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## **The pragmatism of CEMAC bank distress rescue measures: A treatment dose in function of the level of distress**

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### **Abstract**

The banking profession is a very delicate one, based on the premise that one of the activities of a bank is the reception of money from the public with a view of subsequently reimbursing it when demanded. This is the basis of a judicial authority (*Foley v. Hill*)<sup>1</sup> establishing the legal principle that the relationship between a bank and the customer is a debtor- creditor relationship (the bank being the debtor and the customer the creditor). Needless to evoke the important role banks play in promoting national and international economic activities. Bank failure can therefore be very catastrophic. In the face of bank failure, customers risk losing their deposits and the economy may suffer from depression. Mindful of these negative consequences of bank failure, the Economic Community of Central African States (CEMAC) enacted Regulation No. 02/14/CEMAC/UMAC /COBAC on 14 April 2014 fixing the legal regime applicable for the treatment of banks in difficulties. Considering that the level of bank distress may vary from one bank to another, the regulation is pragmatic enough to have ushered a treatment dose in function of the level of distress. It provides a treatment dose for banks whose liquidity and solvency are merely threatened, and something different for banks in which insolvency has settled. This article seeks to explore the mechanism for the administration of these treatment measures to banks in difficulties within the CEMAC Zone.

**Keywords:** CEMAC, bank distress and treatment

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### **Introduction**

COBAC<sup>[2]</sup> regulation R-2009/02 of 1<sup>st</sup> April 2009 indicates that banks are institutions which carry out all banking activities<sup>[3]</sup>. These may be principal as well as accessory activities. The principal activities of banks will comprise the reception of deposits from the public, the granting of credits, the provision of securities and guaranties in favour of other credit establishments, as well as putting at the disposal of the customer, means of payment or their management<sup>[4]</sup>. The accessory activities may include: foreign exchange transactions; operations on gold and other precious metal; the leasing of compartments in safes; investments, subscription of shares, purchase, management, custody and sale of stocks and shares and other financial products; advice and assistance related to matters of property management; advice and assistance in financial management and in a general manner, all the services designed to facilitate the creation and development of enterprises<sup>[5]</sup>.

These activities are very delicate, and consequently bank failure (distress) can be very disastrous on the different stakeholders involved in the banking process. Bank failure can be caused by two factors; namely instability in the world economy and human error or misjudgement as far as bank governance is concerned.

In relation to its contribution to bank failure, we need not dwell much on instability of the world economy. Its crippling effects on banks have been recorded in history. Human error or misjudgements can manifest itself in many forms. Common examples are unwise investments in questionable industrial projects, hazardous dealings in foreign currencies, and the investment of money received on short deposits in long term transactions. When contrary to expectations, short- term deposits

are not renewed, a bank that has lent the funds involved on a long -term basis, faces a liquidity crisis<sup>[6]</sup>.

It is an undisputable fact that turbulence in the banking system has an unfavourable effect on the economy. This is triggered by the fact that banks operate largely by investing funds deposited with them by the public. The collapse of a bank has a disastrous effect on the position of its customers, be they individual account-holders or business enterprises<sup>[7]</sup>.

In addition, the collapse of a bank can induce a financial panic. A run on any bank by its customers sends ripples throughout the banking system generally<sup>[8]</sup>.

The collapse of a bank may also have a very negative effect on international trade. The banking systems of the western world are inter-linked and have to function harmoniously. Money transfers require to be effected promptly. Banker's drafts and travellers' cheques have to be cashed when presented. Letters of credit need to be issued and confirmed forthwith in every trading country in the world on the instruction of foreign correspondent. In all these, there is no time to verify the credit worthiness of the issuing or transmitting bank. In reality, international banking operates on the basis of trust and confidence. When this is shaken, the system loses its versatility and viability<sup>[9]</sup>.

Because of these negative consequences of bank failure on individuals, enterprises and the society at large, CEMAC through the Ministerial Committee of the Monetary Union of Central Africa (UMAC) on the 14<sup>th</sup> of April 2014 enacted Regulation No. 02/14/CEMAC/UMAC/ COBAC fixing the legal regime applicable for the treatment of credit establishments in relation to difficulties they face in the exercise of their banking activities.

Credit establishments are financial companies which mainly practice banking operations and among them are banks and specialized financial institutions. In the course of this article, the word and phrase “banks” and “credit establishments” will be used interchangeably to refer to banks.

The CEMAC regulation has the merit of articulating on the notion of bank difficulty. It adopts a very broad conception of that notion<sup>[10]</sup>. Article 4 of the regulation indicates that a credit establishment is considered to be in difficulty when COBAC finds major dysfunctions of any kind having an immediate or foreseeable impact on its management and/or its financial situation. These will include cases where:

- the credit establishment has serious shortcomings in compliance with the regulations applicable to it;
- the management or financial situation of the credit establishment does not offer sufficient guarantees in terms of solvency, liquidity or profitability and, more generally, are likely to jeopardize the proper performance of its commitments;
- The management structures of the Credit establishment, its administrative or accounting organization, or its internal control have serious shortcomings.

The provisions of the above mentioned CEMAC regulation apply to credit establishments operating on the territory of the Member States. It extends to micro-finance establishments<sup>[11]</sup> implanted on the territory of Member States of CEMAC, except those whose form is incompatible with its application.

The CEMAC regulation under discussion previews two series of measures to ensure the treatment of Credit Establishments in difficulties. The first series consist of a number of measures aimed at the consolidation (stabilizing or strengthening) of credit establishments and the second series relates to the procedure for wiping-off debts applicable to credit establishments.

From the analysis of the measures put in place for the treatment of credit establishments, we realize that two situations are addressed: difficulties which threaten liquidity and solvency and those relating to situations in which insolvency has settled. CEMAC regulation provides different treatments depending on whether the aim is to cure threatened liquidity and insolvency or at the extreme address the cases of credit establishments in which insolvency has settled. The measures put in place to address the difficulties relating to threatened liquidity and insolvency include; preventive measures, disciplinary measures and restructuring measures. Preventive settlement, administration and liquidation previewed in the OHADA Uniform Act relating to the collective procedure for wiping-off debts have been adopted by the regulation to address the cases of credit establishments in which insolvency has settled with some modification taking into account the particularities of banking activities<sup>[12]</sup>. This article will focus on the discussion of treatment measures for credit establishments in relation to difficulties they face which threatens liquidity and solvency and treatment measures of credit establishment in which solvency has settled.

#### **Treatment measures for credit establishments in relation to difficulties which threaten liquidity and solvency**

In order to avoid the disruption of the banking system and the subsequent bank failures which that may engender, two matters have to be constantly watched. The first is the network of

institutions carrying on banking activities and the second is the stability of individual banks within that network. The banking network and the individual banks constituting the latter have to be strong. The achievement of these goals entails the introduction of measures to ensure that banks are able to meet their liabilities. There are practices which can undermine the capacity of banks to meet their commitment. These practices have to be checked to enable the build-up of a strong and buoyant banking system. CEMAC regulations provide measures which could be deployed to prevent banks from slipping into the abyss of illiquidity and insolvency; disciplinary measures if the banks do not heed to the preventive measures; and restructuring measures to attempt to redress a situation of illiquidity and insolvency whose proportion has not arrived at a level for a decision to liquidate. These measures have as objective the preservation or re-establishment of the normal conditions of exploitation of the credit establishment and they are autonomous from each other. Independent of their sequential position in the CEMAC regulation, the measures are prescribed by COBAC in a circumstantial manner depending on the nature of the dysfunction noticed in the exploitation of the credit establishment.

#### **Preventive Measures**

Prevention is the action of stopping something from happening or arising. Used within the context of the treatment of credit establishments, preventive measures are those mechanisms that could be deployed by COBAC to assist credit establishments to avoid running into difficulties. They will include recommendations which COBAC from time to time could address to the Credit establishments;<sup>[13]</sup> warnings from COBAC when credit establishments fail to respect rules of the profession or recommendations<sup>[14]</sup>; injunctions from COBAC when situations in the credit establishments justify;<sup>[15]</sup> a call by COBAC for the contribution of shareholders to boost the activities of the credit establishment if need arises;<sup>[16]</sup> a call from COBAC for solidarity actions from the Professional Association of Credit establishment in a given situation<sup>[17]</sup> and an invitation of the Bank of Central African States (BEAC) for contribution in improving a given situation<sup>[18]</sup>.

#### **Recommendations**

CEMAC regulation empowers the Secretary General of COBAC or his assistant to address recommendations to a credit establishment. These recommendations may aim at: re-establishing or reinforcing its financial situation; ameliorating its management methods; assuring the adequacy of its organization in relation to its activities, its risks or its development objectives. As an illustration COBAC through its Secretary General or his assistant could recommend that the credit establishment submit for its appreciation a *program for re-establishment* (recovery plan) indicating in a detailed manner measures it has taken or intends to take. It could fix the time frame within which the credit establishment has to respond. These recommendations are geared towards the building of a strong credit establishment capable of meeting its immediate and long- term commitments by ensuring that it remains liquid and solvent.

#### **Warnings**

In business, expectations are laid out and employees are required to meet them. They are held accountable for their inability in

meeting them. A warning is a disciplinary act spelling out what is wrong and how to fix it. Warnings generally will state that the employee must make the specific changes within a particular time frame or face further disciplinary action. They are issued when employees disregard company policies or involve themselves in other misconduct.

Within the CEMAC region, COBAC or its President has the powers to issue warnings to credit establishments which fail to respect the rules of the profession or recommendations. This is usually done after the managers must have been given a chance to explain themselves in relation to the issue for which the warning will be issued. When a warning is issued, the person against whom it is issued and the Monetary Authority<sup>[19]</sup> concerned are notified and a copy thereof is sent to the National Branch of BEAC. The fear of further disciplinary sanction after a warning may be a factor to induce a positive change in the conduct of management which may have a similar impact on the performance of the credit establishment.

### **Injunctions**

An injunction may compel somebody to perform a particular act. It may enjoin somebody to refrain from a particular conduct. When the situation of the credit establishment justifies, COBAC can issue injunctions for it to take all the measures aimed at:

-re-establishing or re-enforcing its financial situation, and this could entail a prescription for more restrictive prudential norms and even the transfer of all or part of its shares in other companies;

- ameliorating its methods of management;
- assuring the adequacy of its organization in relation to its risks or its development objectives.

COBAC could in particular enjoin the credit establishment to raise the level of its net assets to match with its risk specificities. It can also call on the Credit establishment to restrain or limit temporarily its activities. COBAC could also enjoin the credit establishment to submit to it for scrutiny a recovery package for effective implementation of the above measures. COBAC fixes the time frame for which credit establishments are expected to comply with the injunctions. In cases where an injunction decision is made, the credit establishment and the Monetary Authority concerned are notified and a copy of the decision is forwarded to the National branch of BEAC.

A credit establishment that does not implement an injunction within the time indicated risk being fined, this without prejudice to other sanctions. The modalities for the calculation of the fines are fixed by COBAC regulations. The decision to fine is the responsibility of COBAC.

### **The Contribution of Shareholders**

When the gravity of the situation of credit establishments justify, its shareholders may be called upon to present to COBAC the appropriate solution they envisage. This solution could be expressed in terms of the financial contribution necessary to improve the situation of the establishment. This could be by means of an increase in capital or any other means of assistance. A calendar for this project must be established. The presentation of the appropriate solution envisaged by the shareholders to COBAC is done upon an invitation by the President of COBAC or on the initiative of the shareholders.

### **Solidarity action**

Solidarity action depicts the coming together of friends to rescue one of theirs who finds himself in a difficult situation. A credit establishment must be part of the Professional Association of Credit Establishments. When the gravity of the situation of a credit establishment justifies, the President of COBAC could make a request to the Professional Association of Credit Establishments to which the particular credit establishment adheres to submit to COBAC the conditions under which the other members of the association could assist to improve upon its case. This assistance could be very fundamental in reversing the negative trend of the credit establishment.

In order to ensure the stability of the banking system and to protect depositors CEMAC decided to set up a mechanism for deposit guarantee. This is known as the Deposit Guarantee Fund for Central Africa (FOGADAC)<sup>[20]</sup>. Its mission consist of indemnifying the savers of a bank in case of unavailability of their deposits and extending a hand of help to banks whose situation leaves fears of total or partial unavailability of deposits or any reimbursable fund within a short time<sup>[21]</sup>. This fund could be summoned to come to the assistance of an ailing bank if necessary.

### **Intervention of BEAC**

When the gravity of the situation of a credit establishment justifies, COBAC could discuss with BEAC all information necessary to enable the putting in place of circumstantial measures for its improvement. This must be done in conformity with the statutes of BEAC. If this is done, the credit establishment may regain its viability.

### **Disciplinary Measures**

When a credit establishment or its personnel disregard recommendations, warnings and injunctions, disciplinary measures may be taken against it. These measures are intended to punishment the credit establishment or its personnel for failing to observe regulations and practices. Due process must be respected before any disciplinary measure is taken against a credit establishment.

### **The Disciplinary Procedure**

The disciplinary procedure against credit establishments or personnel subject to the provisions of the Convention of 17 January 1992 harmonizing banking regulations for Central African States is triggered by COBAC. It may commence disciplinary procedure when a credit establishment or its personnel:

- has ignored warnings;
- has not obeyed an injunction;
- has not respected the specific conditions required or the commitment taken at the moment of application for a license or prior authorization;
- Seriously violates applicable regulations<sup>[22]</sup>.

The commencement of disciplinary procedure against credit establishments is strictly done through their legal representatives and /or the President of their board of directors and also persons exercising the functions of administration (members of board of directors); *de jure and de facto* managers, and auditors within it. Attention must be drawn to the fact that the resignation of a

manager or even his replacement by the board of directors of the credit establishment or the extinction of the employment contract of the auditor of a credit establishment is not an obstacle to the commencement of a disciplinary procedure against them.

### Sanctions Applicable

Without prejudice to criminal and other sanctions, COBAC is empowered to take one or a combination of the following disciplinary sanctions

- warnings
- reprimand
- temporary suspension or prohibition to carry out all or part of certain operations or all other limitations relating to the exercise of the activities of credit establishments
- temporary or permanent prohibition of the disposal of all or part of the assets of the credit establishment;
- prohibition or the limitation of the distribution of dividends to shareholders
- dismissal or disciplinary withdrawal of the license of one or more auditors
- suspension, revocation without more or disciplinary withdrawal of the license of one or more managers
- resignation of one or more members of the board of directors as a result of established fault
- Disciplinary withdrawal of the license of the credit establishment.

The principle of equal opportunity to present a case must be respected in the disciplinary procedure triggered by COBAC. In this light, disciplinary sanctions are pronounced by COBAC only after the parties concerned have presented their case in writing or orally upon its request. In the process of defending himself before COBAC against disciplinary measures, the concerned party may seek assistance from a representative of the Professional Association of Credit establishment or any person of his choice. If he fails to present his case COBAC can then rule in his absence. The disciplinary withdrawal of license of a credit establishment can only be pronounced after COBAC has concerted with the Monetary Authority for appropriate solutions to be put in place for the continuation of the activities of the credit establishment concerned. For this reason before the closure of the disciplinary procedure, COBAC is under the responsibility to address without delay a note to the Monetary Authority indicating the measures susceptible to re-establish the normal conditions for the exploitation of the credit establishment. From the reception of this note, the Monetary Authority has 30 days to expressly pronounce on the continuation of the activities of the credit establishment <sup>[23]</sup>. The Monetary Authority who within the 30 days pronounces for the continuation of the activities of the credit establishment, must within 60 days following, submit to COBAC for approval a restructuring plan <sup>[24]</sup>.

In the absence of a written response and appropriate actions taken by the Monetary Authority within the above time frames, COBAC will pronounce the disciplinary withdrawal of the license of the credit establishment and proceed to appoint a liquidator following the urgent procedure.

A repertoire of natural and artificial bodies whose licenses have been withdrawn by COBAC as a disciplinary measure is held by the General Secretariat of COBAC. They are deleted from that

list after the period for which they are prohibited from conducting credit establishment activities.

### Notification and consequences of some disciplinary measures

The Credit Establishment has to be notified of the disciplinary sanction decisions and copies forwarded to the Federation of the Professional Association of Credit Establishment (FAPEC), the Professional Association of Credit Establishment concerned, and the National branch of BEAC.

The decision which pronounces the dismissal, resignation for reasons of fault, disciplinary withdrawal of the license of auditors, de jure and de facto managers or members of the board of directors have as effect the prohibition of these persons from:

- the control of the operations of credit establishments;
- the exercise of a function within the management or board of directors of Credit Establishments;

These prohibitions to exercise operate over the entire territory of Member States of CEMAC. COBAC fixes the time frame within which this prohibition must run. It must not be less than 5 years and not more than 10 years from the date of notification of the decision of the Credit Establishment concerned <sup>[25]</sup>. This prohibition ceases as of right on the end of the fixed period without COBAC having to take any decision to this effect.

The decision to withdraw a license is published in at least one of the principal organs of the national press or in other media designated by COBAC. COBAC could decide that, decisions relating to other disciplinary sanctions will be rendered public in newspapers or other organs designated by it. The cost shall be borne by the Credit Establishment concerned.

### Appeal against decisions relating to disciplinary sanctions

The decisions relating to disciplinary sanctions are subject to appeal before the CEMAC Court of Justice which is a court of last resort <sup>[26]</sup>. Appeal can be made by persons sanctioned or by the Credit establishment concerned within a delay period of 2 months following the notification of the decision to the concerned. The appeal does not stay the execution of the decision.

### Restructuring Measures

CEMAC regulation considers as the restructuring of credit establishment, all the operations which aim at one or more of the following objectives:

- the re-establishment of conformity of management with regulations when the managers are no longer capable of exercising their functions normally or are not even exercising as a result of disciplinary sanction such as suspension, resignation for fault or withdrawal of license;
- the re-establishment of the conformity of the administration with regulations when there are shortcomings or paralyses in the normal functioning of the company organs;
- The re-establishment of the fundamental financial equilibrium and the putting in place of the rules and internal procedures necessary for the normal functioning of the credit establishment <sup>[27]</sup>.

These operations which are diverse in nature and form can be performed through provisional administration and/or special restructuring.

### Provisional Administration

Provisional Administration is a procedure applicable to credit establishments encountering difficulties of a magnitude that, to return to normal conditions of exploitation, the competent authorities will provisionally substitute the board of directors and the general management by an *ad hoc* management under the modalities set by regulations. The CEMAC regulation indicates the criteria for the appointment of provisional administrators and also spells out situations of incompatibilities with provisional administration. In these light, the regulation provides that the provisional administrator:

- must not have any interest within a credit establishment;
- must not have within the last five years received directly or indirectly a retribution or payment from a credit establishment or from a person controlling a credit establishment and must not have found himself in a situation of subordination in relation to the credit establishment;
- Must not be a former member of the board of directors or de jure or de facto manager of a credit establishment or have been subject to a decision of dismissal, resignation for fault or disciplinary withdrawal of license.

The decision appointing the Provisional Administrator circumscribes the period of execution of his mission to a maximum duration of one (1) year <sup>[28]</sup>. However this duration could be extended by a period not exceeding 6 months or by a supplementary period fixed within the framework of special restructuring <sup>[29]</sup>. When a provisional Administrator is appointed, upon notification of the credit establishment, the powers of the board of directors and the management of the credit establishment come to an end. Consequently all the powers hitherto exercised by these two bodies and other legal representatives are transferred to the provisional administrator.

In the execution of his functions the Provisional Administrator must respect the legal and contractual obligations of the credit establishment. He alone has the powers to present the recovery package plan for the credit establishment to COBAC. In the exercise of its mission, the provisional administrator can, upon prior authorization of the President of COBAC, turn to the expertise or assistance of one or more natural or artificial bodies by dint of their competence. These could be a consultancy, an independent expert, an employee of the credit establishment, or any other person recruited for this reason. Notwithstanding recourse to the expertise and assistance, the Provisional administrator is alone responsible for the execution of the missions fixed in the decision appointing him. Except in cases of personal fault duly established, the Provisional administrator will not be civilly liable against third parties for administrative and management operations executed within the framework of the CEMAC regulation. In case the Provisional Administrator fails to observe established rules or does not act with due diligence, COBAC can after having given him notice to explain address a warning or an injunction or immediately dismiss him from his functions on justified grounds.

COBAC has the powers to lift Provisional Administration under two circumstances. Firstly, when the normal conditions of exploitation of the credit establishment have been re-established, notably with the restoration of solvency and the putting in place of all the organs of management of the entity and secondly, when it is clear that the provisional administration has arrived at a

situation of impossibility to re-establish the normal conditions of exploitation of the credit establishment. In this last situation it will withdraw the prudential license and appoints a liquidator.

### Special Restructuring Procedure

The special restructuring procedure is reserved for credit establishments of systemic importance <sup>[30]</sup> which encounter difficulties such that in order to return to normal operating conditions, a restructuring plan affecting the pre-existing rights of shareholders is imposed to enable it to continue to pursue its activities, preserve the public interest including that of depositors and ensure the stability of the banking and financial system of CEMAC.

Credit Establishment of systemic importance are those which by the assessment of COBAC and the Monetary Authority their failure will have a direct or indirect negative impact on all or part of the banking and financial system and whose effect could extend to other sectors of the economy.

Indicators permitting the identification of systemically important credit establishment are: their size, interdependence of their activity, the absence of direct substitutes or financial infrastructure for their services, their activity at the sub-regional, regional or global scale and their complexity. The identification criteria are specified by a COBAC Regulation <sup>[31]</sup>.

The decision to engage in special restructuring is pronounced by an order of the Monetary Authority in conformity with the opinion of COBAC.

The application for special restructuring is submitted to the Monetary Authority. It is reserved for the legal representative of the credit establishment who has been duly approved by the general assembly of shareholders and to the *monetary authority by automatic seizure*. It is worth noting that neither COBAC nor its General Secretariat can trigger the engagement of Special restructuring procedure. This measure is put in place to limit the powers of bank supervisors to advising the Monetary Authorities in cases where it is deemed that the situation of a credit establishment warrants special restructuring. From the tenor of their advice, if the Monetary Authority is convinced that all the conditions for an order for special restructuring have been fulfilled, he will then issue one.

From the publication of the order of the Monetary Authority putting the Credit establishment on special restructuring, the powers of the General Assembly of Shareholders are transferred to the Legal Representative of the credit establishment – *the Director General*, for the execution of the operations fixed in the special restructuring plan. COBAC could appoint a provisional administrator for a credit establishment under special restructuring. In such a case his appointment will put an end to the powers of the Board of Directors and the Director General which will be transferred to him.

In case the restructuring exercise fails (special or provisional administration), the withdrawal of license qualified *as prudential* is pronounced by COBAC. This comes within the affirmed objective to exclude from the banking system of the sub-region credit establishments whose chances of survival is inexistent despite provisional administration or special restructuring. The regulation previews the extension of the withdrawal of license of the holding or parent company of a credit establishment to all its subsidiaries within the CEMAC Zone.

Contrary to the disciplinary withdrawal of license which necessitates the consultation of the Monetary authority, COBAC upon taking a decision on the *prudential withdrawal* of license simply has to notify the concerned, the Monetary Authority, the Professional Association of Credit establishment (APEC), the Federation of the Professional Association of Credit Establishment (FAPEC) and the national Branch of the Bank of Central African States of the country concerned.

It is interesting to note that the CEMAC regulation in application of the primacy of special Community Law over the Ordinary Law of enterprises in difficulties prohibits the opening of a preventive settlement procedure or administration with regards to a credit establishment placed under the regime of provisional administration or special restructuring <sup>[32]</sup>.

### **Treatment measures for credit establishments in relation to difficulties when insolvency settles**

When the difficulty of the credit establishment is manifested by cessation of payment, the collective proceeding for wiping-off debts is triggered. The OHADA Ordinary law rules on the collective proceeding for wiping-off debts are set aside or amended by CEMAC regulations in preference for an approach specific to banking activities. However the regulation expressly provides that in the absence of specific rules and derogatory ones to the ordinary rules the provisions instituted by the OHADA Uniform Act relating to the collective proceedings for wiping-off debts on preventive settlement, administration and liquidation of property will be applicable to credit establishments.

However, since the banking supervisor may not understand the full scope of the regime of corporate rescue measures surrounding the commercial enterprise, the regulation expressly provides that, in the absence of specific and derogatory rules from ordinary law, the provisions established by the Uniform Act relating to the collective procedure for wiping off debts patterning to preventive settlement, Judicial Administration and liquidation of assets are applicable to credit establishments.

The CEMAC regulation provides for a restrictive definition of the notion of cessation of payment which is a determinant factor in the procedure to be applied to a credit establishment in difficulty. It considers that a credit establishment is in a state of cessation of payment when it is not capable of immediately paying its obligations or if it cannot pay within a period of 30 days. Moreover, it provided that any withdrawal of approval from a credit institution constitutes suspension of payments and leads to its liquidation.

### **Preventive Settlement**

This is a procedure designed to avert insolvency or the cessation of payments or the cessation of the activity of a company and to permit the clearing of debts by means of a composition agreement <sup>[33]</sup>. A composition agreement is an agreement among the creditors of an insolvent debtor to accept an amount less than they are owed in order to receive immediate payment. Preventive settlement as a rescue measure is applicable to an establishment which, whatever the nature of its debts, is experiencing a difficult economic and financial situation but not irreparably compromised <sup>[34]</sup>. To be eligible for preventive settlement, the credit establishment must not be insolvent at the time the proceedings are commenced. It will mean that only an

establishment that is still able to ensure its payments can benefit from it.

If a credit establishment intends to engage in preventive settlement, it must first obtain the prior authorization of COBAC through its legal representative before any referral to a competent court. The institution's request must set out its financial situation and the offer of a composition agreement specifying the measures and conditions envisaged for its recovery; COBAC assesses the ability of the credit institution to achieve the objective of returning to normal operating conditions <sup>[35]</sup>.

### **Administration**

This is an ordinary law procedure involving the taking of measures to restore the economic and financial health of a business with a view to its continued survival. It is thus intended to safeguard the company and settle its liabilities by means of a composition agreement. It is applicable to any establishment in a situation of insolvency. The Competent court in matters relating to administration is the court having jurisdiction over commercial matters at the place where the debtor has its principal place of business or registered office. One of the peculiarities with administration in relation to credit establishments is that it can only be opened with the consent of COBAC.

The credit establishment interested in the opening of administration will file a request in two copies at the competent court. When this is done, the President of the competent court by its own written request setting out the financial situation of the credit establishment will seize COBAC for its opinion. COBAC assesses the ability of the credit establishment to achieve the objective of returning to normal operating conditions. The decision of the COBAC is notified to the President of the competent court and to the Monetary Authority. If COBAC objects, there will be no room for administration. This will only be possible with its consent.

### **Liquidation**

Liquidation is a procedure for the purpose of realizing the debtor's assets in order to clear his liabilities <sup>[36]</sup>. As concerns bank liquidation, it will constitute all the operations before the division of the debtors' assets, which constitute a guarantee for the creditors. The procedure of liquidation of a credit establishment within the CEMAC Zone begins with the withdrawal of the license to operate which was issued by the Monetary Authority or when it is discovered that an institution was operating a banking business without one. The matter is referred to the court only after the appointment of the liquidator, who remains under the control of COBAC. The incompatibilities previewed for the appointment of the provisional administrator mentioned above also apply to the liquidator.

When the liquidator is appointed by COBAC, he must within one month after taking office make a declaration of cessation of payments to the High Court of the place of registration of the credit establishment, for an automatic opening of the *asset-liquidation procedure* and the approval of his appointment. If the decision of the Court is for liquidation, the liquidator of a credit establishment will then be conferred a dual function, namely, that of *bank liquidator* for the banking compartment under the control of COBAC, and that of *judicial-liquidator* for the non-banking compartment, under the control of the *juge-commissaire* <sup>[37]</sup>.

It is worth noting that the liquidation of the assets of a credit establishment involves operations over two distinct compartments, namely the "banking" compartment and the "non-banking" compartment:

- the banking compartment includes the assets and liabilities generated by the banking activity of the credit establishment; it includes, where applicable, the assets and liabilities relating to the accessory activity of the credit establishments;
- The non-banking compartment includes all the assets and liabilities of the credit establishment not belonging to the banking compartment, for example, debts, bonds and commitments not generated by banking activity, as well as property assigned to the operation of the credit establishment.

By way of derogation from the principle of the unity of the debtor's assets, according to which all of his assets form a guarantee for creditors, CEMAC regulation prescribes that the assets of a given compartment only address debts, commitments and obligations concerning that compartment. In short only debts relating to this compartment benefit from the assets. Thus, each compartment gives rise to separate management which is identified in the accounting system of the credit establishment concerned by separate accounts<sup>[38]</sup>.

However, if the value of the realized assets of the "non-banking" compartment enables all the declared and admitted credits of the said compartment to be paid with the exception of loans and subordinated debts and debts to shareholders, the bank liquidator transfers the surplus of assets to the "banking" compartment.

The liquidation process is closed by COBAC after the repayment of all deposits or in a situation of insufficient funds following the realization of all the assets.

## Conclusion

As mentioned earlier in this write-up, the fight against bank failure in any country, region or community should focus on two issues, namely, ensuring the construction of a strong banking network and building the stability of individual banks within that network. To succeed in such an endeavour regulations have to be enacted to guide banks and bankers in the exercise of their activities. The cause of bank failure begins with disrespect of regulations especially those in relation to the standard of care it has to deploy in the management of its resources. To curb this phenomenon, the CEMAC regulation provides mechanisms which can constrain banks and bankers to abide by regulations, these with the intention of consolidating the banking institution to permit it meet with its commitments. If the bank for one reason or the other glides into insolvency, the CEMAC regulation provides a mechanism for collective proceedings for wiping-off debts. The CEMAC regulation has the merit of providing a bank rescue mechanism that takes into account the level of distress. Its strict implementation can prevent insolvency from settling, and if for one reason or the other insolvency settles, the regulation directs on how the situation should be managed in the interest of all the stakeholders.

## References

1. 2H.L.C. 28, 1840.
2. It is an abbreviation for Commission Bancaire de l' Afrique Centrale (The Banking Commission of Central African

States. It is a Supranational Commission charged among other things with the control of the Banking Profession within the CEMAC Zone. It was created by the Convention of 16 October 1990. CEMAC is made up of six countries, namely: Central African States, namely, Cameroon, Central African Republic, Equatorial Guinea, Gabon, Congo Brazzaville, and Chad. The Six countries have a common central bank (BEAC).

3. See, Article 1 of COBAC Regulation R-2009/02 fixing the categories of Credit Establishments, their judicial form and authorized activities, 2009.
4. Ibid.
5. Ibid, Article 5.
6. Ellinger (E.P), *Modern Banking Law*, Clarendon Press, Oxford, 1989, 25.
7. Ibid, 26.
8. Ibid.
9. Ibid.
10. See, Kalieu Elongo (Y.R.). «Le traitement des établissements de crédit en difficultés: Un nouveau règlement adopté» kalieu-elongo.com visited on, 2021.
11. See, Article 1(10) of CEMAC Regulation No. 01/17/CEMAC/UMAC/COBAC of 27 September 2017 relating to the condition for the exercise and control of the activities of Micro-finance within CEMAC. This CEMAC regulation provides for three categories of Micro-Finance institutions. See, Articles 30, 32, 41, 43, 44 and 46 for the categories and their minimum capital requirements.
12. OHADA is the abbreviation for Organization pour l' harmonisation en Afrique du Droit des Affaires translated in English as the Organization for the Harmonization of Business Law in Africa. It has as one of its missions the enactment of uniform business laws (know as Uniform Acts) applicable throughout Member States. One of the Uniform Acts enacted is that on Collective Proceeding for Wiping-off Debts which was originally passed on 10 April 1998 and amended on 10 September 2015. The amended version entered into force on, 2015.
13. See, Article 7 of Regulation No. 02/14/CEMAC/UMAC/COBAC on 14 April 2014 relating to the treatment of banks in difficulties within the Economic and Monetary Community of Central Africa.
14. Ibid, Article 8.
15. Ibid, Article 10.
16. Ibid, Article 13.
17. Ibid, Article 14.
18. Ibid, Article 15.
19. Monetary Authority is the Minister in charge of money and credit. In most of the countries of the CEMAC zone, it will be the Minister in Charge of Finance.
20. Known in French as Fonds de Garantie de dépôts en Afrique Centrale, it was created by CEMAC Regulation No. 01/09/CEMAC/UMAC/COBAC of 20 April 2009 and was put in place on the 21st of February 2011. COBAC Regulation R-2009/03 of 15 December 2009 governs its organisation and functioning.
21. Kelese (G. N.), "Deposits Guarantee and the Stability of the CEMAC Banking System" in *Régulation et intégration Bancaires dans la CEMAC*, 2017, 27-28.

22. Regulation No. 02/14/CEMAC/UMAC/ COBAC on 14 April 2014 op cit Article 17, 2014.
23. Ibid, Article 22(3).
24. Ibid, Article 22(4).
25. Ibid, Article 20.
26. Ibid, Article 25.
27. Ibid, Article 26.
28. Ibid, Article 38.
29. Ibid, Article 38 and 62.
30. COBAC Decision No. DC-2019/151 of 27 April 2019 has established a list of Credit establishment of systemic importance, 2019.
31. See, COBAC instruction No. I-2018/01 fixing the methodology for the evaluation of the criteria for the identification of establishment of systemic importance within the Economic and Monetary Community of Central Africa of, 2018.
32. Commission Bancaire de l'Afrique Centrale, « Présentation du règlement No. 02/14/CEMAC/UMAC/ COBAC/CM du 25/04/2014 relatif au traitement des établissements de crédit en difficulté », P.9. [sgcobac.org](http://sgcobac.org)
33. Boris (M), Nanette (P), David (SS) and Sébastien (T), Business Law in Africa: OHADA and the Harmonisation Process, Kogan Page Ltd, London, 2002, 159.
34. Commission Bancaire de l'Afrique Centrale, « Présentation du règlement No. 02/14/CEMAC/UMAC/ COBAC/CM du 25/04/2014 relatif au traitement des établissements de crédit en difficulté »op cit, 2014, 9.
35. Ibid.
36. See, Article 2 of the OHADA Uniform Act on collective proceedings for wiping-off debts.
37. This is a Judge appointed by the court to supervise the ensuing proceedings relating to the liquidation.
38. Commission Bancaire de l'Afrique Centrale, « Présentation du règlement No. 02/14/CEMAC/UMAC/ COBAC/CM du 25/04/2014 relatif au traitement des établissements de crédit en difficulté », op cit, 2014, 11.