



Doing business in Democratic Republic of Congo as liaison office, Branch or Subsidiary under OHADA

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This article focuses on how to have business presence in the Democratic Republic of Congo as Liaison or representative office, Branch, or Subsidiary under the revised Uniform Act relating to the commercial companies and economic interest groups (Commercial Companies Uniform Act), which came into force on 5 May 2014 and deals with the regulation of business structures and the powers and rights thereof.

1. THE REPRESENTATIVE OFFICE OR LIAISON OFFICE

The representative office is a liaison office considered as the first step of the establishment of the foreign company in DRC. It allows defining the strategies for an effective settlement, studying the local market, analyzing the feasibility of the project, testing the activity, and even promoting a product or a service without marketing it however.

The representation office is only used as a connection between customers (or partners) and the foreign company. It does not have any commercial activity. No employee with the power to legally bind the foreign company (negotiation and conclusion of contracts) can depend of it. However, it is possible to recruit a secretary or a sales employee. In this case, it will be a local personnel reporting directly to the foreign company and considered doing a temporary mission in DRC.

The representation office is not a permanent establishment of the foreign company neither in DRC nor in the OHADA area and therefore is neither subject to the registration in the Trade and Movable Credit Register (RCCM), nor the local taxation.

It is defined as being an establishment belonging to a company and serving as a liaison between the latter and the market of the Contracting State in which it is located. It has no management autonomy and only carries out activities of a preparatory or auxiliary character in relation to the founding company.

a. Functioning of a representative office

Like a branch, a representative office has no legal personality separate from its founding company. Its assets and liabilities are considered to be those of the founding company. It must have a legal representative (natural person).

It can be the establishment of a company whose registered office is not located in the DRC. However, unlike branches, it is not limited to a two-year period.

It must be registered in the Trade and Personal Property Credit Register.

In summary, a representative office is a branch with no commercial activity (i.e., trading and industrial activities or the provision of services). As a cost centre, it cannot carry out any commercial activity.

The representation activities can be summarized as activities of a preparatory and auxiliary character. These activities include follow-up, coordination, information gathering, promotion or public relation activities and more generally any administrative duties not directly generating profits.

Conversely, it cannot engage in trading activities or be involved in such activities, such as negotiating and/or entering into any commercial contracts, on behalf of the founding company.

The representative office is intended to be a simple structure.

However, it is clear that the representative office must not be involved in a commercial activity per se, such as:

- following-up commercial contracts;
- transferring or fulfilling customers' orders;
- delivering goods to the company's customers;
- receiving or storing goods held for resale;
- coordinating and supervising the activities of the business entities of the group to which it belongs.

In reality, these situations correspond, in most cases, to the tax concept of permanent establishment, resulting in the classification of a foreign company as a tax resident and thereby subject to the taxes applicable to a commercial activity in the country concerned. There may be specific cases subject to tax treaties for the avoidance of double taxation. If the representative office carries on all or part of these activities, it becomes an office of a commercial nature, and, it is true that the situation of certain representative offices can be perceived as ambiguous in this respect, without however meeting the definition of commerciality. In the event of commerciality, the activity must be operated by an entity having a commercial legal form.

In order to trade, the liaison office need to be transformed into a branch when its activity exceeds that of a representation activity.

II. THE BRANCH

A branch is a commercial entity created by a company that enjoys certain autonomy from that owner company, without being legally separated. It is a form of direct implantation with no legal or tax identification.

The functions of a branch are usually commercial and logistical assistance for an existing sales structure:

- prospecting;
- management of operational actions (promotion, distribution);

- taking orders and possibly sales;
- monitoring of sales (billing, delivery, bill collection ...);
- information on the market;
- and so on.

What distinguishes it from the subsidiary is that it has no legal personality and it completely depends on the foreign company which is solely responsible.

For the penetration of the DRC market and of the OHADA area, the creation of a branch is an important step. The branch may be a commercial, an industrial or even a services entity. The branch becomes the secondary entity of the foreign company in DRC.

The rights and obligations arising in connection with its activity or arising out of its existence are included in the assets of the foreign company. Like the representative office, it does not have a legal personality despite its registration in the RCCM.

The foreign company is liable for the debts of its branch. The branch may conduct its own commercial activity and even issue invoices directly.

As a permanent establishment, the branch is subject to local taxation and shall establish its own accounts. However, the foreign company must mention on the branch's documents, the information that can identify it.

The benefits of implementing a branch office in DRC are:

- the foreign company retains full control of its trade policy;
- the foreign company gets back all profits;
- the foreign company has a better understanding of the market and customers' needs. Through that, the foreign company may, for example, conduct or coordinate market research more easily;
- it allows a direct presence in the market which helps to give credibility to the company's permanent settlement in DRC, to "nationalize" its products (but not as the subsidiary) and a confidence climate that facilitates communication with local authorities and with clients who feel more secure;
- start-up costs are limited compared to those of the subsidiary;
- the branch may be very helpful in the definition and the implementation of a sales policy (with the information feedback). After-sales service, storage, transport and collection of receivables are thereby facilitated;
- these solutions allow sometimes the company to bypass some administrative barriers by charging with a local VAT number, for example.

The major drawback associated with the establishment of a branch is the relatively high level of administrative formalities (but not as the creation of a subsidiary). Indeed, as a foreign investment, the establishment of a branch is subject to governmental approval and other operations including the opening statement, the registration in the RCCM.

In addition, since the branch does not have a proper legal, tax and commercial status, the foreign company assumes the entire commercial, legal and financial risk, as well as the responsibility for all actions that are taken in DRC.

Moreover, the risk of double taxation is higher than in the case of the subsidiary .

The establishment of a branch should be considered only for:

- a company with significant international experience and also in DRC;
- a company with a qualified and itinerant staff capable to manage the activities in DRC;
- a constant local market that can offer a significant business potential, in order to justify the cost of such a structure.

The steps for establishing a branch in DRC are:

a. Preparation of documents

1. Request for criminal record and copy of identity documents
2. Collection of criminal record and certified copies

b. Authentication and minutes recording

1. Request for the deed of minutes deposit with a notary
2. Signature of the deed of minutes deposit
3. Request for registration of the deed of minutes deposit
4. Collection of the registered deed of minutes deposit

c. Registration of the branch in the Trade Register

1. Application for registration of the branch at RCCM
2. Collection of the registration documents of the branch at RCCM

d. Publication in the legal notices

1. Request for publication in the legal notices;
2. Collection of the papers containing the publication

e. Withdrawal of documents of the branch at the notary

Collection of the registration documents of the branch at the notary office

Finally, it should be noted that if the branch belongs to a foreigner (an individual or a legal entity located outside the OHADA area), it must be transferred to an existing or future legal entity of one of the States Parties no later than two years after its creation.

III. THE SUBSIDIARY

The foreign company that wishes to integrate totally the DRC market has to create a subsidiary that is effectively an OHADA law company, with its own identity. It must be registered in the RCCM.

This is a legally independent company and it is entirely subject to the OHADA law and local taxation.

A choice can be made between a corporation and a partnership. If the choice is a corporation, the subsidiary will be solely responsible for the business it deals. However, without a guaranty or other type of security provided to the subsidiary, the foreign company may lose its initial contribution in the capital of the subsidiary.

The share capital of the DRC subsidiary will be mainly owned by the foreign company (parent company), who may provide leadership, management and control through one or more persons.

In addition to the functions of the branch, the subsidiary performs the following purposes:

- the subsidiary buys irrevocably products from the foreign company and then resells them. It operates in this case as an importer-distributor ;
- it participates in the definition of trade policy (choice and adaptation of the product, pricing, ...) in accordance with the overall strategic and commercial objectives established by the parent company;
- it implements marketing (prospecting, order entry, customer service, ...), logistics (transport, storage and distribution of products) and administrative (customs clearance, invoicing, debt collection) activities particularly through its sales force that is usually recruited locally.

Such establishment gives the following benefits:

- market knowledge is very good with a permanent local presence in the market, provided however, that the subsidiary has sufficient autonomy to adapt to local conditions;
- control of the marketing policy is very good even though the subsidiary is a separate entity;
- the subsidiary holding the DRC nationality, the products of the foreign company are considered domestic and potential customers and partners feel secure about the sustainability of the enterprise in the market. Its credibility is enhanced;

- it allows to simplify and to make profitable logistics, administrative, commercial and financial operations. The company can achieve economies of scale in distribution costs by streamlining the physical transport and storage and in so doing, reduce logistics and marketing costs. In addition, the customer service and the follow-up of bill collection are simplified;
- the foreign parent company is responsible for the liabilities of the subsidiary until the amount it has invested in. It is not automatically fully engaged - as with the branch – by the actions of its subsidiary. Note however that through bonds, often required of the parent, the commitments may go beyond the initial capital;
- it sometimes allows the company to bypass certain administrative barriers by charging a local VAT number, for example.

The steps for creating a subsidiary in DRC are:

a. Preparation of documents

1. Request for criminal record and certified copies
2. Obtaining a certificate of residence (required by the bank when opening the company's account)

b. Application and notarized signature of the statutes

1. Notarized request of the statutes
2. Notarized signature of the statutes

c. Any articles in the fields

1. Application for registration statutes
2. Collection of registered statutes

d. Company registration in the Trade Register (RCCM)

1. Application for registration in the RCCM
2. Collection of the extract from the RCCM

e. Publication in the official gazette or legal notices

1. Request for publication in the legal notices
2. Collection of papers containing the announcement

f. Collection of documents at the notary

1. Collection of registration documents at the notary

G. Opening a bank account

1. Opening a company bank account

2. Deposit of the subsidiary's capital
3. Collection of the company's bank account details