Conversion of the OHADA branch of a foreign company into a OHADA company

Legal aspects and tax issues

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The branch is a commercial or industrial establishment or a service establishment, owned by a company or a natural person, provided with a certain degree of management autonomy (Article 116 of the Uniform Act relating to the commercial companies and the interest economic group - the AUSCGIE).

It does not have an autonomous legal personality distinct of the company or natural person who owns[1] it but, it is registered as such in the Trade and Personal Property Credit Register (Articles 117 and 119 the AUSCGIE).

Branches of foreign companies may be registered in a Member State of the OHADA area[2], but OHADA law has nevertheless intended to restrict temporally the use of this type of structure by companies outside the OHADA area, by requiring that they are contributed to an OHADA-based company after a two-years period (Article 120 of the AUSCGIE).

While it was possible in practice to renew the registration of branches of foreign companies (by successive ministerial exemptions sought in accordance with the former Article 120 the AUSCGIE), the reform of the AUSCGIE (which came into force on 5 May 2014) ended this practice by allowing a single exemption for a maximum period of two years, thus limiting the "*lifetime*" of a branch to a maximum of four years.

As a result of this reform, many branches of foreign companies are forced to convert. This study aims to present the main legal aspects and tax issues of such a transaction.

1. The obligation to contribute branches of foreign companies at the end of the two years period renewable only once (Article 120 the AUSCGIE)

Principle

Article 120 al 1 of the AUSCGIE provides that "*when it is owned by a foreign company, the branch shall be **contributed** to a legal company governed by the law of one of the States Parties, preexisting or to be set up, no later than two years after its creation, unless it is exempted from this obligation by an order of the trade Minister of the State Party in which the branch is located*" (hereinafter referred to as "the Conversion").

The new drafting of Article 120 following the revision of the AUSCGIE, which came into force on 5 May 2014, provides a more stringent framework for the exemption since a paragraph 2 has been introduced to specify that "*subject to the provisions applicable to companies subject to a particular regime, the exemption is granted for a period of two years, not renewable*".

[1] The branch is therefore a simple decentralized department with no legal personality and wealth, enjoying the financial surface and credit of the owner to whom it is attached. To be distinguished from a subsidiary with a full legal personality (for an illustration of the distinction see: Court of Appeal of Ndjaména, No. 281/2000, 5-5-2000: SDV Cameroun and SDV Cameroun v/ STAR NATIONALE, Journal juridique tchadienne, No. 1, May-July 2001, p. 21; Ohadata J-06-58).

[2] They are subject to the law of the State Party in which they are located. The former the AUSCGIE reserved the possibility for international conventions or national laws to provide that branches of foreign companies remained subject to the law of the head office but, this possibility has been abolished as of 5 May 2014 and, the article 118 is now worded as follows: "*The branch may be the establishment of a foreign company or natural person.* [part deleted by the AUSCGIE revised from 05 May 2014] *it is subject to the law of the State Party in which it is located*".

The general principle established in OHADA law[3] is that branches are now <u>registered for two years renewable once by a ministerial exemption</u>. At the end of this period, these must be *contributed* to an OHADA company.

Nota: As the article 120 of the AUSCGIE requires the branch to be contributed to a company "of one of the States Parties", it may be inferred that this obligation to contribute concerns only branches of companies outside the OHADA area. In other words, branches of companies registered in another Member State do not have to be subject of conversion and can remain registered without any time limit.

Exception

Article 120-2 of the AUSCGIE allows "*companies subject to a special regime*" to continue their activity in the form of a branch beyond the maximum two-year period (now renewable only once), which leaves open the possibility for Member States to set up such special regime in their domestic laws[4].

We note for instance, that this was done by the Gabon Republic in the Hydrocarbons Law dated 28 August 2014. Under Article 252 para 2 : "*Branches of foreign companies engaged in hydrocarbon exploitation activities and, the rights and obligations arising from their activities must, upon the entry into force of this Law, be converted into Gabonese companies within a period not exceeding two years, under penalty of forfeiting their operating authorization. <u>However, without prejudice to the application of the legislation in force, companies carrying out hydrocarbon exploration activities in the form of branches shall not be required to convert into Gabonese companies until they have not applied for an exclusive authorization to develop and exploit hydrocarbons</u>*".

In an "Avis" dated 18 October 2016, the OHADA Supreme Court (CCJA) defined the companies subject to a special regime as any legal structure in one of the forms permitted under OHADA law and whose activities or mission of general interest are subject to "*certain rules of sectoral law or derogations from the ordinary law of OHADA commercial companies*". The Court considered for instance that the branches of airline companies are "*companies subject to a specific regime*".

<u>Sanctions</u>

The reform of the AUSCGIE, which came into force on 5 May 2014, also introduced sanctions, which did not previously exist. For example, in the event of non-compliance with the obligation of the branch to contribute provided for in Article 120 (1) of the AUSCGIE, **the Clerk of the RCCM shall de-register the branch**, after a decision of the competent court, ruling on a request, at his request or of any interested party (Article 120 of the revised the AUSCGIE)[5].

A criminal offence was also introduced by the revised OHADA Act: "*The officers of a foreign company or a foreign natural person whose branch, beyond a period of two years, has not been converted to a pre-existing company or to be set up in one of the Contracting States, or de-registered under the conditions laid down in Article 120 shall be liable to criminal sanction*" (Article 891-2 of the AUSCGIE).

The OHADA law referencing to States Parties for the determination of the applicable sanctions, it is necessary to refer to the legislation of each State Party to provide the applicable sanction. Many States have not provided any sanctions at this stage.

[3] Some countries in the OHADA area, like Gabon, had already limited branch renewals to one: in Gabon domestic law, Decree No 0092/MPMEAC of 12 November 2012 setting out the conditions for granting the exemption provided for in Article 120 the AUSCGIE had already stated that "the duration of the exemption will be less than or equal to two years" and had advanced the revision of Article 120 the AUSCGIE to the extent that it was also provided for a single renewal limited to two years. The aforementioned decree also stated that, at the end of the two-year period (possibly renewed once), a branch which has not yet been incorporated or contributed to a pre-existing company had to cease operations on national territory.

[4] Some authors fear that this term "special regimes" could be interpreted more broadly and opens many exceptions to the four-year maximum period now set for branches (OHADA, Alain Fénéon, EJA/LGDJ, 1st Edition), which would in practice make this reform meaningless that came into effect on 5 May 2014.

[5] Some practitioners note that there are no specific penalties for violations of section 120, paragraph 2, for example, which would include the assumption of an exemption granted beyond the four-year maximum (two times two years), African Company Law [OHADA], Alain Fénéon, EJA/LGDJ, 1st Edition, page 857, which states that the case law will have to rule on this issue.

2. Legal regime for the contribution ("conversion") of branches under OHADA law

Article 120 of the AUSCGIE does not specify whether a "conversion" is carried out by *a simple contribution in kind* (Article 45 of the AUSCGIE – Articles 147 and following articles of the AUDCG) or by *a specific partial contribution of assets* ("*apport partiel d'actif*" – of an "autonomous branch of activity") subject to the specific regime of spin-off (Article 195 of the AUSCGIE).

In principle, only the *specific operation of partial contributions of assets* (subject to the spin-off regime):

- Enable the *universal contribution of assets and liabilities* ("*transmission universelle de patrimoine*"), allowing the contribution of all the assets and liabilities of the branch and the related contracts (with the exception in principle of contracts concluded *intuitu personae* and administrative contracts)[6].

- Is subject to a preferential tax regime conferring to the "conversion" operation a "neutral" character (in terms of corporate tax and registration fees, c.f. infra).

We will therefore only describe below the legal regime of *partial contribution of assets* subject to the regime of spin-off and will not develop the contributions of isolated assets or of businesses[7].

As the conversion of a branch of a foreign company by partial contribution of asset is a cross border operation, it is necessary to address the legal modalities for its implementation (i) with regard to OHADA law (law of the company benefiting from the contribution) (ii) while also taking into account the law of the foreign company (the contributor of its branch).

2.1. Principles applicable in OHADA law - from the point of view of the beneficiary company of the partial contribution of asset (new or pre-existing subsidiary of OHADA law)

In view of the location of the assets contributed (by assumption in the State of the company which receives the contributions), the principle of the *rex lei citae* and the principle of *lex societatis* require that the transaction be subject to the OHADA law on *partial contribution of assets* in order to ensure, in the State of the beneficiary company, the full effect of the *universal contribution of assets* attached to these operations.

Conditions and effect of partial contributions of assets under OHADA law

From the point of view of OHADA law, the partial contribution of asset "*is the transaction by which a company contributes of an autonomous branch of activity to a pre-existing company or future company* […]". It is subject to the spin-off regime (Article 195 of the AUSCGIE).

It is important to note that the submission of an the partial contribution of asset to the specific regime of spin-off is (unlike for example French law) not a simple faculty but a consequence of the contribution of an autonomous branch of activity (the condition of autonomy being required in France only to benefit from the preferential tax system and not being required by the Commercial Code). The *partial contributions of assets* must therefore, in OHADA law, relate to an "**autonomous branch of activity**" and not to one or more "isolated" assets.

The completion of a *partial contribution of the branch's assets* presupposes that in principle, the assets and liabilities of the branch are contributed enabling it to continue its activity independently[8].

[6] The labour codes of the OHADA Member States also generally contain provisions permitting the automatic transfer of employment contracts with the branch, as provided for in Article 91 of the Burkina-Faso Labour Code, which provides that "If there is a change in the legal situation of the employer, including by inheritance, change of name, sales, merger, change of activities, incorporation, all work contracts in force on the day of the change shall remain between the new employer and the company's staff".

[7] The mere in-kind contribution of intangible business assets (not dealing with an "autonomous branch of activity") is subject to the regime of transfer of intangible business assets organized by Articles 147 and following of the OHADA Act on General Commercial Law (AUDCG) and Articles 45 and 619 and s of the OHADA Act on Commercial Corporations, and is usually not subject to the preferential regime of partial contribution of assets (assimilated to mergers/spin-off) in corporate tax and registration law, which makes it particularly onerous. The in-kind contribution of intangible business assets does not result in the universal transmission of wealth.

The specific procedure provided for by the AUSCGIE for partial contributions of assets must be executed (see Annex 1: appointment of contribution auditor, adoption of a draft contribution agreement by corporate bodies, filing and publication, deadline for opposition of creditors, approval by the Exceptional General Meeting of each company, declaration of regularity and compliance).

Subject to the spin-off regime, the partial contribution of asset entails the universal contribution of assets (Article 190 of the AUSCGIE), that is, the automatic transfer of the assets, rights and obligations relating to the autonomous branch of activity contributed[9].

The partial contribution of asset is carried out against the remission of new shares, and possibly a balancing payment of which the amount cannot exceed 10% of the exchange value of the allocated shares (Article 191 of the AUSCGIE).

Impact of cross-border aspects of the operation

The cross-border nature of the branch "conversion" transaction by Partial Asset contribution (the contributor having its head office abroad, outside OHADA space) is a complicating factor because the applicable OHADA texts only oversees transactions between OHADA companies:

- Indeed, only Article 199 of the AUSCGIE (which has not been the subject of any case law to this day) expressly deals with "cross-border" restructuring operations, but only in the perspective of internal operations in the OHADA area, indicating that *"merger, spin-off and partial contribution of assets may concern companies whose head office is not located in the territory of the same State Party. In this case, each company concerned shall be subject to the provisions of this Uniform Act in the State Party of its registered office"*;

- However, even if this is not expressly provided for in the AUSCGIE text, there are arguments for considering that a contribution made by a company outside the OHADA area, from its OHADA branch to an OHADA company, may be subject to the legal regime of *partial contributions of assets* (subject to the regime of divisions) under OHADA law:

    - Insofar as the text of Article 199 of the AUSCGIE is not expressly formulated "restricting" or in a "closed" manner[10] but, merely sets out the obligation to comply with the provisions of the AUSCGIE in each State Party when such transaction concerns companies whose head office (and the applicable law, which is defined in principle on the basis of the head office, c.f. Article 1 of the AUSCGIE) is located in two separate States Parties to the OHADA area, an operation which by its nature is governed solely by OHADA corporate law [11];

    - Subject, however, to the following conditions:

        - That the transferring foreign company will be of a corporate form at least equivalent to that of OHADA law companies authorized to make a partial contribution of assets subject to the spin-off regime[12];

        - That each company apply its applicable law to determine the conditions of its **contribution decision**; the decision must be taken by the competent organs of

[8] On this particular point, it should be noted that only the "autonomous" nature of the branch is expressly required in OHADA law, but not the contribution of the full branch (as required, for example, in French law to benefit from the preferential tax system).
[9] See below our observations on intuitu personae contracts and administrative contracts.
[10] Article 199 of the AUSCGIE does not provide that "partial contribution of assets may only concern companies whose head office is located in the territory of a State Party".
[11] It should be noted that if the "branch" of a foreign company (the object of the contribution) is properly subject to the law of the State Party in which it is located (Article 118 of the AUSCGIE), the latter has no legal autonomy and should therefore not be considered as an autonomous "party" to a restructuring operation.
[12] If Article 196 of the AUSCGIE provides that "unless otherwise provided in this Uniform Act, mergers, spin-offs and partial contribution of assets may take place between companies of different forms", the foreign companies must logically have a form at least equivalent to one of the existing forms of company under OHADA law.

each party to the transaction in views of their own *lex societatis* – law of the head office, namely (i) the OHADA law for the beneficiary company[13] and (ii) the foreign right for the transferring company[14];

- That the specific modalities and procedures provided for by the AUSCGIE for *partial contribution of assets* (spin-off regime) can be effectively implemented at the various stages of such an operation in OHADA law, in order to ensure in the State of the beneficiary company (assuming the location of the transferred assets) the full effect of the universal contribution of assets:

  - ✓ Note: OHADA law requires that several steps of the partial contribution of assets transaction be carried out at the head office of the foreign contributor. In particular, these obligations are (i) to have a contributions auditor appointed by the competent court of the head office (Article 619 of the AUSCGIE)[15] and (ii) to deposit the draft of the partial contribution of assets transaction in the commercial register of the contributor's head office, which are likely to constitute difficult practical modalities to be implemented abroad by the transferring company of its branch (unless the foreign State in which the head office of the transferring company is located, like France, has a comparable legal regime in which case it may be advisable to apply it cumulatively, c.f. infra).

2.2. Principles applicable of the foreign transferring company's side

The foreign company transferring its OHADA law branch will have to apply its own company law (*lex societatis*) to take its decision of contribute.

As regards the modalities and effects of the transfer of ownership resulting from the contribution, it will be necessary to verify what are the applicable conflict rules, and whether they are likely to recognize the full effect of OHADA law in their jurisdiction or whether they require, in order to also obtain in that State the effects of an universal contribution of assets, to apply **cumulatively** a specific system of partial contribution of assets under its own law.

In certain cases, in particular where the foreign law provides a legal mechanism comparable to the one existing in OHADA law, a cumulative application of the legal systems of partial contributions of assets may enable (i) to ensure (if necessary) in each legal order concerned that the transaction does indeed recognize a *universal contribution of assets* but may also (ii) to be useful in carrying out in each State the various stages of the partial contribution of assets procedure (c.f. infra).

For example, the French rule of conflict law provides, in case of universal contribution, that the *lex societatis* (law of the registered office) of each of the companies involved in the contribution applies principally to the transaction.

In order to ensure (if necessary) full recognition of the *universal contribution of assets* in France[16], it may therefore seem necessary to implement, also on the French side, the specific provisions applicable to *partial contributions of assets* subject to the system of spin-off in French law[17].

[13] Article 1 of the AUSCGIE: "Any commercial company […] whose head office is located in the territory of one of the States Parties to the Treaty [OHADA] shall be subject to the provisions of this Uniform Act."

[14] If the branch of a foreign company in the OHADA area is properly subject to the AUSCGIE for the conditions of its registration and operation, it is the law of the head office of the foreign company that is intended to apply to the legal terms of its decisions, in particular those relating to its wealth and its existence (see in this sense Court of Appeal of Pointe-Noire, Judgment No. 034 of 17 June 2002, Sabena Company v Ministry/ Public).

[15] Article 672 of the AUSCGIE now provides that "the deliberations taken by the General Assembly in the absence of the merger commissioner's report [also applicable to division and therefore to ABS] are null".

[16] The concept of partial injections of assets is not defined by the Commercial Code, but it is established that the contribution of a branch of activity subject by option to the Separation Scission regime implies the transfer of all goods, rights and obligations relating to that branch (Cass Com 16 February 1988 n° 86-19.645.P).

Such combined implementation (for example, the drafting of a treaty of contribution satisfying the conditions laid down by OHADA law but also by French law) would also facilitate the completion in France of certain stages of *partial contribution of assets* in OHADA law, in particular obligations (i) to have a contributions auditor appointed by the competent court of the place of the head office of the parties to the operation (Article 619 of the AUSCGIE)[18] and (ii) of the filing of the draft of partial contribution of assets in the commercial register of the head office of the contributor, which exist in comparable forms in French law.

3. Tax issues of branch contribution ("conversion")

Although OHADA does not regulate the tax rules applicable in the Member States, which remain defined by the nationals of each State (as well as by the regional regulations and circulars UEMOA and CEMAC), we have thought it useful to present here the main tax issues of branch conversion in the OHADA area.

3.1. Corporate income Tax Issues

The partial contribution of assets in principle results in the corporate tax of all capital gain at the standard corporate income tax rate (from 25% to 35%, depending on the OHADA countries). The capital gains are the result of the difference between the real value of the assets contributed and their net book value to the contributor.

Risk of double taxation and impact of tax treaties

Here again, one difficulty lies in the "cross-border" nature of the branch's contribution (conversion), which may in some cases give rise to a risk of double taxation of the capital gains generated by the contribution: once in the State of the contributor and a second time, more naturally, in the State of registration of the branch.

In the State of the contributor, it is necessary first of all to check whether the rules of domestic law governing the territoriality of the corporate tax do not allow to be granted to the State of registration of the branch the exclusive right to tax the capital gains relating to the contribution of the foreign branch, in particular where an establishment taxable abroad is qualified under the rules of domestic law of the State of contributor's State.

In addition, the tax treaties concluded by OHADA Member States usually provide, based on the OECD convention, that capital gains on the branch's assets are exclusively taxable in the state in which the branch is located (assuming a stable establishment): it is thus usually provided in tax treaties that "*Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State, or of movable property that belongs to a fixed base that a resident of one State has in the other State, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise), may be taxed in that other State*" (OECD Model Convention Art 13-2).

[17] An alternative, on which the French case law has never ruled to our knowledge, could consist in subjecting the operation exclusively to OHADA law on the French side, without taking into account the French rules specific to this type of operation. A judgment of the Court of Appeal of Versailles (CA Versailles, 3 Oct. 1996) seems to indicate that it would be possible, if the parties decided to do so, to submit a contribution operation entailing universal contribution of assets to the lex rei sitae (law of the place of the branch). In the present case, however, it was the French law, the court having held that a contribution by a Dutch company to a French company could be subject to the French spin-off regime.

[18] Article 672 of the AUSCGIE now provides that "*the deliberations taken by the general assembly in the absence of the merger commissioner's report [*also applicable to division and therefore to ABS*] are null".*

Preferential regimes

(i) The vast majority of OHADA Member States have[19], in their ordinary law, preferential regimes providing for an exemption of realized capital gains in the event of *partial contribution of assets*[20]. The preferential regimes generally apply provided that:

- The beneficiary company from the contribution shall also have its head office in this Member State (which is assumed to be the case in the event of the conversion of a branch);

  - ✓ Note: it is generally not required that the transferring company have its head office in the State in question (it is, by hypothesis, only a branch subject to the corporate tax). On the other hand, since the preferential tax system is generally only open to contributions made by public limited companies ("*société anonyme*") or limited liability companies ("*société à responsibilité limitée*"), the form in which the contributor is constituted must be precisely verified.

- The contribution is in the form of transfer of asset, which implies the transfer of an autonomous branch of activity (c.f. supra, this notion can be problematic when some assets of the branch cannot be contributed);

- Must be recorded in the deed of contribution, the obligation of the beneficiary company, to calculate, in respect of items other than the goods included in the contribution, the annual depreciation to be deducted from the profits and the subsequent capital gains resulting from the realization of those elements, on the basis of the cost price determined by the transferring company, net of the depreciations already applied by it. In the absence of a preferential mechanism for the conversion of foreign branches (see below), the implementation of the preferential regimes provided by the General Tax Code must be considered[21].

(ii) In order to take into account the significant constraints posed by Article 120 of the AUSCGIE, some States have adopted specific tax measures relating to the conversion of branches of foreign company, such as:

- **Gabon** (Finance Act 2015), which recently amended its legislation to introduce a more comprehensive *special regime for mergers and related transactions*, which:

  - added additional conditions to those set out above for the benefit of the preferential regime, including (i) a commitment by the contributor, taken in the deed of contribution, to retain for five years the securities received in return for the contribution (as provided for by Article 210 B of the French IMC) and (ii) a specific authorization by the Minister of Finance when one of the companies party to the transaction is a foreign company[22];

  - added to the capital gains exemption, the possibility to transfer deficits from the branch to the beneficiary company.

- **Ivory Coast** (Note 0060/MEF/DGI-DLCD of 5 January 2011), which provided that no taxation would be payable as a result of the transformation of a branch into a national company (with the exception of registration fees applicable to contributions made for the incorporation of companies, see below).

[19] For example, such special regimes have been established in Cameroon, Ivory Coast, Congo Brazzaville (on approval), Senegal, Chad, etc.
[20] Other than those made on the goods.
[21] In some jurisdictions, the Administration has had the opportunity to confirm the application of the special regime notwithstanding the fact that the beneficiary is a company having its head office abroad, provided that it brings its branch duly registered with the tax services and subject to CIT. However, as with the French position on the same question, it cannot be excluded that the Administration intends to reserve the benefit of the preferential regime only to operations allowing the State of the beneficiary to preserve its right to tax the capital gains on securities issued in return for the contribution.
[22] See below our comments in footnote [20].

3.2. Registration Fees Issues

In-kind contributions are usually subject to a proportional registration fee (between 0.25% and 5% depending on the country, and are subject to rates of transfer duties when they are accompanied by a transfer of liability (i.e. liability) which in some States can raise duties to very significant amounts (in some jurisdictions, duties may be as high as 20% for the contribution of certain assets such as real estate).

It can therefore be a significant issue in the case of branch conversion.
The preferential regime related of corporate tax is usually accompanied by a preferential regime in terms of registration fees which reduces the application proportional fees applicable to contributions or replaces of them with low fixed fees.

As an example:

- Gabon has thus limited to a fixed duty of CFAF 5000 of the law applicable to deeds of partial contributions of assets subject to the preferential regime (against 1% applicable to contribution in kind);

- The preferential corporate tax regime implemented by Côte d'Ivoire (c.f. supra) was not, however, accompanied by a total exemption from registration fees, due to the rates applicable to contributions made at the time of incorporation of companies (a digressive rate of 0.3% to 0.1% depending on the amount provided, to which is added a fee of 1.2% for contributions of buildings).

3.3. VAT/customs issues

In the field of VAT, particular attention should be paid to:

- Any adjustments of the right to deduction that would result from the disposal of assets due to the partial contribution of assets from the branch, in accordance with the tax provisions applicable in the OHADA Member States, which most often provide that in the event of the disposal of assets (for any reason) within a certain period of time following their acquisition (for example 3 years), the input VAT deducted must in part (depending on the time elapsed) be paid back to the treasury.

  The possibility of avoiding such regularizations in return for the beneficiary of the contribution to undertake, in the deed of contribution, to carry out such regularizations in place of the contributor is generally not provided in the tax Laws[23].

- The difficulties related to the fact that some laws do not expressly provide for the transfer of VAT credits in the case of partial contribution of assets. It should be noted in this regard that Gabon has expressly provided for the possibility of transferring VAT credits under the above-mentioned specific scheme established by the Finance Act for 2015.

In customs matters, special attention should finally be paid to the suspensive regimes (NTA/TTY) under which certain assets could be held by the branch and which, for the purpose of their contribution, might have to be referred in advance to the General Customs Directorate (assets under the suspension regime, should not, in principle, be transferred; consequently, it's necessary to ensure that the tights to the suspensive regime are transferred as part of conversion process).

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[23] A transfer of the right to deduct to the beneficiary of the contribution could nevertheless be possible if the text so permits.

Appendix 1: Brief overview of the main stage of the legal regime of the partial contribution of assets in OHADA law.

- Conclusion of a **project of partial contribution of assets by the corporate organs of each company participating in the operation:** "*All companies participating in a merger or spin-off operation, shall draw up a project for a merger or spin-off, as the case may be, by the Board of Directors, the Deputy Head, [the President of a "société à actions simplifiées" (SAS)], the managers of each of the companies participating in the transaction*" (Article 193 of the AUSCGIE);

- Preparation of a **report on the transaction approved by the corporate organs of each participant**: "*The Board of Directors or, where applicable, the deputy head, [the President of a SAS], of each of the companies participating in the transaction shall draw up a report which shall be made available to the shareholders*" (Article 671 of the AUSCGIE);

- Appointment of an **contribution auditor** who must write a report, "*One or more merger commissioners [to the partial contribution of assets/spin-off], appointed by the competent court, shall prepare, under their responsibility, a written report on the terms and conditions of the merger*" (the AUSCGIE section 672)[24];
  Note: The Contribution auditor cannot be chosen among the auditors of the companies involved in the transaction. The Contribution auditor is appointed by the competent court of the place of the registered office (Article 619 of the AUSCGIE). If only one report is appointed for the entire operation, the designation shall be made at the joint request of all the participating companies.

- **Filing at the Registry of the project of partial contribution of assets and publication of the notices**: "*the merger project is deposited in the Trade and Personal Property Credit Register of the Head Office of the said Companies and is the subject of a legal notice inserted in a Official Bulletin empowered to receive legal notices from each of the Companies participating in the transaction*" (Article 194 of the AUSCGIE) and there is a **30-day opposition period for the creditors** (Articles 194, 679 and s of the AUSCGIE);

- **Extraordinary shareholders' meeting** where each participant approving the transaction: "*The merger shall be decided by the extraordinary general meeting of each of the companies participating in the transaction*" (Article 671 of the AUSCGIE);

- **Declaration of regularity and conformity**: "*Under penalty of nullity Companies participating in a merger, spin-off or partial contribution of assets are required to file with the Registry a declaration in which they report all the acts done in order to proceed and by which they affirm that the operation has been carried out in accordance with this Uniform Act*" (Article 198 of the AUSCGIE);

- **Date of effect of the contribution**: Article 192 of the AUSCGIE provides that the spin-off (and hence the APA) takes effect: "*1°) In the event of the creation of one or more new companies, on the date of registration, to in the Trade and Personal Property Credit Register, of the new company or the last of them; each of the new companies shall be incorporated in accordance with the rules specific to the form of the adopted company*".
  Note: when the contribution is made to a preexisting company, the 2° of the same article provides that "*in other cases on the date of the last general meeting approving the transaction, unless the contract provides that the transaction takes effect on another date, which must not be later than the closing date of the current fiscal year of the beneficiary companies or before the closing of the last financial year of the company or companies that contribute their assets*".

[24] The partial Commissioners of contribution assets/spin-off verify that the values of the shares of the participating companies are relevant and that the exchange report is fair. The reports are made available to shareholders and indicate (i) the method(s) used to determine the proposed exchange report, (ii) whether the method(s) are adequate in the present case and the values to which each method leads, an opinion given on the relative importance given to this method(s) in determining the value chosen and (iii) the particular difficulties of valuation, as the case may be.