



Reforms to OHADA Commercial Law: Towards a More Attractive Legal Framework for Private Equity

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Introduction

The *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* ("OHADA"), which translates into English as the "Organisation for the Harmonization of Business Law in Africa" is an exclusively business-related legal framework that was created on 17 October 1993 in Port Louis, Mauritius.

Initially established pursuant to a treaty adopted among 14 Member States (the "OHADA Treaty"), OHADA membership has grown to 17 since 1993.¹ OHADA enacts, among other provisions, Uniform Acts that have direct effect and supersede contradictory national laws, subject to any transitional provisions stipulated by the Uniform Acts. The OHADA Treaty also created a supranational supreme court with jurisdiction over the areas of law covered by the Uniform Acts (the *Cour Commune de Justice et d'Arbitrage* or CCJA), in English the Common Court of Justice and Arbitration, to ensure uniformity and consistency of legal interpretation across the Member States.

The substance of the nine Uniform Acts relates to General Commercial Law; Commercial Companies and Economic Interest Groups; organizing Security Interests; organizing Simplified Recovery Procedures and Measures of Execution;

organizing Collective Proceedings for Clearing Debts; Arbitration; and organizing and harmonizing Undertakings Accountings Systems; Contracts for the Carriage of Goods by Road; and Cooperative Companies.

Today, OHADA continues to extend the scope of its legal reforms to better suit the needs of its Member States and their investors. Having previously reformed the Uniform Acts for Security Interests, Cooperative Companies and General Commercial Law in December 2010, OHADA adopted on 30 January 2014 substantial amendments to its core corporations law, the Uniform Act relating to Commercial Companies and Economic Interest Groups (known as the "AUSCGIE"), with almost two hundred new articles and some four hundred revised provisions.

The new AUSCGIE will come into force on 5 May 2014. Commercial companies and economic interest groups formed prior to the entry into force of the revised AUSCGIE are required to harmonize their articles of association with the new provisions within a two-year period following its entry into force. After that period, any non-harmonized provisions contained within the articles of association of a company established within a Member State will be deemed void.

1. The Democratic Republic of Congo is the newest Member State, having adopted the OHADA Treaty in September 2012. Whilst French speaking countries are the most numerous amongst the OHADA members, OHADA also includes Equatorial Guinea and Bissau Guinea, which are Spanish and Portuguese speaking, respectively.

The reform of AUSCGIE improves upon the previous legal framework and introduces a number of significant developments: promoting the creation and development of enterprises; enhancing legal certainty for economic and financial activities and transactions; and, consequently, encouraging both local and foreign investment. These innovations contribute to a simpler, more secure legal framework for investors and companies involved in cross-border transactions in Member States, and make the OHADA laws better suited to private equity investment in Member States.

AUSCGIE has been reformed with the following four aims in mind: (1) creating a new, more attractive legal entity; (2) strengthening legal certainty while enhancing flexibility in the functioning of Member State incorporated companies; (3) imposing certain principles of good governance on commercial companies and economic interest groups; and (4) filling certain gaps in the existing law—in particular, creating greater flexibility as regards the options for corporate financing. These reforms are important for the private equity community for the reasons described below.

1. Introduction of a simplified form of joint-stock company (*société par actions simplifiée*)

One of the major innovations of the revised AUSCGIE is the introduction of a new corporate entity: the simplified joint-stock company (*société par actions simplifiée* or SAS). Under the revised AUSCGIE, any commercial company formed prior to its entry into force can be transformed into an SAS.

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Map of OHADA member states



This form of corporate entity, based on its equivalent introduced in France in 1994, can be organized and operated substantially by reference to the company's articles of association, rather than by reference to the law. The main goal is to offer investors in OHADA countries a flexible structure in which contractual freedom prevails.

The significant flexibility which is now afforded to shareholders in an SAS will inevitably make it the vehicle of choice for private equity investment in Member States, enabling parties with different interests, expectations and rights (such as private equity investors and management) to sit alongside each other as shareholders in the same entity, just as they would in a Delaware corporation or English limited company.

First and foremost, the SAS provides a structure in which the liability of shareholders is limited to their respective capital contributions. Accordingly, the SAS meets the objective of limited liability for investors established by the EMPEA Guidelines.

Second, due to the flexibility in governance referred to above, shareholders are now able to exercise effective control over management. By way of example, the articles of association of an SAS may include provisions limiting the powers of the company's managers. Such provisions may prohibit the managers, in the absence of prior approval

of the shareholders or an *ad hoc* body, from making decisions that could be harmful to the shareholders. The articles of association of an SAS may also provide for a statutory body, such as a board of directors or a committee, in which shareholders may be given seats and assigned a role in the company's management.

Furthermore, the articles of association of an SAS allow the differentiation of rights as between shareholders (whether financial or non-financial), thereby permitting the inclusion of "reserved matters" and other minority investor protection provisions. This means that a shareholders' agreement is therefore no longer the sole means through which to organize the relationship amongst shareholders. Private equity investors can now choose how to allocate the respective rights and obligations of shareholders across the articles of association of the company and the shareholders' agreement. This distinction can be crucial, because a breach of key provisions of an SAS's articles of association can result in the invalidity of the action causing the breach—whether the act is a decision taken in the name of the company or a transfer of shares, whereas a breach of a shareholders' agreement merely gives investors a right to pursue an action for damages. Investors should, however, be aware that the articles of association of an SAS will be available to the public, and confidentiality considerations will need to be balanced against the potential benefits of defining shareholders' rights in the articles of association.

Third, the transfer of shares in a SAS can be easily regulated through the articles of association. The articles of association may define the circumstances in which a shareholder may be required to sell its shares, including by way of exclusion.

2. Increased legal certainty

Among numerous new provisions, four are particularly relevant for private equity investors and demonstrate a desire on the part of the OHADA Member States for a clearer and more effective corporate law, in line with the EMPEA Guidelines.

The first is the confirmed and express recognition by law of the validity of shareholders' agreements, provided they are in compliance with AUSCGIE and the relevant company's articles of association. The second important change is that the new AUSCGIE provides that a transfer of shares in a limited company (*société anonyme*, or SA) or an SAS made pursuant to the enforcement of a share pledge, where the share pledge has not been established with the prior written consent of the relevant company, is subject to any share

transfer restrictions set out in the company's articles of association requiring the prior approval of the potential acquirer by the shareholders. This change gives teeth to share transfer restrictions that a private equity investor negotiates and embodies in a company's articles of association.

In addition, the revised AUSCGIE confirms the validity of clauses which impose restrictions on share transfers, but only when they are, in the case of an SA, justified by serious and legitimate reasons and, in the context of both SAs and SASs, limited in time to ten years. Finally, the revised AUSCGIE makes it clear that in the case of both SAs and SASs, share transfers made in breach of the provisions in the relevant company's articles of association are to be treated as void.

3. Improved corporate governance

The revised AUSCGIE is far-reaching in terms of improved corporate governance. It reinforces the application of good governance principles by, among other things, (i) prohibiting directors from participating in any vote on their own remuneration, (ii) further specifying the types of contracts that require the prior approval of an SA or SAS's board of directors, (iii) introducing the notion of abuse of equality² and (iv) introducing new offences relating to the management of companies, such as the failure by directors to submit companies' financial statements within a month of their approval by the shareholders. Such developments provide additional comfort for private equity investors, particularly for those owning minority stakes, because they make portfolio company management more accountable.

Under the revised AUSCGIE, a competent court can appoint a provisional administrator when the operation of a company is deadlocked as a consequence of action or inaction by its shareholders or another corporate body. In addition, OHADA lawmakers took into account the practical constraints on investors by enabling participation in meetings and voting by video conference and by permitting decisions to be taken at the shareholder and board level by written resolution.

4. New financing opportunities and new types of securities

The financing options for OHADA zone companies have been broadened under the new AUSCGIE. Shareholders of an SA or SAS are now entitled to determine the nominal value of their shares through the company's articles of association.

2. Abuse of equality is a variation of the "abuse by minority" concept in which minority shareholders use their minority rights to frustrate corporate governance by boycotting board or shareholders meetings or taking other actions that prevent majority board or shareholder decisions being implemented. Abuse of equality is particularly intended to cover situations in which a company's share capital is held equally by two shareholders, and prevents a shareholder from blocking the operation of the company by negative votes or not voting, as the case may be.

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The new provisions create the possibility for a variable-capital limited company (*société anonyme à capital variable*), in which there are no formalities or costs related to any increase or decrease in share capital.

The new AUSCGIE also provides for "industry contributions" by which a shareholder makes available to a company technical knowledge, labor or services in exchange for shares. However, industry contributions are not formally contributed to the company's share capital, and cannot be assigned or transmitted to a third party. Accordingly, financial investors can benefit from the expertise and experience of an industrial shareholder without any risk of dilution of their shareholding.

Moreover, an SA and an SAS can now issue complex securities (*valeurs mobilières composées*) (such as convertible bonds), granting access to capital or entitling the company to issue debt securities. Furthermore, a company may now set the order of priority in which securities are to be repaid and which permit their repayment only after all other creditors (including the holders of equity-type loans) have been paid off, (*prêts participatifs*). Additionally, an SA and an SAS may now issue (i) preferred shares, with or without voting rights accompanied, temporally or permanently, by special rights of any kind, and (ii) free shares to salaried personnel. Such amendments provides for a wide range of different classes of equity securities, as recommended in the EMPEA Guidelines.

In addition, the revised AUSCGIE has removed the requirement that the board of directors of an SA be composed of at least two-thirds of the company's shareholders, thereby removing the need to make the shareholder structure of a company overly-complicated, such as granting one share to a board member, in order to achieve the required board composition. Shareholders may of course retain this rule, should they wish to do so, but there is now no obligation.

Lastly, the definition of "offer of securities to the public" has been modified to address the financing needs of commercial companies by permitting them to offer securities directly to professional investors, such as credit institutions and mutual funds, who are referred to as "qualified investors" without the offering being treated as an offer to the public.

Conclusion

The revised AUSCGIE is a significant breakthrough in terms of upgrading OHADA's corporations law to meet the requirements of private equity and other foreign investors. Significantly, the AUSCGIE now meets most, if not all, of the requirements of the EMPEA Guidelines for "effective, clear and flexible corporate securities laws" and sets the stage for further development of local capital markets in the OHADA region.³ As a consequence of the new AUSCGIE, a legal framework now exists within the OHADA Members States for complex corporate and financial transactions of the type required by modern private equity investors.

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3. Nevertheless, some provisions of the AUSCGIE still lack clarity. For example, articles 243 and 244, which apply to all types of companies, introduce a concept of invalidity of corporate acts when certain provisions of the articles of association of a company which are "deemed essential" are breached. This qualification implicitly suggests that certain provisions of the articles of association are not essential and consequently creates a degree of legal uncertainty. Hopefully, the courts of the Member States and the CCJA will take a sensible approach in interpreting any such anomalous provisions and will seek to promote an environment that encourages investor confidence, in keeping with the spirit of the amendments to the AUSCGIE.