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REVISED UNIFORM ACT ON COMMERCIAL COMPANIES AND ECONOMIC INTEREST GROUPS

editorial

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A revised Uniform Act on commercial companies and economic interest groups (the "Revised Uniform Act") was adopted on 30 January 2014 by the OHADA Council of Ministers. The Revised Uniform Act, which replaces the Uniform Act of 17 April 1997, was published in the OHADA official gazette on 4 February 2014¹. The Revised Uniform Act is applicable to all companies incorporated in any of the OHADA Member States from 5 May 2014. Companies which have been set up before the entry into force of the Revised Uniform Act shall update their articles of association within the next two years to ensure that they comply with the provisions of the Revised Uniform Act. The provisions of the former Act continue to apply to such companies until their articles of association are made compliant.

The key changes introduced in the Revised Uniform Act are threefold:

- A new corporate form: the creation of the *Société par Actions Simplifiée* ("SAS"; equivalent to a simplified form of a public limited company), alongside the existing *Société Anonyme* ("SA"; equivalent to a public limited company), is without a doubt one of the most significant changes within the Revised Uniform Act.
- New types of securities: the creation of preference shares, the ability to allocate free shares to staff members and the recognition of the ability for SAS to issue hybrid securities.
- Clearer provisions: existing provisions have been clarified and a number of significant amendments have been made.

The strict application of the Uniform Act to companies remains. However, it has been relaxed in certain circumstances to ensure consistency with the applicable standards. For instance, article 2 of the 1997 Uniform Act which previously stated that the provisions of the Uniform Act were a matter of public policy and thus mandatory (except where a substitution or addition was expressly authorised), has been slightly amended. The new article 2 of the Revised Uniform Act stipulates that articles of association cannot derogate from the Uniform Act, except where

¹ An official English version of the Revised Uniform Act has not yet been published. Pursuant to article 42 of the OHADA treaty "Until such time as they have been translated into the other languages, all documents already published in French shall continue to have full effect".

a substitution or addition is expressly authorised. The 1997 Uniform Act included no more than a dozen of exceptions for SA.

Such strictness guarantees the certainty of legal operations. Uniform law is defined as a body of rules that does not suffer from the interference of national laws and is therefore not subject to civil and commercial law rules which underpin corporate law. As such, it is a type of normative law with no external framework of interpretation, which restricts a judge's powers of interpretation and upholds legal certainty for economic stakeholders.

With respect to the Revised Uniform Act, we would also note the following:

- The Revised Uniform Act strengthens the role of judges and national laws with respect to the operation of companies, in two fields in particular. Firstly, with respect to the grounds which may render a corporate deed null and void, the Revised Uniform Act provides that such deeds can be declared null and void when a provision of the Uniform Act expressly provides for it, or when the "texts governing the nullity of contracts in general" are applied, or in the case of "breach of a clause of the articles of association that is deemed essential by the competent courts". Secondly, with respect to the provisional or safeguard measures which may be ordered by a judge, the Revised Uniform Act provides that a competent court can now order two other measures, in addition to management evaluations. Namely, the appointment of an *ad hoc* agent to represent the minority shareholders or shareholders with equal shareholding whose behaviour is deemed disruptive and "to vote on their behalf", and the appointment of an interim administrator to temporarily ensure the management of corporate issues when the normal operation of the company is "rendered impossible". It will be interesting to see how these provisions will be applied by the courts.
- Conversely, the Revised Uniform Act limits the validity of agreements which are not governed by the articles of association, such as shareholders' agreements, and which are therefore governed by national law. The Revised Uniform Act provides that such agreements shall comply with the provisions of the Revised Uniform Act's provisions, without any exceptions. The Revised Uniform Act also specifies a non-exhaustive list of matters which may be addressed by such agreements: relations between shareholders, composition of management bodies, conduct of business affairs, access to share capital and transfer of shares.
- In contrast with the inflexible nature of the provisions applicable to a *Société Anonyme*, the provisions regarding a SAS are remarkably flexible. In this respect, legal practitioners will be able to express their creativity. However, if a provision of a company's articles of association goes beyond the solutions approved by the Revised Uniform Act, it is necessary to check that the validity of such clause may not be challenged on the basis of national contract law.

SAS IN THE REVISED UNIFORM ACT

Julien David, partner, and Simon Auquier, associate

Alongside *Société Anonyme*, the Revised Uniform Act creates a new type of *Société par Actions* (equivalent to a public limited company): it is the *Société par Actions Simplifiée* ("SAS", equivalent to a simplified form of a public limited company). Book 4-2 of the Revised Uniform Act is exclusively dedicated to this new legal form and was added – just after Book 4 on *Société Anonyme* – in Part II of the Revised Uniform Act, which deals with the various types of commercial corporate structures.

The SAS bears a number of similarities to its French equivalent, which was introduced into French law in 1994 and subsequently amended in 1999. The OHADA SAS is broadly based on the same characteristics and features which made its French equivalent a success (i.e. simple, flexible, simplified governance structure, strong *intuitu personae* of shareholders).

Although it remains subject to some provisions of the Revised Uniform Act relating to public limited companies (e.g. incorporation, dissolution, and capital modifications), the SAS sets itself apart from the *Société Anonyme* in a number of ways. These include the amount and composition of its share capital, the organisation and operation of its governance framework and legal representation. Below is a summary of other noteworthy features of the SAS.

- **Setting up**

An SAS can be set up by one or more members (similarly to a *Société Anonyme*, which can be set up by a single shareholder), individuals or legal entities. The amount of its share capital (as well as the nominal value of its shares) may be set freely by the company's articles of association, and is not subject to the minimum amount requirement of FCFA 10 million which applies to a *Société Anonyme*.

Also, any decision to transform any company into an SAS must be taken unanimously by all members of such company.

An important point: unlike a *Société Anonyme*, an SAS cannot make public offerings.

- **Governance - Operation**

The majority of the rules dealing with the structure, governance and operating rules of an SAS can be freely determined by the members in the articles of association. Thus, unlike a *Société Anonyme* with more than three shareholders, an SAS does not require a board of directors. It is represented by a Chairman (either an individual or a legal entity) with broad powers to act on behalf of the company. Such Chairman may be supported by one or several managing directors or deputy managing directors, who will enjoy the same powers as the Chairman.

The shareholders can set up a collegial governance or management body (such as a steering committee, an executive committee or a council) by specifying in the articles of association the powers, the role and responsibilities of such body. However, in naming such body, care should be taken not to use the term "board" in order to avoid unnecessary confusion with a *Société Anonyme*.

- **Share transfers / Clauses of the articles of association**

The Revised Uniform Act also specifies the requirements for share transfers and new types of shares and securities (see below). The Revised Uniform Act sanctions the validity of exclusion clauses, according to which a member may be required to sell his or her shares in the event of the occurrence of a particular event which is expressly listed in the articles of association (such as a change in control of a shareholder, legal entity, of the SAS). Particular care should be taken in drafting this type of clause. It is essential to specifically identify and limit, as much as possible, the events which may lead to the forced purchase of a member's shares, in order to avoid any misuse.

The introduction of this new type of corporate form in OHADA law - which has already worked well in France and in other French-speaking civil law countries - is an important step forward that should be recognised as such. The SAS will undoubtedly become one of the favoured vehicles for investors in the buoyant OHADA zone.

NEW TYPES OF SHARES AND SECURITIES

Christophe Eck, partner

By introducing legal tools that allow greater flexibility and creativity, the Revised Uniform Act manages to adequately respond to the increased need for investment which is vital to ongoing development of the African continent.

Some of the key changes introduced by the Revised Uniform Act include the creation of preference shares, the creation of hybrid securities and the allocation of free shares to employees. It is fair to say that the Revised Uniform Act drew a certain amount of inspiration from French law on these aspects.

- **Preference shares**

Upon its incorporation or during its corporate life, a public limited company (SA or SAS) may now create shares with or without voting rights, or with specific rights, on a permanent or temporary basis. This flexibility allows for a wide range of possibilities with respect to a company's investment structure.

By authorising the insertion into the articles of association of provisions which were until now only present in shareholders' agreements, the Revised Uniform Act has reinforced the legal certainty of such agreements.

The recognition of specific rights and needs between shareholders is beneficial. It should enable companies to open up their capital to different types of shareholders, by giving certain members double voting rights, and to others preference shares, non-proportional dividends, a right to cumulative dividends, the right to an ad hoc representation on management and supervising bodies, and the right to conduct audits.

This major step forward should be hailed by legal practitioners, namely in the private equity field.

- **Hybrid securities**

The Revised Uniform Act indicates that a public limited company can issue securities giving access to capital, or giving the right to allotment of debt securities.

Similarly to French law, and hopefully with the same level of success, the Revised Uniform Act recognises the ability of SA and SAS to issue convertible bonds, bonds with redeemable equity warrants attached, securities convertible into or exchangeable for new or existing shares. As a result, such securities should become more commonplace and will be highly useful in the implementation of financing operations.

Entrepreneurs will now be able to rely upon structured finance and specialised funds (mezzanine debt, subordinated debt etc.) and will be able to establish a hierarchy and order of priority between these hybrid securities and shares in the event of insolvency, early repayment, access to capital, etc.

- **Allocation of free shares**

SA and SAS will be able to freely offer existing or future shares to employees or certain categories of employees. This comes in addition to the policy regarding preference shares and hybrid securities, and helps build the loyalty of certain managers.

The regime put in place by the Revised Uniform Act is very similar to its French equivalent.

The allocation of free shares should prosper in companies listed on a regulated market as well as in companies which include investment funds in their capital.

CLARIFICATIONS AND CONTRIBUTIONS TO THE *SOCIETES PAR ACTIONS* REGIME

François Krottoff, partner

The Revised Uniform Act comprises a number of changes and additions that put an end to certain uncertainties or difficulties encountered by practitioners with respect to the *Société Anonyme* regime.

Below is a summary of the most significant changes in this regard:

- **In-kind contributions:** the value in-kind contributions shall be assessed by an auditor. The Revised Uniform Act provides that if the general meeting agrees on a higher value, the shareholders shall be jointly and severally liable with respect to third parties for the amount thus agreed upon, for a period of five years. This provision will most likely lead to a number of questions as to its application, even though the subsequent paragraph indicates that the guarantee is in relation the value of the contributions at the time of the audit (rather than the value of the contribution in the future).
- **Constitution of the Board:** The rule according to which the Board could include a maximum of 33% non-shareholders has been abolished. Unless otherwise provided in the company's articles of association, the members of the Board do not need to own shares in the company. This change will significantly facilitate the running of companies. It will also put an end to discussions on the scope of the last sentence of article 494 of the Uniform Act of 1997. For some authors, this provision banned the creation of a Board in companies with two shareholders. This is thankfully no longer the case.
- **Restrictive clauses on the transfer of shares:** the Revised Uniform Act validates pre-emptive rights for shareholders on all share transfers, alongside the existing approval rights. It confirms a solution that was broadly accepted by doctrine and legal practitioners. The Revised Uniform Act also confirms the validity of transfer restriction clauses provided that they are limited to a ten-year term and that there is a legitimate and significant need for such clause. The Revised Uniform Act also indicates that transfers of SAS shares conducted in violation of one of the above-mentioned clauses of the articles of association (approval, pre-emptive, transfer restriction, etc.) shall be declared null and void. This will no doubt reassure investors and legal practitioners who involved in setting up joint ventures in the form of public limited companies, and will thus uphold the predictability and legal certainty of this type of clause.
- **Other noteworthy points:**
 - A dismissal without just cause of the deputy managing director (in companies with a Board and a CEO), of the managing director (in companies with a Board, a CEO and a managing director) and of the general administrator may give rise to the payment of damages.

- The scope of related-party agreements has been broadened and now includes agreements signed with a shareholder owning a stake above or equal to 10% of the capital, or in which such shareholder holds in indirect interest, as well as all agreements signed with an entity in which a shareholder owns over 10% of the capital.
- Shares must be registered, except when admitted to trading on a stock exchange or to transactions of a central securities depository. There no longer is a minimum nominal amount.
- Video-conferencing and other telecommunication methods enabling the identification of participants are authorised, subject to certain restrictions, as a means to take part in Board meetings or corporate general meetings.

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