

THE LEGAL BALANCE BETWEEN JUDICIAL EXEPTIONS AND PARTNERS RIGHTS TO CHANGE COMMERCIAL COMPANIES IN LIGHT OF EUROPEAN AND ALGERIAN LEGISLATION.



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Abstract:

Commercial enterprises are essential to the economic framework of nations. Legislation is dedicated to their protection and financial support. Additionally, it governs essential liberties, such as the freedom to engage in trade and the ability to alter and consolidate, which allows companies to rejuvenate and enhance their presence in both domestic and global markets. Nevertheless, this transformation may face various practical and legal challenges, especially concerning the entitlements of partners and shareholders.

This study aims to illuminate the exceptions that hinder the transfer of commercial enterprises and how legislators in Europe and Algeria have reconciled these exceptions with the rights of their associated partners.

Key Words: Assignment - Business Entities - Consolidation - EU Regulations - Creditors - Agreements.

الموازنة القانونية بين الاستثناءات القضائية وحقوق الشركاء في تغيير الشركات التجارية على ضوء التشريعين الأوروبي والجزائري.

ملخص: تلعب الشركات التجارية الركيزة الأساسية في اقتصاد الدول، لهذا حرص التشريع على حمايتها وتمويلها، كما حرص التشريع أيضا على تنظيم الحريات الأساسية وإحداها حرية التجارة وحرية التغيير والاندماج حتى تتمكن الشركات من تجديد وتقوية وجودها في الأسواق الوطنية والدولية، إلا أن هذا الانتقال قد يصطدم ببعض الإشكالات العملية والقضائية خاصة فيما يتعلق بحقوق الشركاء والمساهمين فيها، فحاولنا من خلال هذه الدراسة تسليط الضوء على الاستثناءات التي تمنع انتقال الشركات التجارية وكيف وازن المشرع الأوروبي والجزائري بينها وبين حقوق الشركاء التابعين لها.

الكلمات المفتاحية: الانتقال - الشركات التجارية - الاندماج - التشريع الأوروبي - الدائنين - العقود.



Introduction

Commercial companies enjoy a special importance and significance rooted in commercial law in general, and commercial companies law in particular, which is of great importance at all commercial, legal, financial, and tax levels.¹

Commercial companies are not a new topic ; humanity has known them since ancient times.

However, trade has endless boundaries. Every day, a new commercial² contract or legal system emerges, such as commercial contracts.

New forms of commercial companies emerge that were previously unknown, For example Algerian law previously recognized specific types of companies, such as general partnerships, limited liability companies, limited partnerships, joint-stock companies, and jointventures.

Now, it recognizes new types of companies, such as joint-stock companies, enterprises, start-ups, and others, This demonstrates that Algerian law recognizes the one-person company and establishes a legal framework for it, similar to European legislation.

Recent developments have contributed to the creation of a new concept, globalization, which has transformed the world into a small village. This has led to the expansion of corporate activities, such that their trade is no longer confined to the borders of a specific country (domestic or national trade). Today, trade has become more international than domestic.

Trade liberalization has fundamentally contributed to the increased pooling of resources. At a later stage, this liberalization has contributed to enhancing economic prosperity, which has had a positive impact on countries. This prosperity has also had a positive impact on individuals through increased standards of living³.

This positive development in international trade liberalization has resulted in Europe's recognition of four fundamental freedoms:

- the freedom of movement of goods,
- the freedom of movement of persons,
- the freedom of movement of services,
- and the freedom of movement of capital.

¹ - Elias Nassif, Encyclopedia of Commercial Companies, Part One, General Provisions of the Company, 2008, p. 3.

² - For more information on contracts, see Abdul Rahman Al-Sayed Qarman, Commercial Contracts and Banking Operations According to the Legal Systems in the Kingdom of Saudi Arabia, Al-Shaqiri Library, 2010.

³ -PERISISN T.Free movement of goods and limits of regulatory autonomy in the EUand WTO.NewYork ; Cambridge university press, 2008, p1.



These freedoms, in turn, have contributed, in one way or another, to the establishment and completion of the European Union's internal market.

In this context, these freedoms are considered the fundamental essence of establishing economic integration among countries, which has had a positive impact on the economic life of countries and individuals. In addition, these freedoms played a fundamental role in creating a common European market, which has historically been the primary goal of the union between countries, including the European Union.

Foremost among these freedoms is the freedom of movement of persons between countries, which in turn includes two types of freedoms: the freedom of movement of workers and the freedom of movement of businesses, this is because the term "person" includes both natural and legal persons.

In addition, the freedom of movement of businesses is closely linked to commercial law in general and corporate law in particular, as the latter determines whether or not to move freely, this is due to the fact that businesses primarily include commercial companies.

It is worth noting that while the transfer and change of businesses does not raise problems at the national level, the situation differs at the international level, where the freedom of movement of businesses faces some difficulties that, in turn, require reform.

However, the process of transferring and merging commercial companies is subject to certain exceptions, particularly judicial ones, particularly in light of the problem of protecting the rights of partners.

Through this research paper, we have attempted to address the following legal question:

What are the judicial exceptions to the change of commercial companies? How have Algerian and European legislators balanced or preserved the rights of partners after the change of commercial companies? To address this problem, we followed the following plan: In Section One The concept of transfer of commercial companies and the judicial exceptions thereto, And in Section Two Protection of partners after transfer of companies in European and Algerian legislation.

We also followed a descriptive and analytical approach to study and cover all aspects of the topic.



THE FIRST TOPIC : The concept of transfer of commercial companies and the judicial exceptions thereto.

Mergers and acquisitions of commercial companies are manifestations of globalization, economic concentration, and the financial strengthening of companies and their ability to realize their projects. After these companies have built up their internal strength, they have the ability to confront external challenges, turning to international and even global markets.

Since every freedom has a source, the freedom of movement of companies between European Union countries finds its legal and legislative source in successive European agreements and European laws, whether laws or directive decrees.

Therefore, this freedom is not merely a judicial interpretation by the European Court of justice ; rather, there are explicit texts that confirm it.

This practice is not limited to this, as there are preliminary issues that may arise when companies exercise this freedom.

First requirement: Definition of the Transfer and Merger of Commercial Companies:

It is defined as an agreement or contract between more than one national or foreign company, resulting in the transfer of all financial assets and liabilities from the merging company to the merging company, i.e., the cessation of its legal personality and financial assets in favor of the new company. There are several types of transfer and merger, such as amalgamation, merger, or separation⁴.

The importance of transfer and merger between companies lies in the fact that they increase competition between companies, reduce public and private expenses and expenditures, increase productivity, profits, and production, improve the positions of weak and indebted companies, and achieve the highest interest of the country, provided that this change and merger does not entail control or arbitrariness in the national market.

First section : The Nationality of Commercial Companies Wishing to Merge from the Perspective of Algerian Law:

When commercial companies enjoy legal personality, they acquire the nationality of the country to which they belong. It is well known that a company has its own nationality, sometimes different from that of its partners and shareholders. The company is subject to the law of its nationality, known as the company's domicile, which governs all matters related to the commercial company, including legal disputes⁵.

⁴ Article 744 of the Algerian Commercial Code.

⁵ - Rahani Douidar, The Effects of Mergers of Joint Stock Companies, Dar Al-Manshurat Al-Halabi Al-Huquqiya, Beirut, 2017, p. 32.



Algerian legislation addresses only the issue of the nationality of natural persons, not the nationality of the commercial company. It adopts only the principle of the company's domicile or the place of practice of the profession or activity, according to Article 50 of the Civil Code, Article 547 of the Algerian Commercial Code.

According to Article 50, Paragraph 5 of the Algerian Civil Code, foreign companies whose headquarters are located abroad are therefore subject to the law of the commercial activity center. However, if these companies have a branch or agency in Algeria, they are subject to Algerian law simply by virtue of their presence in Algeria. We note from this that the Algerian legislator has subjected these companies to Algerian law and has not granted them Algerian nationality.⁶

Second section: Transfer and Merger of Commercial Companies of Different Nationalities:

The practical issue arises regarding the possibility of transferring commercial companies of the same nationality, or whether they are of a different nationality than the merging company or the one to which they are intended to transfer.

We must first clarify that one of the legal consequences of a merger is changing the nationality of a commercial company, which is not a trivial matter, as it affects the rights of partners and shareholders. Therefore, the law allows partners to freely change the company's nationality with the approval of the other partners.

This is enshrined in Article 104 of the new French Commercial Companies Law of 1977⁷, which stipulates that the law does not grant the extraordinary general assembly the authority to change the nationality of a commercial company unless there is a special agreement concluded between France and the other country whose nationality the company seeks to acquire, which accepts the change of the company's nationality and the transfer of its head office to that country.

Second requirement : Judicial Exceptions to the Transfer and Change of Commercial Companies:

It is common knowledge that a company retains its legal personality after a transfer or change and acquires new rights.

⁶ - Majidi Fathi, Series of Lectures and Lessons in Commercial Law, Ziane Achour University, Djelfa, 2010-2011, p. 134.

⁷ - Which states : "The extraordinarily general assembly may change the nationality of a company, provided that the country of entry has concluded with France a special convention permitting the acquisition of its nationality and the transfer of its social status to its territory, thus preserving the company's legal nationality."



However, there are some exceptions that limit and restrict this transfer for companies, which we will review, particularly in the European Union. The basic legislation has two exceptions :

First section : Exceptions to International Legislation:

The first exception to the freedom of transfer of companies can be found in Article 7 of the European Companies Act No. 2157/2001, which stipulates that the actual location of a European company shall be located in the same member state in which the registered office is located. The European member state must include the registered and actual headquarters of the European company. According to the aforementioned article, a European company cannot transfer its registered office unless it also transfers the actual location from one European member state to another, unless it transfers its registered office with it. This would constitute a major restriction or obstacle to the international transfer of a European company.⁸

In addition to this article that restricts the freedom of change and transfer of a European company, Article 8 of the Act requires that this transfer undergo the following procedures:

1. Proposal for the transfer.
2. Publication.
- 3- A report justifying the transfer.
- 4- A two-month period.
- 5 - General Meeting Resolution.
- 6- Shareholder Protection (Minority Shareholders)
- 7- Employee and Creditor Protection.
- 8- Certification from the Competent Authority.
- 9- New Registration and Publication in the Host European Country.

These procedures constitute an obstacle or impediment to the process of transferring companies because they require time and effort from the individuals responsible for the European company.

Second section : Judicial Exceptions

Examining European legislation, we find it unequal and discriminates between national and foreign companies. These exceptions are illegitimate unless justified by public policy, public security, or the public health of the country.

⁸ -Strom, p van gervend, d the european company. New York: Cambridge University Press;2006, p.19



The European Court of Justice established the second case, which focuses on unequal exceptions to the freedom of transfer of companies that are directed against foreign companies.

There is apparent equality, but in reality, the interests of foreign companies are affected more than national companies. In other words, ⁹there is no direct discrimination, but rather indirect discrimination against foreign companies, justified by the requirements of the public interest or by public interest justifications.

This is what European judiciary has established through the European Court of Justice, which has set four conditions for accepting member states' invocation of public interest issues, as follows¹⁰ :

1. This method must be applied equally and non-discriminatory.
2. It must be proven that it is a necessary condition for achieving the public interest.
3. This method must be proportionate to the desired objective.
4. It must be appropriate to achieve the objective and purpose.

A. Circumventing the law and controlling companies :

In this context, we find that the Danish government has denied the freedom to transfer and change companies through the secondary establishment, i.e., the branch, by refusing to register this new branch under the pretext of protecting public and private creditors and preventing fraudulent and illegal transactions under the guise of fraudulent bankruptcy.

The European Court of Justice accepted this principle, but declared that this method is neither appropriate nor proportionate to achieving the desired objective. It justified this by ruling that this branch, with respect to Denmark, could have been registered if the main establishment located in the United Kingdom had carried out some of its operations, even if it had circumvented creditors residing in Denmark. Considering that creditors can invoke European law to protect themselves rather than invoking national law in their country, Denmark.

The European Court of Justice concluded that the Danish authorities could have enacted other measures that were less restrictive to the freedom of movement of companies and did not lead to a breach or violation of European law.

⁹ - ALTINISIK U Free Movement of Companies within the EU. Ankara Bar Review ; 2012, p.99-118 FROM [Http://www.ankarabarreview.org/pdf/aeb-2012-1-pdf](http://www.ankarabarreview.org/pdf/aeb-2012-1-pdf).

¹⁰ -Reinhard Gebhard v Consiglio dellordine delgi avvocati et procuratori di Milano. Judgement of the European Court of Justice of 30 novembre 1995 , Caseno. C-55/94 ECR I-04165.



B- Protection of Creditors:

The European Court of Justice has ruled in numerous rulings that depriving a company of its legal capacity and not recognizing its legal personality as a party to a legal dispute is considered not only.

Restricting the freedom of transfer of companies is unfair and a clear denial of the principle of free transfer of enterprises, one of the most important principles of the European Convention. Furthermore, it does not achieve the economic objectives of member states¹¹.

The European Court of Justice stated that:

1. With regard to combating the abuse of the principle of free transfer of companies in member states, the country of origin of the company may take measures other than obstructing the free transfer of companies.
2. With regard to protecting creditors, there are other measures to protect them. For example, creditors may rely on European Community law to protect them.
3. With regard to fairness in business and tax expectations, the Court has ruled that the government in many cases, in which countries prohibiting the transfer of companies, has failed to provide any evidence that the criteria of non-discrimination, effectiveness, and proportionality between the measure and the objective sought to be achieved by the member states, are met.

Another example from the records of the European Court of Justice is the SEVIC case, after SEVIC¹² merged with another company that applied to register the merger in the German commercial register. The German authorities refused to register this company, claiming that registration is exclusive to companies established in Germany.

They justified these measures by claiming to protect employees, creditors, and minority shareholders, and to enhance financial oversight and tax expectations. After the court stated that mergers constitute one of the methods for exercising the freedom of transfer of companies (freedom of enterprise movement), it accepted this justification from the German authorities.

These measures were deemed inappropriate to achieve the objectives, and were considered to be beyond the need to achieve them.

¹¹ -CRAIG P. BURCA G EU Law : text , cases and Matials New York ; Oxford University Press.2011, p.784.

¹² SEVIC Systems AG . Judgment of the European Court of Justice of 13Dece.



THE SECOND TOPIC : Protection of Partners After Company Transfers in European and Algerian Legislation:

The process of transferring and changing commercial companies has significant implications for partners, specifically creditors, as well as for certain contracts and agreements related to the company's activity.

First requirement : Protections Provided in European Legislation:

According to Articles 49 and 54 of the Treaty on the Functioning of the European Union, EU citizens are treated equally in all EU member states.

Applying this to companies means that European companies receive the same treatment in all EU member states.

If a company exercises its freedom of transfer by transferring a primary or secondary establishment from one member state to another, this company receives the same treatment as national companies of the country to which the transfer is sought. The European Court of Justice has applied the principle of equality between companies and affirmed that the principle of equality prohibits not only explicit discrimination between national and foreign companies based on nationality, but also includes equality that leads to the same result if we apply another criterion of distinction.

An example of indirect discrimination is when a state enacts a new law stipulating that a contract is exclusively for companies owned or majority-owned by the state. Here, this law ostensibly prohibits Italian or foreign companies from concluding the contract. This is ostensibly because this law equates national and foreign companies with respect to their eligibility to conclude the contract.

Apparently, but implicitly and practically, this law places Italian companies in a position of privilege over foreign companies, which constitutes indirect discrimination¹³.

Therefore, companies established in the European Union receive the same treatment with regard to social services, concluding contracts, and taxes.

This is what we will examine in the following two sections :

First section : Social Security and Concluding Contracts

The principle of equal treatment with regard to social services between foreign and national companies relates primarily to the company's employees, not the company itself. However, this discrimination in social services has several negative effects on the work mechanism of employees, which in turn may hinder the freedom of movement of companies within the European Union.

¹³ Commission of the European Communities v Italian Republic .Judgement of the European Court of Justice of 5 December 1989 p 9



The European ¹⁴Court of Justice has deemed the difference in treatment with regard to social services for managers between national and foreign companies to be illegal and a violation of the Convention, specifically Articles 52 and 58 of the Treaty on the European Community (Articles 49 and 54 of the Treaty on the Functioning of the European Union)¹⁵, Equal treatment under the Convention means that employees of foreign companies enjoy the same benefits as those of national companies.

Employees of foreign companies have the right to register in the social security system, according to the text of the International Court of Justice, “The discrimination between employees in the social security law based on.

Second section : Taxes

The equality of taxation between national and foreign companies represents the true and effective application of Articles 49 and 54 of the Treaty on the Functioning of the European Union.

In reality, the harmonization of corporate tax law within the European Union is weak. ¹⁶This is due to the lack of a legal basis for harmonization and the unanimous vote required for issuing this law within the European Union. This means that it requires the approval of all EU member states before it can be issued.

Consultation with the European Parliament and the Economic and Social Committee, in accordance with Article 113 of the Treaty on the Functioning of the European Union.

The European Court of Justice (ECJ) has had the opportunity to fill the gap created by European legislation, and this gap has been bridged through numerous judicial decisions.

The ECJ has therefore become the primary source of European policy on corporate taxation, refusing to hesitate to address any tax dispute related in any way to the freedoms guaranteed by the Treaty on the Functioning of the European Union.

In one of the controversial cases, the French State v. European Commission,¹⁷ the facts of which are summarized as follows:

The French authorities established a tax regime whereby only insurance companies with a registered office in France could benefit from the tax exemptions granted to

¹⁴ - segers v .Bestuur van de Bedrijfsverning voor Bank -en Verzekeringwezen , Groothandel en Vrije Beroepen . judgment of the European Court of Justice of Discrimination.

¹⁵ - Commission of the European Communities v Italian Republic .Judgement of the European Court of Justice of 5 December 1999

¹⁶ - DE LA FERIA R. FUEST C.THE Economic Effects of European Tax jurisprudence. Oxford University : Centre for Business Taxation 2010, p08.

¹⁷ -Commission v . France Judgement of the European Court of Justice of 28 january 1999



shareholders. This exemption did not apply to foreign companies with branches or agencies in France.

In other words, this decision represents tax discrimination or different tax treatment depending on the location of the company's registered office in France or abroad. France justified this action by claiming that the differential treatment was:

A. a result of the distinction prevailing in tax law between residents and non-residents.

B. a result of double taxation agreements.

In this context, the court ruled that Articles 52 and 49 currently prohibit this discriminatory measure based on these grounds. The court continued, stating that the French government had violated the European Convention.

In particular, Article 52 prohibits granting it or granting branches and agencies of foreign companies the right to benefit from tax exemptions. In the same context, and in numerous separate judicial rulings, the Court has ruled that member states have the right to establish or maintain strict legal rules aimed at excluding a completely artificial system intended to defraud or evade national tax law.

Second requirement: The right of shareholders and partners to object to the merger and change of commercial companies.

The transfer and merger of companies entails a radical change in the merged companies, altering the form of the contract and potentially adding new legal obligations to the transferred or merged company^{18, 19} providing additional protection for shareholders or partners.

This is what most legislation has emphasized, as it stipulates the right to object and reject a decision issued by the general assembly.²⁰

A review of the provisions of Algerian Commercial Law reveals that the legislator did not address this issue, unlike what it did with creditors in merged companies. It did not specify whether or not they have specific rights, according to Article 256, paragraph 2, of the Algerian Commercial Code. This contrasts with the French

¹⁸ Abdul Qader Al-Baqirat, Principles of Commercial Law, Dar Al-Diwan University Publications, Algeria, 2017, p. 36.

¹⁹ Article 234 of the Egyptian Commercial Code.

²⁰ -Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003 amending Council Directive 68/151/EEC as regards disclosure requirement in respect of certain types of companies. OFFICIAL.2003 .L221.13-16.



legislator, who gave shareholders the right to choose between accepting and implementing the opinion and decision adopted by the majority of partners, or withdrawing and selling the shares and bonds on the stock exchange.

First section: The Rights of Shareholders to Withdraw from the Company

The Algerian legislator has adopted the same position as its French counterpart, as it did not recognize any rights of shareholders after the transfer and merger of commercial companies after the issuance of the merger decision by the extraordinary general assembly. Therefore, all shareholders are subject to the transfer decision, whether they support it or oppose it, and the opposing group must submit to this decision by examining comparative legislation, we find that it allows partners and shareholders who reject the transfer or merger decision to recover the value of their name and assets. They are free to withdraw from the company they do not wish to belong to.

In this context, we note that although the Algerian legislature denies shareholders the right to withdraw from a commercial company, it does not force them to remain with the new company. It allows them to withdraw from it and sell their shares on the stock exchange, provided that there is no basic legal system or provision restricting the trading of their shares.²¹

From a legal perspective, it is well known that the merging or transferred company retains its legal personality and financial status. Shareholders and partners also retain their rights and obligations. The law allows them to object to the transfer or merger if it involves fraud or deception, and they have the right to resort to the judiciary to invalidate it. If this is not the case, the transfer remains valid and entails all legal consequences, including the partners' fulfillment of their professional obligations and the enjoyment of their rights.²²

Second section : Effects Affecting Creditors and Contracts After the Transfer of Commercial Companies:

The transfer and merger of commercial companies results in several effects, particularly with regard to the group of creditors and contracts. We detail them as follows:

²¹ Article 756, Paragraph 2 of the Algerian Commercial Code.

²² Hossam Eddine Abdelghani Al-Saghir, *The Legal System for Mergers of Companies*, First Edition, Dar Al-Fikr Al-Jami'i, Cairo, 2004, p. 34



First : Effects Affecting the Group of Creditors:

According to Article 576 of the Algerian Commercial Code : "The company becomes indebted to the creditors of the merged company in the place and location of that company, without this entailing a renewal of the debt for them.

Creditors of the company who participated in the merger process and whose debt was prior to the publication of the merger project may file an objection against the latter within thirty days from the publication stipulated in Article 784 of the Algerian Commercial Code. The merger shall not be effective against this creditor if the debts are not paid or the guarantees ordered to be provided are not established.

We conclude from the text of the article that if only one creditor objects to the merger and transfer of the company, this objection shall be ineffective. The article did not address the problematic issues related to agreements that

It allows for prepayment of debts in the event of a merger or transfer of the transferred or merged company and its debtor to the new company.

From our analysis of Articles 756 and 757, we find that the Algerian legislator has approved some provisions related to the transfer of the debts of the merged company within the provisions of Article 756 of the Commercial Code.

The debts of the merged company are transferred to the merging company or to the new company without this leading to their renewal. Thus, the merging or new company replaces the merged company in fulfilling these debts arising from it prior to the merger.

The Algerian legislator also approved, in Article 757 of the Commercial Code, the principle of the continuation of lease contracts concluded by the merged company as a lessee in order to carry out its commercial activity, for the benefit of the merging or new company. In return, it authorized the owners of these premises to file an objection to the merger

Regarding the effects of the merger on rights holders and creditors, for those with special rights, including investment certificate holders and bondholders, their legal status is determined by whether the merging company has presented the merger proposal to their respective assemblies or offered to repay their rights. If the merging company has offered to repay their rights, the merger has no effect on them.

Unlike if the merger proposal was presented to them, if they accept it, they transfer their rights to the merging or new company in the same capacity.

If they reject the merger, they have the right to resort to the courts to demand the fulfillment of their rights. Creditors of the merging companies, in particular, have the right to file an objection to the merger if their debts arose prior to the merger, as indicated by the Algerian legislator in Article 576.

The Algerian legislator thus provides them with legal protection, particularly if the merging company provides sufficient guarantees to repay their debts. The merging



company becomes liable for their debts. In any case, the Algerian legislator sought to reconcile the interests of the merged company and its creditors, who have the right of priority in collecting their debts to the new company.

There are two types of creditors:

1- Sukuk holders:

To protect the rights of creditors holding sukuk, French law provides them with special protection against both the merging and merging companies, requiring their opinion before presenting it to the general assemblies of the companies, if they accept the transfer and merger, they must collect their debts within three months from the date of notification of the transfer. Consequently, the merging and new companies become indebted to the debtor for the debts, interest, and arrears from the date of the merger. If they do not express a desire to recover their debts within the legally prescribed period, they retain their status as creditors in dealing with the new merged company.

2- Ordinary creditors:

Compared to Egyptian law, we find that it protects the group of ordinary creditors, allowing them to expedite the recovery of their debts while providing the necessary guarantees against the new company, which is obligated to repay the debts with sufficient guarantees.

Second: Regarding leases and employment contracts:

1- Effects of leases after merger:

A lease contract is defined as the lessor's permission for the lessee to exploit and benefit from the leased property in exchange for a monetary price for a specified period of time. By applying this definition to the merging company, one of the implications of the transfer and merger is the continuation of lease contracts for the benefit of the transferred or merged company.

Considering that the premises where trade, customer transactions, and industry are conducted are among the most important elements of any company or commercial establishment, they are the basis for generating profits for the newly merged company.

By examining Article 757 of the Algerian Commercial Code, we find that the legislator has authorized lessors of the merged or transferred companies to file an objection to the transfer or division within two months.

By referring to judicial rulings, we find that the company resulting from the merger continues to operate under the terms of the lease contract.



Without the consent of the landlords, who would have to seek guarantees in the event their rights are infringed as a result of this transfer or merger²³.

The problem arises if there is a dissolving condition preventing the merging company from transferring the lease. The answer is found in French court rulings, which permit the merging company, despite the existence of prohibitive and dissolving conditions, to add new partners and shareholders to the leased premises.²⁴

2- Effects of employment agreements and contracts after a merger:

Referring to the text of Article 2 of the Labor²⁵ Code, which stipulates that if inheritance, transfer, conversion, or the establishment of a company causes a change in the legal status of the owner of the establishment or company, all acquired rights and labor relations remain in effect after this amendment or change between employers, new establishment owners, and workers unless there is a condition or legal provision stipulating otherwise.

Therefore, the newly merged company is responsible for the obligations and burdens in addition to the new obligations arising from the exercise of the activity or work. Considering the provisions of collective relations and agreements, they regulate and prepare working conditions to comply with international standards and agreements ratified by the International Labor Organization.

These agreements generally do not apply to the rule of continuity of employment contracts and agreements after the transfer or merger of a company or institution. This differs from the rule governing individual relations. In this context, we find that French legislation does not stipulate the validity and continuity of collective contracts, unlike what it does with individual relations. The transfer does not apply between the new company and the union, and according to French²⁶ judicial rulings and the provisions of the Commercial Companies Law of 1966, it did not continue. Former members and union representatives on the institution's committees continued their work and duties after the merger and change of institutions and companies, continuing their work for only six months after the transfer and merger.

²³ -Cass.civ.30avril2003,N01-16.697,bull.civ,n88.

²⁴ -Cass.Civ,19 fevrier 1997, N 95-14-826

²⁵ Article 15 of Order No. 75-31 of April 29, 1975, relating to the general conditions of labor relations in the private sector, Official Gazette No. 31.

²⁶ - Cass.Soc.25mars 1971.N70-40.139.bull.Soc.N153.



Conclusion :

Through this research paper, we have attempted to present the possibility of companies moving through the transfer of a primary or secondary establishment within the European Union. Articles 49 and 50 of the Treaty on the Functioning of the European Union are considered controversial by the national courts of member states, and in the same context, by the European Court of Justice. This is because the two articles give companies the right to exercise the freedom of transfer of companies through the transfer of a secondary establishment, without any direct reference in the texts of the Treaty to the freedom of transfer of companies through the primary establishment.

The Court established numerous grounds that states can rely on to justify the non-recognition of the freedom of movement of companies and did not fail to implement them in any case.

A company enjoys numerous rights during or after its relocation, perhaps the most important of which is its right to equality with other companies, whether national or international.

Algerian legislation and the European Court of Justice defined the concept of equality between companies in many of their rulings. The Court addressed what is called discrimination between companies and distinguished between indirect discrimination. The concept of discrimination, whether direct or indirect, includes cases in which local or national companies are placed at a higher or better advantage than foreign companies.

The Court expanded the concept of equality to include not only equality between companies, but also equality between employees working in two different companies, one national and one European. The European Court of Justice did not fail to extend the concept of equality in specific cases, such as social security, to include employees within companies, not just European companies themselves. The European Court of Justice has failed to apply the principle of equality in all tax cases, sometimes denying equal tax treatment between domestic and foreign companies. This in itself may hinder the freedom of transfer of companies through a primary or secondary establishment.

This situation calls for legislation to regulate the transfer of headquarters of companies established within the European Union as a form of freedom of transfer of companies. While the European Companies Act grants companies the right to transfer their headquarters, it limits this right to certain types of companies and sets lengthy and complex conditions for such transfers.

Furthermore, the corporate tax law is not easy to unify and issue, as this law requires the unanimity of all European member states. However, the reality is that



issuing such a law would be beneficial because it would achieve equal tax treatment among European companies.

In addition, the unification of the rules of private international law in Europe is a necessity, especially since it codifies the key factor in determining the law applicable to companies.

This is achieved by all European countries adopting the incorporation theory, which in turn contributes to facilitating the exercise of the freedom of movement of companies within the European Union.

In Algeria, every commercial company with a head office in Algeria is subject to registration, regardless of its nationality. As long as the company is not registered in Algeria, there is no need to re-register its branches or agencies with the commercial registry in which the branch or agency is located.

It is well known that the law does not recognize foreign companies as legal entities unless they are registered in a jurisdiction where they are not recognized prior to registration.

As for relocating the company's head office from the country, the matter is unclear, and here the judiciary plays a crucial role in this regard.

In addition to the role of the judiciary, coordination with the laws and judiciary of other countries is essential. Even if a country were to accept the relocation of the company's head office from its territory without subjecting it to liquidation, the laws of the host country might reject this relocation, requiring the company to be re-established in accordance with its national law. We must not neglect the role of the judiciary, which must facilitate this principle. International agreements must be concluded to regulate this issue, especially as countries are currently working to abolish visa requirements among themselves in order to facilitate matters for natural persons.

Therefore, countries must work to achieve equality not only among natural persons, but also between natural and legal persons, by allowing companies to enter and exit without impeding their freedom of movement. Among the above, we propose the following recommendations:

- The general and legal framework for transfers and mergers between companies must be defined, given the resulting implications, while clarifying its provisions and the rights and obligations arising from it, as it is a contract characterized by ambiguity compared to other ambiguities and raises numerous problems.
- The provisions of the Competition Law are the cornerstone of the process of transferring and merging commercial companies, as they combat the status of dominance and abuse in the Algerian market. The Competition Law also permits mergers between commercial companies, provided that the Competition Council is consulted.



- Companies must specify the necessary conditions for merging to avoid practical problems.
- Among the recommendations presented is the establishment of decisive and clear rules and standards, particularly in the process of merging foreign and national companies, and not leaving them to the whims of partners and employers, which would lead to the nationality of the original national company being changed to a foreign one, negatively impacting the Algerian national economy.

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