or the benefit in question, or the value of the overall contributions or benefits in question is more than five million CFA francs [47]. The competent court's president often names the share auditor in response to a request from all or a single founder of the business [48]. After this, he draws up a report of the evaluation in kind which is appended to the Articles of Association.

The *UACC* provides that the shareholders and directors of private limited company and public limited company are jointly and severally liable to third parties for a period of 5 years for the value attributed to contributions in kind and special benefits when this is different from the value determined by the share auditor [49]. When a donation in kind is grossly overvalued, those who are misled about the value of the company's assets may be entitled to damages. The founders of the company will be responsible for the gross-over-valuation made by the shares auditor. In the same way, the auditor will be held accountable by the business and third parties for any carelessness on his part while doing his obligations [50]. However, he may not be responsible for any information or facts he divulges in the exercise of his duty, in accordance with Article 153 of the *UACC*, which provides that in a public limited company, the auditor may, by hand-delivered letter against a receipt or by registered letter with a request for an acknowledgement of receipt, ask for explanations from the chairman of the board of directors, the chairman and managing director, as the case may be, who shall be bound to reply within one month after receiving the auditor's request, on any matter likely to jeopardize the continued operation of the company and which the auditor noticed while examining documents forwarded to him or those to which he had access in the course of performing his duties. However, auditors shall not be liable for damages resulting from offences committed by the members of the board of directors or by the managing director, as the case may be, unless, where he has knowledge of them, and fails to disclose them in his report to the general meeting [51].

An action for damage against an auditor, such action lapses after a period of 3 years from the date of commission of the tort or, from the date of its discovery [52]. Where such deed is described as a felony, the action shall lapse after a period of 10 years [53].

Liability to the Company

The company may hold the company's founders and initial directors accountable for errors made in the performance of their responsibilities, as well as for failing to follow the legislation regulating the type of business in issue or the Articles of Association [54]. According to Article 165 of the UACC, each corporate executive is personally accountable to the firm for any wrongdoing carried out while carrying out this job. The article further specifies that the commercial court shall assess the proportion to be borne by each executive in apportioning damages payable under the criteria set out by the UACC where many firm executives are parties to the same wrongs.

A promoter, shareholder, executive, or other person acting on behalf of the company may be held liable for damages the company suffers as a result of a tort they committed while carrying out their obligations [55]. Such actions shall be instituted by the company executives [56]. One or more partners may also institute an action in the interest of the company after serving a formal notice to the competent bodies to which they fail to react within the time limit of thirty days [57]. The applicants can sue for damages for injury suffered by the company. If the action is successful, damages will be awarded to the company.

Any provision in the articles of association that requires advance notification or approval from the general assembly, the company's management, supervisory or administrative structure, or that prescribes a renunciation of the right to take such action shall generally be deemed to be unwritten [58]. This clause does not prevent a partner or partners from filing a lawsuit from working out a settlement with the defendant(s) in order to end the conflict [59].

According to the regulation, a civil lawsuit brought against business officials for a tort they committed while performing their responsibilities cannot be barred by a resolution of the partners' meeting or by the management, supervisory, or administrative structure of the firm. Additionally, the court where the lawsuit is filed must be one whose jurisdiction includes the company's registered office [60]. A lawsuit brought in the company's name is also time-barred 3 years after the tort was committed or disclosed. When a partner or many partners bring a claim on behalf of the company, the firm is responsible for paying the costs and expenses associated with that claim [61]. Additionally, the filing of a lawsuit in the company's best interest generally does not preclude a partner from suing the business for damages for any harm he may have personally experienced.

Liability for Failure to Pay up Shares

OHADA law also makes provision for civil liability where a shareholder fails to pay up shares. By the provision of Article 774 at least one quarter of the value of shares must be paid up on subscription; the balance has to be paid up as the board of directors makes calls within a maximum period of 3 years from the date of subscription.

Generally speaking, in case of non-payment of the balance on the shares that have not been fully paid up at the time fixed by the board of directors or the managing director, as the case may be, the company has to send a formal notice to the defaulting shareholder by hand-delivered letter with a request for acknowledgement of receipt [62]. If after one month the notice is unheeded, the company must on its own initiative put up the shares on sale [63]. With effect from the same date, unduly paid-up shares shall not be entitled to voting rights during shareholder's meetings and shall not be considered in the calculation of the quorum and majority [64]. However, 30 days after the official notice, the firm must announce in a publication authorized to publish legal notifications the number of shares up for sale prior to the sale of the unpaid-up shares [65]. The business must give notice of the sale to the debtor and, if required, his co-debtors by hand-delivered letter against a receipt or by registered mail with a receipt acknowledgment that includes the date and publication number of the newspaper [66]. The hand-delivered letter against receipt or the registered letter with acknowledgement of receipt must be sent at least fifteen days before the actual sale of the shares [67].

In the event that the unpaid shares are sold, any defaulting shareholder will be obligated to pay any charges spent by the business to complete the sale, or will get the proceeds from the remaining shares [68]. The *UACC* further provides in its Article 777, that any defaulting shareholder, successive transferee and subscribers shall be jointly and severally liable for the unpaid amount of the share. In that connection, the company may take out proceedings against them before or after the sale, for recovery of the sum owed and the costs incurred. In such a case, any person who pays off the company shall be entitled to take action for the entire sum against successive holders of the share.

Criminal Responsibility for Company Formation under the OHADA Uniform Act Relating to Commercial Companies and Economic Interest Groups

OHADA law has catalogued some specific offences relating to the formation of companies in Articles 886 to 888 of the UACC which applies to all the forms of commercial companies provided by the Act [69]. These offences are a direct consequence of the social interaction of persons involved in the formation of companies and the legislator's endeavor to regulate the formation of companies. Certain rules must be respected for the formation of companies and the OHADA legislator has considered these rules worthy of protection by imposing criminal sanctions. In order to do this, the legislator has created a distinction between charges that are directly and indirectly connected to the establishment of corporations when dealing with such offences [70]. Pursuant to Article 101 of the *UACC*, a company is deemed to be formed from the date of signature of its Articles of Association and it is from this date that criminal liability attaches to regulate the proper constitution of the company. Article 5(2) of the OHADA Treaty provides that the Uniform Acts may contain criminal offences but gives the Member States the latitude to fix the penalties for such offences. It is in this connection that the *UACC* in dealing with corporate offences relating to the formation of companies in its Articles 886 to 888, has not laid down any prescribed penalty. The Act merely states that any person who commits any of the offences shall be liable to punitive sanctions. The Act does not specify the punitive sanctions or penalties. Member States are allowed to prescribe the quantum of applicable penalties for the different offences [71]. In Cameroon, the 2003 Law on the repression of offences contained in certain OHADA Uniform Acts has laid down penalties for offences relating to the formation of companies which are applicable throughout the national territory.

Offences Directly Connected to the Formation of Companies under the Uniform Act

The draftsman of the OHADA Uniform Act Relating to Commercial Companies and Economic Interest Groups [72] has made provision for five offences which are directly connected to the formation of a company in its Article 887. These offences include the following:

- False declarations by the notary;
- The submission of a fictitious list of shareholders or subscription bulletins;
- Fraudulent assessment of contribution in kind above the real value;
- Simulation of subscription and deposit of funds;
- Publication of false facts.

False Declaration by the Notary

Article 887(1) of the *UACC* makes provision for the offence of false declaration by the notary. That Article provides: "whoever—knowingly, by the establishment of the notarial statement of subscription and payment or of the depositary's certificate certifies as true and authentic subscriptions he knows are fictitious or declares that the funds, which have not been placed definitely at the disposal of the company have been effectively paid, shall incur a punitive sanction.

From the wording of the Article, it is clear that the object of this offence is to protect the investing public on the one hand and the shareholders and founding members of the company, on the other, from fraudulent declarations. It should be recalled that Article 73 of the *UACC* obliges the founders and first members of the management organs of the company, directors, and managing directors, to deposit at the Trade and Personal Property Credit Register a declaration in which they describe all the actions carried out towards the regular formation of the company and by which they affirm that such formation has been carried out in conformity with the requirements laid down by the Uniform Act. Such a declaration, known as a "declaration of regularity and conformity" or "notarial statement of subscription and payment" must be drawn up by a notary, stating the true position of the transactions carried out by the founding fathers of the company.

The material element or *actus reus* of the offence consist in making a false declaration with knowledge that is untrue. The fraudulent statement either attests to the veracity and authenticity of known to be fictional subscriptions or claims that money that hasn't been put completely at the company's disposal has been properly paid. The mental element or *mens rea* should be read alongside Section 74 of the Cameroonian Penal Code, in that there can be no liability unless the defendant made the declaration intentionally with the knowledge that what he certified as true and authentic was untrue before he did so.

Articles (5)(a) of the 2003 Law punishes false declarations by the notary as a misdemeanor under Cameroonian Law with imprisonment for from three (3) months to three (3) years or with fine of 500.000 to 5.000.000 francs or with both such imprisonment and fine.

The Submission of a Fictitious List of Shareholders or Subscription Bulletins

The offence of submission of a fictitious list of shareholders or subscription bulletins is dealt with in Article 887(2) of the UACC. It is therein provided that:

> *Whoever—hands over to the notary or to the depositary a list of shareholders or statements of subscription and payment bearing fictitious subscriptions or payment of funds which have not been definitely made available to the company, shall incur a punitive sanction*

From the foregoing, it is clear that Article 887(2) of the UACC punishes a person who hands over to a notary or to the depository bank a list of shareholders or statements of subscription and payment bearing fictitious subscriptions or payments of funds which have not been definitely made available to the company [73].

The material element of the offence is simple. It consists of the submission of a fictitious list of shareholders or subscription bulletins to a notary or a bank by the person or persons intending to form the company. Criminal liability attaches once the fictitious list of shareholders has been handed. The offence is an intentional offence and so the mental element embedded in Section 74 of the Cameroonian Penal Code applies. Criminal liability could also be attached even to a person who hands a fictitious list of shareholders to a notary or bank without knowing that it was a false list.

By virtue of Article 5(b) of the Cameroonian Law of 10 July 2003 on the repression of offences contained in certain OHADA Uniform Acts, the penalty for the offence of submission of a fictitious list of shareholders or subscription bulletin is imprisonment for from three (3) months to three (3) years or with fine of 500,000 to 5,000,000 francs or with both such imprisonment and fine.

Simulation of Subscription and Deposit of Funds

Simulation of subscription and deposit of funds as an offence is contained in Article 887(3) of the *UACC*. That Article is couched thus:

> *Whoever—knowingly, by fictitious subscriptions or payments or by publication of non-existent subscriptions or payments or by any other false acts obtains or attempts to obtain subscriptions or payments shall incur punitive sanctions.*

From the above, simulation of subscription and deposit of funds as an offence could entail the use of tricks, the representation of a fact or the concealment of a fact in order to obtain new subscriptions or payments in the formation of the company. The *actus reus* of the offence consist in false acts or attempts through tricks to obtain new subscriptions and payment of deposit for the formation of the company. The offender may use tricks to cause investors to belief that the company has a good reputation. This could be by publishing non-existing subscriptions to induce the investing public to subscribe for shares. This offence is an intentional offence and Section 74 of the Cameroonian Penal Code applies to it.

The prosecution must demonstrate both that the defendant knew the subscriptions or payments were fake by publishing them and by attempting to obtain subscriptions or payments through deceptive acts in addition to showing that the defendant intentionally used tricks to induce subscriptions. This he did by brandishing either a false anterior subscription or a fake document indicating that funds have been deposited. In this regard, Section 75 of the Cameroonian Penal Code, being of general application, covers the offence of simulation of subscription and deposit of funds. That Section, it will be recalled, stipulates that motive shall be immaterial to criminal responsibility.

The quantum of punishment for the offence of simulation of subscription and deposit of funds has been prescribed by the Cameroonian draftsman in Article 5(c) of the 2003 Law. The punishment is imprisonment for from three (3) months to three (3) years or with fine of 500,000 to 5,000,000 francs or with both such imprisonment and fine.

Publication of False Facts

Publication of false facts as an offence relating to the formation of companies is dealt with in Article 887(4) of the *UACC*. That Article stipulates as follows:

> *Whoever—knowingly, in order to obtain subscriptions or payments, publishes the names of persons falsely designated as being or expected to be linked to the company in any capacity whatsoever, shall incur a punitive sanction.*

Mercadal [74] has opined that the offence of publication of false facts is similar to the offence of submission of a fictitious list of shareholders or subscription bulletins as contained in Article 887(2) of the *UACC*.

However, Article 887(2) punishes the submission or publication of a list of shareholders or statements of subscription and payment bearing fictitious subscription or payments of funds, which have not been definitely made available to the company while the offence of publication of false facts as contained in Article 887(4) punishes those who in order to obtain subscriptions or payments publishes the "names of persons falsely designated as being or expected to be linked to the company in any capacity whatsoever."

The *actus reus* of the offence consist in the publication of false facts. Publication could be realized by whatever means so far as it reaches the public. It could be through the radio, a newspaper, an official document or a journal for legal notice. The *UACC* has clearly laid emphasis in Article 887(4) of the false information that could be given. They include subscription and payments that do not exist and the names of personalities attached to the company in whatever capacity. The *mens rea* of the offence consist in publishing the false information intentionally, with the intention to deceive the public. So, Section 74 of the Cameroonian Penal Code applies to the offence. The announcement, for instance, of distribution of dividends or profits, which does not exist will constitute false publication of facts.

In Cameroonian criminal law the penalty for the offence of publication of false facts relating to the formation of companies has been provided for by is similar to that of simulation of subscription and deposit of funds.

Fraudulent Assessment of Contributions in Kind above the Real Value

The offence of fraudulent assessment of contribution in kind above the real value is contained in Article 887(4) of the *UACC*. The Article provides that:

> *Whoever—fraudulently, causes a contribution in kind to be given an assessment above its real value, shall incur a punitive sanction*.

It is to be recalled that by virtue of Article 45 of the UACC, contributions in kind shall be made by the transfer of real or personal rights in property contributed and the effective conveyance to the company of the property to which those rights are attached. The partners shall evaluate the contributions in kind and such evaluation shall be checked by a contribution's assessor [75]. From this, we discover that this offence is directed to two categories of persons, namely, partners and contributions assessors.

So, any partner or contributions assessor who fraudulent assesses contributions in kind above its real value or fraudulently causes the value of the contributions in kind to be increased during assessment, shall be open to punitive sanctions.

The *actus reus* of the offence consist in fraudulently causing the value of the contributions in kind to be increased above the real value. Mere knowledge of over evaluation of the contributions in kind does not suffice to attribute *mens rea*. The offence is an intentional offence and so Section 74 of the Cameroonian Penal Code applies. The offender must have committed the offence intentionally, that is to say by fraudulently increasing the value of the contributions in kind. There must have been a maneuver towards that end. As for instance, where the contribution assessor is bribed into influencing the value of the contribution or where a partner connives with the contributions assessor or another partner to increase the value of contributions in property or a right to be published with an increased value or a value above its real value before the company is registered.

Fraudulent assessment of contributions in kind above the real value is a misdemeanor under Cameroonian criminal law and has the same imprisonment terms like the offence of publication of false facts. It also has a pecuniary penalty of 500,000 to 5,000,000 francs CFA. The pecuniary sentence could also be cumulative with imprisonment.

Offences Indirectly Connected to the Formation of Companies under the Uniform Act

OHADA law has also made provisions for some offences which are indirectly connected to the formation of companies. These are offences connected to the issue and negotiability of shares. To these two, we may add the offence relating to the making of public call for capital. It should be noted that only the individuals listed below—founders, chairman and managing director, general manager, managing director, or assistant managing director, as the case may be—manage public limited companies, where shares can be transferred and negotiated but not private limited companies, where shares are not transferable and negotiated—commit these offences.

Offences relating to the issue of shares

The offences relating to the issue of shares are dealt with in Article 886 of the *UACC*. It is therein provided that:

> *A criminal offence shall be committed where the founders, chairman and managing director, general manager, managing director of a public limited company issue shares before registration of the company or at any time whatsoever where registration is obtained by fraud or the company is irregularly formed.*

From the foregoing, it is discernable that the object of the offence contained in Article 886 of the *UACC* is to punish managers or directors of public limited companies who irregularly issue shares without respecting the procedures enunciated in the Uniform Act who issue shares before the registration of the company. It is to be recalled that the way shares are supposed to be issued under OHADA law has been stipulated in Articles 81 to 96 of the *UACC* [76]. Therefore, if these rules are not followed, the registration process is achieved via deception, or the business is irregularly constituted, criminal culpability attaches. The judge will decide what would constitute the company's irregular creation as the completion of the offence.

Like other offences relating to the formation of companies, the offence relating to the issue of shares has its material and mental elements. The main elements of the offence include issuing shares fraudulently before the business is registered or issuing shares irregularly after the company was formed. The offence is an intentional offence, so Section 74 of the Cameroonian Penal Code applies as far as the *mens rea* of the offence is concerned. The founder, manager or director of the public limited company must have nursed the intention to fraud in the issuance of the shares to the public. However, some authors [77] have opined that for the offence relating to the issue of shares, intention to fraud must not necessarily be proved; even a simple negligence should suffice for conviction.

The Cameroonian 2003 Law stipulates that any founder, chairman and managing director, general manager, managing director, or assistant managing director of a limited company who issues shares prior to the registration of the company or at any time when registration was obtained fraudulently, or the company with fraudulently obtained registration, shall be subject to the same penalty as the offence of fraudulent assessment of contributions in kind above the real value.

Offences Connected to the Negotiation of Shares

The OHADA draftsman has made provisions for some offences connected to the negotiation of shares in public limited companies. These offences are dealt with by Article 888 of the *UACC* in the following terms:

Whoever knowingly negotiates:

1. registered shares which have not remained in the registered form until they were fully paid up; or
2. initial shares before the expiry of the time limit during which they are not negotiable; or
3. shares issued for cash for which payment of a quarter of the face value has not been made—shall incur punitive sanction.

From the above, it is clear that Article 888 of the *UACC* punishes the negotiation of three categories of shares. Negotiating shares before they reach their time restriction for expiry in the share register, as well as shares that haven't stayed in registered form until they're fully paid up and shares that were issued for cash but haven't yet received payments totaling 25% of their face value, are all forbidden in this situation.

All three categories of offences have the same *actus reus*. These consist in entering into negotiations to part with the shares before the time limit. Restrictions on negotiations have been placed on the above categories of shares even though shares in public limited companies can be negotiated. The *mens rea* of the offence consists in knowing about the restrictions and then negotiating for their transfer. Their transfer by other methods such as gifts, wills, or assignment of debt is not forbidden. The commission of the offences connected to the negotiation of shares requires intention to commit the *actus reus.* So by virtue of Section 74 (2), of the Cameroonian Penal Code, "criminal responsibility shall lie on him who intentionally commits each of the ingredient acts of an offence with the intention of obtaining the result," which in this connection is the negotiations to transfer initial shares before the expiry of the time limit during which they are not negotiable, or negotiate registered shares which have not remained in the registered form until they were fully paid up; or to negotiate shares issued for cash for which payment of a quarter of the value has not Cameroonian Law makes provision for the punishment of the offences connected to the negotiation of shares. The penalty is the same like that of offences relating to issue of shares.

Offences Relating to Public Calls for Capital

These offences are also indirectly connected to the formation of companies under the Uniform Act. The issue of shares in violation of rules relating to public call for capital in public limited companies as stipulated in Articles 81 to 96 attracts punishment. Public calls for capital are deemed to be made in the following situations: in companies whose shares are listed on the stock exchange of a Contracting State, from the date of registration of such shares; in companies which, in order to offer any type of shares to the public in a Contracting State, resort is made to credit establishments or stock brokers, or any form of publicity or canvassing. There is equally a public call for capital where the shares are distributed beyond a radius of one hundred (100) persons [78]. In determining this figure, each company or collective bodies investing transferable securities has to be considered as a single entity [79].

With these provisions in mind, the OHADA draftsman has laid down punishment for those who violate rules related to public calls for capital in Article 905 of the *UACC*. That Article provides as follows:

Any chairmen, directors or general managers of companies who issue transferable securities offered to the public:

1. Without a notice being inserted in a newspaper empowered to publish legal notices before any publication measure; or
2. Without prospectus and circulars reproducing the information in the notice referred to in paragraph (1) of this article and bearing a mention of the insertion of such notice in number under which it was published; or
3. Without posters and notices in the newspaper reproducing the same information in or at the very least the extract of the information with reference to the said notice and indication of the number of the newspaper empowered to publish legal notices in which it was published; or

4. Without posters, prospectus, and circulars mentioning the signature of the person or the representative of the company making the offer and specifying whether securities are quoted or not and, where quoted, on which stock exchange-shall incur a punitive sanction.

CONCLUSION

Just like the other offences indirectly connected with the formation of companies, the offences relating to public call for capital are offences which concern public limited companies. Like the other offences, they may be committed by the chairman, directors or general managers who make public calls for capital. The *actus reus* of the offence consist in the violation of rule for the making of public calls as laid down by the Uniform Act, as for instance, making of public call without a notice being inserted in a newspaper empowered to publish legal notices by a chairman, director or general manager. The *mens rea* is embedded in Section 74 of the Cameroonian Penal Code, in that the offence must be committed intentional.

The Cameroonian draftsman has provided the quantum of punishment for the offences relating to public call for capital in Article24 of the 2003 Law. The punishment is imprisonment from three (3) months to three (3) years or a fine of from 100,000 to 1,000,000 francs or with both imprisonment and fine. This penalty is directed at chairmen, directors or general managers who violate the procedure for the making of public calls for capital in a public limited company. People who serve as accomplices in the transfer of transferable securities in violation of the Uniform serve's rules are subject to the same punishment.

OHADA company law further recognizes civil and criminal liabilities in relation to company formation. It recognizes the civil liabilities of promoters/founders, directors, auditors, and all those who are involved in the creation of the company. It also recognizes corporate criminal liability. In the domain of corporate criminal responsibility, the Uniform Act unlike English company law has assembled all the corporate offences relating of companies in one of its parts entitled "offences relating to companies [80]," making access to them easier. However, a major difficult is that these offences are not followed by their penalties in the same section. The Act merely states the offences and refers the punitive sanctions to the criminal law of the Members States without any harmonization of penalties. In those light penalties for offences relating to the formation of companies under OHADA Law varies from country to country. We, therefore, recommend harmonization of penalties relating to OHADA Company Law.

REFERENCES

1. The relevant rules are contained principally in Articles 161–172, 330–332, 740–743 and 886–905 of the UACC and also in the Uniform Act on Collective Proceedings for the Clearing of Debts, Articles 180–215.
2. Ekome E. Public issue of shares under the companies ordinance and the Uniform Act of the OHADA Treaty. Juridis périodique, 2002; 50: 102.
3. Ibid.
4. Takang AR. A Comparative Study of the Concept of Corporate Criminal Responsibility in the United Kingdom and Cameroon: Lessons Drawn from the UK. [Thesis]. LLM in International and European Law (PILC), Vrije Universiteit Brussel, Belgium. 2020.
5. Companies Act Integrated Ready Reckoner|Companies Act (2013). Section 89. Declaration in respect of beneficial interest in any share. ||CAIRR [Online] Available from: https://ca2013.com/declaration-in-respect-of-beneficial-interest-in-any-share/.
6. Martor S, Pilkington N, Sellers DS, Thouvenot S. Business Law in Africa, OHADA and the Harmonization Process. London, England: Kogan Page; 2002.
7. Civil Code. [Online] Available from: https://www.fd.ulisboa.pt/wp-content/uploads/2014/12/Codigo-Civil-Frances-French-Civil-Code-english-version.pdf.
8. Britton P. The Guest-plaintiff, the civil code and the Cour de cassation. International & Comparative Law Quarterly. Oct 1976; 25(4): 826–847.

9. Ibid, Article 1384.
10. Ibid.
11. Article 740(1) OHADA (Organization for the Harmonization of Business Law in Africa) 1993.
12. Article 741(1) UACC.
13. *Ibid*, Article 741(2).
14. *Ibid*, Article 741(3).
15. Article 742 UACC.
16. *Ibid*.
17. Article 743 UACC.
18. *Ibid*.
19. Article 75 UACC.
20. Article 78 UACC.
21. See Article 79 UACC.
22. Article 77 UACC.
23. Article 80 UACC.
24. Article 256(2) UACC.
25. Article 256(3) UACC.
26. *Ibid*.
27. See Article 242 UACC.
28. *Ibid*.
29. Article 330(2) UACC.
30. Article 331(1) UACC.
31. Article 331(2) UACC.
32. Article 331(3) UACC.
33. Article 331(4) UACC.
34. Article 332 UACC.
35. *Ibid*.
36. “L’Impact de l’Acte Uniforme de l’OHADA Relatif au Droit des Sociétés Commerciales et du GIE sur le Contrôle et le Développement des Entreprises Locales » Juridis Périodique. 66: 107–116.
37. Martor S, Pilkington N, Sellers DS, Thouvenot S. Business Law in Africa, OHADA and the Harmonization Process. London, England: Kogan Page; 2002.
38. Article 161 UACC.
39. Article 861 UACC.
40. Ibid.
41. Ibid.
42. Ibid.
43. Article 443(1) UACC.
44. Article 443(2) UACC.
45. Article 164 UACC.
46. See Article 312 of the UACC.
47. Ibid.
48. Ibid.
49. See Article 312 UACC. See also Article 409 UACC.
50. Article 725 UACC.
51. Article 726 UACC.
52. Article 727 UACC.
53. Ibid.
54. Article 165, 330 and 740 UACC.
55. Articles 166 UACC.
56. Ibid.
57. Article 167 UACC.
58. Article 168 UACC.

59. Ibid.
60. Article 170 UACC.
61. Article 171 UACC.
62. Article 175 UACC.
63. Ibid.
64. Ibid.
65. Article 776 UACC.
66. Ibid.
67. Ibid.
68. Ibid.
69. Anoukaha, F., et al. (2002), OHADA Sociétés Commerciales et GIE, Juriscope, Bruylant Bruxelles, pp. 225–306.
70. Pougoué PG, Elongo YR. Introduction critique à l'OHADA. France: Presses univresitaires d'Afr; 2008.
71. *L'Impact de l'Acte Uniforme de l'OHADA Relatif au Droit des Sociétés Commerciales et du GIE Sur le Contrôle et le Développement des Entreprises Locales*, Juridis Périodique. 2006; 66: 107–116.
72. Essoh Clotilde E. The reception of OHADA law in Anglophone Cameroon: Appraisal and proposals. Uniform Law Review. May 2023: unad014. Available at: https://doi.org/10.1093/ulr/unad014.
73. Pougoué PG, Anoukaha F, Toukam JN. Le droit des sociétés commerciales et du groupement d'intérêt économique OHADA. Presses universitaires d'Afrique; 1998.
74. Mercadal BM. Infractions aux Règles de Constitution et d'Augmentation du Fonds Social. Traité des Sociétés Fasc. 1253 N° 7, Cf.
75. Article 49 UACC.
76. See also Articles 51 to 25 of the UACC dealing with company shares.
77. Supra 72n.
78. See article 81, UACC
79. Ibid.
80. See part 3, Title 1 of the UACC.