RELATIVE PRINCIPLE OF PROHIBITING A COMPANY FROM SUBSCRIBING TO AND PURCHASING ITS OWN SHARES IN ALGERIAN LAW

[1]HORIYA SOUIKI, [2]MOHAMED BESSAS
[1]Professor of law Faculty of law, university of Ain Temouchent, Algeria
horiya.souiki@univ-temouchent.edu.dz
[2]Phd student Member of the laboratory of markets, employment, legislation and simulation in the maghreb countries
Faculty of law, university of Ain Temouchent, Algeria
mohamed.bessas@univ-temouchent.edu.dz

Abstract:
The Algerian legislature has meticulously defined the parameters governing a company's ability to subscribe to and purchase its own shares, establishing a regulatory framework that both prohibits and permits such transactions under specific legal conditions. This dual approach ensures a balance between the prohibition of potentially abusive practices and the allowance for strategic corporate actions that align with the interests of all stakeholders, including shareholders and creditors.
The oversight role of the Securities Exchange Commission is critical in this context, as it monitors the activities of publicly traded companies to prevent any manipulative practices aimed at illegal speculation.
Keywords: Company, Shares, Shareholders, Creditors.

Introduction:
Shares are fundamentally central to the structure of capital companies, distinguished by their unique attributes and characteristics when compared to the partnership model prevalent in personal companies. This distinction is particularly evident in the rights and obligations imposed on shareholders, including the essential feature of share tradability[1].
Capital companies often issue shares to secure financial resources[2], under the stipulation that their nominal value cannot be reimbursed, either wholly or partially, until the dissolution and liquidation of the company. Unlike bonds, which impose a fixed interest burden on the company, shares provide the potential for variable returns based on the success of the company's undertakings, with profit distributions conditioned upon the realization of actual profits[3].
Capital companies may also opt to retire certain issued shares, a decision that can be advantageous for returning capital to shareholders during the life of the project rather than at its culmination. This retirement can take various forms, such as:
_ **Amortization process:** This is governed by Article 715 bis 45 of the Commercial Law[4], which mandates that amortization should be financed through distributable profits and reserves rather than

[1] Abdel-Baki Mohamed Abdel-Feki, "Company's Purchase of Its Shares in Emirati Law", University of Sharjah Journal for Sharia and Legal Sciences, Issue 02, Volume 12, University of Sharjah, 2015, United Arab Emirates, p. 144.
[2] This applies in the case of establishment by public resort to savings, see Articles 595 to 604 of Order No. 75/59, dated September 26, 1975, containing the Commercial Law, amended and supplemented. Also see Executive Decree No. 95/438, dated December 23, 1995, concerning the application of Commercial Law provisions related to joint stock companies and conglomerates, issued on December 24, 1995, Official Gazette Issue 80.

[3] Amira Sedki, "Legal Regime for the Purchase of Shares by the Issuing Company", no edition, Dar Al-Nahda Al-Arabiya, 1993, p. 07.

[4] Article 715 bis 45 of the Commercial Law: "Enjoyment shares are shares for which the nominal amount has been reimbursed to the shareholder through amortization deducted either from profits or reserves. This amortization represents an advance payment to the shareholder for his right in the future liquidation of the company." Also see in this regard Fawzi Atoui, "Commercial Companies in Positive Laws and Islamic Law", first edition, Halabi Legal Publications, Beirut, 2005, pp. 147 et seq.

from capital[1]. This approach protects shareholders from undue risks and ensures that they receive fully benefited shares.

_ **Company purchasing its own shares:** This is the focus of the present study. The repurchase of its own shares by a company is a complex operation that entails significant risks if not properly managed. However, when executed within the confines of the law, it can provide substantial legal and economic benefits to the company [2].

The Algerian legislature has addressed this issue through Legislative Decree No. 93/08 [3], further amended and supplemented in Articles 714 to 715 bis 03 of the Commercial Law, by delineating a careful balance between outright prohibition and specific allowable exceptions, underpinned by a comprehensive set of regulatory controls.

This study underscores the critical nature of the processes by which a company subscribes to and purchases its own shares, highlighting the potential risks of unguarded implementation, which can lead to speculative activities punishable under both the Penal Code and securities regulations. Such activities can adversely affect the interests of shareholders and creditors, as well as the broader corporate interests.

Consequently, the Algerian legislature has intentionally restricted the freedom of companies to subscribe to and acquire their own shares, prompting the need to investigate the following query:

Given the general prohibition by the Algerian legislator on a company’s subscription to and acquisition of its own shares, **what are the limits of this prohibition concerning the parties and transactions involved? Which transactions are exempt from this prohibition as allowed by the legislator?**

This investigation employs a descriptive and analytical methodology to first elucidate the fundamental concepts related to the topic, followed by a detailed analysis of the legal frameworks governing the subscription to a company's own shares, structured as follows:

1: Scope of the Prohibition Principle

The Algerian legislator has meticulously crafted a framework that either directly or indirectly prohibits a company from subscribing to or purchasing its own shares, and extends this prohibition to the act of mortgaging its shares. This legislative approach prioritizes the safeguarding of the company's interests, while also protecting the interests of shareholders and creditors.

It is critical to thoroughly explore the scope of this prohibition, particularly concerning the individuals involved and the nature of the prohibited operations.

1.1: Scope of the Prohibition Principle in Terms of Persons

It is established under Algerian law that a company is prohibited from either directly subscribing to or purchasing its own shares or doing so indirectly through an intermediary who acts in his own name but on behalf of the company. Detailed explanations of these restrictions are as follows:

1.1.1: Prohibition of Direct Purchase Transactions

The direct acquisition or subscription of its own shares by a company is expressly prohibited, as outlined in the first paragraph of Article 714 of the Commercial Law, which states: "It is prohibited for a company to subscribe to its own shares and purchase them directly..."

The rationale for this prohibition is based on several key legal principles:

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[1] Mohamed Moheb El-Din Guerbach, "Legal Regime for the Company’s Purchase of Its Shares", Doctoral Thesis in Law, Faculty of Law, Cairo University, 2004, p. 07.

[2] Haitham Al-Tass, "Mechanism of Share Purchase by Joint Stock Companies in the Securities Market", Damascus University Journal for Economic and Legal Sciences, Issue Two, Volume 35, 2018, Damascus University, Syria, p. 91.

[3] Legislative Decree No. 93/08, dated April 25, 1993, amending and supplementing Order No. 75/59, dated September 26, 1975, containing the Commercial Law, Official Gazette Issue 27, published on April 27, 1993.

— The doctrine of contract in civil law prevents a party from contracting with itself, making it impractical for a company to be both a shareholder and a share subscriber.

— Allowing a company to control part of its own capital would lead to the creation of fictitious shares, undermining the base of capital stability that serves as a general guarantee for creditors.

— The act of a company subscribing to and purchasing its own shares disrupts the principle of equality among shareholders, potentially privileging certain individuals or groups within the company.

— Such transactions affect the supply and demand rules that determine share prices, creating a fictitious demand that results in an artificial increase in share price. The legislator has thus not permitted companies to freely engage in this process but has prohibited it while stipulating conditional relative exceptions where permissible, as detailed below [1].

One critical oversight in the current Algerian legislation is the absence of specific penalties for violations related to a company subscribing to and purchasing its own shares, including the determination of the fate of the acquired shares. Examination of the regulating articles, specifically Articles 806 to 811 of the Commercial Law, reveals no legal provision that explicitly criminalizes this process and penalizes those responsible.

Given the legal principle that analogy cannot be used in criminal matters, and based on the fundamental legal doctrine that there can be no crime or punishment without a law (penal law), the act of a company purchasing its own shares in this situation is deemed permissible under current legislation.

Moreover, despite the existing prohibition, the Algerian legislator has not specified what should happen to shares acquired in contravention of this rule. Is there an applicable annulment regime for them?

The silence of the legislator on this point necessitates an examination of comparative laws. For instance, European Directive 92-101, as stated in Article 21, mandates that shares must be divested within a year from the date of their purchase or subscription if the provisions of the prohibition on a company purchasing its own shares are violated, and they are considered nullified after this period if the divestment has not occurred [2].

1.1.2: The Prohibition of Indirect Purchase Operations

The Algerian legislator's prohibition on a company subscribing to and purchasing its own shares extends not only to direct transactions but also to all indirect methods. This is explicitly stated in the first paragraph of Article 714 of the Commercial Law: "...or by a person acting in his own name on behalf of the company."

This inclusion broadens the prohibition to encompass scenarios where, for instance, a newly established subsidiary within the economic unit of a corporate group undertakes such transactions.

Although a subsidiary or a newly formed company maintains legal independence, its economic dependency on the parent company arises from significant ownership or control exerted by the latter [3].

The legal standing of transactions where a subsidiary purchases shares from the parent company for its own account generates considerable debate among scholars. Some argue that such transactions should

[1] Mohamed Moheb El-Din Guerbach, op. cit., p. 22.

[2] Article 21 "Shares acquired in violation of the provisions of Articles 19 and 20 must be disposed of within a year from their acquisition. If not disposed of within this period, paragraph 3 of Article 20 applies." Directive 92/101/EEC of the Council, of November 23, 1992, amending Directive 77/91/EEC concerning the formation of public limited companies as well as the maintenance and alterations of their capital (OJEC 1992 L 347, p. 64).

[3] For more details on the provisions of subsidiary companies in Algerian law, see Souiki Horiya, "Protection of Factional Interests under Economic Unity in Corporate Conglomerates", no edition, Dar Al-Jami'a Al-Jadida, 2018, p. 49 et seq.

be deemed valid unless it can be demonstrated that there was a deliberate agreement and that the primary intent was to benefit the parent company [1].

However, European Directive 92-101, specifically Article 24 bis, clarifies that the subscription of shares in a joint-stock company (parent) by a subsidiary, which controls the majority of voting rights or exercises control over the parent company, whether directly or indirectly, should be regarded as conducted for the benefit of the parent company [2].

From the provisions of this directive, it is presumed that such subscriptions indicate a coordinated effort to conduct transactions under a fictitious name, potentially conflicting with the interests of the subsidiary. Yet, it's important to note that no specific provision mirrors this scenario in the Algerian Commercial Law, despite regulations concerning corporate groups found in Articles 729 to 732 bis 4.

In scenarios involving individual actors, where transactions are executed by a person under a fictitious name, the burden of proof shifts significantly. It is insufficient to merely establish a link or relationship between the company and the fictitious shareholder acting as an intermediary.

It must be convincingly shown that the transaction was carried out for the benefit of the company issuing the shares, particularly at the critical juncture of subscription, purchase, or mortgage of the shares. In such cases, the claimant is entitled to use all available means of proof to substantiate their claim [3].

Additionally, according to Article 715 of the Commercial Law, any subscriber or holder of shares in this context is mandated to jointly pay the value of the shares with the founders, board members, or managers, as applicable. This provision treats the transaction as if it were subscribed to for the person's own account.

Despite these detailed regulations, ambiguities persist. A closer examination of Articles 714, first paragraph, and 715 of the Commercial Law indicates that while the legislator prohibits a company from subscribing to and purchasing its own shares through an individual acting independently yet on its behalf, Article 715 lacks specific legal repercussions for such actions.

The content of this article appears to adopt the theory of appearances, treating the holder of shares under a fictitious name as a bona fide shareholder, which introduces a layer of complexity and ambiguity necessitating legislative clarity and intervention [4].

1.2.: Scope of the Prohibition Principle in Terms of Transaction Subject

The prohibition principle governs transactions involving a company's own shares, specifically those that encompass subscription, purchase, or mortgaging. This section delineates the specifics of these transactions.

1.2.1: Prohibition of Company's Subscription and Purchase of Its Own Shares

As established by Legislative Decree No. 93/08, the Algerian legislator has instituted a comprehensive prohibition against both the subscription and purchase of a company's own shares, whether conducted directly or indirectly. This legislative decree reinforces the absolute prohibition on the company's subscription to its own shares, acknowledging no exceptions to this rule due to the substantial risks such activities pose.

These risks include the potential creation of fictitious capital, which could destabilize the financial foundation of the company. The principle of absolute prohibition in terms of subscription emphasizes

[1] Mohamed Moheb El-Din Guerbach, op. cit., p. 45 et seq.

[2] Article 24 Directive 92/101/EEC "The subscription, acquisition or holding of shares of the public limited company by another company within the meaning of Article 1 of Directive 68/151/EEC, in which the public limited company directly or indirectly owns the majority of voting rights or on which it can exercise directly or indirectly a dominant influence, are considered to be done by the public limited company itself."

[3] AmiraSedki, op. cit., p. 140.

[4] Ben Aich Wided, "Company's Purchase of Its Shares between Permission and Prohibition", Journal of Legal and Political Research and Studies, Issue Seven, 2015, University of Blida, p. 243.

the seriousness of these concerns and categorically rejects any form of relativity or exception to this rule [1].

1.2.2: Prohibition of Company's Mortgaging Its Own Shares

The prohibition also extends to the mortgaging of a company's own shares. This is explicitly stated in Article 715 bis 3 of the Commercial Law, which declares: "It is prohibited for the company to mortgage its own shares, either directly or through a person acting in his own name on behalf of the company."

The rationale behind this prohibition lies in the need to uphold the true value of capital, which serves as a fundamental guarantee for creditors. Furthermore, this prohibition ensures that shareholders maintain a genuine commitment to fulfilling the value of the subscribed shares.

Allowing companies to mortgage their shares to shareholders and secure loans against them could lead to scenarios where the capital becomes fictitious and illusory, thus undermining the financial integrity of the company [2].

2: Conditions for Lifting the Prohibition and the Validity of Such Actions

In certain exceptional circumstances, the Algerian legislator allows for the lifting of the prohibition on a company purchasing its own shares, subject to stringent conditions designed to prevent speculative practices. The jurisprudence outlines these conditions to ensure the legality and propriety of such transactions.

2.1: Cases for Lifting the Prohibition

The provisions of the Commercial Law, specifically in Articles 714, second paragraph, and 715 bis, detail the scenarios under which the prohibition can be lifted:

2.1.1: Case of Capital Reduction

Article 714, second paragraph, of the Commercial Law provides a clear instance where the prohibition may be lifted: "…however, the general assembly that decided on an unjustified capital reduction for losses may allow the board of directors or the board of managers to purchase a specific number of shares for cancellation."

This clause allows the company to engage in the purchase of its own shares for the explicit purpose of capital reduction. Such a transaction must follow established procedures for capital reduction, which necessitate a resolution by the extraordinary general assembly.

This assembly must specify that the reduction will be effected through the acquisition and cancellation of a predetermined number of shares, ensuring that the reduced capital does not fall below the legally mandated minimum. Additionally, the capital reduction plan must be supported by an auditor's report, which assesses the reasons for and terms of the reduction.

This report must be made available to the shareholders at least fifteen days before the extraordinary general assembly meeting convened to decide on the reduction [3].

2.1.2: Case of the Company Purchasing Its Shares to Regulate Stock Prices

Under specific conditions, the Algerian legislator permits a company to purchase its own shares, primarily when such shares are listed on the stock exchange, and the objective is to regulate stock prices. This exemption is detailed in Article 715 bis of the Commercial Law.

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[1] Mohamed Moheb El-Din Guerbach, op. cit., p. 51.

[2] Ibid., p. 53 et seq.

[3] Article 712 of the Commercial Law: "The extraordinary general assembly deciding on capital reduction, which may delegate all powers to achieve this to the board of directors or the board of managers, as applicable. However, it may not under any circumstances violate the principle of equality among shareholders. The capital reduction project must be communicated to the auditor at least forty-five days before the assembly meeting. When the board of directors or the board of managers, as applicable, carry out the process based on the assembly's delegation, a record of this is made and submitted for publication, and the necessary amendment to the charter is made."

When a company listed on the stock exchange notices a decline in the prices of its shares, it may decide to intervene by buying back its shares from the market. This action is based on the principle that stock prices are governed by market forces of supply and demand. By issuing a buy order, the company can potentially influence the market's perception, indicating a renewed demand for its shares, which, in turn, might lead to an appreciation in their value [1].

According to the second paragraph of Article 715 bis of the Commercial Law, before proceeding with such a purchase, a company must first secure a license from the ordinary general assembly.

This license must specify several crucial details, including the maximum price at which the shares can be purchased, the minimum price at which they can be sold, the maximum number of shares the company is allowed to hold, and the timeframe within which this holding must be completed. Importantly, this license is valid for a maximum term of one year.

Following the acquisition, the company is obligated to keep the Securities Exchange Regulation and Monitoring Committee fully informed regarding the planned transactions and the acquisitions that have been made. The company must also furnish any clarifications or respond to queries as deemed necessary by the committee. Failure to comply with these requirements can result in the non-execution of the company's orders, whether these are issued directly or indirectly [2].

Legislative frameworks such as Legislative Decree No. 93/10[3] , later amended and supplemented by Law 03/04 [4], and preceded by Legislative Decree No. 93/08—an amendment and supplement to the Commercial Law—have been pivotal in organizing the securities market, particularly concerning joint stock companies and securities transactions.

A key requirement for a company listed on the stock exchange that intends to purchase its own shares is the submission of an informative memorandum to the committee. This memorandum is regulated by Article 03 of Regulation No. 96/02, which outlines the essential information that must be disclosed by companies and entities publicly resorting to savings when issuing their securities [5]. The memorandum should include:

- An overview of the securities' origin and their organizational structure, providing details such as the corporate name, address, legal form, date of establishment and expiration, and other pertinent general information, along with insights into its social capital and the distribution of shares among shareholders.
- Detailed information on the specific transaction being proposed, including its characteristics.
- A comprehensive clarification of the issuer's activity development, offering a narrative of the company's history, its administrative structure, and general characteristics of its activities, along with information about the company's branches.

Furthermore, the issuer is required to deposit the draft memorandum with the committee for endorsement, at least two months before the issue date. This submission must be accompanied by several documents:

- A draft information statement providing a succinct summary of the contents of the informative memorandum.
- A copy of the company's charter or internal regulations.

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[1] Samah Hussein Ali Al-Rikabi, "The Nature of the Company’s Purchase of Its Shares in the Securities Market", Babel University Journal for Human Sciences, Issue Four, Volume 28, Babel University for Human Sciences, 2020, Iraq, p. 157.

[2] Article 715 bis 1 and Article 715 bis 2 of the Commercial Law.

[3] Legislative Decree No. 93/10, dated May 23, 1993, related to the securities exchange, Official Gazette Issue 34.

[4] Law No. 03/04 dated February 17, 2003, amending and supplementing Legislative Decree No. 93/10, related to the securities exchange, Official Gazette Issue 11.

[5] Regulation No. 96/02, dated June 22, 1996, Official Gazette Issue 36, amended and supplemented by Regulation No. 04/01, dated July 8, 2004, Official Gazette Issue 22.

- The minutes from the meeting of the competent body that decided on and authorized the issuance operation.
- The most recent financial statements.

The committee may also request additional documents from the issuer to verify the authenticity of the financial assets being issued.

2.2: Conditions for the Validity of Operations Exempted from the Prohibition

In the context of a company purchasing its own shares, certain conditions must be met to ensure the validity of these transactions. Legal scholars, drawing on established jurisprudence, have identified a range of interests that need to be safeguarded for such transactions to be considered valid:

2.2.1: Protection of Creditors' Interests

The interests of creditors are paramount when a company decides to purchase its own shares, as such actions impact the principle of capital stability. It is critical that the company does not undermine the general guarantee for creditors by reducing its capital or distributing what would effectively amount to fictitious profits to shareholders.

While there are exceptions allowing for capital reduction under specific circumstances, as previously noted, strict adherence to publication procedures is required. This action is considered a charter amendment and, if not properly executed, may result in the invalidity of the transaction.

Notably, creditors prior to the amendment cannot lay claim against the reduced capital. The financial resources utilized for purchasing shares must come from free reserves or profits that are not earmarked for other obligations [1].

2.2.2: Protection of Shareholders' Interests and the Company's Interests

Beyond considering creditor rights, the validity of transactions involving a company purchasing its own shares also hinges on the protection of shareholder interests, ensuring adherence to the principle of equality among shareholders. This equality pertains to shares of identical value and encompasses equivalent rights and obligations.

The transaction must not disrupt the established balance of equality among shareholders. Furthermore, it is essential to respect the principle that allows a partner to remain in the company and the principle of free transferability of shares.

When a partner exits the company, whether through the sale or redemption of shares, they lose their status as a partner, along with associated rights. This departure also impacts the remaining shareholders, who may then have to shoulder a greater share of any losses the company might incur in the future.

Additionally, the company's interests must not be overlooked in these transactions. The decision to purchase its own shares must be made by the appropriate corporate authority and must unequivocally benefit the company. This ensures that the operation is not only legally compliant but also aligned with the company's strategic objectives and financial health [2].

Conclusion

The process of a company subscribing to and purchasing its own shares carries inherent risks that can adversely affect both creditors and shareholders. Creditors face potential harm due to impacts on the principle of capital stability, while shareholders may be deprived of their enduring right to remain associated with the company.

[1] Amira Sedki, op. cit., p. 29.

[2] For more detail, see Amira Sedki, op. cit., pp. 37-55.

Furthermore, if such transactions are executed contrary to legal stipulations, they could jeopardize the project itself. The same concerns extend to the actions involving the mortgaging of company shares.
Our comprehensive analysis of the topic reveals clear legislative distinctions in how different transactions are regulated. While the subscription of shares for the purpose of capital increase is unequivocally prohibited, similarly stringent restrictions apply to transactions involving the mortgaging of shares.
However, the legislator has tempered the prohibition regarding the purchase of shares, prescribing specific conditions under which these transactions may proceed. These conditions include cases of capital reduction and circumstances where a company purchases its shares to stabilize or regulate stock prices.
Given the complexities and potential for adverse effects highlighted by our study, several legislative enhancements are proposed to refine the regulation of these financial activities:

- It is imperative for the legislator to reevaluate and amend the current legal frameworks governing the subscription, purchase, and mortgaging of a company's shares.
- There needs to be clear legal guidance on the outcome of shares that are acquired in violation of the established prohibitions.
- The ambiguity currently surrounding Article 715 of the Commercial Law requires resolution. This article should be rewritten to eliminate any contradictions between the prohibitive and permissive aspects of subscribing to and purchasing shares under a fictitious name and on behalf of the company.

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Legal text

[1] Order No. 75/59, dated September 26, 1975, containing the Commercial Law, amended and supplemented.

[2] Law No. 03/04 dated February 17, 2003, amending and supplementing Legislative Decree No. 93/10, related to the securities exchange, Official Gazette Issue 11.

[3] Legislative Decree No. 93/08, dated April 25, 1993, amending and supplementing Order No. 75/59, dated September 26, 1975, containing the Commercial Law, Official Gazette Issue 27, published on April 27, 1993.

[4] Executive Decree No. 95/438, dated December 23, 1995, concerning the application of Commercial Law provisions related to joint stock companies and conglomerates, issued on December 24, 1995, Official Gazette Issue 80.

[5] Regulation No. 96/02, dated June 22, 1996, Official Gazette Issue 36, amended and supplemented by Regulation No. 04/01, dated July 8, 2004, Official Gazette Issue 22.

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