



Incorporation of company in Democratic Republic of Congo: Types to chose from under OHADA Law

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This article focuses on 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.

Commercial companies (with the exception of non-registered companies) must be registered with the Trade Register (RCCM). The commercial companies recognized by the Commercial Companies Uniform Act are:

1. LIMITED LIABILITY COMPANY (SOCIÉTÉ À RESPONSABILITÉ LIMITÉE – SARL) (LTD)

Article 309 of the Commercial Companies Uniform Act states that a limited liability company is a company in which the partners are liable for the company debts only to the extent of their respective contributions, and the rights of the partners are represented by the number of shares held by the partner in the company. A limited liability company can be established by a natural or a legal person, or between two or more natural or legal persons.

In Congo, there is no minimum share capital.

The company is managed by one or more natural persons (*gérants*) appointed in the articles of association or in a subsequent instrument of the company.

The SARL is more suitable to small-size businesses.

2. PUBLIC LIMITED COMPANY (SOCIÉTÉ ANONYME) (SA)

Article 385 of the Commercial Companies Uniform Act states that a public limited company is a company in which the shareholders are liable for the company debts to the extent of their contributions and shareholders' rights are represented by the shares. The main difference between a limited liability company and a public liability company is that the public liability company may make calls for capital to the public.

The shares' nominal value is freely set in the articles of association. Should the company wish to make a capital call to the public, the minimum share capital in the company must be 100 million CFA Francs.

Unlike other forms of business structures, the shares in a public limited company may not represent contributions of the partners.

The public limited company is managed by a general manager (*administrateur général*) or by a board of directors (*conseil d'administration*) depending notably on the number of shareholders.

3. SIMPLIFIED JOINT STOCK COMPANY (SOCIÉTÉ PAR ACTIONS SIMPLIFIÉES) (SAS)

The Revised Commercial Companies Uniform Act created the SAS. This form of company [SAS] offers far more flexibility to the shareholders and managers than the public limited company, which was the most commonly used vehicle for the implementation of foreign investments in Africa until now. With the introduction of the SAS, the OHADA zone benefits from a type of company more suitable for investment operations than those existing in other countries that boast similarly dynamic economies.

An SAS can be registered with no minimum share capital requirement and have both legal and natural persons as shareholders. Its mode of governance is flexible and can be tailored to the shareholders' needs. The Commercial Companies Uniform Act provides that, subject to compliance with mandatory rules (for example, representation of the company by a president, exclusive power of the shareholders' general meeting for some corporate decisions such as those relating to annual accounts and profits, share capital and the transformation of the company), the articles of association of the SAS can freely provide for the organisation, the management and the functioning of the company. This includes the possibility to appoint general managers, deputy general managers, an executive committee, and a supervisory board.

Such flexibility will allow setting up governance modalities adapted to the different profiles of the investors in private equity operations, but also within the framework of joint ventures between a local partner (for example, a national company) and a foreign partner.

4. NON-REGISTERED COMPANY (SOCIÉTÉ EN PARTICIPATION)

Article 114 of the Revised Commercial Companies Uniform Act states that partners may agree to not register a company. The non-registered company (which can be a joint venture) has no legal personality and is not subject to registration with the RCCM.

Articles 854 et seq of the Revised Commercial Companies Uniform Act and articles applicable to partnerships (*sociétés en nom collectif* – SNC) also apply to such non-registered company, notably the liability of the shareholders, which can be unlimited.

5. COMPANY CREATED DE FACTO AND DE FACTO COMPANY

Article 864 of the Revised Commercial Companies Uniform Act states that an organisation is considered as a company created de facto when two or more persons or entities act as partners without having formed between themselves one of the companies recognised by the Revised Commercial Companies Uniform Act. Should an organisation be recognised as a company created de facto, the rules relating to partnerships (*sociétés en nom collectif* – SNC) in the Revised Commercial Companies Uniform Act are applicable to the organisation.

Article 865 of the Revised Commercial Companies Uniform Act states that, when two or more legal or natural persons have formed between themselves one of the companies recognised by the Revised Commercial Companies Uniform Act but the constitution of such company is affected with an error which has not been corrected, or if such persons have formed a company which is not one of the companies recognised by the Revised Commercial Companies Uniform Act, such company is considered as a de facto company. Should an organisation be recognised as a de facto company, the rules relating to partnerships (*sociétés en nom collectif* – SNC) would apply to such organisation.

6. BRANCH

Article 116 of the Commercial Companies Uniform Acts states that a branch is a commercial or industrial establishment or services belonging to a company or individual which acquires a certain autonomy of management. The branch may be established by a company or a natural person.

A branch does not have a distinct legal personality separate from the company or owner. It is subject to the national laws of the member state. However, it must be registered with the Trade Register.

Previously, the Uniform Act Relating to Companies provided that branches owned by foreigners must be contributed to a local company not later than two years after the branch was set up unless the trade minister ordered the waiver of this requirement. Businesses were thus able to obtain, upon being granted the authorisation by the relevant minister or the delegated administrative authority, an indefinite extension of such waiver despite significant local activity. Now, however, the duration of the said waiver will be limited to a two-year period (article 120) and penalties are provided for in case of violation of the above-mentioned obligation, for example deletion of the branch from the companies register (article 120 §§3 and 4) and criminal sanctions applicable to the managers of the foreign company or to the foreign natural person (articles 891-2). Such amendments will have concrete implications, as the obligation set forth in article 120 of the Uniform Act Relating to Companies is so often violated or circumvented in practice.

In practice, the conversion of a local branch into a subsidiary can be implemented through:

1. a contribution of the branch's assets and commitments in consideration for a capital increase in the company benefiting from the contribution; or
2. a sale of the branch's assets pursuant to which a pre-existing or newly registered local company acquires the assets and pays the corresponding price or records a debt of the same amount.

It is important to note that the tax cost of such operations could be very significant, and consequently such operations must be carried out with the assistance of experienced lawyers.