

DEMOCRATIC REPUBLIC OF THE CONGO (DRC)

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FIRM INFORMATION

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GENERAL INFORMATION

The Democratic Republic of the Congo (DRC) is located in Central Africa. To the north it borders the Republic of Congo, the Central African Republic and South Sudan. To the east it borders Uganda, Rwanda, Burundi and Tanzania. To the south it borders Zambia and Angola and the Atlantic Ocean to the west. The DRC is the second largest country in Africa and the eleventh largest in the world. With a population of over 76 million people, the DRC is the most populous Francophone country, the fourth most populous nation in Africa and the nineteenth most populous country in the world.

THE ECONOMY

DRC's economy is predominantly export-oriented, with the focus on mining products. The DRC boasts an abundance of natural resources, namely forests and minerals such as diamonds, gold, copper, tin, Colombo tantalite or coltan, bauxite, iron, manganese, cobalt, petroleum and methane gas. Tourism is not an industry in the DRC as a result of civil wars in the region. Agriculture is a driving force of the economy despite the fact that cropland only comprises 3% of the national territory. The main crop produced is coffee, while the main products are wood (afromosia, ebony, wenge, iroko, sapele, sipro, tiama, tola, kambala and lifaki) and rubber.

POLITICAL SYSTEM

The Constitution, promulgated on 18 February 2006, established the institutions of the Third Republic and introduced a democratic and semi-presidential system with a bicameral parliament.

LEGAL SYSTEM

The main provisions of private law can be traced back to the 1804 Napoleonic Civil Code. The Congolese legal system, however, is predominantly based on Belgian law. The Constitution endorses the separation of powers doctrine, emphasising the independence of the judiciary, legislature and executive. The judiciary comprises the Constitutional Court, the 'Cour de Cassation', the Council of State, the Supreme Military Court, as well as the civil and military prosecutor's

offices attached to these courts. Specialised courts may also be established. The DRC is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

INFLATION RATE

The inflation rate was 1.7% in December 2016.

GROSS DOMESTIC PRODUCT

The growth of the Congolese economy slowed in 2015, falling to 7.7% from 9.2% in 2014, the trend continued in 2016 (7%), with a recovery expected to start in 2017 (8%).

ACCESSION TO OHADA TREATY

The DRC's accession to the Treaty of the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (Organisation for the Harmonization of Business Law in Africa) (OHADA) presents both opportunities and challenges to companies doing business in the DRC, as well as in other OHADA Treaty countries (Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo Brazzaville, Ivory Coast, Equatorial Guinea, Gabon, Guinea Conakry, Guinea Bissau, Mali, Niger, Senegal and Togo).

GENERAL CORPORATE LAW

Investors will consider the implementation of the OHADA Uniform Act on Commercial Companies and Economic Interest Groupings (the 'AUSGIE', from the acronym formed by its French name) a welcome development. The DRC's current legal framework relating to commercial companies stems from disparate legislation dating back to the colonial era (in some respects going as far back as 1887). This legislation contains historical anomalies ill-suited to modern business practices. Even though the DRC decree-law of 22 June 1926 has been amended, it still requires specific Presidential approval for the formation of and changes to the shareholdings in joint stock limited liability companies known as "SARLs". It also provides that no SARL may have less than seven shareholders and limits the voting rights attached to shares in SARLs so that



no shareholder may exceed 20% of the total voting rights notwithstanding the number of shares they hold.

Despite this, the AUSGIE remains a modern piece of legislation which, at the time of its promulgation in 1997, reflected the most recent trends in continental European (particularly French) company law.

Today, the AUSGIE's reach is expanding to better suit the business needs of OHADA Members States and their potential investors, with amendments having been implemented from 30 January 2014. The new AUSGIE came into force on 5 May 2014. Commercial companies and economic interest groups formed prior to this date are required to update their articles of association in accordance with the new AUSGIE before 5 May 2016. The articles of association of any company which have not been updated by this date will be deemed to be void. One of the major innovations of the revised AUSGIE is the introduction of a new corporate entity, namely the simplified joint stock company (*société par actions simplifiée* or SAS). Any company formed prior to the revised AUSGIE can be transformed into a SAS.

JOINT VENTURES

Significant foreign investment in the mining sector has traditionally taken the form of joint ventures concluded with either foreign investors or DRC entities (often public sector entities). The management and administration of these joint ventures frequently requires negotiations between shareholders in order to ensure that a proper balance is achieved between control of management and strategy, voting rights and rights to dividends. The DRC has already adopted a series of progressive and modern codes relating to various industrial sectors (a Mining Code, Forestry Code and Investments Code) which has made those sectors attractive to foreign investors. New laws have been promulgated recently such as the law No 15/005 of 17 March 2015 on insurances code and the law No 15/012 of 1 August 2015 on hydrocarbon general regime. However, existing company law prevents controls from being implemented (particularly shareholder control over management) to protect the interests of parties to these joint ventures. Parties to joint ventures have had, therefore, to introduce these controls themselves through private joint venture agreements, which do not always fit into the current legislative framework and are difficult to enforce. The implementation of AUSGIE, however, will make it easier for joint venture parties to conclude these agreements in a manner that is both consistent with the applicable legislation and enforceable. In future these arrangements may be incorporated in the joint venture's statutes or articles of association which are filed with the local commercial registry and are a matter of public record.

MAIN FORMS OF COMMERCIAL COMPANIES

AUSGIE creates 5 types of companies:

- Société en Non Collectif (SNC)
- Société en Commandite Simple (SCS)
- Société par Action Simplifiée (SAS)
- Société à Responsabilité Limitée (SARL) - limited liability companies, formerly private limited liability companies known

as SPRL's

- Société Anonyme (SA) - formerly known as SARL's (public limited liability company's), which are the equivalent of continental European companies.

These companies will enable joint venture parties to negotiate arrangements within a familiar framework. Subject to certain limitations, parties are free to create different categories of shares with diverse voting and dividend rights and enjoy a certain measure of freedom in determining how the company in question should be managed. SARL's and SA's have proved to be the two most popular types of companies.

The OHADA SARL does not have a board of directors and the management is exercised by one or several managing directors (*gérants*). However, certain decisions may only be made by the shareholders. The challenge for investors, when dealing with this type of company, is ensuring that strategic decisions are not decided by the *gérants* without the input of the shareholders. The difficulty is that, according to the applicable law, the *gérant* is fully entitled to represent the company in its dealings with third parties, unless the third party has been specifically notified that shareholder approval is a requirement.

The OHADA SA by contrast usually has both a board of directors (*conseil d'administration*) and management consisting either of a Chairman and Chief Executive Officer (*Président-Directeur Général*) or, at the option of the shareholders, a separate Chairman of the Board (*Président*) and Chief Executive Officer (*Directeur Général*), appointed by the Board. This allows for a balance of power and control, particularly well-suited to joint ventures between foreign investors concerned with long-term strategic decisions and local parties whose focus is on the day-to-day management of the company. Alternatively, for companies with less than three shareholders, it is possible to opt for management by a single managing director (*administrateur général*) similar to the OHADA SARL. This form of management can be particularly useful for wholly-owned subsidiaries. The single shareholder SA is an improvement on the seven shareholder SARL currently used in the DRC.

In order to avoid the burdensome regime of SARLs formed under current DRC law, most companies in the DRC were incorporated as a *société privée à responsabilité limitée* (or SPRL) notwithstanding that the SPRL was initially intended for privately held or closed companies (such as family-owned businesses). As a result of the OHADA Treaty, DRC companies will be required to bring their constitutional documents (statutes) in line with the rules governing the relevant corresponding OHADA type of company. This implies that a company established as a SPRL may opt for the OHADA SARL form, which is the most similar. However, it may be advisable for certain businesses that are incorporated "by default" as SPRLs to convert to an OHADA SA (the typical open capital company), which is in practice likely to be the most suitable form in which to conduct their business.

Sociétés Anonymes ("SA") is a new form of company. It presents a significant improvement for investors. With the sole



requirement that the SA be represented by a chairman, the Reformed Uniform Act on companies allows the shareholders to organise their governance as they see fit, and therefore to tailor the SA's articles of association to their precise needs such as the structure of governance bodies, the rules applying to such bodies and the powers of the shareholders.

SA must have a Chairman (Président), which may be a corporate entity (represented by an individual) or an individual, vested with full powers of management. Such powers may be restricted by the articles of association, but as in an SA, such restrictions are not binding on third parties.

The articles of association may also determine alternative forms of management, such as a board, committees, general manager or deputy general manager, although in all cases the Chairman remains the legal representative with full powers to bind the company, notwithstanding any other provisions in the articles of association.

IMPROVED CORPORATE GOVERNANCE

AUSGIE and the other OHADA Uniform Acts which came into force on 12 September 2012, also bring about challenges for foreign investors. It is possible that limitations on the number of offices that directors or officers may hold in different companies, might make it difficult to obtain local talent for such positions. The revised AUSGIE, however, is far reaching in terms of improved corporate governance. It has reinforced the application of good governance principles by:

- prohibiting directors from participating in any vote on their own remuneration
- specifying the types of contracts that require the prior approval of an SA or SAS' board of directors
- introducing the concept of "abuse of equality"
- introducing new offences relating to the management of companies, such as the failure by directors to submit the company's financial statements within a month of their being approved by the shareholders.

These developments provide additional comfort for private equity investors, particularly those owning minority stakes, as they make portfolio company management more accountable. Under the revised AUSGIE, a competent court can appoint a provisional administrator when the operation of a company is deadlocked as a result of action or inaction by its shareholders or another corporate body. In addition, AUSGIE takes the practical constraints on investors into account by providing for meetings and votes to take place via video conference and by permitting decisions taken at the shareholder and board level to take place via written resolution.

ACCOUNTING AND AUDITING

Other modifications to the legislative framework will also present both incentives and challenges for investors. All SA companies and certain SARL companies meeting specified thresholds of share capital, total annual turnover or levels of employment, are required to designate official statutory auditors (commissaires aux comptes) to review and certify the company's accounts. This provides a safeguard against irregularities in the accounts (every major international accounting firm maintains offices in a number of OHADA member states) and grants auditors

the power to trigger "alert proceedings", which require management to respond to queries in the event of financial difficulties. The OHADA Uniform Act on Accounting Law (AUL) creates a comprehensive framework for accounting rules and procedures, which may differ from the international accounting standards used by major international companies. The AUL rules require a company's financial year to coincide with the calendar year and impose an obligation on companies to close their annual accounts on 31 December.

INSOLVENCY

The OHADA Uniform Act on Insolvency Proceedings also provides a comprehensive framework both for companies encountering financial difficulties and seeking relief from the demands of creditors, as well as for creditors filing their claims.

TAXATION

The general system of taxation in the DRC is based on the principle of territoriality and tax is accordingly levied on all income derived from the DRC. The following are the main taxes:

- Corporate tax at 40%
- Corporate tax for mining companies at 30%
- Withholding tax on income from movables at 20% and for mining activities at 10%
- Personal income tax rate is based on a sliding scale with a maximum of 30%
- Property tax is levied from US\$0.30 to US\$1.50 per square metre of the built property
- Tax on rental income at 22%
- Valued Added Tax (VAT) at the uniform rate of 16% on the local sale, import and provision of services. The law introducing VAT was promulgated in 2010 but its effective date was 1 January 2012. VAT replaced turnover tax which is no longer applicable in the DRC.

INVESTMENT CLIMATE AND EXCHANGE CONTROLS

DRC welcomes all foreign investment. The exchange control regulations currently in force are very liberal and commercial banks are authorized, subject to certain tax being paid, to freely transfer dividends, capital gains, interest and capital on foreign loans out of the country. Upon disinvestment, investors may freely remit capital without any restriction. Residents of the DRC are authorized to hold foreign currency accounts with local commercial banks.

The following fees and restrictions apply to remittances:

- The Central Bank of Congo ("BCC") levies a royalty of 2% on any payment to or from abroad regardless of the status of the transferor and transferee
- Cross-border transfers to and from the DRC, with a value equal to or greater than U.S. \$10 000 (including, entry of capital as direct investment, portfolio and other investments, including pre-financing of exports), must be made through an approved credit institution or intermediary and are subject to an RC declaration
- Revenues (remuneration, direct investment, portfolio, and



other investments income, such as profits, dividends, leasehold interests) can only be received or transferred through an approved bank.

INTELLECTUAL PROPERTY

Patents, trademarks, designs, and commercial names are protected by the provisions of the Intellectual Property Law. There is a general registry located at the Ministry of Economy where trademarks, patents and designs may be registered. The DRC is a member of the World Intellectual Property Organization (WIPO).

FOREIGN INVESTMENTS AND INCENTIVES

The DRC has promulgated an Investment Code to encourage the investment of local and foreign capital in activities which contribute to the economic and social development of the country. The Code provides for one general regime under which incentives may be granted. For a project to benefit from the provisions of the Code, the investment must be at least US\$10 000 for small and medium sized businesses and US\$200 000 for other enterprises.

The Investment Code provides certain advantages for foreign investments. It sets the conditions, benefits and rules for direct investment, both domestic and foreign, in areas other than mining, oil, banking, insurance and reinsurance, arms production and military related activities, production of explosives, assembling equipment, military equipment and paramilitary or security services, as well as commercial activities. Investors can only benefit from these advantages for a specific period of time depending on the geographical location of their investment.

The Investment Code does not govern investments in the mining sector. The Mining Code provides for some incentives to private investors, including:

- Exemption from customs duties on the export of samples for analysis and industrial tests
- Exemption from customs duties on the import of foreign expatriate staff's property
- Full exemption of customs duties on exports in relation to the mining project
- A reduced rate on professional profit tax contribution
- A reduced rate on the exceptional contribution on the compensation of expatriates.

The Investment Code also provides the following concessions and incentives:

- Duty-free imports of all new plant, machinery and equipment associated with the project in question, as well as spare parts up to 10% of the Cost, Insurance and Freight (CIF) value of the equipment
- Duty free exports of local semi-finished or finished products
- Exemption from corporate tax and tax on share capital
- Exemption from real estate or property taxes.

The duration of these exemptions depends on the location of the investment and may vary from three to five years.

BUSINESS OPPORTUNITIES

There are opportunities for investments in the mining, petroleum, agricultural production, forestry exploitation, local manufacturing, infrastructure and tourism sectors in the eastern part of the country.

MEMBERSHIP OF INTERNATIONAL AND REGIONAL ORGANISATIONS

The DRC is a member of the International Monetary Fund (IMF), World Bank, United Nations (UN), African Union (AU) and African Development Bank (ADB). The DRC's accession to OHADA is viewed as a promotion of the rule of law, as the OHADA Common Court of Justice and Arbitration has been established as the highest court of appeal with the power to overturn decisions by local DRC courts. The DRC is a member of the Washington Convention establishing the International Center for Settlement of Investment disputes (ICSID) which applies to disputes between the DRC and nationals of other ICSID contracting States. The DRC is also party to several bilateral investment treaties that provide for arbitration in the case of disputes between the DRC and a national of a bilateral investment treaty contracting state.

Currently, foreign arbitral awards from outside OHADA member States are recognized and enforced in the DRC, after a Tribunal of High Instance of competent authority has granted enforcement. However, this will soon change after the DRC's recent accession to the New York convention. The DRC is the 153rd State to become a party to the New York Convention.

