THE ISSUE OF INFORMING SHAREHOLDERS OF LIMITED COMPANIES UNDER OHADA LAW

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ABSTRACT

The needs for good governance of commercial companies have led the OHADA legislator to rethink the management of companies in its geographical and legal area. In doing so, he instituted several mechanisms, organized those that already existed and rearranged others. Among these mechanisms stands the right to information of shareholders.

The shareholders' right to information appears to be a prerogative which derives from the ownership of shareholders' capital, which ownership goes hand in hand with the exercise of a certain number of rights. True means of controlling the action of the governing bodies of the company, this right allows recipients, to receive sensitive information either voluntarily or involuntarily this, with a view to holding the next meetings of the company. In other words, the debates that take place during general meetings are above all, a reflection of the information made available to shareholders by the social manager.

Being occasional or permanent, the information in question relates to a certain number of documents whose analysis will undoubtedly allow the dissection of the vice that hampers the company's development and emergence, and propose possible solutions for greater performance. While examining the ins and outs of this right, this article discusses in detail the framework of the exercise of said with excrescences on the shortcomings that affect certain areas of the law. Thanks to the doctrinal work, this article proposes from the axes identified by certain authors, the tracks to either reinforce the framework of the exercise of this right, or rearrange it for a greater performance.

***Keywords*:** Shareholder, Manager, Information, Law, Public Limited Company.

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INTRODUCTION

The demands of globalization or modernization of the business world have led to rethink the mechanisms of transparency in commercial companies in general and public limited companies in particular. Traditionally limited to the sole control of management operations, these requirements today call for taking into account other aspects, especially the information of each other on the conduct of the company's activities. What contains the concept of information? Who is affected by this information?

Through the information mechanism, the community legislator intends to put all social actors on the same level and at the same level of information regarding the management of the company. The importance of this mechanism was reminded by an author[i] for whom, *"the prediction of success or failure will deliver key information to decision makers on the errors to avoid and the precautions to be taken"*. The use and usefulness of information leads to decisions being made very quickly in order to prevent the worst from happening.

It has long been wondered why the issue of information in public limited companies has particularly caught the attention of Community legislators. On this fundamental question, it should be noted that, information practices in these companies do not in themselves constitute new concerns. For a long time, questions about the real place of this mechanism and its effectiveness have always been asked, given that these companies play a part in their economic commitment, a great role in the development of States.

Considered as direct actors of the company, the shareholders have a right to information on the management of the company. This right, which is based on the ownership of the capital they hold, appears to be a means allowing them to control the management of their stake. Unlike the neo-classical school which believes that the company should be managed in the interest of the shareholders only, the modern conception of corporate governance emphasizes a deferred role of the latter, who must also give their opinion on the general orientation of the case, exercise their shareholder rights[ii].

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The right to information of direct actors poses a problem of its nature. Is this a formal requirement of public order or a simple moral obligation therefore optional and not binding? An author[iii] wondered whether shareholder information is a recognized and guaranteed requirement, or quite simply, a fundamental requirement of OHADA commercial company law, common to all forms of commercial companies.

Continuing the reflection and leading to a kind of response, the same author[iv] points out that the information due to shareholders is not included in the rights attached to corporate titles[v] (stocks, shares). Nor is it expressly affirmed by any general provision of the Uniform Act relating to the law of commercial companies and of the GIE. This is likely to cast doubt on the public order nature of this requirement.

Beyond this criticizable thesis, it should be observed that a careful examination of the provisions of the Uniform Act on Commercial Companies makes it possible to realize that, the shareholders' right to information has been addressed implicitly, with a very indirect style. It is through a finalist reading that, we realize that, this right is a recognized and guaranteed requirement. Going through the uniform act on companies, we note that the legislator, without expressly describing it, organized the framework for informing shareholders with its corollary which is the duty to participate in general meetings.

To hoist commercial companies of its area to international standards in terms of governance, the OHADA legislator has dedicated the information of stakeholders, both as a right and as a duty[vi]. The result of this right is nothing more than the concern to allow each other to have a view of the social situation.

We therefore understand that the right to information induces another right, that of participation by all in the life of society. In view of its delicacy and especially of its framework which is relatively full, it should be noted that the shareholders are entitled to information which is both occasional (I) and permanent (II).

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OCCASIONAL INFORMATION FOR SHAREHOLDERS OF COMMERCIAL COMPANIES

As one of the attributes conferred by the status of shareholder, the right to information consists in disseminating either periodically or permanently, information having a certain impact on social activity. It is, as an author[vii] reminds us, a means for recipients to ensure the wellness of the company and then to monitor the management of their contributions. According to another author[viii], the right to information is the prerequisite for any control over the actions of managers.

Presenting itself as a limit to the full powers of managers, this right requires that an information dissemination system be put in place which, when fully established, offers important guarantees not only to shareholders but also to third parties. Thus, stating that *"the dissemination of accurate, timely information on all significant matters concerning the enterprise must be guaranteed"*[ix], one author points out that the Community legislator must make this right a requirement and guarantee it exercise to all. It justifies the degree to which certain principles such as good governance is taken into account in the company[x].

The right to information relates to a set of questions which aims to promote publicity rules in company law and to implement the rules of good governance in companies. Ultimately, it is a matter of protecting shareholders against certain practices that would jeopardize the management of their property entrusted to the manager. The occasional information relates to documents to be communicated to shareholders (A) which communication, proceeds from a well-crafted legal regime (B).

Shareable documents for shareholders

Prior to the holding of a meeting[xi], the occasional information differs according to the types of companies even if the spirit remains the same. Also known as the right of communication, the latter finds its basis in practice because, after meetings, certain decisions having a particular impact on the life of the company are taken. As such, it was wise to recognize prior information for the benefit of shareholders. This allows them to decide with full knowledge on the management entrusted to managers.

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This measure inevitably responds to the concerns of both public authorities and professionals of adapting the content of information to the needs of investors and making it easily accessible[xii]. In view of the above, it is wise to analyze the quality of the various communicable documents (1) before questioning their quantity (2).

The quality of documents available to shareholders

The quality of communicable documents differs depending on whether it is ordinary general meetings or other general meetings.

Within the framework of the ordinary general meeting, the documents to be communicated to the shareholders are almost identical. These are the inventory, the summary financial statements, the list of directors and shareholders, the reports of the statutory auditor and the board of directors.

In the context of other general meetings which may be extraordinary or special, the documents to be supplied are governed by a diversified regime. Thus, it can be the report of the board of directors or the general administrator, that of the auditor, the liquidator in the event of the opening of a collective procedure and the text of the proposed resolutions.

The aim is to make all these documents available to shareholders for prior examination before collective decision-making bodies are held. It is from this examination that the shareholders will have an idea of the conduct of social activities towards horizons of performance or social underperformance. In the latter case, they can use the various legal mechanisms recognized by the legislator to either draw the leader's attention to a certain number of facts or to raise the alarm with all its corollaries. Besides the quality of its communicable documents, it is also worth questioning their quantity.

The quantity of documents available to shareholders

Generally, these are the accounting documents describing the assets and liabilities of the company. They make it possible to summarize at the end of the financial year, the real situation of the company[xiii]. To keep traceability of transactions, these documents must be kept in accordance with the rules of sincerity and regularity because, despite being made available to shareholders, they must be able to translate the true image of the company.

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On this image also depends the performance of the company as well as the quality of its economic relations. These documents, which generally relate to *"the financial state of the company"*, allow shareholders to ask questions, anticipate possible risks and maximize their profit. It is through the communication of these documents that certain capital operations such as the approval of accounts or agreements are decided. It is understood that such measures can only be taken with full knowledge of the facts.

From all of the above, it should be stressed that the right of communication of documents as organized in the OHADA uniform act, is oriented towards the right of scrutiny that each other must have over the conduct of social businesses. It allows us to lift the veil on all the bad practices that cause society to malfunction in terms of management opacity. But as organized, this right has several shortcomings and deserves an adjustment.

It is, therefore, in view to put an end to all its bad habits likely to slow down the growth and development of companies that the OHADA legislator enshrined for the benefit of shareholders this right to information, the legal regime of which should be examined.

THE LEGAL STATUS OF DOCUMENTS WHICH CAN BE COMMUNICATED TO SHAREHOLDERS OR PARTNERS

Considered an important factor in the governance of public limited companies, the shareholders' right to information includes several rules, the most important of which relate to the time limit (1) as well as the terms of communication of said documents (2).

The deadline for communicating documents to recipients

Regarding the issue of the communication deadline, the reading of articles 289 and 345 paragraphs 2, 525 and 526 of the uniform act on commercial companies and GIE allow us to note that the legislator opted for a single regime in matters of communication delay. This is fifteen (15) days before the general meeting.

Justifying this deadline, an author claims that this is *"a favorable opportunity offered to partners (shareholders) to get a precise idea of the management of their business by the management body"*[xiv]. Another justification lies in the fact that, for a good analysis of said

documents, the shareholders must have a reasonable time for their processing. This is, moreover, which justifies that the legislator unwinds from any effect, the deliberations taken in violation of the provisions of this article.

The analysis of the deadline given to managers for communicating documents to shareholders makes sense both on the side of the supplier and of the recipient of the information. Indeed, for the manager, it would be necessary to be seized in time in order to prepare and order these documents because, in terms of accounting, the principle of budgetary annuality would require that the archiving of data be done on an annual timeline. Then, the documents should be processed because, it is important to find a fair balance between the right to information and the imperatives of preserving business secrets.

As for the recipient of the information, it should be noted at the outset that reading and interpreting accounting documents is not easy for everyone. In view of its technical nature, its wording and above all its presentation, the recipients are most often assisted by a man of art in order to dissect its scope. For this, a reasonable period of time should be allowed to seek the said professional because, the conclusions of his interpretation will play a significant role both for the shareholder and for the company. If the question of time has been wonderfully addressed by the Community legislator, what about its modalities?

THE PROCEDURES RELATING TO THE COMMUNICATION OF DOCUMENTS TO SHAREHOLDERS

With regard to the terms of this communication, it is important to note that these documents can be communicated to the shareholders either by sending or by consulting them. In general, the most usual method is to send these documents before the meeting and at company expense to the recipients who receive them at their homes[xv].

However, there are certain documents which the shareholders can only consult on the spot. This is the case for the inventory or the list of shareholders. This, either because of their importance or their volumes[xvi]. This is a survival of the old rules that prevailed in France and in certain African countries[xvii]. This option also shines by the relatively high number of these drawbacks. Thus, for some authors, it constitutes a *"real obstacle to the access to social*

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information"[xviii]. According to the same author, these disadvantages are all the more proven that the difficulties of transport, of location of the head office are common realities. All that is recommended to shareholders is to make good use of it.

By analyzing these methods, it becomes clear that the Community legislature has transposed into application a practice which is common in the French system. Indeed, it is not an exaggeration to say that the limited companies of the OHADA space include within them, people who do not have a general or special intellectual capacity, allowing them to study documents and, the weak level of use of new information and communication technologies, means that this so-called "sending" method seems to be pure sinecure which cannot be really used if not less and less.

The shareholders' right to information does not only have a variant. Beyond occasional information, the latter also have a right to permanent information.

PERMANENT INFORMATION TO SHAREHOLDERS

Unlike occasional information which is limited in time, permanent information is characterized by its constancy and continuity in that it is not enclosed in any temporal condition. It allows shareholders to know the real situation of the company at any time of the year.

A real means of controlling the actions of corporate officers, this right is materialized by the possibility granted to shareholders to consult certain documents at the head office (A). As a corollary, they may, in the light of the documents consulted, ask questions in written form (B).

The right to consult documents at head office

Another variant of the shareholders' right to information, the right to consult social documents at the registered office is a modality provided for by the Community legislator in order to allow shareholders to have a mindset on the conduct of social affairs. However, this method of informing shareholders (1) has several drawbacks (2).

1) The right to the consultation of the social documents by the shareholders

According to the OECD report as commented on, shareholders have the right to obtain timely and regular, relevant and regular information about the company[xix]. Thus, beyond the circumstantial communication, they have the right to consult at any time and at the registered office, all the documents that arise from the financial year.

Thus, article 525 is sufficiently clear when it provides that *"... any shareholder has the right by himself or by the proxy he has appointed by name to represent him at the general meeting to take cognizance at the registered office..."* The field of this right is wide because, it covers all accounting documents and documents which is not without consequence because, for an author[xx] *"too much information generates over-information, then disinformation, finally rejection of information"*

However, the statutes may provide for several other documents in support of those expressly listed in the uniform act. On analysis, this right, which is a necessary pledge for the transparency of companies, is largely limited.

2) The normative inadequacies of the right to consult social documents

Generally speaking, it appears from 525 of the Uniform Act on companies that : "the right to information can only be exercised twice a year. This constituency is justified on the one hand, by the fact that, the rules of establishment and conservation of these documents are spread out in time and on the other hand, by the concern not to weigh on the leaders, the threats of an unexpected check that could happen at any date of the exercise.

In addition, reinforcing these limitations, the legislator affirms that the addressees of this right must warn the directors of their intention to exercise it at least fifteen days in advance. This condition is in line with the first, which sets up safeguards to prevent the exercise of this right from being considered as a sword of Damocles hanging over the leaders.

However, the use of this information is likely to create some problems for society. Sometimes calling into question business secrets, this information may include sensitive aspects of social life. It has moreover been asserted that, *"the conduct of business requires a certain confidentiality, so that a completely transparent management would be against the interest of*

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society ... Too much information kills information"[xxi]. In addition, no limitation is made on the use of said information.

Doctrine has therefore deduced that it must be used with due regard for the social interest[xxii]. Indeed, permanent information is characterized by the fact that it can intervene at any time. It can happen, at any time that a request for information or consultation of documents intervene. Similarly, some shareholders may wait until the last minute to ask questions, some of which have nothing to do with the content of the information.

Such an attitude is not such as to allow the social leaders to exercise in peace all of the missions entrusted to them. In addition to these arguments, the fact that the dissemination of information has a cost, which can increase the expenditures of the company.

Unfortunately, the time granted seems to give latitude to leaders, guided by bad faith, to falsify or forge certain documents or exhibits. It is probably to mitigate the scope and consequences of such a measure that article 289 in fine provides that shareholders may be assisted by a chartered accountant or an auditor at their expense. Finally, it should be noted that the purpose of exercising this right is to allow shareholders or associates to ask written questions to corporate officers. This other right appears to be the corollary of the right to information conferred on them.

SHAREHOLDER INFORMATION THROUGH THE RIGHT TO ASK MANAGERS WRITTEN QUESTIONS

Shareholders may obtain information by written question, both periodically and permanently, either on the eve of a general meeting or at any time during the financial year. The substance of this right deserves to be revisited (a) as well as the abuses which it can lead to (b).

The consistency of the right to ask written questions to officers

Made necessary to ensure the continuity of social activity, this right is clearly enshrined in 158 of the Uniform Act on Commercial Companies and GIE which provides that *: "In a public limited company, any shareholder may, twice per exercise, ask written questions to the*

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chairman of the board of directors, the chairman and chief executive officer or the deputy head, as the case may be, on all facts likely to jeopardize the continuity of operations".

When the documents communicated, either occasionally or permanently, or during consultations held by the shareholder at the head office, result in grey areas, the shareholder may ask written questions to the managers. This right is also limited in time. Recipients can only exercise it two (2) times per fiscal year. The concern of the legislator is to save what can still be saved from social activity.

This is, moreover, in line with the spirit of the business world, where the slightest doubt about the continuity of the business requires clarification. This is the whole sense of salutary disposition which makes it possible to sound the alarm. Recognition of this right is a guarantee that shareholders have a say in the conduct of social activity. What is all the more remarkable is that the field of this law is relatively vast. It is characterized by the use of the expression *"everything done to compromise the continuity of operations"*.

This method of informing shareholders is not without consequences because it can lead to situations of abuse.

The dangers inherent in this mode of information: Abuse in its exercise

In general, it may happen that the exercise of this right leads to abuse, that is to say excessive use. Indeed, abuse is considered to be the fact for the holder of a right, function or prerogative to go beyond the normal use thereof[xxiii]. Abuse occurs when the attitude of the information requester accommodates other considerations and induces an intention to harm the person of the director. This is why the doctrine proposes to sanction any exercise of this right for purposes extraneous to its purpose[xxiv].

The first difficulty raised by this question of abuse is that it is an attitude, a behavior which is the sovereign discretion of the trial judges. Thus, it is not excluded that one leads to a situation with variable geometry where, the same situation can be qualified as abuse in one direction, and not being able to contain this qualification in another.

Ultimately, the shareholder information framework was approached with sufficient tact on the part of the Community legislature in the sense that the primary objective being to secure business life as well as its secrecy.

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CONCLUSION

In general, it should be noted that the shareholders' right to information appears to be one of the factors for the performance and governance of public limited companies. The framework is already fixed, it is important to organize it better, or at least to arrange the rules which govern its exercise. To better reform this right, the legislator must, on the one hand, rearrange its exercise framework because, as Yves Guyon observed : *"although significant progress has been made, better information for shareholders is desirable"*And, on the other hand, to better sectorize the different versions in order to learn and inform each other about the challenges of this information.

It should be noted that efforts still need to be made regarding the information of shareholders. These should mainly relate to their querable nature. Thus, the choice of the mode of transmission of information is an essential factor in the outcome and especially in the search for better participation of shareholders in social work. Having opted for the querability of social information, the legislator did not advance things because, as one author emphasizes, *"querability is regrettable since it largely conditions the efficiency, speed and quality of transmission some information"*.

In order to guarantee shareholders control over management, the legislator would benefit from reviewing the system for the transmission of information. In our opinion, the choice of the portability of said documents would be the guarantee of the success of this procedure because, *"the fact of obliging the shareholders to have to move to the registered office constitutes a real obstacle to the access to social information"*. In all cases, the objective sought is to allow the directors, debtors of this information, to be able to transmit it or have it consulted at the right time, and in the right place, in order to allow the shareholders, creditors of this duty to have total visibility of the state of health of the company.

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REFERENCES

[i]Liman (O) : Les facteurs de succès et causes d'échecs des entreprises en zone enclavée, Mémoire de DEA en sciences de gestion, Université de Ngaoundéré 2002, p5

[ii]Anoukaha (F) et autres : *OHADA, sociétés commerciales et GIE*, Bruylant, Collection Droit Uniforme Africain, 2002, p.75

[iii]Tsopbeing (M-W) : L'information des associés, une exigence fondamentale du droit des sociétés OHADA ? Révue de l'ERSUMA, n°6, Janvier 2016, p"'

[iv] Ibid, p35

[v]Ibidem

[vi]The recognized fundamental division emphasizes political rights and financial rights. Political rights, which may be akin to the right to information, are more concerned with participation in collective decision-making bodies and decision-making. It is a right for shareholders and a duty for managers.

[vii]Bomba (D-T) : « Le contrôle de gestion des sociétés commerciales dans l'espace OHADA », op cit, p.137

[viii]Tagourla (F) : « *Les pouvoirs des dirigeants sociaux dans l'espace OHADA à l'épreuve des principes de la bonne gouvernance* », Penant, n° 883, Avril-Juin 2013, p.207

[ix]OECD Report, 2004, p11; The OECD is the Organisation for Economic Co-operation and Development, founded in 1961 and headquartered in Paris, France, with 34 member states. The OECD is the successor to the Organisation for European Economic Co-operation (OEEC), which was created to administer aid from the United States and Canada as part of the Marshall Plan to help rebuild Europe after the Second World War. Its mission is to strengthen the economies of its member countries, to improve their efficiency, to promote the market economy, to develop free trade and to contribute to the growth of both industrialised and developing countries.

[x]Carton (A-M) et al. : « *L'associé minoritaire dans les sociétés régies par le droit OHADA* », Cahier de droit et de l'entreprise, n°1, Janvier 2010, p.21

[xi]Cozian (M) et autres. : *Droit des sociétés*, Litec,18eme Edition, Paris, 2005, P.287

[xii]Couret (A) : « Le gouvernement d'entreprise : la corporate governance »,*Dalloz*, 1995 ; p.163

[xiii]Juilien (R) et autres : *Lexique des termes juridiques*, 17eme édition,, Dalloz, p.404

[xiv]Bomba (D-T) : « Le contrôle de gestion des sociétés commerciales dans l'espace OHADA », op cit,p.127

[xv]Cozian (M) et autres : *Droit des sociétés*, Litec ,18eme Edition, Paris, 2005, P.287

[xvi]Ibidem

[xvii]Act No. 85-40 of July 29, 1985 on the Companies and Economic Interest Grouping Code of Senegal.

[xviii]Carton (A-M) et autres.: « L'associé minoritaire dans les sociétés régies par le droit OHADA »,opt cit, p. 23

[xix]Johnson (F-A):« Les principes du gouvernement d'entreprise »,*Revue expert associés*, n° 6, Déc. 2005, p.2.

[xx]Guyon (Y) *: «* Corporate Governance », opt cit, p.7.

[xxixxi]Guyon (Y) *: «* Corporate Governance », opt cit, p.7.

[xxii] Carton (A-M) et autres.: « L'associé minoritaire dans les sociétés régies par le droit OHADA », op cit,p.23.

[xxiii]Cornu (G):*Vocabulaire juridique*, op cit, p.325

[xxiv]Cozian (M) et autres : *Droit des sociétés*, op cit, p.287

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