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The Company's Merger Agreement and its Effect on the Parties, Creditors and Bondholders

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Abstract:

Merger is a legal process in which two or more companies unite. This unification takes place either by one company merging with another or by both being merged into a new company that replaces them. As a result of the merger, the merging company ceases to exist and its legal personality is dissolved, with all its assets, including liabilities, being transferred to the merging company or the new company formed as a result of the merger. In addition, in the case of a merger by absorption, the capital of the merging company is increased, and in the case of a merger by combination, a new company with new capital is created. The merging company becomes liable to the creditors of the merging companies - whether they are ordinary creditors or bondholders - and is responsible for all their debts without this resulting in a renewal of the debt.

Keywords: Merger, companies, merging company, creditors, bondholders, merged company, capital.

Introduction:

The merger of companies is one of the most prominent manifestations of the concentration of economic entities, as it leaves only a single legal entity at the end of the process. Various legislations, including Algerian commercial law, have paid attention to company mergers because of their importance in protecting the national economy from large competing companies.

From a legal point of view, mergers can be divided into two types: the first involves the dissolution of the legal personality of one or more companies and the transfer of their financial liabilities to an existing company; this type is known as a “merger by absorption”. The second type involves the dissolution of the legal personality of all the merging companies and the creation of a new company which takes over the assets of all the merging companies; this is known as a ‘merger by combination’.

As a result of the merger, the legal personality of the merging companies is dissolved and their assets are transferred to the merging or new company. In addition, the shareholders of the merged company retain their status as shareholders of the merging or new company.

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Since the merger results in the dissolution of the merging companies, it affects their creditors and the creditors of the merging company. Therefore, in the first section of this study, we will examine the effects of the merger on the merging company and the effects of the merger on the merging company, and in the second section, we will examine the effects of the merger on creditors and bondholders.

Section One: Effects of the Merger on the Companies Involved

The parties to the merger agreement are the merging and the merged companies. The merger results in the dissolution of the legal personality of the merging companies and the transfer of their assets to the merging or new company. In addition, the shareholders of the merging company retain their status as shareholders of the merging or new company[1].

Since the merger leads to the dissolution of the merging companies, it consequently affects their creditors and the creditors of the merging company. In this section, the first sub-section examines the effects of the merger on the merging company, and the second sub-section discusses the effects of the merger on the merging company.

Subsection One: Effects of the merger on the merged company

The merged company is the company whose legal personality ceases to exist as a result of the merger, whether its assets are transferred to an existing company in the case of a merger by absorption or to a new company in the case of a merger by combination. Consequently, the merger agreement results in the loss of its legal capacity and the dissolution of its legal personality, together with the transfer of its financial liabilities to the merging company or the newly formed company. The merger also results in the termination of the powers of the board of directors or managers. Therefore, we will deal with the loss of the company’s capacity to act in the first sub-section and the transfer of the merged company’s liabilities to the merging or new company in the second sub-section.

First branch: Loss of capacity of the company

Since a merger is one of the methods of dissolving a company and extinguishing its legal personality, while at the same time transferring its financial obligations to another company, it inevitably leads to the loss of its legal capacity, which renders it incapable of acquiring rights or incurring obligations[2].

If the merged company is a creditor or debtor, it is replaced in that capacity by the merging or new company, which then assumes the same status. Similarly, if it is a plaintiff or defendant in legal proceedings, it shall cease to be a party to such proceedings upon completion of the merger, and the merging or new company shall take its place in law, becoming the entity entitled to take part in all legal proceedings[3].

In addition, the powers of the managers or the board of directors cease with the dissolution of the company and the liquidator becomes the representative of the company before third parties, initiating legal proceedings on its behalf, whether the company is the plaintiff or the defendant[4].

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Since merged companies do not go through a liquidation phase as in ordinary cases of company dissolution, the status of the managers and the board of directors in representing the company ceases without this status being transferred to the liquidator. Instead, representation is transferred to the managers or the board of directors of the merging company, as the case may be[5].

Second Branch: Transfer of Liabilities of Merged Company to Merging or New Company

On completion of the merger, all the assets of the merging companies are transferred to the merging or new company. This includes all rights, whether proprietary (original or ancillary), belonging to the merging company, as well as its personal rights. The merging or new company replaces the merged company in its rights vis-à-vis third parties, unless the nature of the personal right precludes such a transfer, in which case it remains with the merged company and ceases to exist upon its dissolution[6].

It is important to note that the rights of the merged company are not transferred to the merging or new company on an individual basis, but rather as a collective financial liability that includes both positive and negative elements.

The issue of the transfer of the rights of the merged company to the merging or new company has given rise to considerable debate among legal scholars. Some scholars argue that this transfer is similar to an assignment of rights.

However, the majority of scholars consider that the rules governing the assignment of rights do not apply to the transfer of rights following a merger. The rights are not transferred separately but as a whole to the merging or new company.

This view has long been upheld by French and Egyptian jurisprudence, whose decisions generally confirm that the rights and obligations of the merged company are transferred to the merging company as a comprehensive effect of the merger. This transfer does not relate to specific elements of the assets and liabilities, but to its financial liabilities as a whole, including both positive and negative components[7].

There is a debate in legal scholarship about the transfer of the debts of the merged company. One group of scholars argues that the transfer of debts from the merged company to the merging or new company constitutes a renewal of the debt because of the change in the debtor, which requires the consent of the creditors of the merged company to this transfer. Conversely, another group argues that this transfer does not constitute a renewal of the debt, as renewal requires the individual consent of all the creditors of the merged company, which poses significant challenges that could hinder the completion of the merger.

Article 756 of the Algerian Commercial Code provides: “The company becomes liable to the creditors of the merged company in place of that company, without this substitution constituting a renewal for them”[8].

This makes it clear that the legislator has expressly determined the nature of the transfer of debts from the merged company to the merging or new company, stating

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that the merging or new company assumes the obligations of the merged company and replaces it in this respect, without this being considered a renewal of the debt due to the change of debtor.

Section Two: Effects of the Merger on the Merging Company

As mentioned above, mergers can be by absorption or by amalgamation. While the merger has implications for the merging companies, it also has significant implications for the merging or new company, particularly for the shareholders of the merging companies who acquire the status of shareholders of the merging or new company. This includes assuming the known and unknown liabilities of the merging companies and increasing its capital by the amount of the assets of the merging companies.

First branch: Increase in the capital of the merging company

The merger results in the dissolution of the legal personality of the merged company and the transfer of its assets to the merging company, thereby increasing its capital by the amount of the financial position of the merged company[9]. In addition, the merger leads to the inclusion of new shareholders in the merging company, who become the shareholders of the merging companies and who, after the merger, enjoy all the rights of the existing shareholders of the merging company.

A question has arisen as to the applicability of the prohibition on trading in non-cash securities to the new shares issued by the merging company after the merger. It is well known that in many jurisdictions non-cash shares are often not tradable until a certain period has elapsed in order to clarify the financial position of the company and to prevent shareholders from overstating the value of these non-cash shares and using their sale as a means of unjust enrichment[10].

The Algerian legislator, like the French and Egyptian legislators, prohibits the trading of non-cash shares both when a company is incorporated and when its capital is increased. Article 709, prior to its amendment in 1993, stated: “Non-cash shares may not be separated from the capital and may not be traded until two years have elapsed from the date of registration of the company in the commercial register or from the date of registration of the amendment following the increase in capital”[11].

French jurisprudence has settled on the view that the prohibition of trading applies only to commercial methods of trading and does not extend to civil methods. On the other hand, Egyptian jurisprudence holds that the prohibition of trading covers both commercial and civil methods of trading shares[12].

Since the merger is considered as a capital increase for the merging company and as a contribution in kind for the new company resulting from the merger, the shares representing these contributions in kind should be subject to a trading prohibition from the date of registration of the merger agreement.

However, the Algerian legislator expressly stated in Article 710 - prior to its amendment by the provisions of Legislative Decree No. 93-08 of 25 April 1993 - of the Commercial Code that the prohibition on trading in non-cash shares does not apply

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in the case of mergers. The article provides: "In the event of the merger of a company or the contribution by a company of part of its financial elements to another company, the prohibition on the separation of shares from the capital and their transfer does not apply to the non-cash shares of a joint stock company that has existed in this form for more than two years at the time of the merger or contribution".

Furthermore, if the capital of the merged company or the contributed assets at the time of the merger or contribution is represented partly by tradable shares and partly by non-tradable shares, the above exception applies only to the number of new shares proportional to the part of the capital previously represented by tradable shares.

When the shares issued are distributed among the shareholders of the merged company or the company contributing the assets, the shareholders who held non-tradable shares prior to the merger or contribution receive shares of the same type.

It is clear from the above that, prior to the 1993 amendment, the legislator exempted from the prohibition of trading the shares issued by the merging company as a result of the merger and the shares of the new company, provided that certain conditions were met:

1. At least two years have elapsed since the creation of the merged company at the time of the merger.

2. The merged company must have been a joint-stock company or a partnership limited by shares during the preceding period.

3. The shares of the merged company must be tradable; if the capital of the merged company consists of both tradable and non-tradable shares, the exemption applies only to the shares issued by the merging company in exchange for the number of tradable shares.

If several companies are merged, some of which have tradable shares and some of which do not, the merging company will issue tradable shares only in proportion to the shares of the companies whose shares are tradable[13].

A question has arisen in French jurisprudence as to the starting point for calculating the two-year period during which trading in these shares is prohibited. One view is that the blackout period starts from the date of issue of the shares in kind, i.e. from the date of the merger. Another view is that the period should be calculated from the date of incorporation of the merged company or from the date of a capital increase if the increase was decided before the merger[14].

We believe that the two-year period should run from the date of the merger. The rationale is that the lifting of the lock-up is an exception and exceptions should not be broadly interpreted or extended. Since the conditions for the exception set out in Article 710 are not met, we have to revert to the original rule set out in Article 709 and thus enforce the prohibition in accordance with what that article prescribes, which starts from the registration of the company in the Commercial Register or the registration of the amendment following the capital increase.

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However, following the 1993 amendment, the Algerian legislator no longer distinguishes between cash and non-cash shares in terms of their tradability; both types are tradable from the date of the company's registration in the commercial register. In the case of a capital increase, the shares become tradable from the date of full payment of the capital increase, regardless of whether the shares are in cash or in kind, without the need for a specific period.

As a result, in the case of a merger, the shares received by the shareholders of the merged company - being shares in kind - are tradable from the day the merger is completed and the contract is registered at the National Centre for the Commercial Register. This is confirmed by Article 715 bis: "In the case of mergers of companies or when a company contributes part of its financial assets to another company, the shares become tradable in order to facilitate this merger. These shares shall allow, where appropriate, the issue of new shares having the same value as or based on the value of the old shares".

Second branch: Liability of the merging company for the debts of the merged company

The merger results in the complete transfer of the financial obligations of the merging companies - both assets and liabilities - to the merging or new company. Consequently, the merging company becomes liable to the creditors of the merging companies and is responsible for all their debts. This raises the question of the basis for this liability[15].

One view is that the basis for this liability derives from the idea of renewing the debt by changing the debtor. This implies the extinction of the debts of the merging company and the creation of new debts in the liability of the merging company.

Since the renewal of a debt requires the consent of the creditors of the merged company according to the rules of renewal by change of debtor, and since such consent is almost impossible to obtain, some scholars argue that the renewal of the debt does not require the consent of the creditors of the merged company in the case of a merger[16].

This view has been criticised on the grounds that the renewal of the debt results in the creation of a new debt in the liability of the merging company, which has its own defences and guarantees. However, in the case of a merger, the debt is transferred to the merging company with the same characteristics and attributes. Moreover, the legislator has expressly stated in Article 381-1 of the French Companies Code that "The merging company becomes liable for the debts of the merged company and replaces it, without this replacement being considered a renewal of the debt"[17].

Another view is that the merger involves an assignment of the debts of the merged company. This assignment can be made in two ways: either by an agreement between the original debtor and the new debtor to transfer the debt to the new debtor, which is not effective against the creditor without its consent, or by an agreement between the creditor and the assignee (the new debtor) that the latter assumes the debt of the original debtor, which does not require the consent of the original debtor.

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A group of Egyptian scholars have argued that, in the light of the Egyptian Companies Law of 1954, the merger effectively constitutes an assignment of debt. According to this view, the merging company assumes the role of the new debtor (the assignee), while the creditors of the merged company become the assignors. Since the merger involves an assignment of debts, the assignment is not effective against the creditors unless they consent to it. Consequently, a creditor who accepts the assignment becomes a creditor of the merging company, while a creditor who does not accept the assignment retains its claim against the merged company (the original debtor)[18].

Another argument is that the liability of the merging company is based on a limited mandate to perform the obligation. This means that the merged entity remains obligated to pay its debts and its obligations are not extinguished until those debts are paid in full. However, the continued liability of the merged company does not prevent it from transferring its assets to the merging or new company, unless such a transfer is intended to prejudice the creditors[19].

However, it cannot be argued that this limited mandate is the basis for the merger itself, since the merger requires the dissolution of the merged company on completion of the merger process. It would be incorrect to say that the merged company continues to exist until its debts have been paid in full, as this would imply the existence of several debtors rather than a single debtor.

In addition, some argue that the merger contains a condition for the benefit of third parties, suggesting that the creditors of the merged company can enforce their rights against the merging company if the latter has assumed the liabilities of the merged company as set out in the merger agreement. This condition effectively acts as a provision in favour of the creditors[20].

It has also been argued that the merging company acts as a universal successor to the merged company. This is justified by the fact that a merger results in the transfer of the financial liabilities of the merging companies, including both their assets and liabilities, as a collective entity to the merging or new company. This is analogous to an heir receiving the estate of a deceased person and inheriting both his rights and obligations. Thus, the merging company does not acquire the rights and obligations of the merging companies as separate entities; rather, it inherits the financial liabilities as a whole, including any liabilities that may not have been known at the time of the merger agreement, even if, for example, the merging company includes a clause in the merger agreement releasing it from unknown liabilities or certain known liabilities[21].

Many French judicial decisions, both before and after the enactment of the 1966 Companies Law, have adopted the concept of succession as the basis for the transfer of debts from the merging company to the acquiring company.

Many French scholars consider that, although the 1966 Companies Law does not explicitly state that it adopts the concept of succession as the basis for the transfer of the debts of the merged company to the merging company, it does provide that a merger requires the transfer of the financial debts of the merged company to the

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merging or new company. This provision is, in fact, the essence of the idea of succession[22].

The Egyptian judiciary was also quick to embrace the idea of succession, with the Egyptian Court of Cassation ruling on 10 March 1955 that when two companies merge, the merging company succeeds to the financial liabilities of the merged company by general succession. This principle has been consistently upheld by the Egyptian Court of Cassation in numerous cases[23].

Despite the ambiguity created by the Egyptian legislator in the Egyptian Companies Law of 1981, specifically in Article 132, which states: "The merged company or the company resulting from the merger shall be considered the successor of the merged companies and shall replace them legally in terms of their rights and obligations, within the limits agreed upon in the merger agreement, without prejudice to the rights of creditors". This suggests that the succession intended by the legislator is specific and not general. However, Egyptian scholars insist that a merger requires the transfer of all assets and liabilities of the merging companies to the merging company, even if the parties to the merger agreement agree otherwise, because such an agreement would be detrimental to creditors. This is contrary to the provisions of Article 132, which makes the succession a general one[24].

The Algerian legislator has adopted a concept of succession similar to that of the French legislator, although without explicitly stating it. Article 756 of the Algerian Commercial Code provides: "The company becomes liable to the creditors of the merged company in place of that company, without this substitution constituting a renewal for them". Therefore, the transfer of all the debts of the merged company to the merging or new company, as set out in the aforementioned Article 756, can only be reconciled with the idea of succession.

Chapter Two: Effects of the Merger on Creditors and Bondholders

The merger affects the creditors of the merged company because it replaces the original debtor[25] with another party obliged to pay the debt. It also affects the creditors of the merged company if the merged company is insolvent, because it weakens their overall security and allows the creditors of the merged company to claim against the assets of the merged company.

Accordingly, in the first section we will consider the effects of the merger on creditors, and in the second section we will discuss the effects of the merger on bondholders.

Section One: Effects of the Merger on Creditors

In the case of a merger, creditors are divided into two categories: creditors of the merged company, which loses its legal personality, and creditors of the merged company, which continues to exist but faces the risk of a reduction in its overall security due to competition from creditors of the merged company.

The Algerian Commercial Code regulates the rights of creditors precisely, stating that the merging or new company becomes liable in place of the merged company, without

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this leading to a renewal of the debt. This means that the debt, with all its characteristics and attributes, is transferred to the merging or new company, which becomes liable to the creditors[26].

The second paragraph of Article 756 allows creditors of the merging companies (the merging and the merged companies) whose debts arose before the publication of the merger project to object within thirty (30) days from the date of publication of the merger contract in one of the official gazettes designated for legal notices. The court will then assess the seriousness of the objection. If the court concludes that the merger affects the status of the company and weakens the overall security of the creditors, thereby posing a real threat to them, it may order the accelerated repayment of the contested debts unless the merging company undertakes to provide guarantees. If the court considers the guarantees to be sufficient, it will order the merging company to provide them; if not, it will respond to the creditor's request. The court cannot impose additional guarantees on the company as it does not have the power to order the parties to the dispute.

If the court finds that the objection is unfounded and does not affect the rights of the creditors, i.e. does not affect the financial position of the company or weaken the overall security of the creditors, it will dismiss the objection[27].

If the debts of the objecting creditors are not settled or if the merging company does not provide the guarantees ordered by the court, the merger will not be effective against them. This means that the objecting creditors of the merging companies cannot pursue the company that owes them without interference from the creditors of other companies.

Contrary to French law, the Algerian legislator provides that the objection of only one creditor does not affect the merger process. The Algerian legislator thus positions itself between those legal systems that give the objection a suspensive effect on the merger, such as Lebanese and Saudi law, and those that state that objections do not stop the merger process, such as French law[28].

However, if there is an agreement between the creditor and the debtor (the merged company) that provides for the extinguishment of the debt in the event of the merger, this agreement must be honoured and the debt will therefore become due immediately, thereby eliminating the suspensive effect.

Section Two: Effects of the Merger on Bondholders

Bonds are negotiable instruments of equal value representing a long-term loan contracted by public subscription[29]. The Algerian legislator originally prohibited the issuance of bonds with the enactment of the Commercial Code in 1975, as stated in Article 699: "The issuance of bonds, profit shares or founding shares is prohibited from the date of entry into force of this law"[30]. However, following a revision by the legislator in Legislative Decree No. 93-08, the issuance of bonds has been authorised and their provisions are regulated in Articles 715 bis 81 to 715 bis 113 of the Commercial Code[31].

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The Algerian legislator, like the French and Egyptian legislators, has given the holders of a single bond issue the status of a collective body, recognising this group as a legal entity. Its purpose is defined as the defence of the common interests of its members, and its representation is entrusted to one or more proxies appointed by the extraordinary general meeting of bondholders. In cases of urgency or if the agents are unable to act, a court may appoint an agent to represent the Group. The agents have the power to take all management actions on behalf of the group to protect the common interests of the bondholders.

Although the Algerian legislator has not made specific provisions to protect the rights of bondholders in the event of a merger, it can be argued that the legislator has empowered the general meeting of bondholders to deal with any amendments that may affect the contract between the bondholders and the issuing company. Article 715 bis 98-1 of the Commercial Code states: “The general meeting of bondholders shall discuss all matters relating to the protection of bondholders and the execution of the loan contract, as well as any proposals aimed at amending the contract or some of its elements”.

In addition, Article 715 bis 103 provides: “The issuing company may not, under any circumstances, impose early repayment of the bonds, unless this is expressly provided for in the issue contract”. Therefore, if the issuance contract contains a clause allowing early repayment of the bonds, the issuing company may repay the value of the bonds before proceeding with the merger.

In the event of a merger, the general meeting of bondholders may be convened to approve any amendments to the indenture resulting from the merger. If the general meeting concludes that the merger does not affect the rights of the bondholders, they become bondholders of the merging or new company. Conversely, if the general meeting decides that the merger affects their rights, the bondholders, through their representative, may object to the merger as ordinary creditors under Article 756 of the Commercial Code and demand repayment of the bond value plus interest. The court may then order the accelerated repayment of the bond value or require sufficient guarantees, as appropriate[32].

It is important to note that only the group of bondholders, through its representative, has the right to file and pursue a lawsuit against the indebted company. Individual actions by bondholders will not be accepted and any decision will be binding on all bondholders, including those who disagree with the group’s position[33].

Conclusion

From the above, we can see that a merger is one of the most significant forms of concentration in the economy, as it involves the consolidation of several legal entities into a single legal entity: the merging company or the new company created as a result of the merger.

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The merger results in the dissolution of legal entities and the transfer of their financial liabilities, assets and obligations to other legal entities. It also results in the liability of the merging companies for the obligations incurred by the merged companies.

The Algerian legislator has addressed the risks of mergers for creditors and bondholders by stating that the merging or new company becomes liable in place of the merged company, without this leading to a renewal of the debt. This means that the debt, with all its characteristics and attributes, is transferred to the merging or new company, making it liable to the creditors. Creditors, whether of the merging company or of the new company, have the right to object to the merger.

Bondholders, through their representative, may also object to the merger and this procedure is treated in the same way as any other objection by ordinary creditors. The court always has the discretion to accept the objection by providing sufficient guarantees for the creditors of the merging company or by accelerating the repayment of the debt. Alternatively, it may reject the request if it considers the objection to be unfounded.

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