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Changes in the Legal Framework Governing Congolese Public Enterprises: Between Regulatory Rationalization and Persistent Structural Weaknesses

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ABSTRACT

The reform of the State portfolio introduced in 2008 in the Democratic Republic of the Congo profoundly transformed the legal framework governing public enterprises. By replacing the administrative model with a framework based on commercial company law inspired by OHADA law, this reform aimed to improve corporate governance, performance, and transparency. However, the analysis highlights a gap between normative innovations and their practical effectiveness. Through a legal and analytical approach, this study demonstrates that, despite its ambitious objectives, the reform remains incomplete due to institutional constraints and persistent political interference. As KABONGO TCHISSENS points out, the transformation undertaken has failed to eliminate poor governance practices.

Keywords: Public Enterprises, Corporate Governance, Reform, OHADA, Democratic Republic of the Congo, Normative Effectiveness.

1. INTRODUCTION

Public enterprises are a fundamental instrument of state economic intervention in the Democratic Republic of the Congo. Long characterized by centralized and politicized administrative management, they underwent a major reform in 2008 aimed at modernizing them.

This reform, enacted through Laws No. 08/007, 08/009, and 08/010 of July 7, 2008, is part of an effort to align with international standards of governance and performance. It brings about a structural transformation by introducing the commercial corporation model, governed by OHADA law.

However, despite these advances, practice reveals persistent shortcomings, raising questions about the actual effectiveness of this legal transformation. This situation led us to ask the following question: To what extent has the 2008 reform led to an effective improvement in the governance and performance of Congolese public enterprises?

This issue has led us to offer the following preliminary response: the reform has essentially resulted in regulatory streamlining without any substantial transformation of management practices. The objective of this paper is to analyze the actual impact of this legal transformation by comparing regulatory innovations with institutional realities.

However, this study contributes to enriching the doctrinal discourse on the law of public enterprises in the DRC by highlighting the limitations of legal reform in the face of institutional realities; it also helps identify the shortcomings of the current system and propose concrete solutions to improve the governance and performance of public enterprises; since public enterprises are major drivers of economic development, their effectiveness is essential for the country's growth, job creation, and economic stability.

Furthermore, to ensure a rigorous methodological approach, this study is based on a qualitative approach combining: the legal (dogmatic) method, which allows us to analyze legal texts (the 2008 laws, OHADA law, etc.); the analytical method—which involves a critical examination of governance and transparency mechanisms; the comparative method which involves comparing these mechanisms with international standards; and the documentary method which involves the use of scholarly works and scientific articles. This methodology thus enables us to assess the effectiveness of legal norms within their context of application.

2. THE NORMATIVE RATIONALIZATION OF THE LEGAL FRAMEWORK FOR PUBLIC ENTERPRISES

2.1 From the Administrative Public Enterprise to the Commercial Corporation

The 2008 reform introduced a major transformation by replacing the administrative model with one based on the commercial corporation. This shift is reflected in: the legal autonomy of public enterprises; their subjection to OHADA law; and the introduction of modern governance principles. As KABONGO TCHISSENS points out, "the reform of the state's portfolio reflects a desire to break with previous practices characterized by inefficient bureaucratic management." Similarly, ISSA-SAYEGH emphasizes that "the integration of OHADA law strengthens legal certainty and transparency in the management of commercial companies."

In this regard, it is worth noting that prior to the reform, Congolese public enterprises were governed by the 1978 framework law, which established a highly centralized model: these enterprises operated under the direct supervision of the state, with limited managerial autonomy and frequent blurring of the lines between political interests and economic imperatives.

The 2008 reform introduced a fundamental distinction between:

- Public enterprises transformed into commercial companies.
- Public institutions.
- Public services.

The transformation into commercial corporations now subjects these entities to general business law, particularly the rules established by the Organization for the Harmonization of Business Law in Africa (OHADA). In our humble opinion, this transformation marks a significant turning point. The public enterprise ceases to be a mere administrative division and becomes a legal entity under private law, endowed with financial autonomy and subject to profitability requirements.

Strategic enterprises such as GECAMINE and SNCC, for example, have thus been restructured in line with this commercialization approach.

2.1 The Introduction of Modern Governance Principles.

The reform enshrines several fundamental principles: the separation of management and oversight functions; accountability of executives; and financial transparency. It

also enshrines the transformation of the State into a shareholder, which constitutes a major development. However, these innovations remain largely theoretical due to their limited implementation.

This has also led to the establishment of:

- The separation of management and oversight functions.
- The establishment of boards of directors.
- The appointment of accountable corporate officers.
- The requirement for financial transparency.

The government now acts as a shareholder rather than a direct manager. This shift reflects a transition from a bureaucratic model to a governance model inspired by international standards.

The creation of the State's portfolio as a separate supervisory entity reflects this commitment to professionalizing the management of public holdings. In theory, this reform strengthens:

- Legal certainty.
- The accountability of executives.
- The predictability of applicable rules.
- Alignment with regional standards.

3. PERSISTENT STRUCTURAL WEAKNESSES

Despite these regulatory advances, practice reveals several major limitations.

According to KABONGO TCHISSENS: "The politicization of appointments undermines the professionalization of public enterprise management." This situation limits the autonomy of these enterprises and weakens their governance.

3.1 The Persistent Ambiguity of the State's Role as a Shareholder.

In theory, the state acts as an ordinary shareholder. In practice, political intervention remains pervasive:

- Politically motivated appointments.
- Interference in day-to-day management.
- Economic decisions driven by non-commercial imperatives.

This duality fosters confusion between the logic of public service and the logic of profitability; the proclaimed autonomy is sometimes merely nominal.

3.2 Economic and Institutional Constraints. Several factors limit the effectiveness of the reform.

- Weak internal and external control mechanisms.
- Insufficient managerial skills.
- Structural debt inherited from the past.
- An unstable economic climate.

Some restructured companies continue to post chronic losses despite their new legal status. This shows that regulatory reform alone is not enough to guarantee economic performance.

Legal transformation has not always been accompanied by a thorough financial restructuring or a genuine organizational audit.

4. BETWEEN LEGAL MODERNIZATION AND UNCOMPLETED REFORM: WHAT IS THE OUTLOOK?

The transformation of the legal framework governing Congolese public enterprises is part of a commendable drive toward modernization. However, it reveals a paradox. The legal framework is now relatively coherent and modern, but institutional practices remain fragile.

For the reform to take full effect, several conditions appear essential:

- Clarify the strategic role of the state as a shareholder.
- Depoliticize appointments.
- Strengthen audit and oversight mechanisms.
- Ensure training for managers.
- Stabilize the macroeconomic environment.

The fundamental question then becomes that of institutional culture: Can legal reform bring about lasting change in practices without a profound shift in administrative and political behavior?

5. DISCUSSION

The results of the legal analysis confirm the hypothesis that the 2008 reform primarily brought about a normative rationalization, without, on its own, guaranteeing a corresponding transformation of management practices. This distinction is essential: adopting the status of a commercial corporation alters the operational framework, the competent bodies, and the applicable rules, but it does not automatically produce the managerial skills, control mechanisms, and institutional behaviors necessary for effective management. In

other words, the reform created the legal conditions for modernization; its effectiveness depends on their actual implementation.

This conclusion can be illuminated by agency theory. In a public enterprise, the government, as a shareholder, entrusts management to corporate officers who have discretion in decision-making. This separation between ownership and management can lead to conflicts of interest, particularly when executives pursue personal, political, or short-term objectives rather than the company's long-term interests. Jensen and Meckling demonstrate that these conflicts generate agency costs and make mechanisms for oversight, incentives, and accountability indispensable. Applied to the Congolese context, this analytical framework helps explain why the proclaimed legal autonomy must be accompanied by truly active boards of directors, reliable financial reporting, independent audits, and periodic evaluations of executives.

From this perspective, the politicization of appointments and interference in day-to-day management are factors that undermine the relationship between the state as a shareholder and corporate managers. Shleifer and Vishny emphasize that interactions between policymakers and executives of public enterprises can lead to a prioritization of political or distributive objectives at the expense of economic efficiency. It does not follow that all state intervention is illegitimate: the state remains responsible for defining missions of general interest and for overseeing the use of public resources. The problem arises when this strategic responsibility turns into interference in operational decisions, hiring, procurement, or day-to-day management. It is therefore important to clearly distinguish between the state as owner, the state as regulator, and the state as public authority.

This distinction aligns with the guidelines set forth in the OECD Guidelines on the Governance of State-Owned Enterprises. These guidelines recommend that the state exercise its shareholder rights in an informed, transparent, and coordinated manner, while allowing boards of directors the autonomy necessary to fulfill their missions. They also emphasize appointment procedures based on merit, competence, and transparency. These standards do not, in and of themselves, constitute proof of their application in the DRC; rather, they provide a framework for comparison that helps identify the institutional conditions still lacking in the Congolese reform process. The professionalization of public officials should thus be based on predefined criteria, competency profiles, conflict-of-interest disclosures, and evaluations grounded in measurable objectives.

The issue of oversight constitutes a second major lesson. The transformation into a commercial corporation should not be understood as a mere change in legal form. It implies an effective system of accountability: operational internal control, risk management, an internal audit function with sufficient autonomy, independent external oversight, and the regular publication of financial and non-financial information. The OECD (2024) specifies that public enterprises should apply high standards of accounting, transparency, compliance, and auditing, and that the internal audit function should report to the board of directors or its specialized committee. Such requirements help prevent conflicts of interest, detect irregularities, improve control over financial commitments, and strengthen the confidence of citizens, economic partners, and creditors.

The DRC's State-Shareholder Report for fiscal year 2021 notes that the laws of July 2008 formed the foundation of the portfolio reform and that they organized the transformation of enterprises, the State's divestment, the framework for public institutions, and portfolio management. This legal framework demonstrates that the reform is not limited to subjecting companies to OHADA law; it also requires the State to have the institutional capacity to properly exercise its functions as a shareholder. Law No. 08/010 specifically governs the State's representation in portfolio companies. However, the existence of a body responsible for the portfolio is not sufficient if that body lacks the human resources, consolidated data, and monitoring tools necessary to assess the companies' performance and hold their executives accountable.

Law No. 08/008 of July 7, 2008, on general provisions regarding the State's divestment from portfolio companies, Official Gazette of the DRC, special issue of July 12, 2008. It is also important to clarify the relationship between profitability and the public service mission. Public enterprises may simultaneously pursue commercial objectives and objectives in the public interest, such as ensuring the continuity of an essential service, regional development, or access to services in less profitable areas. In such situations, performance evaluation cannot be limited to net income. It must distinguish between costs associated with public service obligations and losses attributable to mismanagement, and specify the terms of compensation by the government. Otherwise, executives may be held liable for expenses resulting from unfunded public decisions, while government subsidies and guarantees risk masking poor performance. Transparency regarding the objectives, costs, and financing of public missions is therefore a prerequisite for good governance (OECD, 2024).

The financial and organizational difficulties mentioned in the article also call for an approach that goes beyond institutional reform alone. A company that is in debt, undercapitalized, and facing obsolete equipment or payment arrears cannot sustainably restore its performance through a change in legal status alone. Legal restructuring must be accompanied—depending on each company's specific situation—by an asset and financial audit, a debt repayment plan, the modernization of information systems, a coherent investment policy, and a performance contract. These measures must be preceded by a customized assessment to avoid applying one-size-fits-all solutions to companies with different sectors, missions, and constraints.

This discussion thus leads to the identification of three complementary levels of reform. The first is normative: it concerns the consistency of legal texts and their alignment with the OHADA Uniform Act on Commercial Companies and Economic Interest Groups. The second is institutional: it focuses on clarifying the division of responsibilities among the overseeing ministries, the bodies in charge of the portfolio, the boards of directors, and the executive management. The third is managerial: it concerns the competence of executives, risk management, the quality of accounting and financial information, and a culture of accountability. A persistent weakness at any one of these levels can reduce the effectiveness of the other two.

Finally, the limitations of this study must be clarified. Based on a qualitative, legal, and documentary analysis, it highlights tensions between the regulatory framework and governance requirements, but it does not statistically measure changes in the performance of public enterprises since 2008. Findings regarding losses, debt, or political interference must therefore be further explored through sector-specific empirical studies, based in particular on financial statements, audit reports, management reports, and service quality indicators. Such research would allow for comparisons of enterprises based on their sector, legal status, level of public ownership, and degree of exposure to public service obligations.

Ultimately, the 2008 reform cannot be considered either a total failure or a complete success. It established a legal framework better suited to the commercial management of public holdings, but its institutional effectiveness depends on the ability of stakeholders to respect the separation between strategic direction and operational management, to hold governance bodies accountable, and to ensure effective oversight. Legal modernization therefore achieves its full potential only when it translates into verifiable practices, published results, and a sustainable improvement in the quality of services provided to the public.

CONCLUSION

Based on the foregoing, we believe that the reform of the legal framework governing Congolese public enterprises constitutes a major step forward in the evolution of national economic law. It has enabled significant regulatory streamlining, aligning the Congolese framework with regional and international standards. However, the persistence of structural weaknesses reveals that the transformation remains incomplete. The gap between the law and practice remains the primary issue. Legal modernization, while necessary, is not sufficient. It must be accompanied by effective institutional reform, strengthened governance, and a genuine culture of accountability. Thus, the transformation of the legal framework governing Congolese public enterprises appears to be a work in progress, oscillating between reformist ambition and structural inertia.

The reform of the legal framework governing Congolese public enterprises represents a major step forward in the modernization of economic law. It has led to: regulatory streamlining; alignment with international standards; and an improvement in the legal framework. However, its effectiveness remains limited by persistent structural constraints. Thus, the reform is legally ambitious but institutionally incomplete. Its success will depend on the authorities' ability to accompany regulatory innovations with far-reaching structural reforms.

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