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# Civil Liability for Defective Disclosures in the Cameroon Securities Market: A Comparative Analysis

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## ABSTRACT

*The Douala Stock Exchange (DSX) of Cameroon was created in 1999 and went operational in 2001. Two decades after only three companies are listed in the stock exchange. The Cameroon capital market laws do not make provisions for civil liability regime, consequently, members of the general public do not have accurate information in the offer document. In fact, the accuracy of the information document is imperative within the securities market for investors to make investment decisions. This paper has as objective to examine the adequacy of protection accorded to investors through civil liability regime in Cameroon. Adopting an in-depth content analysis of both primary and secondary data, this paper strongly calls for the enactment of a civil liability regime within the securities market regulation in Cameroon.*

**Keywords:** Civil Liability, Defective Disclosure, Securities Market.

## I. INTRODUCTION

Companies that are willing to go public and are looking to raise funds from the general public are required to inform the public about the shares offered, the actual state of the company and the nature of future activities through a document known as a prospectus or an information document. A prospectus must have the information legally required in order to allow the potential participants to make an informed investment decision.<sup>4</sup> The prospectus is regarded as the most important document containing information about the Initial Public Offering (IPO). It is asserted that ‘sufficient investment information is significant for the prevention of “bad”

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<sup>4</sup> See article 12(1)(2)(3) & Article 13 (1)(2)(3) of Law No. 99/015 of 22 December 1999 on the Creation & organization of Financial Market in Cameroon. See also article 3 & 6(a) of General Instruction No. 002/CMF/04 Relating to Information document required from Issuers making Public Call for Capital.

IPOs in a disclosure regime'.<sup>5</sup> Therefore, 'full, fair and true prospectuses'<sup>6</sup> are essential to the integrity of the primary share market.

Putting in place an effective disclosure regulation is widely regarded as an appropriate strategy for adoption in developed securities markets. Thus, the imposition of liability for non-compliance with the disclosure requirements for a prospectus is essential for the protection of investors. In order to do this, the compensation of investors who suffer loss or damage from defective disclosures is the core purpose of both civil and even criminal liability. The preparation of the prospectus involves input from a number of sources, such as the issuing company, its directors including the managing directors, the company secretary, auditors, lawyers, issue managers and underwriters.

Shleifer and Wolfenzon found that poor investor protection laws through disclosure and civil liability regime will lead to a decrease in public confidence in the securities market, as well as having a significant effect on firms' capital inflows from the public.<sup>7</sup> Having a strong civil liability regime can strengthen investor protection. Civil liability for defective prospectuses provides incentives to comply with the requirements and thereby foster investor confidence.

Therefore the role of investor protection is crucial to the development of the capital markets, in that, investor protection promotes investor confidence by reassuring them that their interests are being safeguarded against market malpractices and that recourse against such malpractices is available.

The civil and criminal liability regime for defective prospectuses in Cameroon is still unclear or not adequate enough as compared to those of some selected developed countries. The lack of investor confidence in the securities market is the result of numerous incidents of malpractice by corporations and their professionals and intermediaries and thus poor number of listing in the Douala Stock Exchange (DSX) market till date. The essence of this article therefore is to examine and evaluate the current civil liability regime, if any, that exist within the Cameroon securities market laws. In order to carry out a proper evaluation, a comparative study is carried out with some selected developed countries known to have a well functional and efficient capital market with a civil liability regime in place. These countries include The United Kingdom (UK), The United States of America (USA) and Australia.

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<sup>5</sup> S. M Solaiman, (2009), "Investor Protection by Securities Regulators in the Primary Share Markets in Australia and Bangladesh: A Comparison and Contrast", 16(4) *Journal of Financial Crime* 305, 322.

<sup>6</sup> A. M. Zahid & A. McGee, (2002), "Prospectus Disclosure and the Role of the Securities Commissions in Ontario and Bangladesh: A comparative Study", 4(2) *International and Comparative Corporate Law Journal* 163, 180.

<sup>7</sup> A. Shleifer & D. Wolfenzon. (2002), "Investor Protection and Equity Markets." 66 *Journal of Financial Economics* 1, Pp. 3-27, P. 4.

## II. CIVIL LIABILITY FOR DEFECTIVE DISCLOSURES

The essence of this section is to understand who is an issuer within the context of securities market and also to identify those who fall under the name issuers given that an issuer is often a corporate body who though recognized in the eyes of the law as a person but does not act on its own. Some person must act on the behalf of the companies and so the acts and minds of such persons are directly attributed to that corporation.<sup>8</sup> These persons are considered as the ego of the company.<sup>9</sup> These consist of company managers and directors as well as auditors charged to prepare the information document on the behalf of the company.

### (A) Issuers

An issuer is a corporation, government, agency, or investment trust that sells securities, such as stocks and bonds, to investors. Issuers may sell the securities through an underwriter as part of a public offering or as a private placement. An organization that registers, distributes, and sells a security on the primary market.<sup>10</sup> An issuer can be a private company or a government. Those working on the behalf of issuing company include company directors/managers and auditors.

A company director, manager or managing director is someone who is responsible for the daily operations of a company, organization, or corporate division. In some countries, the term is equivalent to CEO (Chief Executive Officer) the executive head of a company. While an auditor in simple terms is a person authorised to review and verify the accuracy of financial records and ensure that companies comply with tax laws. They are involved in the preparation of financial statements be it monthly, quarterly and annual financial statements of the issuing company. To this effect, the Uniform Act on Commercial Companies in Article 96 holds them liable in cases of misleading or inaccuracies in the financial statements. Article 15 further states that the auditors assume the responsibility for the information documents.<sup>11</sup>

### (B) The Douala Stock Exchange (DSX) Market

The Douala Stock Exchange Market (DSX) or the Stock Exchange of Cameroon was created in 1999<sup>12</sup>, launched in 2001 and made the first trading on the 30th June 2006.<sup>13</sup> The Douala Stock Exchange is a public limited company with a Board of Directors and capital of 1.8 billion

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<sup>8</sup> *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705

<sup>9</sup> *Ibid.*

<sup>10</sup> <https://www.investopedia.com/terms/i/issuer.asp>( accessed 24<sup>th</sup> November, 2020)

<sup>11</sup> *Supra* n. 5 Article 15

<sup>12</sup> By Law No. 99/015 of 22 December, 1999 Relating to the Creation and the Organisation of the Financial Market in Cameroon.

<sup>13</sup> By the Cameroon Water Bottling Company Plc (SEMC-Société des Eaux Minérales du Cameroun ).

francs CFA.

The Douala Stock Exchange (DSX) has as objective to establish the DSX as an attractive place for savers and to introduce the idea of Stock Market finance into the managerial culture of companies in Cameroon; to make the DSX an essential component of the economy of Cameroon ; to make a contribution to the growth and development of Cameroonian companies by allowing them to adopt and implement wider ambitions and achieve more quickly their objectives of development into international markets; to participate in the wider diffusion of a culture of transparency and sound corporate governance; to make a contribution to the dematerialisation of financial assets; to make a contribution to increase awareness of Cameroon on international markets.<sup>14</sup>

The DSX has one of its functions to monitor the legality of the operations carried out by the stockbrokers (Investment Service Providers) acting as negotiators, compensators or by any person acting on their behalf, and shall ensure the legality of negotiation during trading sessions generally. In case of any irregularity noticed by the Stock Exchange, it shall notify the FMC and the commission has the sole powers to carry out investigations on an ISP concern.<sup>15</sup> The FMC may empower the DSX to sanction an ISP who acts contrary to market rules and the powers shall be proactive measure aimed at stopping any action prejudicial to the interest of the market. The sanction may include expelling an ISP from a trading session as well as any other person concerned and the decision taken shall simply be communicated to the FMC.<sup>16</sup>

### **III. CIVIL LIABILITY FOR DEFECTIVE DISCLOSURE IN PROSPECTUS UNDER THE CAMEROONIAN LAW**

A civil action is a lawsuit filed by a private person or an individual (not the government) against another private person. Usually, these lawsuits seek monetary damages for injury or loss that the party suing (the plaintiff) alleges the party sued (the defendant) caused. A defendant who loses in a civil action does not face the risk of prison or fines, like in criminal court. A classic civil lawsuit would be a lawsuit by a person injured in a vehicle accident against the driver of the vehicle who caused the accident. By contrast, a criminal action is a prosecution by the government (usually the state) of an individual for violating a provision of the criminal code. The penalty that a defendant faces in a criminal action may include an imprisonment, a fine, or both such imprisonment term and fine. If you intentionally or even mistakenly injure someone

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<sup>14</sup> *Ibid.* P. 6.

<sup>15</sup> Article 7 of the Rules and Regulations of the Douala Stock Exchange of Cameroon.

<sup>16</sup> *Ibid.* Article 8.

or damage someone's property, you could end up being responsible for paying for the other person's losses. This is known as "civil liability. It is the legal responsibility of paying money for damage to another person's health, business or property.

The rationale for civil liability for wrongful, misleading or non-disclosure in a prospectus or annual report by the issuer making public call for capital is simply to provide monetary compensation to an investor who relied on such wrongful information and thus suffers a loss through a wrong investment decision.<sup>17</sup>

### **(A) Objective of Prospectus Civil Liability**

The main object of imposing liability for a defective disclosure is to provide protection for investors or speculators, whether they are investors in an IPO where a company is going public (the primary market) or involved in later transactions, often between investors (the secondary market).<sup>18</sup> Deterrence is generally created by liabilities for misconduct in every respect for the wrongdoers.<sup>19</sup> In addition, a legal framework based on deterrence effectively protects investors in the securities market.<sup>20</sup>

With respect to increasing the liquidity of shares of a company in the market, the civil liabilities regime has two main objectives: firstly, to ease compensation for the victims of defective continuous disclosure; and secondly, to deter persons who may potentially otherwise become involved in breaching disclosure provisions and requirements.<sup>21</sup> It is thought that social utility is mostly gained by deterring corporate misconduct and, therefore, imposing a strong civil liability regime can be the most efficient means of deterring corporate misconduct.<sup>22</sup> A comprehensive civil liability regime for defective disclosures in prospectuses is of vital importance in order to fully ensure a high level of investor protection, which is the main objective of the disclosure philosophy.<sup>23</sup> Thus, it can be clearly asserted that civil liability for defective disclosure in a prospectus works in favour of investor protection.<sup>24</sup> Other scholars

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<sup>17</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465

<sup>18</sup> The terms 'investors' and 'speculators' are used interchangeably in this article. The secondary market will be covered subsequently: 'Civil Liability for the Secondary Market Disclosures in Cameroon: Periodic Disclosure and Continuous Disclosure' will all be treated.

<sup>19</sup> M. B. Fox, (2009), "Civil Liability and Mandatory Disclosure", 109 *Columbia Law Review* Pp. 237, 240.

<sup>20</sup> G. Golding, (2001), *The Reform of Misstatement Liability in Australia's Prospectus Laws* (PhD Thesis, University of Sydney,) P. 74.

<sup>21</sup> L. E. Mitchell, (2009), "The 'Innocent Shareholder': An Essay on Compensation and Deterrence in Securities Class-Action Lawsuits", 2 *Wisconsin Law Review* 243, 295; See also W. Yee Wan, (2009), "Reconsidering Personal Liability of Directors and Senior Managers for Misstatements and Non-Disclosures to the Securities Market", 9 *Journal of Corporate Studies*, Pp. 235, 240.

<sup>22</sup> L. Friedman, (2000), "In Defense of Corporate Criminal Liability", 23 *Harvard Journal of Law & Public Policy*, Pp. 833, 857.

<sup>23</sup> S. M. Solaiman, (2009), "Investor Protection by Securities Regulators in the Primary Share Markets in Australia and Bangladesh: A Comparison and Contrast", 16(4) *Journal of Financial Crime*, Pp. 305, 322.

<sup>24</sup> R. P. Austin & I. M. Ramsay, (2010), *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 14<sup>th</sup>

argue that the primary purpose of the imposition of civil liability provisions in securities is to create compliance with the law rather than compensating investors.<sup>25</sup> He however argues that civil liabilities, in turn, have a dual purpose: compensation of the injured investors and prevention of conduct and transactions which would cause losses and create a need for compensation.<sup>26</sup>

## **(B) Defectiveness of the Prospectus under the Cameroonian Law**

In order to understand what constitute a defective prospectus under the Cameroonian law, we shall attempt to give a meaning of the phrase “defective prospectus” and objective of the information deemed to be material or relevant to prospective investors on the shares issues within the securities market.

### **1. Meaning & Scope of “Defective Prospectus” within Cameroonian Laws**

The phrase ‘defective prospectus’ is broad and too generic in nature. However, the term defective prospectus may mean that there is a ‘misstatement in prospectuses’, ‘misrepresentation in prospectuses’ and ‘untrue statement in prospectuses’, which phrases are commonly used to signify a defective prospectus.<sup>27</sup> Initially or literally, the meaning of the term ‘defective’ then implicitly there is something wrong with it and it does not work properly’.<sup>28</sup> In our context therefore, a prospectus identified as being defective implies it does not comply with the requirements either because it does not contain all the material required or because it contains a misleading or deceptive statement.<sup>29</sup>

Furthermore, the meaning of the term ‘misstatement’ refers to stating wrongly or incorrectly or the giving of false information. The term ‘untrue statement’ or ‘misstatement’ is used in the broader sense. As a result, an ‘untrue statement’ means a statement which is in fact untrue, not a statement that, in the belief of the directors as well as promoters, is untrue. It includes not only false statements but also statements that produce or gives a wrong impression of actual facts.<sup>433</sup>

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ed.), P. 893.

<sup>25</sup> H. Shulman, (1933),”Civil Liability and the Securities Act” 43 *Yale Law Journal*, Pp227 & 253. Shulman concludes his discussion by stating that, ‘Civil liability is imposed partly for the purpose of compensating investors, partly, and probably more, for the purpose of compelling compliance with the Act so as to avoid certain types of losses and the need of compensation’.

<sup>26</sup> Shulman, n. 13

<sup>27</sup> The phrase ‘false or misleading’ is also used to signify the defective prospectus

<sup>28</sup> The term ‘defective’ means having a fault or faults; not perfect or complete. Another meaning is ‘faulty’, for example, defective goods. See A. S. Hornby, (2010) *Oxford Advanced Learner's Dictionary* (Oxford University Press, 8<sup>th</sup> ed, ,P.397

<sup>29</sup> Alanazi, Badar Mohammad G Almeajel, (2012), Investor Protection and the Civil Liability for Defective Disclosures in the Saudi Securities Market: A Legal Analysis, Doctor of Philosophy thesis, Faculty of Law, University of Wollongong,. P. 135, <http://ro.uow.edu.au/theses/> (07/08/20).

It is also used to signify a defective prospectus. Misrepresentation associated with contractual commitments means ‘a false material statement of fact intended to induce another person to enter a contract, and relied on by that person to their detriment’.<sup>30</sup> To this effect, the US Court of Appeal in *SEC v Manor Nursing Centers Inc.*,<sup>31</sup> held that a defective prospectus is materially false and misleading, even when a prospectus in the correct form is duly delivered, if that prospectus contains material or inaccuracies in the information included.<sup>32</sup>

The disclosure of the information required to be stated in the prospectus is essential to inform investors who intend to participate in the IPOs on its terms and conditions. This information enables the investor take decision whether or not to invest. Therefore, omissions from a prospectus can mislead investors’, affecting their decisions (and even be to their disadvantage). It is said that a successful plaintiff must demonstrate that, among other things, an omission is misleading.<sup>33</sup> Hence, an omission in a prospectus is omitting to state a material fact that is required to be stated in the prospectus.<sup>34</sup> In considering the defectiveness, the prospectus must be considered as a whole, it may be misleading in that, the statement in the prospectus are correct but incomplete.

English law states that the omission must be of a fact, and is of importance only when that omission renders other facts to be false.<sup>35</sup> In addition, under US securities law, there is a duty to disclose special information not known to the purchaser.<sup>36</sup>

In Cameroon, Article 12(1) of the 1999 law creating Financial Market in Cameroon simply states that those making public call for capital must first publish and make available to the general public a document intended for their information, bearing on the content and terms of this public offering as well as the organization, the financial situation and the evolution of the activities of the issuer, the information provided to the public must be ‘accurate’, ‘precise’ and

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<sup>30</sup> E. Peter Nygh & Peter Butt, (2002), (eds), Butterworths Business and Law Dictionary, LexisNexis Butterworth, 2<sup>nd</sup> ed.

<sup>31</sup> 458 F 2d 1082 (2<sup>nd</sup> Cir. 1972).

<sup>32</sup> Shulman, n.13, P. 136.

<sup>33</sup> S. Arnold Jacobs, (1973),”What Is a Misleading Statement or Omission under Rule 10b-5?” 42 *Fordham Law Review*, Pp. 243, 244.

<sup>34</sup> Arnolds Jacob, n.21; The *Securities Act 1933* (US) s. 11(a); 15 USC s. 77(k)(a) (1933) imposes liability for the omission of any material fact that should be have been included in the prospectus; or any necessary detail where such omission would give a misleading impression of other material in the prospectus.

<sup>35</sup> This result is found by Komal Dave, who also defines the ‘misstatement’ as ‘a falsehood or concealment or an ambiguity or an exaggeration – all of these have the potential to mislead a prospective investor in the company’. For more details, see Komal Dave, *Company Law - Liability for a Mis- statement in a Prospectus* (18 December 2012) <<http://jurisonline.in/?p=172>> (07/08/20). The basis of this statement is: ‘Lord McNaughton has precisely stated that the prospectus must be taken as a whole for “everybody knows that half a truth is no better than a downright falsehood”’

<sup>36</sup> The *Securities Act 1933* (US) S. 11(a); 15 USC S. 77(k)(a) (1933) imposes liability for the omission of any material fact that should be have been included in the prospectus; or any necessary detail where such omission would give a misleading impression of other material in the prospectus.



'sincere'. Three terms have been used being 'accurate', 'precise' and 'sincere'. Firstly, 'accurate' will mean 'conforming exactly', 'free from an error or mistake'.<sup>37</sup> The information on the prospectus must therefore be exactly the situation in the company, void of any mistakes or errors. It should be noted that a mistake or error may either be intentional or negligently. Secondly, the word 'precise' is synonymous to 'accurate' thus conveys the same meaning within the context of this research.<sup>38</sup> The word 'sincere' on its part may mean 'free of pretense or deceit', 'falseness'.<sup>39</sup> To this end, it implies that, a prospectus must not contain wrongful or false information intended to defraud or mislead investors to making a decision to invest in the offerings.

In a nutshell, a 'defective prospectus' under the Cameroon law within the spirit of article 12(1), will mean a prospectus that is inaccurate (having incomplete information which may be construed to be non-disclosure of material information), contains mistakes and conveys false information with the intention to mislead the general public or investors.

Inaccuracy and insincerity may also be construed in this case to be a Misfeasance (that is a conduct that is lawful but in appropriate, incorrect), Nonfeasance (failure to disclose information when they were under the duty to do so) and malfeasance (disclosing information that is wrong or false).

## 2. Materiality Requirement

The duty imposed on an issuer is to disclose all material information in the prospectus necessary for an investment decision. With respect to investment in securities, the principle of material information can be referred to information that would have affected a reasonable investor in making an investment decision. It is to an extent difficult to establish what constitute material information. The current preferred judicial standard<sup>40</sup> for determining materiality in securities litigation holds that an omitted fact is material where there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote or to

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<sup>37</sup> Hornby, J. Turnbull, D. Lea, D Parkinson, P. Phillip, B Francis, S. Webb, V. Bull & M. Ashby, (2010), *Oxford Advanced Learner's Dictionary* (Oxford University Press, 8<sup>th</sup> ed.).

<sup>38</sup> Hornby, J. Turnbull, D. Lea, D Parkinson, P. Phillip, B Francis, S. Webb, V. Bull & M. Ashby, (2010), *Oxford Advanced Learner's Dictionary* (Oxford University Press, 8<sup>th</sup> ed.).

<sup>39</sup> Hornby, J. Turnbull, D. Lea, D Parkinson, P. Phillip, B Francis, S. Webb, V. Bull & M. Ashby, (2010), *Oxford Advanced Learner's Dictionary* (Oxford University Press, 8<sup>th</sup> ed.).

<sup>40</sup> For Judicial interpretation of 'materiality', see also the following cases; *TSC Industries v Northway*, 426 US 438 (1976) and *Basic Inc. v Levinson*, 485 US 224 (1988). In the latter case, "proposal was reported in the proxy statement, and also recent substantial purchases of National's common stock, suggestive of manipulation, by National and a mutual fund). The District Court denied respondent's motion for summary judgment, but the Court of Appeals reversed, holding that the claimed omissions of fact were material as a matter of law, and defining material facts as "all facts which a reasonable shareholder might consider important."

purchase or sell stock.<sup>41</sup>

The UK Court of Appeal in *Cackett v Keswick*,<sup>42</sup> the judge stated that information is considered material if it induces or deters a reasonable investor in regard to an investment decision. Moreover, omission from information that which would have an impact on the investment decision is considered misleading.

The concept of materiality is important within the context of securities in the United States on the basis that under s 15 of the *Securities Exchange Act 1934* (US), a company can be held civilly or criminally liable for false, misleading, or omitted statements of fact in documents, if the fact in question is found by the court to have been material. In the US, information should be disclosed if there is a substantial likelihood that a 'reasonable investor would consider it important to an investment decision.'<sup>43</sup>

In Australia, a corporation must disclose information to the Australian Securities Exchange (ASX) in accordance with the Listing Rules, where the information involved is that which 'a reasonable person' would expect to have a material effect on price or value.<sup>44</sup> According to ASX Listing Rule 3.1, materiality must be assessed having regard to all the relevant background information, including past announcements that have been made by the Company, and other generally available information.<sup>45</sup> In the UK, the court in *Rex v Kylsant*<sup>46</sup> held that the prospectus was misleading not because of what is stated but because of what it concealed or omitted which was considered material information. In *Coleman v Myers*,<sup>47</sup> it was suggested that omissions or misstatement of material facts must be information that investors would take into account in making their decision. It is therefore necessary that the defectiveness of a prospectus must be linked or associated to materiality.

In-as-much as a 'defective prospectus' under the Cameroonian law within the spirit of article 12(1), is construed to mean a prospectus that is inaccurate (having incomplete information which may be construed to be non-disclosure of material information), contains mistakes and

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<sup>41</sup> S. Heitzman, C. Wasley and J. Zimmerman, (2010), "The Joint Effects of Materiality Thresholds and Voluntary Disclosure Incentives on Firms' Disclosure Decisions", 49 *Journal of Accounting and Economics*, Pp. 109 & 128. [1902] 2 CH 456 [2].

<sup>43</sup> The case of *TSC Industries Incorporation v. Northway Incorporation*, n. 25

<sup>44</sup> *Corporations Act 2001* (Cth) s 674(2). See also the Australian Securities and Investments Commission, *Disclosure and the Role of ASX and ASIC* (7 April 2012) <[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/disclosure-role-asx-gibson.pdf/\\$file/disclosure-role-asx-gibson.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/disclosure-role-asx-gibson.pdf/$file/disclosure-role-asx-gibson.pdf)> 5.(07/08/20).

<sup>45</sup> ASX Listing Rule 3.1 lists the following examples of information which, if material, must be disclosed to the ASX: forecasts; insolvency; transactions; dividends declared; dividend not declared; issue of securities; and tracing beneficial ownership of shares.

<sup>46</sup> [1932] 1 KB 442.

<sup>47</sup> [1977] 2 NZLR 255.

conveys false information with the intention to mislead the general public or investors, it should be noted that there is not legal provision stating clearly what constitute a “defective prospectus” under the Cameroonian Securities laws. Rather there is just an inference that when a prospectus false short of the legal requirements of disclose, the administrative sanctions and thereafter, where need be, criminal or panel sanctions shall be matted by the competent court. This demonstrates inadequacy of the law in Cameroon, given that, what may constitute defectiveness in the prospectus is unclear and as such difficult to establish by an aggrieved investor. This implies that there is an imperative need for defective mechanism on the ground to determine what information may be considered material.

### **(C) Civil Liability Provision for Defective Disclosure in Prospectus(Legal Provisions)**

The duty to disclose information through the prospectus is generally on the issuers wishing to make public call for capital per Article 12(1) of the 1999 creating and organizing the Financial Market in Cameroon. Article 15(a) of the of the General Instruction relating to the information document required from the issuer, stipulates that, the responsibility for the information document or the prospectus is assumed by the issuer’s manager(s), auditor(s) and Investment Service Providers (ISPs). The senior executives of the issuer has to certify that to their knowledge the data contained in the prospectus are correct and do not contain any omission or information likely to alter the scope. The director of the issuer or other persons who assume this responsibility shall sign a certificate according to the scheme described in “annex III”. The responsibilities for auditors and ISPs are clearly started in Article 15(b) and (c).

The Cameroonian securities law has not spelt out the specific civil liability to be incurred by manager(s), auditor(s) and ISPs in the case of a defective prospectus. In effect there is not restitutive mechanism put in place to compensate an investor who has suffered a loss as a result of an omission or misleading information likely to influence an investor.<sup>48</sup>

Civil liability for defective disclosures in prospectuses in Saudi Arabia for instance, is found in Article 55 of the Capital Market Law 2003 (CML’03). Investors who suffer damages resulting from a material misrepresentation in a prospectus can sue to recover damages.

Article 55(a) of the CML’03 states that:

*In case a prospectus, when approved by the Authority, contained incorrect statements of material matters or omitted material facts required to be stated in the prospectus, the person purchasing the Security that was the subject of such*

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<sup>48</sup> Article 15(a)(b) &(c) of the General Instruction No. 002/CMF/04 Relating to the Information Document Required from the Issuers Making Public call for Capital.

*prospectus shall be entitled to compensation for the damages incurred by him as a result thereof. A statement or omission shall be considered material for the purposes of this paragraph if it is proven to the Committee that had the investor been aware of the truth when making such purchase it would have affected the purchase price.*

Civil liability here refers to the compensation of investors or subscribers who may have sustained loss or damage by subscribing to an IPO. Civil liability for defective prospectuses is found in the Article 55(a) of the CML'03, which states that in the case of a defective prospectus, investors are entitled to seek compensation. The prospectus subject to civil liability, when approved by the authority, contains incorrect statements of material or omitted material facts required to be stated in the prospectus.

For claims based on Article 55(a), compensation for aggrieved investors comes as damages that represent the difference between the purchase price of the security (not to exceed the price at which it was offered to the public) and the price of the security when bringing the legal action to the court.<sup>49</sup> If the defendant can prove that the investor's loss was not due to the defective prospectus in question, such loss shall be excluded from the damages for which the defendant is responsible.<sup>50</sup> The defendants are jointly liable for compensation. Thus, the amount of indemnification is to be subject to: the provisions of the contract or agreement entered between the liable persons and the investor; or what the court believes is equitable and does not harm the interest of investors or otherwise contravene the spirit of the CML'03.<sup>51</sup>

In the US, s 18(a) provides civil liability for any false or misleading statement made in any document filed with the Security Exchange Commission (SEC) for the United States.

The investors in Cameroon are not protected by any compensation or indemnification scheme in cases of a loss suffered as in the case of US and Saudi Arabia above. This will obviously scare away investors within the DSX market.

#### **IV. CIVIL LIABILITY FOR DEFECTIVE DISCLOSURE IN SECONDARY MARKET**

The secondary market is a place where investors can purchase a security from another investor rather than the issuer.<sup>52</sup> This market provides a trading facility for both equity and the debt

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<sup>49</sup> *Capital Market Law 2003* (Saudi Arabia) art 55(e).

<sup>50</sup> *Capital Market Law 2003* (Saudi Arabia) art 55(e).

<sup>51</sup> *Capital Market Law 2003* (Saudi Arabia) art 55(e).

<sup>52</sup> The term 'secondary market' refers to a market where securities are traded after being initially offered to the public in the primary market and/or listed on the Stock Exchange. The majority of trading is done in the secondary market: Share Gyan, *What is Meant by Secondary Market?* (07/08/2020) <<http://www.sharegyan.com/learn-stock-market/secondary-market/what-is-secondary-market.php>>.

securities. Thus, the rights of investors need to be protected, and laws and regulations are needed to foster public confidence, market integrity and economic prosperity. In the secondary market, greater disclosure is vital to market sustainability.

Disclosure in the secondary market will have three benefits, namely: '(i) the market will be a fairer place in which to invest; (ii) the market will be a less risky place to invest; and (iii) resources will be allocated more efficiently'.<sup>53</sup> However, greater disclosure needs to be combined with an effective disclosure regulatory framework.<sup>54</sup>

### **(A) The Legal Provisions**

As earlier discussed above, there is no express legal provisions under the Cameroon securities law compelling continuous disclosure within the secondary market. It is rather inferred in articles 7(g), 13(c) and 14 of the General Instruction relating to the information document required from the issuers. As it is in the case of the primary market in Cameroon, there is no liability imposed on defaulter making disclosures in the secondary market enabling investors who sustain loss or damage due to violation in the secondary market disclosure requirement including defective disclosure in the secondary market to recover compensation. This is not the case with other jurisdictions.

In Saudi Arabia for instance article 10 of the MCR'04, which was issued for the purposes of the application of Article 56(a) of the (CML'03), provides civil liability for defective disclosures in secondary market. According to Articles 10(a) and 10(c) of the Market Conduct Regulation 2004(MCR'04):

*(a). A person shall be liable for damages to a claimant if he makes an untrue statement of material fact and the statement is made: 1) for the purpose of profit or commercial benefit; and 2) in relation to the purchase or sale of a security.<sup>55</sup>*

*(c). A person shall be liable for damages to a claimant, if he is obliged under the CML'03 and CMA regulations to make a statement and fails to do so provided that: 1) the claim for damages is in relation to the purchase or sale of a security; and 2) what has been omitted relates to a material fact.<sup>56</sup>*

Again there is a lacuna in the securities law and disclosure provisions in the secondary market

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<sup>53</sup> M.B. Fox, (1997), "Securities Disclosure in a Globalising Market: Who should Regulate Whom" 95 *Michigan Law Review*, Pp.2498 & 2608.

<sup>54</sup> G. North, (2010), "A Call for a Bold and Effective Corporate Disclosure Regulatory Framework" 28 *Company and Securities Law Journal*, Pp. 331 & 355.

<sup>55</sup> *Market Conduct Regulations 2004* (Saudi Arabia) art 10(a).

<sup>56</sup> *Market Conduct Regulations 2004* (Saudi Arabia) art 10(a).

in Cameroon.

### **(B) Periodic Disclosure Requirement**

Periodic disclosure in Cameroon is embedded in Article 15(1) of the General Rules and Regulations of the FMC,<sup>57</sup> which also makes allusion to Articles 847 and 853 of the Uniform Act on Commercial Companies and Economic Interest Groups.

Article 847 stipulates that the companies whose shares are listed on the stock exchange shall publish in a newspaper empowered to publish legal notices within a period of four months from the close of the fiscal year and no later than fifteen days before the date of the annual general meeting of shareholders; (i) the summary financial statements (balance-sheet, profit and loss account, table of income and expenditure and annexed statement); (ii) the proposed allocation of income; (iii) for companies with subsidiaries or holdings, the consolidated summary financial statements, if available.

Article 853 on the other hand requires that companies not listed on the stock exchange, half of whose shares are held by one or more listed companies having: (i) a balance-sheet above two hundred million (200 000 000) CFA francs; or (ii) a share portfolio with an inventory value or stock exchange value exceeding eighty million (80 000 000) CFA francs, shall, within a period of forty-five days following the approval of the summary financial statements by the meeting of shareholders, publish in a newspaper empowered to publish legal notices the documents, approved summary financial statements containing the attestation of the auditors, and the decision to allocate the income.

Companies whose shares are listed on the stock exchange of one or more State Parties shall, within a period of four months following the end of the first half of the fiscal year, publish in a newspaper empowered to publish legal notices of the State Parties a table of trading operations and the profit and loss situation as well as a semester report of its trading operations accompanied by an attestation from the auditor on the authenticity of the information provided.<sup>58</sup>

The Uniform Act has not apportioned any responsibility to company representatives to ensure this is done and on time. However, an implied responsibility could be apportioned on company manager(s), officers and auditors charged to preparation of the above mentioned documents and subsequent publication. Article 15(a) of the General Instructions relating to information

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<sup>57</sup> Decision No. 02/002 of 3<sup>rd</sup> December 2002 on the General Rules and Regulations of the Financial Market Commission

<sup>58</sup> Article 849 of the Uniform Act on Commercial companies & Economic Interest Groups

required from issuers has attributed responsibility to issuer's managers, auditor(s) and ISPs. And by-so-doing certify that the data in the information made public is correct and do not contain any omission or information likely to alter the scope.

Furthermore, the Uniform Act has not made any statement on the civil liability of the company representative publishing the documents mentioned in articles 847, 848 and 853 with false or misleading information and also in case they fail to publish such documents as prescribed by the Uniform Act. The General Instruction in Article 15(a) after attributing responsibility on company manager, auditor and ISPs failed to state that they are liable to compensate an investor for their loss or damages incurred as a result of false information or non-respect of periodic disclosure requirements.

With an absent or even a weak civil liability mechanism to compensate investors who suffer a loss due to wrongful, omission or failure to make periodic disclosure, investors are not protected within the Cameroon capital market system.

In other countries like Saudi Arabia for instance, paragraph (a) of Article 56 of the CML'03 imposes civil liability for misstatements in periodic disclosures. Its provision states that:

*Any person who makes, or is responsible for another making, orally or in writing, an untrue statement of material fact or omits to state that material fact, if it causes another person to be misled in relation to the sale or the purchase of a Security, shall be liable for compensation of the damages.<sup>59</sup>*

It has been seen that the civil liability provisions can be applied to all breaches of primary and secondary market disclosure regimes. This is absent within the Cameroon securities law in both primary and secondary markets.

The liability for breaches of continuous disclosure provisions are investigated in the light of the statutes and judicial precedents of the US, the UK, and Australia. All these countries have developed a civil liability regime for violations of continuous disclosure requirements.

Australia has a developed continuous disclosure regime. Civil liability for defective continuous disclosure is available under the Company's Act 2001 (CA'01). A breach of s. 674(2) can result in an order for compensation for damage or loss suffered by a person. Persons who suffer loss or damage as a result of a listed entity's breach of s. 674(2) & 219 may recover that amount from the entity under s. 1317. Section 1325 of the CA'01 provides that an order may be made against a person engaging in the relevant contravention or against a person who is involved in

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<sup>59</sup> *Capital Market Law 2003* (Saudi Arabia) art 56(a).

the contravention. The effect of this is to potentially extend the civil liability consequences for a breach of the continuous disclosure provisions to individuals associated with the relevant conduct. This section expanded the liability to not only include the entity but also a person who is involved in a listed disclosing entity's contravention, with such person able to be held civilly liable.<sup>60</sup>

In the UK, s 90A of the Financial Service authority Act 2000 (FSMA'00) imposes civil liability for misstatements in all information published by, or the availability of which is announced by, the issuer by means of a Recognised Information Service (RIS) or other means required or authorised to be used when an RIS is unavailable. Therefore, announcements subject to this liability can be made through documents, RIS and secondary sources. Section 90A specifies a number of persons who can be held civilly liable for breaches of mandatory ongoing disclosure. These persons are the company, directors and senior executives of the issuer, that is, those having responsibilities in relation to the information in question or its publication.<sup>61</sup>

In the US, Rule 10b-5 of the SEA'34 is the principal provision for claiming defective disclosures, which affects market trading once securities have been issued. In addition, s 18(a) of the SEA'34 also provides civil liability for defective statements made in connection with purchase or sale in a security.<sup>62</sup>

In the above developed jurisdictions, investors who suffer loss or damage as a result of breaching continuous disclosure requirements are entitled to sue for compensation. The company, directors, senior executives, officers, spokespersons, influential persons and others are clearly liable for the breach of continuous disclosure requirements in the UK. In Australia, it is clear that a claim of civil liability can be made against the company or any person engaged or involved in violating the continuous disclosure regime. In the US, civil liability is imposed on any person, directly or indirectly, in connection with the purchase or sale of any securities.

## **V. CIVIL LIABILITY FOR DEFECTIVE DISCLOSURE BY ISSUERS IN SOME SELECTED DEVELOPED COUNTRIES & LESSONS FOR CAMEROON**

The scope of civil liability of persons for defective disclosures in the prospectus is examined in the light of some selected developed countries consisting of United States of America (US),

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<sup>60</sup> See *Corporations Act 2001* (Cth) s 674(2A). For example, about the implementation of this section, see: *Kim Riley v Jubilee Mines NL* (2006) WASC 199.

<sup>61</sup> Senior Executives are the individuals who hold the highest of organisational management and have day to day responsibilities of managing a company or corporation. However, a definition of the senior executive of the issuer in the UK has not been found under the Financial Services and Markets Act 2000 (UK) and the Companies Act 2006 (UK).

<sup>62</sup> *Securities Exchange Act 1934* (US) s 10b-5.



United Kingdom (UK) and Australia. Each of these countries has a developed and a better regulated securities market. The *raison d'être* is to be able to carry out an evaluation of the civil liability provisions in Cameroon with a view to bringing out its weaknesses through a comparative study.

In the US, ss. 11 and 12 of the Securities Act 1933 (SA'33) deal with the liability for disclosure in a prospectus. Section 11 imposes civil liability for untrue disclosure or nondisclosure of material facts on every person who signs the registration statement.<sup>63</sup>

Additionally, this section clearly states the liability of directors, experts,<sup>64</sup> underwriters,<sup>65</sup> and 'any person whose profession gives authority to a statement made by him [or her], who has with his [or her] consent been named as having prepared or certified any part of the registration statement...'<sup>66</sup> Section 12 of the SA'33 imposes civil liability on any person who is involved in the preparation of a prospectus that contains untrue statements or omits to state a material fact.

In Australia, s. 728 of the Company's Act 2001 (CA'01) states the liability for misleading or deceptive statements or material omission in a prospectus. Section 729 imposes civil liability on persons who are accountable to compensate investors who sustained consequential loss or damage from their subscription to an IPO caused by the defective prospectus. The persons liable under s 729 of the *Act* are: the person making the offer, directors, underwriters, persons named in the 'disclosure document'<sup>67</sup> with their consent as having made a statement, and a person who contravenes or is involved in the contravention of the prohibitions against the inclusion of misleading or deceptive statement or omission of material information from the disclosure document.

In the UK, s. 90 of the FSMA'00 specifies those persons who can be held liable for a defective prospectus. Persons will include the issuer and anyone who accepts responsibility for or has authorised the prospectus. Thus, those persons are responsible for compensating anyone who has acquired securities and suffered loss as a result of an untrue or misleading statement

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<sup>63</sup> 15 USC s 77a (1933) (US). A prospectus is a part of the registration statement required for an IPO to be filed with the US Securities and Exchange Commission. In the US, the 'registration Statement' is a prepared set of documents, including a prospectus, which is filed with the Securities Exchange Commission prior to an Initial Public Offering.

<sup>64</sup> 'Experts' include accountants, engineers, or appraisers, or any person whose profession gives authority to a statement made by him or her, who has with his or her consent been named as having prepared or certified any part of the registration statement: *Securities Act 1933* (US) s 11(a)(4); 15 USC s 77k(a)(4) (1933).

<sup>65</sup> 'Underwriters' includes managing underwriters.

<sup>66</sup> *Securities Act 1933* (US) s 11(a)(4); 15 USC s 77k(a)(4) (1933).

<sup>67</sup> The term 'disclosure document' includes, among other things, a prospectus for the offer: *Corporations Act 2001* (Cth) s 9.

(including an omission) in a prospectus.

Furthermore, it imposes civil liability on any person who fails to comply with S. 81. That person is therefore liable for the payment of compensation to any person who has acquired securities of the kind in question and suffered loss in respect of them as a result of the failure to include the required information. However, civil liability under s. 90 does not prevent other liabilities that may have arisen.<sup>68</sup> Hence, parties liable for information contained in prospectuses in the UK include; (i) the issuers; (ii) directors at the time when the prospectus is submitted; (iii) each person who has authorised himself or herself to be named, and is named as a director; (iv) each person who accepts, and is stated in the prospectus as accepting responsibility for the prospectus/listing particulars or part thereof; (v) any other person who has authorised the contents, or any part of the prospectus.

In addition, under s. 51(1) of the *Companies Act 2006* (UK) (CA'06), promoters are responsible for pre-incorporation contract, deeds and obligations.<sup>472</sup> However, in the UK, liability of promoters was established both under the common law of torts and under the liability provisions of company legislation.<sup>69</sup> Promoters, lawyers and any person who has a separate certification in the prospectus can be held liable under English common law; the ratification or adoption, after the incorporation does not discharge the promoter from liability of contract.

The above shows that a statutory liability is imposed by developed countries on the issuers, promoters, directors, underwriters, issue managers and experts who can become liable to compensate each investor who, having relied on the defective prospectus, suffers loss or damage by investing in an IPO. In addition to statutory liabilities, those persons are also liable under the common law of torts.<sup>70</sup>

## VI. DRAWBACKS OF THE CIVIL LIABILITY PROVISIONS

The previous discussion on the civil liability provisions for defective prospectus in some selected developed countries shows that there is a deficiency in the Cameroon law given that there is no statutory provision imposing civil liability for a defective prospectus. Therefore, investors who have incurred damage as a result a defective prospectus and who ought to be compensation for the sustained loss or damage will go uncompensated as unlike the case in the UK, US, Australia and even Saudi Arabia.

The previous description of the civil liability regimes of the selected countries and Saudi Arabia

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<sup>68</sup> *Financial Services and Markets Act 2000* (UK) c S.5, s 90(6).

<sup>69</sup> *Benjamin v Wymond* (1884) 10 VLR (Eq) 3 (the establishment of promoter's liability).

<sup>70</sup> More Discussions regarding remedies available for investors in common law are provided under contract and tort law in the subsequent subsections.

and even Cameroon shows that the issuers, directors, underwriters and experts are liable in these jurisdictions for defective prospectus.

These drawbacks in the legal provisions produce weaker protection of investors in the disclosure regime in Cameroon securities market. The disclosure provisions contained in the Articles 12 and 13<sup>71</sup> and also in articles 3, 4, 6, 7, 9, and 15<sup>72</sup> aim to develop the securities market, although, as some scholars have affirmed, this development has been negatively affected by the weaknesses of the protection of outside investors in the DSX market. In UK, promoters are also liable for defective prospectuses, equally important, lawyers play a significant role in the corporate fundraising process. Lawyers are subject to civil liability, due to their involvement in the IPO process in other jurisdictions.

## VII. CONCLUSION

The essence of this article was to examine the civil liability for an issuer or representative who has issued a defective prospectus within the ambit of the disclosure regime in Cameroon with a primordial aim of protecting investors. The liabilities stem from the fact that issuers wishing to make public call for capital are under legal duty to disclose all relevant information that will permit an investor make an investment decision. The disclosure shall be made through an information document or a prospectus which shall be submitted to the Financial Market Commission (FMC) for an authorisation before publication. The information document shall contain information on the financial situation of the issuer, activities as well as prospects of the company and other relevant information. Disclosure shall be done in three stages; during IPOs, continuous disclosure in secondary markets and periodic disclosures. The legal provisions in Cameroon makes allusion to just two, during IPOs and periodic disclosures. Failure to meet the information disclosure requirement shall constitute a breach of legal duty and so automatically attract liability of the defaulter(s).

A comparison was made between civil liability regimes in Cameroon and selected developed countries known to have well develop and efficient securities markets, such as UK, US and Australia. Results show that there is no civil liability mechanism aimed at compensating aggrieved investors in the Cameroon securities market laws. The compensation made available at common law under contract law and negligence tort was invoked based on the article 68 of the Cameroon constitution and section 11 of Southern Cameroon High Court Law (SCHCL) 1955. It was noticed that remedies made available under contract-common law fraud and under

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<sup>71</sup> Law No. 99/015 of 22<sup>nd</sup> December 1999 Creating and Organising Financial Market in Cameroon

<sup>72</sup> General Instruction No.002/CMF/04 Relating to the Information Document Required from Issuers making Public call for Capital.

tort law- negligence misstatements are not easily accessible in that it is very challenging for the plaintiff to establish a case under either remedies. The best solution therefore is providing for civil liability system under statute as adopted by some developed countries like US, UK and Australia.

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