REFLECTIONS ON A SPECIAL LEGAL CATEGORY: CREDIT INSTITUTIONS OF SYSTEMIC IMPORTANCE UNDER CAMEROONIAN LAW

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REFLECTIONS ON A SPECIAL LEGAL CATEGORY: CREDIT INSTITUTIONS OF SYSTEMIC IMPORTANCE UNDER CAMEROONIAN LAW

Meeky Ebjaff Ngum[1]

Abstract : *This piece concerns itself with a special category of credit institutions that has emerged in recent years, as a construction of insolvency law. It ponders upon the justifications for the existence of this peculiar but yet little understood legal category as well as its legal implications. Our findings reveal that the emergence of credit institutions of systemic importance is underpinned by both theoretical and practical imperatives, relating to the special law of bank insolvency. It is also justified by the proven ineffectiveness of traditional resolution tools in the resolution of this category. This notwithstanding, both economic and legal analysis do not clearly demarcate the borderlines of this notion, leaving it to be determined as a matter of urgency by banking supervisors during insolvency. The practical implications are primarily the application of a derogatory regime of insolvency rules. This work holds that the intended benefits of this institution can only be fully reaped, if its contents are fully regulated by law, for practical reasons relating to both the prevention and resolution of bank insolvency.*

Keywords : *Cameroonian law, Credit institutions, Restructuring, Insolvency law, Difficulties, Cemac regulations.*

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INTRODUCTION

The 2014 CEMAC[2] Regulation on the stabilization of credit establishments in difficulties[3] introduces the concept of credit establishments of systemic importance into Cameroonian law[4], though this concept is relatively known in international banking circles[5]. The Regulation does not define a credit establishment of systemic importance, but simply goes ahead to provide that[6],

A credit establishment of systemic importance is identified based on such indicators as, size, interdependence of their activities, the absence of direct substitutes or financial infrastructure for the rendering of their services, their activities at the sub-regional, regional and global level, and their complexity.

In general terms, a credit establishment can be considered to be of systemic importance, if its individual crisis has a substantial adverse impact on the system[7]. It is one whose failure puts the system at risk. Here the word "system" means not only the financial sector but extends to the real economy[8] and ultimately the functioning of a state or possibly several states, if not all states[9]. This knock-on effect from one individual market player to the system as a whole through its counter parties[10] became apparent during the 2008 financial crisis[11]. The issue though, is that

[2]This is the French acronym for the Economic and Monetary Community of Central African States. Member States include: Cameroon, Central African Republic, Chad, Equatorial Guinea, Congo and Gabon, as provided for by the preamble of the Ndjamena Treaty of 16 March 1994 establishing CEMAC as revised on 25 June 2008 in Yaoundé, and 30 January 2009 in Libreville. According to article 2 of the above Treaty, "the essential mission of the community is to promote peace and harmonious development of member states, within the framework of institutions of two unions: an economic union and a monetary union. In each of these two unions, member states intend to establish a single union, likely to carry to completion, the process of economic and monetary integration".

[3] Article 56.

[4] Kalieu Elongo (Y.R.), « Le nouveau régime de traitement des difficultés des établissements de crédit en zone CEMAC », Juridis Périodique, No.105, Janvier-Fevrier-Mars 2016, p.144.

[5] See the 2015 Basel Committee principles for identifying and dealing with weak banks.

[6] Article 56 (2).

[7] Attinger (B.J.), "Crisis management and bank resolution : Quo vadis Europe?", European Central Bank, Legal working paper series, No13, December 2011, p.19.

[8] Walter (J.), "Basel 3 : Stronger Banks and a more Resilient financial system", Speech delivered in Basel on 6th April 2011, p.2. Available online at www.bis.org/speeches/sp110406.pdf. Last consulted on 09/07/16.

[9] Attinger(B.J.), op.cit., p.19.

[10] Hupkes (E.), "Insolvency-Why a special regime for banks", Current Developments in Monetary and Financial Law, Vol.3, IMF Washington, 2003, p.24.

[11] Walter (J.), op.cit., p.2.

this concept of systemic credit institutions is essentially very elusive[12] as there is no clear consensus on how it should be determined[13]. Hence, indicators[14], in particular the size have proven to be very important in identifying credit institutions of systemic importance. Another indicator is the interconnectedness of the institution with other institutions within or outside a group structure, which increases the risk of contagion and the impact of failure in the market[15]. The next indicator is substitutability; a very small institution may be vital for the functioning of the system as a whole, as it provides strategically unique and crucial services which cannot easily be replaced by others[16]. Another key indicator is the complexity of the business model and/or the financial products provided by an institution which contributes to its systemic relevance, as it renders it very difficult for all market participants to assess the outcome and impact of a crisis situation[17]. This has both psychological and practical implications; it easily creates panic reactions (runs) as counterparties of the ailing institution are not able to assess the risk deriving from the critical situation thereby creating a self fulfilling prophecy of failure[18]. These indicators have been more or less adopted by the CEMAC legislator for the determination of the systemic importance of credit establishments.

From the foregoing, it is clear that difficulties which a credit establishment may face become highly virulent, when considered in the light of systemically important credit institutions[19]. The failure of such a bank poses a major threat to the public purse and ultimately public order and as such poses a serious moral hazard[20]. The case of "Lehman Brothers" is highly instructive, as its collapse in 2008 triggered an unprecedented financial melt-down in the history of banking. In effect, over the years, the financial market both on national and international spheres had

[12] With this in mind, the CEMAC legislator has empowered COBAC to come up with a Regulation, specifying the modalities for identifying such credit establishments.

[13] Drehmann and Tarashev,"Systemic importance : some simple indicators, BIS Quaterly review, March 2011,p.26. Available online at www.bis.org/publ/qtrpdf/r_qt1103e.pdf. Last consulted 16/07/16.

[14] The co-authors contend that "taken together, our results highlight that, simple indicators do help to assess the degree of banks systemic importance.... these results suggest that this may be the most suitable route for practical purposes...". See Drehman and Tarashev, op.cit., p.27.

[15] Risch (A.), "The financial stability council", Journal of banking and financial law, Vol.31, 2011-2012, p.524.

[16] Ibid.

[17] Drehmann and Tarashev, op.cit., p.27.

[18] After the collapse of Lehman Brothers, market participants were not able to assess precisely their own exposure and their counterparties' risk. This led to an overestimate of risk which was itself destructive of value.

[19] Attiger (B.J.), op.cit., p.19.

[20] This is especially so as such banks always count on being rescued and rightly so.

grown beyond that whose crisis could be contained with the traditional rescue tools[21]. This somewhat justifies the inability of the authorities to contain the 2008 financial crisis[22]. Legal systems and supervisory authorities were not sufficiently equipped to face the crisis. As such, the crisis sparked a mad rush for law reform at both the national[23] and international levels[24]. The 2014 CEMAC Regulation was adopted in this context. It adopts a wide range of measures coined under the caption "special restructuring", aimed at the stabilisation of systemic credit establishments in difficulties. It also has the particularity that the measures are likely to affect pre-existing shareholder rights[25], in order to preserve the continuous operation of the institution, public interest, the interest of depositors, and the stability of the CEMAC banking and financial system[26].

I. THE LEGAL SIGNIFICANCE OF CATEGORIZING SYSTEMIC CREDIT INSTITUTIONS

Once a credit institution is identified as being of systemic importance, a derogatory regime of restructuring rules is applicable to it in the event of crisis. This can be justified by the fact that their relevance demands additional attention, plus the fact that ordinary restructuring rules have in addition proven not to be quite suitable in doing so.

The National Monetary Authority is the nerve centre in the initiation process of special restructuring. This is because it is not only a decision making organ, but equally serves as a relay between the bank owners (shareholders) and the supervisor (COBAC[27]), in the process

[21] Krimminger (D.), "Ending too big to fail", Cross-border Bank Insolvency, Oxford, 2011, p.285.

[22] Ibid.

[23] See for instance Section 1 of the Banking Act of England 2009, dealing with the special resolution regime.

[24] Risch (A.), op.cit., p.525.

[25] This is a very delicate issue as shareholders are indeed the owners of the company. In this light, the European Court of Human Rights held in *Jahn and others v. Germany (*Application no46720/99, 72203/01 and 72552/01), ECHR 2005-VI, paragraph 93., that "an interference with the peaceful enjoyment of possessions must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights". See by the same court *Mellacher and others v. Austria* (Application no 10522/83 11011/84), 19 December 1989, series A, no 169, paragraph 45(c).

[26] Article 56(1) of the 2014 Regulation.

[27] COBAC is the French abbreviation for the Banking Commission of Central African States, created by the Convention of 16th October 1990. It has as mandate to survey and control the CEMAC banking system, and also to sanction defaulting subjects, so as to guarantee the efficiency of its action. See Sunkam Kamdem (A.), « Réflexion sur le système de régulation institutionnelle de l'activité bancaire dans la CEMAC », Revue libre de Droit, 2014, p.134-148, see also Njoya Nkamga (B.), « La COBAC dans le système bancaire de la CEMAC », Annales de la Faculte des Sciences Juridiques et Politiques, Université de Dschang, Tome 13, 2009, p.85 et seq.

that may lead to the restructuring decision. The decision to put a credit establishment under special restructuring is subject to a conforming opinion from COBAC. Its role is vital and its opinion appears to be binding upon the National Monetary Authority that must implement it. Once the file requesting the procedure is fully constituted, consisting mainly of the draft restructuring plan that has been drafted by the legal representative of the credit establishment[28], it is forwarded by the National Monetary Authority to COBAC. The draft restructuring plan can be regarded as the body of measures that are proposed for the stabilisation of a systemic credit establishment in difficulties.

COBAC is the ultimate judge based on the afore mentioned elements, to determine whether or not the credit establishment will be able to be restored to its normal conditions of operation. Time is key in the process of stabilisation of systemic banks, as the risk of contagion looms very large at this stage. As such, the trigger point of stabilisation procedure must be very precise[29]. In line with this, COBAC is limited by a deadline of two months as from the day it receives the complete file enabling it to make the decision[30]. COBAC may equally render the decision through the urgency procedure of "in premises" consultation. Failure to give its response within this deadline will be taken to mean a positive response. Where the decision has been rendered, it is notified to the National Monetary Authority. Another aspect of punctuality relates to the fact that the procedure must be conducted within the time frame laid down by the special restructuring plan[31]. The Monetary Authority where it so duly justifies may prolong the initial deadline, after receiving a conforming opinion from COBAC.

Generally speaking, when a credit establishment is under special restructuring, there is need for its patrimony to be protected against further dilapidation[32]. The legislator has provided for some safeguards towards the achievement of this goal. The restructuring decision may subject both private and public deposits held by the credit establishment to particular modalities of payment. This may be recourse to fractional payment for a particular period of time, to allow the bank regain some financial stability. It may also fix the conditions and modalities of any restructuring

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[28] Ibid, article 59.

[29] Lipschultz (M.), "The CoCo Compromise: Banks, Investors, and Regulators Settle for a Debt-Equity Hybrid as a Source of Capital", Review of banking and financial law, Vol.35, p.142.

[30] Article 60 (3) of the 2014 Regulation.

[31] Ibid, article 61.

[32] Kelese Nshom (G.), Regional integration laws and banking security in Cameroon, Phd thesis, University of Dschang, 2014, p.392.

action that the credit establishment has decided to undertake[33]. According to article 67 of the 2014 Regulation[34], any action initiated against the credit establishment under special restructuring as well as any measures of execution on its patrimony are suspended as from the day of publication of the decision declaring special restructuring. The suspension is only lifted as from the day another decision is taken lifting the credit establishment from special restructuring. The suspension of individual lawsuits against the bank is the normal consequence of initiating collective proceedings for redress against any enterprise. Upon the publication of the restructuring decision, individual lawsuits[35] are automatically suspended[36]. However, lawsuits by the bank against its debtors for forceful seizure subsist[37]. This is aimed at avoiding a situation where property necessary for redress is alienated prematurely[38].

The publication of the restructuring decision equally entails a prohibition for the shareholders to sell their shares[39]. The rationale for this is difficult to see at first view as the sale of shares does not directly affect the capital of the company. However, it can be thought that where a credit establishment is in serious difficulties, a massive sale of shares is likely to occur within the company for fear of future losses and the adverse effects of a worsening crisis. Furthermore, a massive withdrawal of shareholders will spell doom for the share value of such a company on the stock exchange market plunging it deeper into crisis.

II. SPECIAL TECHNIQUES FOR RESTRUCTURING SYSTEMIC CREDIT INSTITUTIONS

Once the decision putting the credit establishment under special restructuring is published, the powers of the general meeting of shareholders are transferred to the legal representative of the credit establishment for the execution of the operations laid down under the restructuring plan[40]. The operations of special restructuring are varied and are mostly drawn from ordinary law.

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[33] Article 65 of the 2014 Regulation.

[34] See also section 7 of the 1996 Ordinance.

[35] They include actions tending to order the bank to pay a sum of money, actions demanding a cancellation of banking contracts and actions in exercise of an enforcement measure.

[36] *Meridien Bank Cameroun c/ Fossung Henri*, C.A. Centre, Arrêt nº 203/CIV du 21 Juillet 1993 and *Banque Camerounaise de Développement c/ Maitre Ossongo Étemé*, C.A. Centre, Arrêt nº 142/CIV du 3 Mars 1994.

[37] *Société ASAT SA c/ COFINEST*, C.A Littoral, Arrêt nº 176/C du 19 Octobre 2012 (unreported).

[38] Nyama (J.M.), OHADA, Droit des Entreprises en Difficultés, CERFOD, 2004, p.18.

[39] Article 66 of the 2014 Regulation.

[40] Ibid, article 64.

These can be conveniently classified as into measures affecting registered capital and other measures

2.1. MEASURES AFFECTING REGISTERED CAPITAL

The capital of a company has been defined as the total amount or the value of a corporation's stock[41]. Doctrine highlights the role of capital in financial institutions in general and banks in particular, presenting them as important components in risk valuation[42]. Capital does not only constitute the pivot of banking activity[43] but equally permits banks to hedge the risk they run[44]. In this light, capital can be regarded as unprotected sources of financing for the bank. This means in times of distress, shares do not have to be paid off, until after the bank has paid off its more pressing obligations. The banks can, therefore, draw upon these financing sources as needed, to address shortfalls caused by a sharp decline in asset value thus, providing security against a default. The larger the ratio between these financing sources or capital and the banks overall assets, the better the bank is able to weather losses from loans or other risky activities[45]. From this analysis, capital variation or fluctuation may voluntarily be undertaken within a credit establishment, to respond to various forms of difficulties within it. This is especially where the difficulties have a financial origin. Capital variation includes increase in capital, reduction of capital as well as the imputation of losses to the company's capital.

2.2. SHAREHOLDER CONTRIBUTIONS OR RECAPITALISATIONS

As a measure to redress some of the difficulties that a systemic credit institution could be facing, there may be need to reinforce its capital. This measure could imply an increase in registered capital, or any other support as well as a schedule for its implementation[46]. Failure by the shareholders to present such appropriate solutions to COBAC, can be remedied by having

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[41] Bryan Garner (A.), *Black's Law Dictionary*, 9th Edition, Dallas Texas, West, 2009, p.221.

[42] Soupmo Badjio (D.), "A warning model for bank default in CEMAC", University of Liege, p.6. Available online at http://www.cass.city.ac.uk/__data/assets/pdf_file/0004/53986/1B_SoupmoBadjio.pdf. Last consulted on 15/06/16.

[43] Shrieves (D.) and Dahl (H.), "The relationship between risk and capital in commercial banks", Journal of banking and finance, no 16, p.440.

[44] Charles Calomiris (W.), "How to regulate bank capital", National affairs, Issue No10, Winter 2012, p.1.

[45] Ibid.

[46] Ibid article13.

recourse to article 40 (1) of the 1992 Convention according to which "when the situation of a credit establishment so justifies, the president of the Banking Commission invites[47] the shareholders of the concerned establishment to look for solutions that the situation warrants" . Indeed, it has been submitted that an increase in registered capital is one of the measures shareholders may adopt and could be critical in ensuring that the credit establishment regains a good standing[48]. This request to look for solutions is addressed to the entire body of shareholders. The advantage of this procedure which is enshrined in the 2014 Regulation is that it may be initiated by both the COBAC president and by the shareholders themselves. This power given to shareholders is of critical importance, as they are indeed the real owners of the company, and will be more preoccupied than any other stakeholder in the implementation of this preventive measure. Shareholders are partners in business with depositors and as such, they are to find a financial solution to difficulties at the onset[49].

The main problem however, is that nothing suggests that an obligatory requirement rests upon the shareholders to effect an increase in registered capital[50] or, to propose any other appropriate solution, leaving COBAC with nothing but the force of persuasion in case of resistance or failure to act by shareholders[51]. Neither of the above legal provisions spells sanctions against a shareholder or credit establishment that refuses to implement this measure. It is humbly submitted that the Banking Commission cannot address a warning or a reprimand or even apply disciplinary measures against a credit establishment for failing to abide by these provisions. This refusal does not constitute a disregard for law, which seems to be concerned only with the manner in which the establishment is managed. Furthermore, no shareholder of a public limited company can be forced to increase its shares against its will[52]. It can, therefore, be gathered from the above that there is only a moral obligation against the shareholders to commit themselves in this respect[53]. Moral obligations only appeal to the conscience as opposed to legal

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[47] It has been submitted that the president of COBAC is bound to invite the shareholders to suggest action, see Kalieu (Y.R.), « Le contrôle bancaire dans la zone de l'union monetaire de l'Afrique centrale » op.cit., p.462.

[48] Nguihe Kante (P.), op.cit., p.70.

[49] Mendamkam Toche (S. J.), La securite du déposant dans le système bancaire de la CEMAC, Thèse de Masters, Université de Dschang 2008, p.37.

[50] Kalieu (Y.R.), "Le contrôle bancaire dans la zone de l'Union Monétaire de l'Afrique Centrale », op.cit., p.463.

[51] Ibid.

[52] See article 72(2) UACCEIG.

[53] Frisson Roche (M-A.), op.cit., p.88.

obligations which are sanctioned by constraint organised by public authorities[54]. This preventive measure is therefore legally less efficient, limiting its contributions towards attaining the full potential of stabilisation.

Another means of effecting capital increase could be by requesting bailout from healthier credit institutions.This is a measure that may allow other credit establishments to come to the rescue of one whose situation so requires. Under article 14 of the 2014 Regulation, COBAC can request the Professional Association of Credit Establishments (APEC) to which the credit establishment belongs, to submit to it, conditions under which the members of the association may participate in the stabilisation of the credit establishment in question. This measure had earlier been provided for by article 40(2) of the annex to 1992 Convention which provides that "the president of COBAC can equally ask the professional association of credit establishments concerned to examine and to submit to it conditions under which the other members could participate in the stabilisation of the credit establishment in difficulties". These provisions raise a number of issues.

2.3. THE PRIMORDIAL ROLE OF THE REDUCTION OF REGISTERED CAPITAL

The reduction of registered capital is the converging point of a number of measures provided for by the CEMAC legislator to stabilise systemic credit establishments in difficulties. Though these measures are provided for as different solutions, they all are mechanisms for reducing registered capital or result in a reduction of registered capital. The reduction of registered capital may initially appear contradictory to the goal of stabilising a credit establishment already experiencing difficulties. Since capital serves as a shock absorber, it may appear that recapitalization should be the most reasonable solution[55]. It has been argued though, that a reduction in registered capital can serve to bring down its value to an amount which can more effectively be controlled by the control organs[56], in this case, the legal representative of the

[54] Terre (F.), *Introduction générale au droit*, Paris, Précis Dalloz, 1991, P.11.

[55] Shrieves (R.E.) and Dahl (D.), op.cit., p.440.

[56] Sangang (B.I.), La Restructuration de l'entreprise en difficulté, Thèse de Master, Université de Dschang, 2016, p.41.

credit establishment. Another researcher[57] contends that it serves to harmonise the registered capital with the corporate reality of the moment.

The reduction of capital during the life time of a company may be effected for various reasons. However, as a remedy to difficulties, it is usually effected in order to absorb losses incurred in the running of the business. But the risk engendered in capital reduction is glaring. It constitutes a real threat to the security of the company's creditors who may suffer loss should such reduction fail to salvage the ailing company. With this in mind, some legal provisions strictly regulate this operation. Article 66(2) of the UACCEIG provides that where after being formed, the company's capital drops to an amount below the minimum fixed by the Uniform Act for that form of company, the company shall be dissolved, except the capital is raised to an amount at least equal to the fixed minimum as stipulated by the Uniform Act. The 2014 Regulation is silent as to the extent to which the reduction of registered capital can be done, specifically whether it may be reduced below the regulatory threshold.[58] It is submitted that such reduction of registered capital cannot bring the amount below the regulatory minimum, if it must remain in compliance with the law.[59]

A reduction of registered capital calls for a modification of the AOA, which falls under the competence of the extra ordinary general meeting which has to authorise the operation. This may appear to pose problems in special restructuring as powers of the general meeting have been suspended. In reality, this is no problem, as the UACCEIG[60] empowers shareholders to delegate such powers to the management or the BOD. Furthermore, under special restructuring, the powers of the shareholders are vested in the legal representative of the credit establishment, who may thus exercise them without need for further authorization.

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[57] Nguihe Kante (P.), Les techniques de sauvetage des entreprises en difficultés en droit Camerounais, Thèse de doctorat de 3eme cycle, Université de Yaound II-Soa, 1999, p.71.

[58] Article 1 of COBAC Regulation R-2009/01 of 1st April 2009 laying down the minimum registered capital for credit establishments in CEMAC, fixes the amount at 10 billion francs CFA. This Regulation does not specifically provide that a credit establishment which does not meet the minimum capital will be dissolved.

[59] Nguihe Kante (P.), op.cit., p.71.

[60] Article 68.

2.4 IMPUTATION OF LOSSES ON REGISTERED CAPITAL AND CORPORATE RESERVES

Bank capital can play a key role in absorbing losses in times of financial distress. In anticipation of financial difficulties that may occur within a company, the law makes it an obligation for companies to constitute some reserves by drawing from their income[61]. These reserves may be statutory or legal; their aim is to water down the adverse effects of financial losses the company may suffer at the operational phase. Article 144 of the UACCEIG equally makes provision for the constitution of optional reserves. They are constituted by drawing from distributable profits. It is normally the competence of the general meeting to decide upon deductions for the constitution of optional reserves. It has not been clarified in the 2014 Regulation whether optional reserves may be drawn upon during special restructuring, but it is submitted that this should be the case, since the general purpose of reserves is to absorb any losses the credit company may experience. Article 64(a) of the 2014 Regulation, provides for the imputation of losses on registered capital and reserves of the credit establishments.

These reserves are brought forward from the income realised during a trading year and must together with current losses be set aside before any distributable profits will accrue[62]. It can, therefore, be deduced from this that such imputation may well mean that no distributable profits will accrue towards the shareholders, if the reduction of losses and reserves leave no remains. When the company is in financial difficulties, the reserves can then be used for purposes of recapitalisation or for other measures of financial reinforcement. These reserves are also a measure for the protection of the registered capital as well as the interests of the creditors. This is because solid reserves may absorb any reasonable losses, there by shielding the registered capital, which is the pillar of corporate interest and guarantee for the reimbursement of creditors.

III. OTHER TECHNIQUES

In this case, changes affecting both the financial and the managerial structure of the credit establishment in the long run will be most appropriate. The CEMAC legislator in the 2104

[61] Article142, UACCEIG.

[62] Ibid, article 143.

Regulation[63] takes this into consideration by making way for mergers and acquisitions as rescue measures for systemic credit establishments in difficulties. These are rescue measures that allow the credit establishment to reinvigorate itself, by obtaining assistance from actors outside the credit establishment, particularly from other credit establishments. The credit establishment can, therefore, benefit from the good financial and organisational standing of any of its competitors, to remain afloat in business.

3.1 MERGER OR ACQUISITION OF THE CREDIT ESTABLISHMENT IN DIFFICULTIES

The concept of company mergers or acquisition of companies within CEMAC is governed by OHADA law, particularly the UACCEIG. It defines a merger as "an operation where two or more companies merge to form a single company, either by creating a new company, or by one acquiring the other"[64]. Poorly performing companies, even under liquidation can be absorbed by another company or participate in the constitution of a new company through a merger. A merger is generally geared towards the objectives of liquidity, capital adequacy and corporate governance[65]. From a legal view point, it is the transfer of the assets of one or more companies to another or the combination of their respective assets in to a single corporate entity[66]. This was the case of Barclay's Bank which amalgamated with *Banque International pour le Commerce et l'Industrie du Cameroun* (BICIC). This was also the case in 2007, when *Attijariwafa Bank* acquired 79.15% of *Compagnie Bancaire de l'Afrique Occidentale* (CBAO), and the resulting bank was a solid commercial bank at the service of economic and social progress at a continental scale[67].

The raison d'être for merger is, therefore, to allow an ailing enterprise to increase its competitive capacity to an acceptable level within the market and to reorganise its structure and finances by benefiting from the good standing of its merging partner[68]. A merger is one of the reorganisation

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[63] Article 64(b).

[64] Article 189(a). The ordinary law procedure for mergers is governed by articles 670 et seq of the UACCEIG.

[65] Ebimobowei (A.) and John Sophia (M.), "Mergers and acquisitions in the Nigerian banking industry: An explorative study", The Social Sciences, Vol.6, Issue3, 2011, p.1.

[66] Ibid.

[67] Pirewa (E.), « Régime juridique et fiscal de la fusion des sociétés : cas de la fusion CBAO- Attijari bank Sénégal », Institut Supérieur de Management, Dakar, 2009, p.2.

[68] Ibid, p.5.

operations that may take much time due to its procedures and consequences[69]. But a merger under ordinary circumstances which enjoys a full application of ordinary law provisions must be clearly distinguished from that carried out as a special restructuring measure[70]. The merging of companies may adopt one of two mechanisms.

A merger is said to have been conducted through absorption where one or more companies transfer to an existing or newly created company their entire assets and liabilities in the state in which they are on the day of the wrapping up of the operation[71]. The transferring company or companies ipso facto, become dissolved but not liquidated. In this case, the absorbed company disappears and is incorporated into the absorbing company. As such, the absorbing company is required to increase its capital and operational capacities in order to meet its new exigencies at both levels. The transfer requires that payment be made for the absorption of the ailing company by the healthy one. This is done through the attribution of a corresponding value of equity. In this regard, the shareholders of the absorbed company ipso facto, hold a corresponding fraction of shares in the absorbing company[72], under the conditions laid down by the merger contract or the restructuring plan. The properties of the dissolved banks excepting those excluded in the restructuring decision are transferred to the new entity[73]. The new bank subrogates the disappearing one in pending civil, criminal and administrative actions, and decisions against or in favour of it are enforceable. Any future claims against the disappearing bank are made against the new one[74]. This mechanism is commendable as it saves the life of the bank and thus, protects its depositors and creditors. This operation may also be carried out by absorption of the bank in crisis.

In this form of merger, another bank acquires the restructured bank or though rarely, the restructured bank may acquire the other[75]. This form of merger is subject to the same rules as during the creation of a new bank and the effects are the same. This was the case of BICIC, which replaced *Banque Nationale pour le Commerce et l'Industrie du Cameroun* (BNCI) and

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[69] Kelese Nshom (G.), op.cit., p.404.

[70] A merger under special restructuring is conducted under the direction of the legal representative of the credit establishment, following the provisions of the restructuring plan.

[71] *BICEC SA c/ Ngako Jean-Claude et autres*, CA Littoral, Arrêt nº 127/C du 20 Juillet 2012 (unreported).

[72] Article 191 (1), UACCEIG.

[73] Section 10 of the 1996 Ordinance on restructuring.

[74] *BICEC v Kumcho Onguedou Andiang Juline*, suit nº BCA/27/2006 of 6 March 2006 (unreported).

[75] The second scenario may only be in exceptional circumstances and is highly unlikely, since a bank in difficulty should reasonably lack the leverage to absorb a healthy one.

which was in turn taken over by BICEC in 1997[76]. This was equally the fate of *Amity Bank* that was taken over by *Banque Atlantique*[77]. The restructuring of Amity bank was ordered in 2008[78] and its licence was subsequently withdrawn in 2009 and it was finally taken over by *Banque Atlantique* approved in 2008. The merger shall take effect, either on the day of registration of the new bank or the last of them, if they are more than one, in the Trade and Personal Property Register. The registration must be published in accordance with rules of publication in company matters.

3.2 RECOURSE TO A BRIDGE BANK

Article 64(f) of the 2014 CEMAC Regulation introduces a completely new reorganizational measure into CEMAC banking law, which consists of the use of a bridge bank (*banque de relais*), in dealing with the impaired assets of a credit establishment in difficulties. This solution has not been explicitly explored as it is provided for in indicative terms as follows

Recourse to a bridge bank in charge of receiving in a provisional manner, all or part of the assets rights and obligations of the establishment in question, in view of a sale under the conditions fixed by the National Monetary Authority following the conforming opinion of COBAC.[79]

Faced with this vagueness of the community legislator, recourse to international practice in the domain[80] and comparative law, will best illustrate how a bridge bank functions in bank resolution. In effect, the existence of difficulties within a credit establishment may adversely affect the productivity of the institution, leading to the accumulation of impaired assets within the institution[81]. The existence of such impaired assets may raise two important preoccupations. First, the need to dispose of those assets to banks that are better positioned to transform them into profitable business property. Second, the need to handle such assets expertly, so as to

[76] Kelese Nshom (G.), op.cit., p.407.

[77] See « le protocole d'accord signé le 10 Janvier 2008 entre Amity Bank et le groupe banque atlantique », cited by Kelese Nshom, op.cit., p.407.

[78] See arrêté N^O483/MINFI du 19 Septembre 2008 portant restructuration d'Amity Bank and the decision of the Banking Commission, COBAC D-2008/52 du 4 Juillet 2008, portant avis conforme de la COBAC pour la publication de l'arrêté de mise en restructuration de Amity Bank.

[79] Article 64(f) of the 2014 Regulation.

[80] Basel committee principles for identifying and dealing with weak banks of July 2015.

[81] Lawrence Baxter (G.), "Betting big : Value, caution and accountability in an era of large banks and complex finance" Review of Banking and Financial Law, Vol.31, 2011-2012, p.768.

minimise their continuous degradation, before a purchasing bank or institution shows up. In both instances, the breach bank appears as a suitable solution.

The use of a bridge bank in stabilisation of a credit establishment in difficulty allows for a continuity of critical functions and viable operations, especially in cases of partial transfer of assets to the bridge bank. This allows time to envisage the most appropriate solution within such circumstances[82]. From the reading of article 64(f) of the 2014 CEMAC Regulation, the asset transfers to a bridge bank may be partial or total. In the latter case, the bank will normally have its licence withdrawn as a total transfer of the bank's assets will mean its inability to continue in business[83]. This may or may not lead to the liquidation of the bank depending on how the transfer is effected. Where this is through a merger, it will simply lead to the disappearance of the bank in difficulties.

The conditions under which the receiving credit establishment must operate as a going concern are unclear, but since the receiving bank is charged only with selling the impaired assets, it is logical that these impaired assets are only held separately for that purpose. The assets and liabilities that are not transferred to the bridge bank remain with the bank in difficulty, which in this case is known as a residual bank[84]. The bridge bank, is therefore, designed to bridge the gap between the failure of the bank and the time when the bank's business can be evaluated and marketed to suitable purchasers. It may also allow potential purchasers the time necessary to access the bank's position in order to submit their offers, while at the same time likely to permit uninterrupted service to bank customers. As such, a bridge bank transaction is most commonly used where the failed institution is marketable but where the purchasers may need more time to carryout due diligence on the bank's books. It is strongly recommended that such a measure must be time conscious, since the bank will lose value should the arrangement remain in place for an unreasonable period of time.

The bridge bank is charged with looking for a suitable purchaser for the impaired assets of a credit establishment in difficulties, under the conditions laid down by National Monetary Authority and COBAC. These assets if sold may constitute a serious booster to the financial standing of the credit establishment. The purchasing bank should generally ensure that it has

[82] Article 210, Basel committee principles for identifying and dealing with weak banks.

[83] Ibid.

[84] Ibid.

the expertise and skill to manage the impaired assets[85], without which its business may suffer contagion from such a purchase. There are several manners of sale such as: sales en bloc, "portfolio" sales, asset by asset sales, securitization or sales to a restructuring entity.

Several advantages have been advanced for the sale of bad banks assets:

- It is likely to improve the balance sheet, thereby making the bank more attractive;
- Bank management can focus on steering the bank through its present problems and on its strategic development, rather than devoting scarce time to problem assets; and
- Specialists may be hired to maximize the recovery of value from the impaired assets, for instance, by adapting the assets to make them more attractive to investors.

3.3 BUSINESS SALE TRANSACTION

The 2014 Regulation[86] equally provides for a total or partial sale of business property as a resolution mechanism for systemic credit establishments in difficulties. This mechanism is peculiar in that it does not make recourse to a bridge bank and therefore, the sale is conducted directly by the credit establishment in question. This situation is tentatively suggestive of a credit establishment that has failed. This is understandable since the failure of a systemic credit establishment is only the beginning of crisis for the real economy. The intention of the legislator here is, therefore, to make its exit less painful for affected stakeholders. The purchase may equally lead to a situation of dissolution without liquidation, where the sale is by merger. The residual bank may be easier to manage in case of partial sales of the most impaired assets.

The 2014 Regulation does not detailly lay down rules relating to the transfer of such assets. However, ordinary law makes room for a composition agreement provided for in the Uniform Act on Collective Proceedings[87], where the sale or transfer is done as a means of ensuring the continuity of the bank. A sale transaction may involve tangible or intangible assets and movable or immovable property. It may also involve a subsidiary or unit of the bank, which

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[85] Marais (A.) and Karl (H.), "Corporate restructuring: Does damage to institutional trust affects employee engagement?", South African Journal of labour relations, Vol.37, No.2, 2013, p.13.

[86] Article 64(c).

[87] See Pougoue (P.G.) et Kalieu (Y.R.*), L'organisation des Procédures Collectives d'Apurement du Passif OHADA* coll. Droit Uniforme, PUA, Yaoundé, 1999. Cited by Kelese Nshom (G.), op.cit., p.397.

can be operated autonomously, so as to maintain the economic activity, jobs relating thereto, and to pay off debts[88]. The business sale transaction may be structured in different ways, depending on the objectives and requirements of the purchaser, the deposit insurance and the government. It is generally structured such that the acquirer purchases all assets and assumes all deposits.

The problem with sale transactions is that motivation can generally be lacking for potential purchasers. As such, financial inducement is most often necessary to raise purchaser interest. Such incentives can take the form of cash injections from deposit insurance. The resolution authority may also assign to the acquirer performing loans and other good quality assets, for an amount corresponding to the insured deposits it will assume. Assets not sold to the acquirer can then be subject to liquidation. Another problem that can be faced by such transactions in the CEMAC sub region is the lack of an effective and well organised stock exchange market[89]. This is due to the fact that the transfer of assets is a very complex operation and where stock exchange markets are not highly operational, the operation becomes difficult. With the maturity of the Libreville and Douala stock exchanges, it is expected that the transfer of company assets within such markets will be carried out with ease.

For a business sale transaction to be successful, it should have the following characteristics:

- It should be completed as quickly as possible. This mitigates the interruption of business, preserving the value of the bank and reducing mitigation cost[90];
- The purchaser should have the financial and organisational capacity to absorb the business of the failed institution. If there is more than one acquirer, a competitive bidding will be the most desired way of choosing the purchaser, so that the best price and terms are obtained for the net assets of the failed bank[91]; and
- Closing the bank as a legal entity implies that the shareholders lose their investment, and management is removed. From this standpoint, a business sale transaction will be consistent with minimising moral hazard[92].

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[88] Article 131 (3) UACP.

[89] Kelese Nshom (G.), op.cit., p.398.

[90] Article 206, Basel committee principles for indentifying and dealing with weak banks.

[91] Ibid, article 207.

[92] Ibid, article 208.

This form of resolution equally presents some advantages: it minimises the impact on the market, by quickly returning assets and deposits to normal banking operations. It protects customers against loss of service. This is especially so as business sale transactions can typically be completed over a weekend.

IV. SPECIAL CONCERNS IN PARENT COMPANY RESOLUTIONS

Following the default of Lehman Brothers[93], governments around the world had to mobilize enormous rescue packages to cope with widespread financial panic. In these efforts, a fundamental flaw of the international financial architecture became apparent, namely; the inability of supervisors to orchestrate orderly bank resolutions across borders[94]. Since then, the international regulatory community has made efforts in devising the best approach to resolving large and cross-border banking groups[95]. When one looks at the structure of such groups, this does not come as much of a surprise. Their legal design, with the group split into individual legal entities, does not reflect in any way their economic functioning. The business lines do not correspond to the legal structure. Therefore, any legal system based on the single legal entity approach, which recognises only each legal entity as having legal personality and as the bearer of rights and obligations, is not able to reflect this complex group dimension[96].

With this in mind, the CEMAC legislator in the 2014 Regulation[97], has made provision for the effects of the withdrawal of the licence of a parent company on its subsidiaries. Article 78(1) reads:

COBAC may consider that the prudential withdrawal of the licence of a credit establishment which is a parent company, could lead to the licence withdrawal or the withdrawal of authorisation of implantation of its subsidiary, created in one or several CEMAC member States, taking into account their narrow financial and legal interconnectedness, and the consequences that can arise from such withdrawal.

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[93] A banking group with over 3000 legal entities in some 50 countries.

[94] In effect, these flaws arise from differences in legal systems, differences in supervisory authorities, attempts by governments to protect national economic interest, the large number of legal entities at times involved, and the inability to quickly access vital data necessary for timely action.

[95] European commission, “Cross border resolution of global banks”, Discussion paper 11, September 2015, p.5.

[96] Attinger (B.), op.cit., p.59.

[97] Article 78 et seq.

Though subsidiaries and members of banking conglomerates generally have legal personality, the reality of their functioning allows finances to easily move from one entity to another, especially in times of financial turmoil. As such, the action of COBAC at such times will likely be to investigate the state of outstanding financial indebtedness between the subsidiary and the defunct mother company. This will allow it ascertain whether the subsidiary runs the risk of crisis, should stabilization measures not be instituted within it.

In the above circumstances, COBAC appoints a provisional administrator in substitution of the Board of Directors and the management[98]. He has to momentarily pilot the affairs of the company and has the same powers and obligations like the provisional administrator under ordinary restructuring. The decision of appointment of the provisional administrator confers upon him all powers to manage and represent the credit establishment and all other attributes normally exercised by the Board of Directors and management. The decision has to be notified to the subsidiary concerned and to the National Monetary Authority of the State in which such a subsidiary is found. Notwithstanding the use of the word "State" by the legislator, it is submitted that the subsidiaries could be implanted in many or even all CEMAC member States and as such, the procedure may be engaged in as many States as it appears necessary.

At most three months into his appointment, the provisional administrator elaborates a restructuring plan which he tenders to the general meeting of shareholders for validation[99]. Such a restructuring plan either proposes the reinstatement of the suspended corporate organs, or proposes the measures that should be adopted to stabilise the subsidiary. The former case will probably be when upon his investigations, the provisional administrator ascertains that the subsidiary is not or is no longer in a position to suffer difficulties linked to the collapse of its mother company. The second situation is when the fears of the supervisor have been duly ascertained by the provisional administrators who therefore, together with the shareholders are empowered to adopt the appropriate measures of redress. The legislator has not made any indication as to the type of measures that can be most suitable. But since this measure falls under the scope of special restructuring, it is thought that any of the special restructuring measures will suffice. Even other extraneous measures can also be proposed, especially as the entire procedure is subject to the approbation of COBAC and the Monetary Authority[100] , to

[98] Article 78(2).

[99] Ibid., article 80(a).

[100] Ibid, article 80(b).

which a report thereof is addressed before it can become applicable. COBAC gives its response in one month following the reception of the file.

Provisional administration may either end with the restoration of the subsidiary credit establishment to normal functioning or by impossibility to restore the normal functioning of the credit establishment. Either situation has its own consequence. When the provisional administration is successful, COBAC lifts the subsidiary from provisional administration. This is conditioned by the restoration of solvency and the reinstatement of the suspended corporate organs[101] as well as all normal corporate organs. Another issue relating to the success of the procedure is that the subsidiary has to obtain a new licence in a case where it operated under a unique licence[102] with its mother company. In such a situation, the subsidiary must undertake afresh the licensing procedure, to obtain its own licence as a separate entity. Where the provisional administration is unsuccessful as evidenced by an impossibility to restore the normal functioning of the credit establishment, COBAC goes ahead to withdraw the licence of the credit establishment and appoints a liquidator[103].

[101] Ibid, article 81(a).

[102] The unique licence allows a bank or financial institution that has obtained authorization to exercise its activities within a member state of the community the right, if it so desires, to spread to another member state, by opening subsidiaries or branches, without being subject to the administrative requirements for licensing in that country, see article 1 of Regulation No 01/00/UMAC/CEMAC/COBAC of 27 November 2000, instituting a single licence for credit establishments within CEMAC.

[103] Article 82 of the 2014 Regulation.

CONCLUSION

The 2008 financial meltdown laid bare the inefficiency of the traditional stabilisation measures to redress difficulties that arise in systemic credit establishments. This sparked law reform on a global scale to respond more efficiently in the event of future systemic difficulties. The respond of the CEMAC legislator as expressed in the 2014 Regulation is a “cocktail” of ordinary law measures such as mergers, capital variation and asset sales, readapted to meet the exigency of speedy resolution, which is indispensable in such a case. The need for speed has been ensured by the suspension of the corporate organs and in some circumstances the appointment of the provisional administrator to conduct the process. The problem of cross border resolutions of parent and subsidiary credit establishments has also been dealt with in the regulation. The main difficulty is that most of the measures of special restructuring have been dealt with in a purely indicative manner. The problem is further compounded by the fact that these measures draw their foundations from ordinary law and the modalities through which they are ordinarily conducted include the participation of shareholders and other corporate organs, which are already suspended during special restructuring[104]. It is true that the modalities of application of these measures may best be laid down in the restructuring plan[105], but it is feared that such application of the law on a case by case basis can be a source of legal insecurity. It will, therefore, be most judicious for the legislator to further expatiate on these measures to ease their application.

[104] This is the case with mergers, capital variation, and asset transfers.

[105] See article 65(d) of the 2014 Regulation.

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