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SUPERVISION AND CONTROL OF CORPORATE MANAGEMENT; CAMEROON AND GERMANY. A COMPARATIVE ANALYSIS.

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ABSTRACT

This study looks at the pros and cons of supervision techniques put in place by the OHADA Uniform Act relating to Commercial Companies and Economic Interest Groups, for companies doing business in Cameroon, in comparison with German corporate supervision mechanisms classified as unique[1]. In the quest to increase the effectiveness of Cameroon's corporate control techniques, this research proffers answers to the following questions; whether, there are aspects in the German supervision framework which are compatible with those of Cameroon, and how they could be implemented to achieve greater efficiency in control.

The thesis analyzes the main features of public limited and private limited companies in Cameroon and Germany, and the conflict of interests' problems inherent in them, which flow directly from the agency relationship between shareholders and managers. It gives a detail explanation of the supervision mechanisms in the jurisdictions, their merits and drawbacks. The research answers the above question in the positive i.e., there exist many issues in the German model which are compatible with that of Cameroon, and clearly expounds on the implementation of these issues in Cameroon.

[1] See note 4, infra

INTRODUCTION

Corporate Governance is a facet of company law that has evolved in recent years into a new branch of law, which together, strive to promote stability in companies by averting the possibilities of mismanagement. Since its inception, corporate governance has enjoyed great acceptance in major jurisdictions like the United States of America and Germany, leading to the adoption of codes as supplements to their corporate laws.

Simpliciter, corporate governance laws have as main purpose to set up rules, techniques or institutions aimed at controlling and check-mating management (managers or directors) which occupies a salient, sensitive, strategic and fiduciary position in the running of companies' going concern. This is at par with the definition of the OECD. Per it, "corporate governance is a country's private and public institutions, both formal and informal, which together govern the relationship between people who manage the corporations and all others who invest resources in corporations in the country"[2].

In most developing economies, e.g. Cameroon, corporate governance is seen as part of company laws, neither having a separate legislation nor viewed for scholarly purposes as a distinct course. The need therefore for the adoption of corporate governance codes in these countries cannot be overemphasized.

My inspiration to write on this topic stems principally from the political rhetoric by the government of Cameroon on the OHADA Treaty, showering it with all sorts of

[2] OECD Development Centre Policy Brief No. 23, Corporate Governance in Developing, Transition and Emerging-Market Economics, : 7

praises and endowments as a modern law, and a master piece in the field of business, which serves the needs of Cameroon.

OHADA is a French acronym connoting "Organization pour l'Harmonisation en Afrique du Droit des Affaires", officially translated into English as the "Organization for the Harmonisation of Business Law in Africa" (OHBLA). It is a treaty entered into on the 17th of October 1993 in Port Louis (Mauritius) mostly by former French colonies in Africa, with the prime objective of creating a business friendly environment for foreign investors, with legal and judicial security[3].

The legal instrument regulating investment vehicles under the OHADA Treaty is the Uniform Act Relating to Commercial Companies and Economic Interest Groups. Before the advent of this treaty, the Parliament of Cameroon had not passed any Act in this sphere of the law. Being a bilingual country, it depended principally on received English and French laws in the various parts of the legal divide.

Due to the inability of the of the Cameroonian parliament to pass a uniform company law applicable to the state of Cameroon, especially because of incessant failures to strike a compromise between the received French and English laws, the President of the Republic of Cameroon went through the back door and signed the OHADA Treaty in wanton disregard of constitutional procedures. To make matters worse, the treaty provides succinctly that its working language is French. As a consequence, the Anglophones have been unwilling and reluctant to embrace the treaty.

This work seeks therefore, to give an objective analysis or appraisal of the techniques (internal and external) that are used in companies to control and supervise directors or managers in the performance or execution of their duties in Cameroon, under

[3] http://www.ohada.com/index.php?newlang=english, 08/03/2009

the auspices of the Uniform Act relating to Companies and Economic Interest Groups, in comparison with Germany, whose supervision technique is classified as a sui generis model, an alternative to that which is customary in the Anglo-Saxon world[4]. This analysis has the incidence of seeing whether there are aspects in the German supervision framework which are compatible with that of Cameroon, and how they could be implemented to achieve greater efficiency in control.

This study also intends to expose some of the potentials and weaknesses of the supervision mechanisms put in place by the Uniform Act. It also clarifies the agile and ever enquiring minds of young legal scholars and business men who are at the fore front of business, that despite OHADA's criticisms as French Napoleonic laws, making Anglophone Cameroonians, judges inclusive; to take it with a pinch of salt, it is still a force to reckon with, albeit subject to reforms to be hinted at infra. For example, the Uniform Act relies on auditing as its main supervision technique and lays down an aesthetic framework for auditors to efficiently carry out their duties. This is a factor which was overlooked in Enron and led to a serious crisis[5].

In order to properly understand the mechanisms put in place by legal instruments in Cameroon and Germany for the control of corporate management, chapter one of this thesis looks briefly at the legal investment vehicles in these jurisdictions while chapter two expounds on the meaning of management, those involved in it, the problems of management generally, and the source, scope and limitation of management powers. Chapter three deals with the internal and external supervision techniques present in the

[4] Thomas J. Andre Jr, "Some Reflections on German Corporate Governance: A Glimpse at German Supervisory Boards ," *Tulane Law Review* 70, (June, 1996): 2
[5] Steven Pearlstein & Peter Behr, "At Enron, the Fall Came Quickly: Complexity, Partnerships Kept Problems From Public View", Washington Post Staff Writers, December 2, 2001.

different forms of companies in Cameron and Germany. Worthy of note here, is the fact that while investors in Cameroon adhere to auditing as the main control technique, German shareholders rely on the supervisory board as trustee. The above discussion shall however be limited to public and private limited companies.

On a final note, a thorough analysis shall be made on the control techniques, exposing Cameroon's merits and shortcomings with respect to Germany. The completion of such a study without recommendations for my country, which is still developing and in dire need of better laws or legal investment vehicles that attract investors, would be, like a cup of tea without sugar.

In this respect, I do not intend to advise policy makers to transplant the German model of supervision of corporate management stricto sensu or mutatis mutandis into Cameroon but rather, to maintain the status quo and introduce aspects of German law which are compatible with the existing mechanisms, socio-economic nature and background of Cameroon. A salient example of this is the adoption of a Cameroonian Corporate Governance Code. Since the underlying aim of every corporate governance code is to attract investors and creditors; foreign or local, such a move by the Cameroonian parliament will go a long way to attract wealthy stockholders to Cameroon and make its business sector to be buoyant.

This research is based mainly on primary sources of law in the area of companies and corporate governance (statutes) in Cameroon and Germany. However, the importance of secondary sources such as treatises cannot be underestimated. Outstanding articles and journals from internet databases shall also be relevant for the completion of this work. To bolster our understanding of the problems inherent in management, recourse will be made to American law, having a well developed corporate governance system.

In sum, although this project shall broadly encompass supervision and control techniques of company management in Cameroon and Germany, and recommendations for Cameroon, my presentation shall be systematic (step by step).

CHAPTER 1

LEGAL INVESTMENT VEHICLES IN CAMEROON AND GERMANY

The corporate laws of Cameroon and Germany provide for a plethora of legal investment forms for investors wishing to venture into business in these economies. They include partnerships, private companies, private limited companies and public limited companies. This chapter seeks to showcase the very nature of these company forms in order to better appreciate the control and supervision techniques over management to be discussed infra. This appraisal shall however be limited to private limited companies and public limited companies.

1.1. CORPORATE FORMS IN CAMEROON

The legal instrument regulating companies in Cameroon as aforementioned is the OHADA Uniform Act relating to Commercial Companies and Economic Interest Groups. It refers to private limited companies (in French; Société à Responsabilité Limité) and public limited companies (Société Anonyme) inter alia, as commercial companies[6]. According to it, a commercial company shall be formed by one , two or more persons via

[6] OHADA Uniform Act, art 6

agreement by pooling their assets in cash and in kind together for the purpose of sharing profits and bearing losses under conditions required by the Act[7]. It is trite noting that these two forms of business vehicles are the most exploited.

1.1.1. Private Limited Companies (Société à Responsabilité Limité) or SARL):

The Uniform Act defines a private limited company as one in which the partners (shareholders) are liable for the debts of the company up to the limit of their contributions, and their rights are represented by company shares. Such a company can be formed by a natural person, a corporate body, by two or more natural persons, or corporate bodies[8].

A private limited company is required to have a registered capital of at least one million CFA francs, divided into equal shares with face value of not less than five thousand francs CFA[9].

It is managed by one or more natural persons appointed by partners in the articles of association or by partners holding more than half of the registered capital in general meeting, safe where the articles of association require a stronger majority. The manager(s) performs all management acts in the company's interest[10].

Partners have the right to vote in general meeting and their votes are equal to the number of company shares they hold[11]. The partner with the majority of company shares

[7] *Ibid*. Art 4
[8] *Ibid.* Art 309
[9] *Ibid.* Art 311
[10] *Ibid.* Arts 323 & 328
[11] *Ibid*. Art 334

chairs the general meeting of partners if none of the managers is a partner. But if otherwise, such a manager shall chair[12].

Partners also have the right to be permanently informed of the company affairs. Prior to the holding of a general meeting, they are informed of the "summary financial statements of the fiscal year, the management report prepared by the manager, the text of proposed resolutions, the auditor's general report as well as the auditor's special report relating to regulated agreements"[13].

Decision-making in private limited companies is done via ordinary collective decisions for example, the annual ordinary general meeting of partners, and extraordinary collective decisions. While the former decides on management actions and regulated agreements, the latter has the object of amending the articles of association.

The Uniform Act does not oblige all private limited companies to have an auditor. Only such companies which have more than ten million CFA francs as registered capital or whose annual turnover exceeds two hundred and fifty million CFA francs and have a permanent staff of more than 50 persons[14].

Managers, their spouses, contributors in kind, persons having special benefits and persons receiving periodic payments from the company or from its managers as well as their spouses may not be appointed auditor[15].

Finally, as far as the powers, duties, liability, dismissal and remuneration of the auditor is concerned, the Act stipulates that they shall be governed by a special law regulating the auditors' profession[16].

[12] *Ibid.* Art. 341
[13] *Ibid.* Art. 345
[14] *Ibid.* Art. 376
[15] *Ibid.* Art 378

1.1.2. Public Limited Companies (Société Anonyme) or SA):

Per the Uniform Act, "a public limited company is a company in which liability of each shareholder for the debts of the company is limited to the amount of shares subscribed to, and his rights are represented by shares"[17].

All public limited companies are required to have a fixed minimum authorized capital of ten million CFA francs divided into shares having a face value of not less than ten thousand CFA francs[18]. Shares are subscribed to, in cash and in kind. As its name goes, only public limited companies are allowed to make public offers for shares.

This law makes provision for different methods of management and administration of a public limited company. That is, a public limited company with a board of director and a public limited company with a managing director. It is possible for a company to change its method of administration and management but this decision can only be taken by an extraordinary general meeting of shareholders[19].

"A public limited company with board of directors is managed either by a chairman and managing director or by a chairman of the board of directors and a general manager". Directors are appointed by the articles of association and where necessary by the constituent general meeting[20]. A corporate body can also be appointed director. In such a case, it shall nominate a permanent representative who will not be a director but who shall incur the same liabilities as if he were a director[21].

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[16] *Ibid.* Art. 381
[17] *Ibid.* Art. 385
[18] *Ibid.* Art. 387
[19] *Ibid.* Art. 414
[20] *Ibid.* Art. 419 & 415
[21] *Ibid.* Art. 421

In the case of a public limited company with board of directors administered by a chairman and managing director, the chairman is appointed by the members of the board. In this capacity he ensures the general management of the company and represents it when dealing with third parties[22].

However, where the public limited company with board of directors is administered by a chairman of the board and a general manager, while the former is in charge of controlling company management, the latter has general management and representation powers; although both are appointed by the members of the board of directors[23].

Public limited liability companies with not more than three shareholders are not required to have a board of directors. Instead, a managing director is appointed to administer and manage the company. He may be chosen from within or outside the shareholders and shall represent the company in its relation with third parties[24].

A special genre of public limited company exists under the Uniform Act having just a single shareholder. Here, all decisions, whether falling within the jurisdiction of the ordinary general meeting or the extraordinary general meeting are taken by the lone shareholder[25]. The law specifically requires all these decisions to be published in newspapers carrying legal notices; known in Cameroon as the Official Gazette.

The Uniform Act mandates all public limited companies to have one or more auditors who may be natural persons or companies incorporated by natural persons. These auditors are appointed by the constituent or ordinary general meeting of

[22] *Id.* Arts. 462 & 465
[23] *Ibid.* Arts. 480 & 487
[24] *Ibid.* Arts. 494 & 495
[25] *Ibid.* Art. 558

shareholders. It is worth mentioning here that, the Uniform Act relies a great deal on auditors as its most salient supervision mechanism to protect investors.

Decision making by shareholders is done in ordinary general meetings and extraordinary general meetings. Shareholders have voting rights which could be exercised personally or by proxy. Shareholders also have the right to examine and receive a copy of the summary financial statement and reports of the auditor, board of directors or managing director[26].

1.2. CORPORATE FORMS IN GERMANY

In Germany as in Cameroon, the two main types of companies are limited liability companies (GmbH) and stock corporations (AktG). However, unlike Cameroon, where the OHADA Uniform Act regulates the two most used types of corporate entities, German companies are regulated by different legal instruments. The Act on Limited Liability Companies is charged with the regulation of private limited companies whereas; stock corporations are governed by the Stock Corporations Act. Another novel type of company is the European Company known in Latin as Societas Europaea, created by a European Union Council Regulation. By virtue of Germany's membership in the union, Societas Europaea stands as one of its corporate forms.

Of paramount importance also are the Co-determination Act and Corporate Governance Code which make a great impact on the organization and functioning of German companies, for the most part in stock corporations. These impacts shall be exposed as we expound at length on the investment vehicles in the ensuing paragraphs.

[26] *Ibid.* Art. 525

1.2.1. Private Limited Companies (GmbH):

Private limited liability companies in Germany are companies which can be formed by one or more persons for any lawful purpose[27]. The domicile of such companies is the place stated in their articles of association.

The share capital of a private limited company is required to be at least €25000, divided into share capital amounts of €50. However each shareholder must hold a minimum of €100 share capital. Shares are subscribed for cash and non-cash contributions[28].

The law makes it possible for a GmbH to be administered by one or more managing directors who must be natural persons. Shareholders or other persons can be appointed directors. They can be so appointed in the articles of association or subsequently by the meeting of shareholders[29].

In the language of the Act, private limited companies are represented by the managing directors in and out of court[30]. This simply connotes that managing directors act on behalf of these companies in all ramifications and that, the company is bound by all such transactions entered into by them.

The Act limits the authority of managing directors to represent the company to the objects of the company as determined in the articles of association and to the

[27] German Act on Limited Liability Companies, § 1
[28] *Ibid.* § 5
[29] *Ibid.* § 6
[30] *Ibid.* § 35

resolutions of shareholders, but no such limitations shall have legal effect so as to prejudice third parties[31].

Decision making in a GmbH is in the Shareholders meeting. Shareholders decide inter alia on financial statements and appropriation of dividends. Shareholders have the right to vote. Each share carries a vote. They also have the right to be informed without undue delay, upon request of the affairs of the company and the right to inspect the books and records[32].

To conclude, the Act makes it optional for private limited companies to have a supervisory board, the main supervisory organ in stock corporations. It proceeds by stating that, a GmbH wishing to have a supervisory board must so indicate in its articles of association. In such a case, the relevant provisions of the Co-determination and Stock Corporations Acts will apply, but will not interfere with, or alter the traditional structure of the GmbH except to the extent to which it is necessary to achieve the basic purposes of co-determination[33].

1.2.2. Stock Corporations (AktG):

A stock corporation is a company formed by one or more persons having a separate legal entity and in which liability to creditors is limited to the company assets. Its domicile is designated in the articles of association[34].

An AktG, per the Stock Corporations Act can constitute a commercial enterprise even though the purpose of the company is not to engage in commercial activity.

[31] *Ibid.* § 37
[32] *Ibid.* § 46 & 51a
[33] *Ibid.* § 52
[34] German Stock Corporations Act, § 1

Moreover not all stock corporations are listed in the stock exchanges. Only corporations whose shares have been admitted to a market supervised and regulated by state recognized authorities are available to the public[35].

Stock corporations must have a minimum share capital of €50000 and shares can be issued with or without par value. Par value shares are required to have a face value of at least €1 while non-par shares do not carry any face value[36]. Shares are not divisible.

Contributions for the acquisition of shares in return, in an AktG can be in cash or in kind. In the latter case, the assets should have ascertainable economic value[37]. There are no multiple voting rights; each share confers rights to vote[38].

The administrative organs of a stock corporation are the management board and the supervisory board. The management board is responsible to manage the company and may be composed of one or more persons, but only natural persons with full legal capacity can be members. Stock companies having a share capital of more than €3million must have at least two persons in the board, unless otherwise provided in the articles of association. A labor director is also appointed in to the management board[39].

The management board in an AktG represents the company in and out of court. It has duties to call for a shareholders meeting promptly where a company incurs a loss equal to one-half of its share capital, to file a bankruptcy petition when a company becomes insolvent and to employ the care of a diligent and conscientious manager in conducting business[40].

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[35] *Ibid.* § 3
[36] *Ibid.* § 8
[37] *Ibid.* § 27
[38] *Ibid.* § 12
[39] *Ibid.* § 76(2)
[40] *Ibid.* § 93(1)

The members and chairman of the management board are appointed and revoked by the supervisory board. The management board submits reports on the state of business, profitability of the company and intended business policies to the supervisory board[41].

The Co-determination Act requires all stock corporations among others to have a supervisory board[42]. The main aim of this Act is to set an equal representation and participation of shareholders and employees in the supervisory board via their representatives.

Under the Stock Corporations Act a supervisory board will be composed of three members. This is subject to the articles of association, which may provide for a higher number and such number must be divisible by three. Stock companies with a share capital of up to €1.5 million and more shall have nine and fifteen members respectively in their supervisory boards. Companies with more than €10 million share capital are required to have twenty-one members. However these provisions do not affect the provisions of the Co-determination Act which stipulates otherwise[43].

Only natural persons can be members of supervisory board. An individual can not be a member of the supervisory boards of more than ten commercial companies. Representatives of shareholders in the supervisory board are elected and removed from office by the shareholders' meeting[44].

The representatives of the employees are appointed and dismissed pursuant to the Co determination Act. Under it, election of labor representatives can be conducted either through delegates based on the principle of proportional representation or via direct

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[41] *Ibid*. § 90
[42] German Co-determination Act, § 1(1)
[43] supra See note 34, § 95
[44] *Ibid*. § 101

election wherein any employees who have attained the age of 18 are entitled to vote[45]. These labor representatives in the supervisory board can be dismissed by a resolution of delegates or a vote cast by employees, preceding an application for dismissal[46].

The supervisory board has as primordial duty to supervise the management of the company. It can examine and inspect the books and records of the company as well as assets or commission individual members or special experts to carry out such examination and inspection. The supervisory board has the sole power to represent the company against the management board[47].

The supervisory board determines the aggregate remuneration of the management board members and authorizes the extension of credit to them. Membership in the supervisory board and management board at the same time are incompatible[48].

The supervisory board also has duty of care analogous to that of the management board. Members of the supervisory board are subject to the duty of confidentiality. They must keep secret, reports received from management or confidential consultations.

Despite the representatives of shareholders in the supervisory board, shareholders still have rights to decide on myriad issues in general meeting which the articles or Stock Corporation Act expressly vest. Some of such issues inter alia include appropriation of dividends, appointment of external auditors, amendment of articles and measures to increase or decrease share capital[49].

In sum, shareholders also have a right to information. Each shareholder must be provided upon request, with information at the meeting of shareholders by the

[45] supra See note 42, § 18
[46] *Ibid.* § 23
[47] supra See note 34, § 111 & 112
[48] *Ibid.* § 105, 111 & 115
[49] *Ibid.* § 119

management board pertaining to the company's affairs, to the extent that the information is necessary for a proper evaluation of the relevant issues on the agenda.

The German Corporate Governance Code was enacted to address the issue of the supervisory board's independence, looked at as problem. The code accords powers to the supervisory board to independently advise and supervise the management board[50].

1.2.3. European Company (Societas Europaea):

The European company is a sui generis type of corporate form in Germany which this study seeks to unravel. This entity was brought into being by a European Union Council Regulation and supplemented by a Council Directive dealing with the involvement of employees in the European Company.

According to the regulation an SE can be formed in four ways: by a merger, formation of a holding company, the formation of a joint subsidiary or by the conversion of an exiting public limited company formed under national law[51].

The formation of a European Company by merger is limited to public limited companies from different member states. The creation of a European Company holding company is available to public and private limited companies which have their registered offices in different member states or have subsidiaries or branches in member states other than where they are registered. Finally a European Company formed by a joint subsidiary is opened to any legal entities governed by public or private law.

The minimum subscribed capital of a European Company is set at € 120000. However where the laws of a member state provide for a higher capital for companies

[50] Petri Möntysaari, Comparative Corporate Governance: Shareholders as Rule-maker (Springer Berlin-Heidelberg: 2005), 263
[51] Council Regulation (EC) No 2157 / 2001 of 8 October 2001; art 17, 32, 35 & 37

engaging in certain going concerns, such laws will apply to European companies with registered office in that jurisdiction[52].

The European Company's registered office indicated in the statutes, must be where its central administration is situated and must be registered in such place so stated.

The Regulation gives the possibilities for a European Company to be administered by a two-tier or one-tier system. Under the two-tier system the company is managed by the management board while the supervisory board supervises management. The general meeting of shareholders appoints members of the supervisory board and they in turn appoint management board members. No person can be a member of the two boards at the same time. Under the one-tier system, the company is managed by an administrative board[53].

The Council directive like the Co-determination Act, organizes employee involvement in a European Company not in the realm of management, but at the level of supervision[54]. This directive provides for a hand full of options to ensure employee participation. For example, one is where employees form part of the supervisory board or administrative board depending on the structure of the company, or where the employees represented by a separate body or other models to be agreed upon by employees and management.

[52] *Ibid.* Art. 4
[53] *Ibid.* Art. 38, 39, 40 & 43
[54] Council Directive 2001 / 86 / EC of October 2001

CHAPTER 2

MANAGEMENT OR ADMINISTRATION OF CORPORATE ENTITIES

After examining the different types of corporate forms in Cameroon and Germany this chapter intends to discuss the nature and facets of management. As a Precursor, it looks carefully at the meaning of management, those involved in company management and their duties. The chapter then unveils seriatim, the very problems of management which incept from the agency relationship inherent in companies, and wraps up with a classical exposition of the sources, scope and limitation of management powers in private and public limited companies of both jurisdictions.

2.1. What is Management

Under the OHADA Uniform Act, a private limited company is managed by one or more natural persons while a public limited company can be managed either by a chairman and managing director or by a chairman of board of directors and a general manager[55].

Per the Act on Limited Liability Companies, German private limited companies are represented by managing directors in and out of court. On its part, the Stock Corporation Act stipulates that the management board has direct responsibility for the management of a stock corporation. Even the European Union regulation creating the European Company

[55] supra See notes 10 & 19

merely posits that in a two-tier system, an SE will be managed by the management board and by the administrative organ in a one-tier system[56].

From the look of things, neither of these laws specifically gives a hard and fast definition of management. Recourse therefore has to be made to common sense and the thoughts of legal scholars.

The term, management is a word of art. Simpliciter, in this context, one could say management means a group of persons in charge of directing the going concern of a corporate entity. The Black's Law Dictionary defines management as the people in a company who are responsible for its operation. It distinguishes further between middle and top management. While the former relates to people who manage operations within the company and execute upper management's orders or directives, the latter relates to the highest level of a company's management where, important policy decisions and long-term business are taken[57]. It is this latter case which is of importance to our study.

These definitions of management are seconded by Berle and Gardiner in their treatise. According to them, management is defined as that body of men, who, in law have assumed officially the duties of exercising domination over the business and assets of a company[58].

2.2. Problems Inherent in Management

This section of the write-up seeks to elaborate briefly on opportunistic behaviors of management which conflict with the interests of shareholders. These conflicts in

[56] supra See note 52
[57] Black's Law Dictionary, 8th Edition, (St. Paul, MN: Thomson/West : 2005), 801
[58] Adolf A. Berle & Gardiner C. Means, "The Modern Corporation and Private Property," (Transactions Publishers),196

corporations, not only common in German and Cameroonian settings arise generally and usually from the delegation of management powers by shareholders to managers. Such conflicts constitute just one facet of the three generic corporate agency qualms. The others involve conflicts between majority and minority shareholders, and finally conflicts between the company and non shareholder constituencies like creditors, employees and customers[59].

This concept of delegation of powers is the back bone and fundamentals of agency relationships and is akin to the transformation phenomenon from family controlled businesses to professionally managed businesses in most economies. The quest for expertise and well trained personnel for better results and continuity of business over generations being the rationale or main thrust of this similarity.

As has been hinted at, delegation of management powers is a basic feature or characteristic of large companies with dispersed ownership and has the far-reaching merit of allowing centralized management, a condition sine-qua-non for heightened productivity[60].

There exist however a series of transactions in which management opportunism could be very acute, that is, where directors directly or indirectly benefit from their fiduciary position. American law has couched and developed an impressive body of rules under the principle of fiduciary responsibility or duty. These rules relate to various interest conflicts of corporate management. They include self-dealing, usurpation of

[59] Henry Hansmann & Reinier Kraakmann, The Anatomy of Corporate Law: A Comparative & Functional Approach (Oxford University Press: 2004), 2
[60] *Ibid.* at 11

corporate opportunity, dealing in corporate control, insider dealing, and the sale of shares[61].

Previously, in Anglo-Saxon legal systems directors were not allowed to deal or enter into transactions with their companies[62] because they had a lot of discretionary powers to dilute company assets[63]. Nowadays however, they are allowed to deal with their companies for practical and plausible reasons albeit subject to control. Gerard Hertig and Hideki Kanda argue that small companies can only transact with directors, officers and major shareholders, either because third parties cannot evaluate their prospects or because companies would be obliged to disclose business secrets or strategies to get loans[64].

Moreover, it is contended that the cost of prohibiting self-dealing transactions outweighs its benefits[65] and barring such dealings can induce frivolous litigations against directors[66].

American law distinguishes between two types of self-dealing transactions. The one is when a director contracts with the company on less favorable terms than could be got

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[61] Klaus J. Hopt / Gunther Teubner, "Corporate Governance and Director's Liabilities," Walter de Gruyter, (1985):151

[62] e.g., Lucian A.Bebchuk & Christine Jolls, Managerial Value Diversion and Shareholder Wealth, 15 JOURNAL OF LAW & ORGANIZATION 487 (1999) in note 61infra.

[63] Paul L. Davies, GOWER & DAVIES, PRINCIPLES OF MODERN COMPANY LAW 393 (7th ed. 2003) UK; Harold Marsh, *Are Directors Trustees?* Conflict of Interest and Corporate Morality, 22 BUSINESS LAWYER 35 (1966)US in Gerard Hertig & Hideki Kanda, The Anatomy of Corporate Law: A Comparative and functional Approach (Oxford University Press: 2004),101

[64] Gerard Hertig & Hideki Kanda, The Anatomy of Corporate Law: A Comparative and functional Approach (Oxford University Press: 2004), 101

[65] See Lucas Enriques, The Law on Company Directors' Self Dealing: A Comparative Analysis, 2 INTERNATIONAL & COPARATIVE LAW JOURNAL 297 (2000) in Gerard Hertig & Hideki Kanda, The Anatomy of Corporate Law: A Comparative and functional Approach (Oxford University Press: 2004), 102

[66] Gerard Hertig & Hideki Kanda, The Anatomy of Corporate Law: A Comparative and functional Approach (Oxford University Press: 2004), 102

from proper negotiation in an open market and the other, is when a director buys assets from his or her company or the company secures or guarantees a loan of a director from a third party.

Usurpation of corporate opportunity is another arena of conflict of interest. Here, directors take or divert what rightfully belongs to the company by transacting with outsiders rather than with the company. Insider trading, quite apart from the others is another serious avenue for conflict of interest. The access to in-house information makes insiders to be aware of the good and bad business days and hence trade. Eloquent testimonies of such are short-term round trip purchase-and-sale or sale-and-purchase transactions by directors[67].

The sale and issue of shares is also an area where shareholder conflicts with management are inherent. The United States case law portrays a good picture in this respect. The first avenue for conflicts under this head cropped-up when directors were given unfettered authority to evaluate the pecuniary value of contributions in kind, in order to determine whether they are commensurate to the par value of the shares subscribed to[68].

The second of such instances turns on non-par value shares. The laws governing non-par shares usually require that permission for the issue of these shares, at a particular amount should be granted by a vote of shareholders or by a resolution of the board of directors. In most cases, the articles give the discretion to set the price to directors[69].

[67] *Ibid.* at 112
[68] Farwell *v*. Great Western Telegraph Co., 161 Illinois522; Trust Co *v*. Turner, 111 Iowa 664. Dodd, D. L.: "Stock Watering" (N.Y. 1930) Chap. III in Tom Hadden, 'Regulating Corporate Groups: An International Perspective', Corporate Control & Accountability (CLARENDON PRESS, OXFORD): 132
[69] See note 58 supra at 146

A stock purchase warrant is also an aspect which evinces conflicts of interest on the issuance of shares. Stock purchase warrants are options which enable the holder to subscribe to shares of the company issuing them, at a price stated on the warrants. The terms of the options could be limited or perpetual; however perpetual options are more frequent. The law grants the discretion for the issuance of these shares solely and unconditionally to the board of directors unless the company's charter provides otherwise[70].

The last issue to be addressed as far as conflict of interests between corporate owners and managers in the issuance and sale of shares are concerned is that of blank stocks. Blank stocks came into being due to the dire need for the creation of authorized but unused preferred stock, giving directors the power to vary the rate of dividend stated in the charter before the stock is issued. It allows directors to by-pass the rigorous amendment formalities of the charter and, to alter other qualities of the stock itself. A blank stock, in fact, constitutes a blank check giving directors discretionary powers to fill it as they deem fit[71].

The final, but not the least segment of transactions that hinge on management problems (conflicts of interests) albeit to a little extent relates to significant actions or organic changes in corporations. Organic actions generally consist of mergers, charter amendments, sale of corporate assets and alteration of capital. Most legal systems (France & Germany) also classify corporate divisions and restructurings as significant actions[72].

[70] Delaware General Corporation Law (1929) §14 in note 66 supra, at 165
[71] Delaware General Corporation Law (1929) section 5, sub-section 4; section 13 supra note 66 at 168
[72] Edward Rock, Hideki Kanda & Reinier Kraakman, The Anatomy of Corporate Law: A Comparative & Functional Approach (Oxford University Press: 2004), 133

Unlike in the aforementioned transactions on interest conflicts between managers and shareholders where delegation of authority is total, in these cases delegation of authority is partial[73]. As a consequence the magnitude of director opportunism in organic changes is not as high as it is in self-dealing transactions.

The reasons proffered by Rock, Kanda and Kraakman for the non-delegation of complete authority to directors on matters relating to company organic changes especially mergers, are that, these actions are large, they require vision or broad gauge of investment-like judgments and ultimately, and they involve the risk of high powered conflicts of interest between the company and managers or controlling shareholders[74].

In contrast to other legal systems, the United States presents an exception; it fails completely to regulate corporate divisions. Authority automatically vests in the board of directors. Once again, Rock, Kanda and Kraaakman move this position by stating that, a corporate division is the transactional inverse of a merger. They reason that, unlike mergers, transactions in corporate divisions are smaller, the board of directors has the necessary expertise, and the risk of conflict of interests is lower[75]. It is submitted that however small the risk of conflict of interests, there exist a possibility for management opportunism to arise.

2.3. Sources of Management Powers in Cameroon and Germany

After looking at management problems from a global perspective, and the strict sense or meaning of management in the preceding sections of this chapter, we now ride-

[73] *Ibid*. at 131
[74] *Ibid.*
[75] *Ibid*. at 136 & 137

on to examine specifically the sources of management powers under Cameroonian and German legal systems. It is worth pointing out at the very beginning that, the sources presented by the corporate legal instruments in both countries do not detract from one and other, or from the generally known sources of management powers existent in the company laws of other major jurisdictions. However, this head is included for coherence purposes of this write-up.

In Cameroon the OHADA Uniform Act makes it clear that the powers of managers in commercial companies are defined and well spelt-out by the articles of association. It provides for a broader basis, stipulating that where the articles fail to define management powers, managers may act in the company's best interest[76].

The Uniform Act itself also serves as a source of management powers. This is evident from its provisions which make it clear that, directors and managers shall have full powers to commit the company within the limits provided by the Uniform Act for each form of company[77].

In private limited companies as well as public limited companies the Act provides for the collective decisions of partners or shareholders as another source of management powers. In this regard, we have shareholders resolutions taken in Annual Ordinary General Meetings, Special Meeting and Extraordinary General Meetings[78].

A final source of the powers of managers is peculiar to public limited companies with board of directors. Board members sitting in board meetings take decisions and resolutions. Such decisions may increase, reduce or affect the powers of directors

[76] Uniform Act, art 277
[77] *Ibid*. art 121 & 465
[78] *Ibid*. art 349,357,546,551 & 555

performing managerial functions. But the Act requires that these decisions should be at par with the spirit of the articles of association, otherwise null and void[79].

On the other side of the eye are sources of management powers under German law. A thorough examination of the Acts on Limited Liability Companies and Stock Corporations shows the articles of association as the main source of management powers in the respective entities. Per the former, managing directors shall represent the company in the form determined by the articles, and the latter puts it in simple terms that, the articles will determine the purpose of the enterprise[80].

A second source of management powers in German companies is shareholders resolutions or bylaws in general meeting. In both Acts, decisions made by shareholders on matters pertaining to the company are passed by the majority of votes cast[81].

Managing directors of an AktG can also get their authority to act for and on behalf of the company from bylaws issued by the management board except where the articles provide otherwise. Here, the Stock Corporations Act expressly posits that the articles can make binding provisions in respect of specific matters relating to the bylaws and requires a unanimous vote by the board[82].

Another source of management powers specific to stock corporations, but which applies to private limited companies if they opt for a supervisory board in their articles of association are the bylaws passed by the supervisory board. Under the Act, the

[79] *Ibid*. art 454
[80] German Acts on Limited Liability Companies & Stock Corporations, § 35 & 23 respectively
[81] *Ibid*. § 47, 48 & 129
[82] German Stock corporation Act, § 77

supervisory board can issue bylaws if the articles confer it such powers rather than to the management board[83].

The European Company (SE) follows the letters and spirit of stock corporations as far as the sources of management powers are concerned. The tenor of this is Council Regulation organizing SEs which purports that, subject to it, the formation of an SE will be governed by the law applicable to public limited companies in the member state in which the SE establishes its registered office. This is buttressed by a provision in the Regulation to the effect that, a member state may provide that managing director(s) shall manage the SE under the same conditions required for public limited companies having registered offices within its jurisdiction[84].

2.4. Scope and Limitation of Management Powers

This facet of my study lays emphasis on the powers of managers, effects of such powers and the extent to which managers, in the exercise of these powers can commit or bind the company. The scope and limitation of management powers, usually defined by corporate laws and companies' objects clause is of great importance, as it gives an additional protection to stockholders and future investors. In relation to stockholders, it provides a platform within which managers must remain in the performance of their duties, the failure of which will inevitably attract liability. With respect to future investors, it apprises them of the prevailing circumstances in a company, enabling them to found a good judgment on whether to invest or not.

[83] *Ibid.*
[84] Council Regulation (EC) No 2157 / 2001 of 8 October 2001, art15 (1), 39(1) & 43.

2.4.1. Under Cameroonian Law:

The OHADA Uniform Act has myriad provisions touching on the scope of management powers. As a precursor, it provides among others that the management of commercial companies shall have full powers to bind the company with respect to third parties without showing proof of any document granting such powers, albeit within the limits stated in the Act for each form of company. The company will be bound by the acts of management which are unrelated to its objects unless it can be shown that a third party knew or could not have been unaware of the fact, and the mere publication of the articles is not sufficient proof. Also, in its relation with partners (shareholders), the articles of association may limit the powers of management, but no such restrictions shall have effect against third parties acting in good faith[85].

In the case of a private limited company, the Act bestows on managers the widest powers to act on behalf of the company under all circumstances, but subject to acts expressly conferred on partners. It reiterates the fact that a private limited company is bound by acts of managers which fall outside its objects clause, when they deal with bona fide third parties[86].

Concerning public limited companies, the Uniform Act distinguishes between public limited companies with or without board of directors. For those having a board of directors, the board has the widest powers to act on behalf of the company, within the limits of its objects and subject to those reserved by the Act for shareholders' meeting[87].

[85] Uniform Act, art 121, 122 & 123
[86] *Ibid.* art 329
[87] *Ibid.* art 435

The board of directors may either elect to have a single person as chairman and managing director who ensures the general management and representation of the company or a general manager distinct from the chairman of the board of directors in charge of generally managing and representing the company, in its relations with third parties. In both cases the Uniform Act accords them the widest possible powers within the confines of the company's objects in the execution of their duties and protects bona fide third parties for acts not falling within the object clause[88].

As far as a public limited company without board of directors is concerned, the Act posits that the managing director shall ensure the administration, representation and general management of the company. In this endeavor he has the widest possible powers to act in all circumstances, safe in instances mentioned in the preceding paragraphs. Good faith third parties are given protection for acts not within the company's objects by holding it bound[89].

2.4.2. Under German Law:

The scope and limitation of management powers in German companies, like other issues addressed above are provided for, by the respective legislations regulating them. First and foremost, the Act on Limited Liability Companies proffers that managing directors in representing a private limited company will do so as determined by the articles of association. In the words of the Act, the company is bound by transactions

[88] *Ibid.* art 465 & 487
[89] *Ibid.* art 498

legally performed in its name by managing directors and, it is of no moment whether or not the transactions are expressly performed in the company's name[90].

The Act obliges managing directors to stay within the limits of their authority to represent the company as prescribed by the articles of association, unless otherwise provided by resolutions of shareholders. However no such limitations to managing directors' authority are detrimental to any third parties[91].

The Stock Corporations Act on its part, unequivocally puts it that the management board will be directly responsible for the management of a stock corporation, and will represent it in and out of court[92].

The Act broadens management powers by mentioning that the authority of the management board to represent the company may not be restricted. Further, it obligates management board members to comply with the restrictions relating to their authority to manage the company as required by laws regulating stock corporations, provisions in the articles of association and resolutions of the supervisory board, the shareholders' meeting and the bylaws of the management board and supervisory board[93].

The third aspect to be treated in this sub-section relates to the scope of management powers in an SE. Whether an SE adopts a one-tier or a two-tier structure, the Council regulation governing SEs is silent on the powers of management. It simply states that a member state may require managing director(s) acting on behalf of, or representing the company to be subject to the same conditions applicable to public limited liability

[90] § 35 & 36
[91] § 37
[92] § 76 & 78
[93] § 82

companies which have registered offices within its territory. Meaning an SE situated in Germany will be regulated by the Stock Corporations Act if German laws so provide[94].

[94] Art 39(1) & 43(1)

CHAPTER 3

SUPERVISION AND COTROL TECHNIQUES OR MECHINISMS

After grasping the various types of legal investment vehicles, the very nature of management and the opportunistic behaviors of managers or directors, this chapter now aims at discussing the control techniques used in Cameroon and Germany to abate the opportunism of management or put it under complete check. Black's Law Dictionary defines supervision as the act of managing, directing or overseeing persons or projects[95]. We are concerned here with the latter part, i.e. overseeing managers and their projects or duties.

The chapter draws a line between internal and external control mechanisms in both jurisdictions and critically elaborates on their merits and drawbacks. It concludes with a series of proposals for Cameroon, inspired from the German control strategies, to supplement and complement already existing ones.

3.1.1. Internal Control Techniques in Cameroon

The control techniques under this sub-section, despite having some similarities in private limited and public limited companies vary to a considerable extent. In order to ease our understanding of these mechanisms in the corporate forms, it is appropriate for us to discuss them separately.

[95] See note 57 supra, at 1205

3.1.1a. Private Limited Companies:

The techniques used in private limited companies range from shareholders rights and approvals, control by auditors, prohibitions and liabilities imposed on managers in their management duties.

The Uniform Act accords partners the right to be permanently informed of the company's affairs, and the right of communication fifteen days prior to the holding of general meetings. This right of communication relates inter alia to summary financial statements of the fiscal year, management reports prepared by the manager and proposed resolutions[96].

In spite of the above, any partner who is not a manager also has the right to consult the registered office twice a year, inspect and make copies of all books, accounting documents, minutes of meetings as well as collective decisions. Such a partner may put written questions to the manager on issues likely to affect the company's going concern and the manager has a month to reply. The Act increases the efficiency of this control technique by giving partners the opportunity to seek for the assistance of professional accountants or auditors[97].

As far as regulated agreements are concerned, i.e. agreements concluded directly or via a third party between the company and its manager(s), the transactions must be disclosed and the manager(s) or auditor is required to submit a report of the agreements to the ordinary general meeting for approval by partners holding more than half of the capital. In this respect, if the manager is a partner, he is not allowed to vote during

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[96] Uniform Act, art 344 &345
[97] *Ibid*. art157 & 289

deliberations on the agreements[98]. Finally, the amendment of the articles of association, variation of capital or shareholders' equity and transformation are exclusively reserved for the approval of shareholders by extraordinary collective decisions[99].

The prohibition of some transactions in the company is another form of control. The Uniform Act expressly bans managers (natural persons) to take loans from their companies, obtain overdrafts on a current account, or make the company to guarantee their engagements with third parties. This prohibition extends to the spouses and dependants of managers and has the effect to render null and void any such contracts[100].

The threat of liability to managers for breach of their duties (tort) also serves as a form of control. Managers are jointly or severally liable for mistakes made during management, violations of legal or statutory provisions and violations of the articles of association. In all these instances managers may not only be held liable in damages to partners, but also to the company[101].

The last control technique with respect to private limited companies is the use of auditors. The Act compels companies of this kind whose registered capital and annual turnover exceeds ten million CFA francs and two hundred and fifty million CFA francs respectively, with a permanent staff of more than fifty persons to designate at least one auditor. The auditor examines documents of the company to check if there exist any discrepancies or matters likely to jeopardize its continued operation. If any in fact exits, the auditor then requests for written explanations and envisaged measures from the

[98] *Ibid.* art 350-354
[99] *Ibid.* art 357
[100] *Ibid.* art 356
[101] *Ibid.* art 330 & 331

manager, who must reply within a month[102]. Finally, contribution in kind or special benefits is evaluated by a shares auditor[103]. More on auditors' supervisory role will be seen infra under public limited companies.

3.1.1b. Public Limited Companies:

The control techniques used by shareholders in private limited companies are similar to those inherent in public limited companies with or without board of directors. In both forms of public companies, shareholders have the right to be informed of the company's affairs. They supervise management by examining at any time, the company's documents including but not limited to summary financial statements, reports of auditors and directors.

Moreover, every shareholder has the right twice a year, to put written questions to the chairman and managing director, general manager or managing director on issues that are likely to undermine the smooth running of the of the company[104]. The control exerted by shareholders over management is also seen in their appointment and dismissal of managers at the constituent general meeting[105].

Concerning regulated agreements, the Uniform Act once again requires the approval of shareholders in ordinary general meeting. However, unlike in private limited companies where shareholders approval is the only control mechanism, the Act in addition, obliges a prior authorization by the board of directors of such agreements.

[102] *Ibid.* art 376, 150 & 151
[103] *Ibid.* art 400
[104] *Ibid.* art 525-526
[105] *Ibid.* art 420

Concerned directors are therefore bound to disclose their interests in agreements entered into with the company, and are precluded from voting to get the board's authorization[106].

Significant actions or organic changes are under the whims and caprices of shareholders. The Act empowers the extraordinary general meeting of partners to authorize mergers, scissions, transformations and variation of capital[107]. The special meeting, which brings together holders of a particular class of shares, reinforces the control of partners by approving or disapproving the decisions of general meetings[108].

The Act also forbids or prohibits directors, general managers and assistant general managers and their relatives from taking loans and overdrafts from their companies or makes the company to secure or guarantee their commitments towards third parties. The Act nullifies all such agreements[109].

The board of directors also plays an important supervisory role clearly visible in public limited companies where the board chairman is distinct from the general manager. Here, "the board of directors control management of the company entrusted to a general manager. The chairman of the board can at any time of the year, carry out verifications that he deems fit and may requests all documents relevant for the accomplishment of his mission"[110]. Although the Act talks of the similar control by the board (independent directors) in public companies with a chairman who is at the same time managing director, we express a lot of reservations.

The Uniform Act relies a great deal on auditors as its most efficient supervision mechanism. It states that each public company shall be audited by one or more auditors.

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[106] *Ibid.* art 438-440
[107] *Ibid.* art 551
[108] *Ibid.* art 555
[109] *Ibid.* art 450
[110] *Ibid.* art 480

The auditors could be natural persons or companies incorporated by natural persons. They certify the regularity and veracity of the financial statement, and give a fair judgment of the financial situation of the company. Auditors have the permanent task to audit the assets and accounting documents of the company to check compliance with the accounting rules in force. The auditors also verify the accuracy of information given in the management report of the board of director or managing director[111].

The auditors are required to report irregularities and inaccuracies they discover in the performance of their task, and disclose to the public prosecutor's office any offence they discover. The Act gives auditors access, at any time of the year, to the company's accounting documents, books and minutes registers, to carry out verifications that he deems fit[112].

Finally, the imposition of civil and criminal liabilities on directors or managing directors for violations of the articles of associations or regulations, acts as a form of control making them to always be on their guards and to be frugal[113].

To conclude, safe for supervision by the board of directors, the other control mechanisms apply in like manner to public limited companies without a board of directors.

3.1.2. Internal Control Techniques in Germany

German corporate laws and corporate governance code have put in place a series of control techniques to put managers to check in the carrying out of their management role

[111] *Ibid.* art 694, 710-713
[112] *Ibid.* art 716-717
[113] *Ibid.* art 740

and performance of other duties. In the ensuing paragraphs control mechanisms in the different types of companies shall be discussed seriatim.

3.1.2a. Private Limited Companies:

In GmbHs shareholders are at the fore front of supervision of manager(s). Every shareholder has the right to information and inspection. The Act on Limited Liability Companies compels managing directors to inform any shareholder who requests for the company's affairs without undue delay, and to permit him inspect or examine the books records[114].

The Act provides for myriad issues requiring the exclusive decision of shareholders. Some of these include the appointment and removal of managing directors, approval of annual financial statements and measures pertaining to the examination and supervision of management[115].

Significant actions in a GmbH such as the amendment of the articles of association and variation of capital also require a resolution by three fourths of shareholders' votes cast[116].

Another control mechanism set-forth by the Act is the total prohibition of loans granted to the managing directors. It renders all such loans invalid and obliges the immediate repayments of the loan to the company[117].

German law imposes a duty on managing directors to employ the diligence of an orderly businessman in running the affairs of the companies. A breach of this duty

[114] German Act on Limited Liability Company, §51
[115] *Ibid.* § 46
[116] *Ibid.* § 53, 55 & 58
[117] *Ibid.* § 43a

attracts liability of directors in damages. This duty and the fear of liability serve as effective control mechanisms.

The supervisory board is the main control organ in German companies playing an outstanding role; especially in stock corporations where it is compulsory. The supervisory board is optional for German private limited companies. Per the Act, any GmbH wishing to have a supervisory must so indicate in its articles of association[118]. As its name goes, the supervisory board supervises and advices managers in the performance of their duties; to be expounded at length infra.

3.1.2b. Stock Corporations:

As aforementioned, the supervisory is the main control organ in German stock corporations. The Stock Corporation Act maintains two important organs in AktGs. The management board in charge of the company's management and the supervisory board which supervises management. The supervisory board has powers to examine and inspect the books, records and assets of the company. It can determine that specific types of transactions may only be entered into with its consent[119].

The Stock Corporation Act compels the management board to submit reports to the supervisory board on intended business policy, the profitability of the company, the state of business and transactions that may have a material effect on the liquidity or profitability of the company. In addition, the supervisory board has authority at any time, to request for a report on the company's affairs[120].

Under the German Corporate Governance Code, the task of the supervisory board to appoint and dismiss members of the management board greatly augments its level of

[118] *Ibid.* § 52
[119] German Stock Corporations Act, § 111
[120] *Ibid.* § 90

control. The Code also requires the chairman of the supervisory board to be in regular contact with the management board (chairman or spokesman), consult with them on business development and management of risks[121].

Shareholders, as seen in GmbHs have a plethora of rights which in effect operate as control on managers. Shareholders have the right to be informed of the company's going concern upon request. These rights extend to the company's legal and business relations, and annual financial statements. The Act also requires the approval of financial statements after the examination of the supervisory board, and ratification of the acts of members of the supervisory and management boards. The amendments of the articles, variation of share capital and other significant action are subject to a three fourths majority of shareholders' votes cast[122].

Imposition of the duty of care on members of the management board is another means of control. The Act requires managers to employ the care of a diligent and conscientious manager in doing business. The threat of liability, once again makes managers to chary or wary in their business decisions[123].

The Act forbids evasive transactions i.e. the grant of a loan or security by the company to a person, for him to acquire shares in the company. Such transactions are null and void. The Act also prohibits members of the management board from engaging in any trade with the company or getting any credits from it without the prior consent of supervisory board[124].

[121] German Corporate Governance Code, § 5.1 & 5.2
[122] See supra note 119; at §119, 131, 173 & 193
[123] *Ibid.* § 93
[124] *Ibid.* § 71a, 88& 89

To sum up, the last control technique to be treated under this sub-section is the use of special auditors. The Act empowers special auditors to audit the company's books, records and assets. It authorizes them to request all information and documents members of the supervisory board and management board, necessary for a diligent audit[125].

3.1.2c. Societas Europaea:

An SE with a two tier structure is no different from a German stock corporation. Under the E.U. Regulation, the supervisory organ supervises the work of the management organ. It requires the management board to report the progress of business and foreseeable developments of the SE's going concern to the supervisory board, at least once every three months. Furthermore, the management organ is required to inform the supervisory organ of any matter likely to affect the SE, including all information it needs to carry out supervision. Every member of the supervisory organ has the right to examine all information forwarded to it[126].

In the case of an SE with a one tier structure, the regulation is silent about the supervisory organ. However, it states that a member state may provide that a managing director(s) will be responsible for managing the company under the same conditions as public limited companies having their registered offices in it territory[127]. In this is case, the independent directors shall be in charge of supervision.

3.2.1. External Control techniques in Cameroon

The internal control techniques espoused by the corporate laws seen in the preceding sub-sections, although luscious and lofty are not all encompassing. Recourse

[125] *Ibid.* § 145
[126] Council Regulation (EC) No 2157 / 2001 of 8 October 2001, art 40 & 41
[127] *Ibid.* art 43

has to be made to external financial institutions which play very important roles in the supervision of corporate management. These institutions comprise banks and stock exchanges.

Control by banks is evinced in credit relationships entered into with private limited companies as well as public limited companies. One of the conventions of La Commission Bancaire de l'Afrique Centrale (COBAC) expressly allows banks to engage in lending operations[128]. The bank as creditor in this respect, effects supervision over management by requesting that documents of the company be sent to it, in order to reach a decision whether or not to grant the loan. Even after granting the loan, the bank can still require management to keep it posted or informed on the activities of the company as a condition for the extension of future credits. This control technique could be very efficient if the company is financially dependent on a bank.

The COBAC convention also permits banks to purchase, manage, keep, sell and subscribe to stocks including all financial products[129]. In these capacities, banks play the role of investment companies and carry out the supervisory function together with the stock exchange. On the other hand, since the convention allows shareholding by banks, the appointment of its representative in the board of directors could have been an effective monitor, but the law precludes banks from participating in enterprises[130].

The other external control is applicable to companies that list or trade their stocks in the capital markets (stock exchanges). The Douala Stock Exchange is the only market on

[128] Annexe à la Convention portant Harmonisation de la Réglementation Bancaire dans les Etats de L'Afrique Centrale, http://www.beac.int/cobac/cbconv.html, 19/03/2009. (COBAC is translated Banking Commission of Central Africa. It is the organ that regulates banking in the Central African sub-region).

[129] *Ibid.* art 8
[130] *Ibid.* art 9

which stocks are traded in Cameroon. Its Rules and regulations require a series of disclosures. According to them, the issuers must inform the Stock Exchange of any facts that could negatively affect share prices, and make available any information requested by it[131].

In addition to these disclosure requirements, the Douala Stock Exchange works with six banks in Cameroon acting as investment service providers (ISPs). These banks include; Commercial Bank of Cameroon, Afriland First Bank, Société Générale de Banques au Cameroun, Ecobank, BICEC and SCB. Basically they are the only ones authorized to negotiate and trade stocks, and keep accounts for their clients. In this capacity ISPs act as portfolio management consultants[132].

3.2.2. External Control Techniques in Germany

Financial institutions in Germany also exercise external control on management in like manner as those in Cameroon. Banks and stocks exchanges have a long history in dealing with stocks of companies.

Theodor Baums in his treatise expresses a lukewarm attitude to contractual arrangements as a control mechanism for banks because of unforeseen circumstances that may occur after the conclusion the contract, which usually can not be settled ex ante by agreement. Instead he identifies four devices banks use to execute control over companies[133].

[131]Douala Stock Exchange Rules 86 & 98
[132] http://www.douala-stock-exchange.com/intervfonct_us.php, 15/03/2009
[133] Theodor Baums, Corporate Control & Accountability: Banks and Corporate Control in Germany, (CLARENDON PRESS. OXFORD), 267

The first is monitoring of a company's activities by the bank as a creditor, before and after lending money to the company. Here, banks scrutinize the companies' projects before extending loans to them. They keep close contact with the companies by evaluating their reports and balance sheets, dialoguing with managers and having a representative in the board. A special kind of bank-company nexus in Germany is the "housebank relationship" where, there exists a credit link between the two, and the bank has thorough information about the company.

The next devices comprise the rights available to the bank as shareholder. The German banking law does not bar banks from acquiring and holding in non-credit companies. These rights as seen under GmbHs and AktGs include; the rights to vote**,** inspect documents, appoint directors and a host of others.

The last device via which banks can control the company is in their capacities as custodians. Since the line between commercial banks and securities firms in Germany is inexistent, banks are allowed to trade stocks. Banks have custody of these shares and vote on behalf of the owners at the meeting of shareholders.

Only commercial banks can underwrite securities in Germany. They have seats in all the stock exchanges. A good example is Citibank AG which acts as a dealer and broker at the same time on the Frankfurt Stock Exchange[134].

Peter O. Mulbert in his article makes reference to these monitoring techniques, although he limits his write-up to the first three devices i.e. banks as shareholders, banks having a member on the supervisory board and bank's lending operations[135].

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[134] infra, note 137
[135] Peter O. Mulbert, "Banks Equity Holdings in Non Financial Firms and Corporate Governance: The Case of German Universal Banks" in Klaus J. Hopt & ors. , Comparative Corporate Governance, (OXFORD UNIVERSITY PRESS: 1998), 451

The Stock Exchanges in Germany also play a crucial role in management supervision. According to Mark J. Roe, Securities markets require time to time monitoring of managers, and the prime monitoring techniques inter alia consist of market competition and a good board[136].

Germany has eight stock exchanges created under the Stock Exchange Act. They are situated in Hamburg, Frankfurt, Berlin, Munich, Dusseldorf, Stuttgart, Bremen and Hanover. The market in Hamburg is the oldest but the one in Frankfurt is the most buoyant with about two-thirds of total trading. The Deutsche Börse AG came into existence in 1992 to takeover the Frankfurt Stock Exchange and other clearing and settlement houses. Frankfurt Stock Exchange members hold 68% of stocks in Deutsche Börse while the seven others own just 10%[137].

The Stock Exchange Act and Rules of the Stock Exchanges mandate companies to make the following disclosures[138];

- purpose of the company,
- the most recent financial statements of the company,
- classes of stocks and their respective rates,
- members of management and their functions,
- explanations of the main items in the balance sheets,
- substantial holdings in other companies, and
- a description of business operations, current business activities and prospects.

[136] Mark J. Roe, "German Co-determination & German Securities Markets", in Klaus J. Hopt & ors. , Comparative Corporate Governance, (OXFORD UNIVERSITY PRESS: 1998), 371

[137] James A. Hart & Dieter Schultze-Zeu, U.S. Business and Today's Germany, (1995) http://books.google.com/books, 20/03/2009

[138] *Ibid.*

3.3 Merits and Shortcomings of Management Control Techniques

This section of the thesis dwells briefly on the importance and demerits of the internal the external control mechanisms in Cameroon and Germany addressed above. These merits and drawbacks of the mechanisms are discussed in the paragraphs below.

3.3.1. Merits:

In both jurisdictions legal instruments confer an avalanche of rights to shareholders; the right to vote and to information, the right to inspect and examine company documents and the right to appoint auditors and directors. Also, decisions on significant actions and regulated transactions are left exclusively for shareholders. In all these instances shareholders' control is complete, unfettered and effective since decision making is not shared.

To increase the efficiency of shareholders' control, the Uniform Act requires them to seek assistance from professional accountants and to seek redress in courts, which are always willing to rule by summary judgments[139]. An exception however is in Germany where the Companies Acts water down the control of shareholders by expressly granting management the power to deny information and inspection, if there is reason to believe that shareholders will use the information for purposes that may cause harm to the company[140].

Auditing of management is of importance to Germany as one of its control instruments, but of greater significance to Cameroon because the Uniform Act uses

[139] Uniform Act, art 528
[140] German Act on Limited Liability Companies and Stock Corporation Act, §51a & 131(3) respectively.

auditors as its main technique to counter management opportunism. Auditors monitor management activities, and expose their mistakes and excesses. The Uniform Act gives them broad powers to make verifications at any time of the year, to report offences discovered to the office of the prosecutor and threatens them with liability for failing to do so.[141]. Moreover, the fact that auditors are appointed by shareholders and not directors is a guarantee of their independence in performing their duties. All of these are indications pointing to the effectiveness of this technique.

Jorg Baetge and Stefan Thiele in their article also confirm the merits of auditors as a monitor of coporate management. They argue that auditors' monitoring function reveals management results to shareholders permitting them to directly monitor management[142].

In Cameroon, the chairman of board of directors when different from the general manager also ensures control of management. The merit here is that since he has no nexus with management, his control and those of other non-executive board members are not fraught with conflicting interests. They can therefore be relied upon by shareholders.

The supervisory board is the main organ charged with supervision of managers in Germany. As earlier seen the Stock corporations Act gives it the authority to consent to projects before their execution by the management board. Supervisory boards also approve the actions of management. Johannes Semler observes that, supervisory boards of German corporations do not only have the duty to monitor management but also to advise it[143].

[141] See note 139 supra, art 716 & 718
[142] Jorg Baetge & Stefan Thiele, "Disclosure and Auditing as Affecting Corporate Governance" in Klaus J. Hopt & ors. , Comparative Corporate Governance, (OXFORD UNIVERSITY PRESS: 1998), 723
[143] Johannes Semler, "The Practice of the German *Aufsichtsrat*", in Klaus J. Hopt et al , Comparative Corporate Governance, (OXFORD UNIVERSITY PRESS: 1998), 277

The German Corporate Governance Code strengthens the supervisory board's monitoring function by obliging its chairman to keep close contact with the management board, and necessitates the formation of committees to increase the efficiency of the board[144]. The advantage behind all these provisions is to ensure risk management within the company. In addition, since a single person cannot be a member of the two boards at the same time, the independence of members of the supervisory board can not be put to question.

The role of fiduciary duties and prohibitions of loans posited by the corporate laws of Cameroon and Germany are also salient. They are useful in the sense that no additional cost arises in their application. They are rules and standards to be observed by management. Breach of these rules and standards attracts nullity and liability respectively. Although their merits are not as glaring as the others, fiduciary duties and prohibitions carry out a very important control function.

As for external supervision mechanisms i.e. banks and stocks exchanges we shall not belabor the point. The sections dealing with external control techniques elaborately showcase their importance[145].

3.3.2. Shortcomings:

The corporate law instruments in both jurisdictions, as seen in the previous chapters shower shareholders with a plethora of rights used in dispensing supervision in companies. At first sight, one could think they are without problems. In practice however, shareholders control has not been praised as being too effective or all-encompassing in performing the supervisory role to curb managers' opportunistic behaviors. The numerous companies' crises are self explicit on this point.

[144] German Corporate Governance Code, § 5.2 & 5.3

[145] See Sections 3.2.1. & 3.2.2 of Chapter 3 supra

The prohibitions and imposition of standards (fiduciary duty) in company laws to be observed by managers, like criminal laws only have deterrent effects and in fact, do not efficiently tackle or prevent the conflict of interests problems envisaged in chapter two.

Cameroon relies solely on auditing as the main technique to monitor the activities of management in companies. The Uniform Act states that founders, managers, their spouse or relatives may not be appointed auditors[146]. The emphasis here is on the word ‘may’. An interpretation of this phrase means managers, their spouse or relatives could be auditors under some circumstances, thereby creating interest conflicts which it purports to eschew, and defeating the independence of auditors it preaches. Also, the time limits for management to responds to auditors’ written questions on irregularities discovered calls for criticisms. The Act gives a period of one month[147]. One month is too long a time. This could be financially detrimental to stakeholders.

The next issue that calls for concern under the Uniform Act turns on public limited companies which have a chairman of board of directors who, at the same time is the managing director. In such companies the chairman cumulates two functions. He presides over board meetings and manages the company. In practice this is not plausible; it makes the chairman to be very powerful and influential. In effect, the chairman supervises himself or simply put; “he is a judge of his own cause”. One could talk of control by non executive directors in the board, but unfortunately for shareholders they are not always independent and moreover, the Act gives the chairman a casting vote in case of a tie in board meetings[148].

146 Uniform Act, art 698
147 *Ibid.* art 151
148 *Ibid.* art 454

Even in public limited companies where the chairman of board of director is distinct from the general manager, the Act fails to provide for the creation of committees in the board for a greater efficiency in its supervision function. The Act fails to require the board chairman to always be in close contact with the general manager to manage risks and monitor the company's activities.

The German main supervision organ in companies is a subject of international criticism. As earlier seen the German Co-determination Act requires stock corporations with more than 2000 workers to form a board with equal representation of shareholders and labor. Mark J. Roe posits that this equal participation in the supervisory board weakens its powers since the control of shareholders is halved. He says this explains the weaknesses of German securities markets, since shareholders face a labor dominated board[149].

Even Thomas J., expresses doubts on the independence of the supervisory board. He states that, since representatives are appointed by constituencies, e.g. banks which have existing financial stakes in the company, it is difficult to see these representatives to be independent[150].

As has been discussed, banks play an important monitoring role in curbing management opportunism. However this function is curtailed in Cameroon by banking laws which preclude banks from fully participating in companies. In Germany it is conceived that even though banks have representatives in supervisory board, banks

[149] See note 136 supra at 372

[150] Thomas J. Andre, Jr., "Cultural Harmony: The Expropriation of Anglo-Saxon Corporate governance Ideologies to Germany", 73 TUL. L. Rev. 69 (1998): 151-156

cannot get information from the board to monitor companies since board members are bound by the duty confidentiality[151]. It is therefore hard to see banks' control as effective.

The final aspects to be looked at are demerits of stock exchanges. The Douala stock exchange is still very young and Cameroon being a developing country, people seldom know the use of capital markets let alone, how they function. Since not many companies list their stocks in the Douala stock exchange there is lack of competition to monitor management. Although the stock exchange requires mandatory disclosures, they do not serve as good control mechanisms. For example the disclosure of financial statements is not expressly mentioned as one of the items.

The German Stock Exchange Act and Rules of the Stock Exchanges on the other hand have good disclosure requirements but research has shown that, the absence of an organ to compel disclosures coupled with the intervention of the government in business also affects the control of German stock exchanges. Research also shows that the fragmentation of capital markets in Germany makes them inefficient and less competitive[152].

CONCLUSION AND RECOMMENDATIONS FOR CAMEROON

Managers and directors of companies occupy a strategic and fiduciary position, as a result of the delegation of management powers by shareholders to them. There exists an avalanche of instances where interest conflicts between stakeholders and managers could arise. The main goals of this thesis as mentioned already, was to appraise the control

[151] See note 135 supra at 452
[152] See note 137 supra

techniques used in Cameroon and Germany in abating these conflicts, see whether there are aspects in the German control mechanisms which could be transplanted to complement those in Cameroon, and of course, how they should be implemented.

Corporate laws in Cameroon and Germany attempt to a reasonable extent to lay supervision frameworks for check-mating the excesses of management in their legal investment vehicles. Superficially, these frameworks look faultless and up to the task. However, effective and efficient control mechanisms require something more; the interplay of many factors and institutions outside the realm of existing company laws. And unless these factors are duly considered and the institutions properly put in place, the struggle to completely outsmart managers' dilution or opportunistic behaviors in the carrying out of their duties will continue to remain an illusion.

The two main types of companies under Cameroon are SARL and SA. In SARL, supervision and control of managers rest with shareholders (and auditors in some cases). Four different types of SAs exist. The OHADA Uniform Act uses auditing as the main control technique in public limited companies, although the role of shareholders and board of directors in this respect cannot be underestimated. The Act also provides standards and rules to be abided by managers of both company forms.

In Germany the most used forms of companies are GmbH and AktG. In the former type of company, shareholders' control role may not be overemphasized, and research shows in the latter case that, the supervision of management by the supervisory board is impeccable. Germany's membership in the European Union has brought forth a unique type of corporate form known as an SE. Its advantage is that it gives investors in Germany the option to create companies having one-tier or two-tier structures, partially doing away with the co-determination requirements. In both jurisdictions, banks and stock exchanges also play a supervisory role.

From a critical point of view, these control techniques are not magic wands to the management problems. As seen earlier, the Cameroonian and German supervision techniques, despite their merits, are fraught with a plethora of shortcomings. A classic exposition is the German supervisory board, which has suffered wanton criticisms on the basis that the co-determination inherent in it greatly weakens the board's supervisory role. As a consequence, this stifles the growth of Securities markets in Germany, since potential investors express lukewarm attitudes to acquire shares in companies because of the fear of being diffused by a board full of workers' representatives.

In spite of these criticisms, the German economy has enjoyed great success and has many lessons and aspects that Cameroon could emulate. Albeit these aspects cannot be implemented in like manner, or the same results may not be achieved, because of political, economic and socio-cultural disparities, Cameroon will have the benefit of the hind side.

With regard to the problem of the Uniform Act's over reliance on auditors to supervise management, a functional rather than structural equivalence of the German supervisory board can be introduced into Cameroon's one-tier board structure to supplement auditors. A structural equivalence will increase cost and achieve little or nothing, since Cameroon alone out of sixteen member states cannot reform the OHADA Treaty. The functional equivalence relates to role of non executive directors. If the monitoring function or power that the supervisory board commands can be extended to non executive directors, the effectiveness of control could possibly rise. This proposal is more feasible because, unlike the introduction of a structural equivalence involving substantial changes in the Uniform Act, functional equivalence necessitates a milder reform.

In respect of persons which the Uniform Act precludes from being auditors because of their relationship or nexus with management, it is recommended that the stronger term “shall” should be used instead of the weaker “may” because men imbued with wit can easily give different interpretations to the word, and the very purpose of auditors will be defeated.

The time limit for managers to respond to the auditors’ questions on inaccuracies or irregularities discovered from verifications under the Uniform Act should be reduced to days and not a month. It is submitted that many things can go wrong within one month. A crisis does not need more than a split second or a minute to ensue. A shorter time limit should therefore be provided.

A credible proposal is the adoption of a Cameroonian Corporate Governance Code. In this respect, there exist two important issues from the German Corporate Governance Code that could be beneficial to Cameroon’s control mechanisms. The one is the creation of committees in the board of directors with non executive directors as members. This will increase the efficiency in handling board matters. The second issue is requiring the chairman of the board of directors to always be in close contact with the general manager for risk management and monitoring.

A very important lesson to be learnt from the German corporate law system is the separation of management and controls i.e. the management board and the supervisory board respectively. This is in sharp contrast with Cameroon’s public limited company, with a single person acting as chairman of board of directors having casting vote and managing director at the same time. It does not evince transparency, which the German Corporate Governance Code upholds as one of its prime objectives. This type of corporate form calls for reform.

On the scanty nature of the Douala Stock Exchange's disclosure requirements, its rules should clearly specify the requisite documents. In this respect, the German Stock Exchange Act and Rules of Stock Exchanges carefully list the disclosure items. The dearth of an organ to compel disclosure in Germany should also be borne in mind. Policy makers in Cameroon should take reasonable steps to achieve this end. Sensitization should be one of the priorities of the Douala Stock Exchange to increase awareness on the function and benefits of capital markets. This will have the positive effect of increasing competition; an important monitoring device.

Finally, the Cameroonian government should learn from its German counterpart which likes intervening in business, that although it is necessary at times, the practice is not always good, as James A. Hart & Dieter Schultze-Zeu state in their treatise[153].

In sum, it is worth drawing the attention of Cameroonian policy makers that the above mentioned recommendations are not an ultimate panacea to the shortcomings of the control mechanisms but could go a long way to overcome them, with the multiplier effect of augmenting investors' confidence in managers.

[153] See note 137 supra

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