THE PREFERENTIAL RIGHT TO SUBSCRIBE AS PROTECTION FOR EXISTING SHAREHOLDERS

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Abstract:
The Algerian legal framework has accorded a variety of financial privileges to shareholders of joint-stock companies, one of the most prominent being the preferential subscription right. This right is essential for current shareholders to safeguard their stakes in the company against potential dilution due to the arrival of new investors. It becomes particularly pivotal during capital increases, ensuring that existing shareholders can retain their relative ownership percentages. This safeguard is automatically invoked whenever the company opts to augment its capital, underscoring its significance in maintaining shareholder equity.
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1. INTRODUCTION:

The establishment of a robust legal environment is imperative for stimulating the Algerian national economy. Despite considerable individual initiatives, the realization of large-scale projects requiring collective investment and significant capital accumulation has remained challenging.[1]
This necessity has spurred the development of the commercial company model, which exists at the intersection of contractual agreements and legal frameworks. Although fundamentally a contract, a company is distinguished by its creation of a legal entity that possesses its own juridical personality, enabling it to actively participate in the economic sphere. The joint-stock company is particularly lauded as the quintessential structure for capital-intensive enterprises.
These companies are designed to amass funds for the execution of commercial or industrial ventures that address societal demands, thereby catalyzing economic development and propelling the national economy forward. Given the substantial influence and rapid expansion of these entities, primarily concentrated in a few hands, even capitalist regimes have approached this corporate form with caution. [2]
While the genesis of the first joint-stock company can be traced back to France, it was not until the 1807 codification of commercial law that its establishment necessitated prior authorization to safeguard public investments. The autonomy to establish these companies freely was only realized during the Industrial Revolution.
The notion of subscription is intrinsically linked to the establishment of a securities market, facilitating the exchange of stocks and bonds, which plays a crucial role in bolstering the economic infrastructure and commercial landscape of the country. This corporate form has thus garnered significant legislative attention, motivated by the objectives of protecting investors' savings and exerting control over the national economy.
Although the legislation has not explicitly defined it, leaving the task to legal scholars as is often the case, the judiciary and academia have made concerted efforts to articulate it as a declaration

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[1] Hind Qassi Abdallah, *The Rights Attached to Shares in a Joint-Stock Company*, PhD thesis, Private Law specialization, Faculty of Law, University of Algiers-1, Benyoucef Benkhedda, 2017-2018, p.1.
[2] Abdelkader Hemr Al-Ain, *The Legal System of the Establishment of a Joint-Stock Company*, no edition, New University House, Alexandria, 2013, p.4.

of intent to partake in a company's venture by allocating a portion of the capital, represented by a certain number of shares.

Dr. Aziz Al-Akili characterizes this as a "legal act wherein an individual, termed a subscriber, pledges to acquire one or more shares of the company, remitting the nominal value on the stipulated dates and in the agreed proportions, as outlined in the contract and bylaws, thereby becoming a shareholder in the company." [3]

Professor Ayman Al-Shanti elucidates it as a "commitment by an individual to engage in the capital of a general joint-stock company based on a prospectus and issuance conditions, which must be unconditional, binding the subscriber to fulfill payment for the shares they have opted into, while obligating the company's founders to issue the subscribed shares."[4]

The journey of company formation commences with the subscription process. There are two primary methods of subscribing to shares in a joint-stock company: closed or private subscription, exclusive to the founders, and public subscription, open to the general populace.

Key steps encompass the preparation of a prospectus, a subscription application form, and the collaboration with licensed financial institutions or banks to manage the subscription process. Additionally, the public subscription offer must be publicized in at least two local newspapers.

The subscription is documented in a formal agreement that specifies the number of shares subscribed, the subscriber's endorsement of the company's contract and bylaws, the office address, and all pertinent details[5]. Subscription conditions include formal prerequisites like the creation of a subscription prospectus as mandated by Article 595 of the Algerian Commercial Law, alongside general substantive conditions such as capacity, consent free of defects, the subject matter, and the foundational cause.

Specific substantive conditions also exist, such as the requirement for the subscription to encompass the company's entire capital, which must be definitive, executed, and irrevocable, and initiated by no less than seven individuals.[6] To mitigate potential disadvantages to existing shareholders, the legislator has endowed them with the preferential right to subscribe to new shares equivalent to the capital increase, a privilege reserved exclusively for existing shareholders.[7]

The Algerian legislator has meticulously delineated the preferential right to subscribe in numerous articles of the Algerian Commercial Law, specifically Articles 694, 715 Repeated 111, 823, 825, Articles 695 to 701, 715 Repeated 49, Articles 715 Repeated 66, 715 Repeated 118, and 715 Repeated 123.

These provisions collectively affirm the uniform right of shareholders, irrespective of the nature of their shares, whether cash or in-kind, ordinary or preferred, capital or enjoyment shares, to prioritize acquiring new shares and other transferable securities. This right is fundamentally designed to maintain shareholders' stakes within the company should they opt to exercise it; alternatively, opting out leads to a redistribution of these rights among the shareholders, each of whom retains the autonomy to exercise this right as they see fit.[8]

To elucidate further, it is essential to address the following legal query: How has the legal framework surrounding the preferential right to subscribe bolstered the protection of shareholders in a joint-stock company?

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[3] Aziz Al-Akili, *The Mediator in Commercial Companies: A Comparative Legal and Judicial Study*, 1st edition, Dar Al-Thaqafa, Jordan, 2008, p.201.

[4] Ayman Al-Shanti and Amer Shaqir, *Principles of Commercial Law*, 1st edition, Dar Al-Bidaya Publishing, Jordan, 2005, p.213.

[5] Accessed on April 2, 2020, at 23:07, on *Concept of Depression*, mawdoo3.com.

[6] Accessed on April 2, 2024, at 23:07, *Subscription*, Universitylifestyle.net.

[7] Ghada Ahmed Issa, *Agreements in a Joint-Stock Company*, 1st edition, Modern Study of the Book, Tripoli-Lebanon, 2008, p.72.

[8] Hind Qassi Abdallah, op.cit., p.162.

2. The Concept of the Preferential Right to Subscribe

Roblot and Ripert have insightfully commented on the preferential right to subscribe as "the legal embodiment of a shareholder's claim over the company's assets, as the issuance of new shares dilutes his proportionate share in these rights[9]."

The mechanism for capital augmentation through the issuance of new shares necessitates their offer for public subscription, introducing competition from potential new shareholders not previously part of the company. This scenario does not infringe upon the original shareholders' entitlements, thanks to the legislative provision of the preferential right to subscribe.[10]

2.1 Definition of the Preferential Right to Subscribe, Conditions for Its Exercise, and How Existing Shareholders Can Benefit from It:

This section will elaborate on defining the preferential right to subscribe, outline the conditions under which it can be exercised, and explain how it benefits existing shareholders, with detailed elaboration in the subsequent subsections.

2.1.1 Definition of the Preferential Right to Subscribe

The preferential right to subscribe is a legislatively granted privilege that safeguards existing shareholders' interests within the company[11], which could be diluted by the entry of new shareholders.

This right extends to their share in the reserves, which new shareholders would also lay claim to upon joining the company, and their voting rights, which could be diluted if new shareholders come to hold a majority. It enables them to preserve their initial capital stake in the company and facilitates the process of capital increase.

This right is universally bestowed upon every shareholder when the company's capital is increased, proportional to the value of their shares, and is exercised on an egalitarian basis among shareholders. Notably, the legislator has introduced an exception for preferred shares, which are endowed with a priority that supersedes even this general preferential right, granting these shares an enhanced status in subscription rights compared to ordinary shares.

This right can also be exercised by the "bare owner" should the shares be burdened with a usufruct, permitting the beneficiary to act in their stead if they forego this opportunity. [12]The legislation grants flexibility in setting the term for exercising this subscription right, stipulating a minimum duration of 30 days from the commencement of the subscription period.

This right, known as the "right for all shareholders to enjoy the priority in subscribing to the shares issued by the company during an increase in its capital, proportional to their shareholdings,"[13] is also referred to as the "irreducible subscription right." It is deemed a personal right aimed at fostering equity among shareholders. The priority subscription right serves as a safeguard for the interests of existing shareholders within the company.

The legal framework for this right, influenced by its French analogue[14], is clearly articulated in Article 694 of the Commercial Law. It states: "shares include the preferential right in subscribing to capital increases for shareholders proportional to the value of their shares, the preferential right in

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[9] As (R) Roblot and (G) Ripert put it: "It is the legal translation of the right that belongs to the shareholder over the company's assets; the issuance of new shares would diminish their share of this right." (G) Ripert and (R) Roblot, *Les sociétés commerciales II*, Tome 1, Volume 2, 19th edition, L.G.D.J., Paris, p.621.

[10]Ait Mouloud Fateh, op.cit., p.82.

[11] Definition of subscription: It is the declaration of the subscriber's desire to join the company under formation by contributing a specific number of shares in its capital. The subscription is the commitment to contribute and the completion of this contribution constitutes the fulfillment of this obligation.

[12] The meaning of exercising this right by the owner of the usufruct and the neck owner: In principle, the neck owner exercises the preferential right to subscription because they own part of the capital, while the usufructuary only holds a right over it.

[13] Jasem Farouk Ibrahim, *The Rights of Shareholders in a Joint-Stock Company*, Halabi Legal Publications, Beirut, 2008, p.142.

[14] Philippe Merle, *Commercial Law, Commercial Companies*, 19th edition, Dalloz, Paris, 2016, p.337.

subscribing to cash shares issued to achieve capital increase, and any condition contrary to this is considered as non-existent."

From this provision, it is evident that when a company seeks to augment its capital by issuing new shares, the legislator equips existing shareholders with a compensatory mechanism for potential dilution of their rights, commonly known as the preferential subscription right.

This right enables each shareholder to proportionally subscribe to the new shares according to their existing holdings, thereby maintaining their stake and influence within the company. This scenario, termed the "unreduced subscription right," ensures that existing shareholders are given precedence over new investors, who have not contributed to past efforts, in subscribing to these shares.

The principle of fairness mandates that new shareholders should not partake in the gains from previously invested capital, reserving this privilege for those who have historically invested[15]. Recognized as a fundamental shareholder right, the Algerian legal texts mandate that either the general assembly or the board of directors may only abrogate this right under specific conditions and procedures, treating it as a public order issue.[16]

2.1.2 Conditions for Exercising the Preferential Right to Subscribe

This right is fundamentally integral to the shareholders, empowering existing shareholders to subscribe to new shares issued by a joint-stock company. Various legislations outline specific conditions to qualify for the preferential right to subscribe to new shares, encapsulated as follows:

- Universality of the right, this right is uniformly available to all shareholders, precluding any exclusive grants to specific categories; it is a universal entitlement among shareholders. Should the company attempt to favor one group over another, such an action would be deemed arbitrary and subject to annulment upon the request of the disadvantaged shareholders.
- Existing shareholders are entitled to this right when the company opts to increase its capital by issuing new cash shares. This right does not come into play when the capital increase involves incorporating reserves, as these shares are not publicly offered, thereby eliminating any competition between new and existing shareholders regarding company outputs.[17]
- The authority to increase capital must originate from the Extraordinary General Meeting, which holds the primary jurisdiction over such decisions. This resolution serves as the "birth certificate" for the activation of preferential rights.[18]
- The preferential right to subscribe must consider the proportion of shares each shareholder possesses. This right, known as the "Irreducible Right", allows shareholders to subscribe to new shares in proportion to their existing holdings and is inherently non-dilutable. Should any shares remain unsubscribed by the initial shareholders, these are then re-offered to them in accordance with their original share proportions, now termed the "Reducible Right".
- The legally mandated period of 30 days for exercising this right must be strictly observed, reflecting the company's need to balance timely capital expansion with the interests of the

[15] Fatiha Ben Azzouz, *Protection of Minorities in a Joint-Stock Company*, Master's thesis in Private Law, Faculty of Law, University of Abou Bakr Belkaid-Tlemcen, 2007-2008, p.59.

[16] Ait Mouloud Fateh, op.cit., p.83. In this regard, Philippe Merle states: "The right to subscription is of public order and is protected by criminal law." Philippe Merle, op.cit., p.337.

[17] Fatiha Ben Azzouz, *The Role of the Stock Exchange Operations Regulation and Control Committee in Protecting Shareholders in a Joint-Stock Company*, PhD thesis in Law, Private Law specialization, Faculty of Law and Political Science, University of Abou Bakr Belkaid-Tlemcen, 2015-2016, p.188.

[18] Asma Ben Ouerad, *Protection of Shareholders in a Joint-Stock Company*, PhD thesis in Law, Business Law specialization, Faculty of Law and Political Science, Department of Private Law, University of Abou Bakr Belkaid-Tlemcen, 2016-2017, p.61.

shareholders, ensuring that the period for exercising the preferential right is not arbitrarily determined.[19]

- Improper allocation of this right can lead to the nullification of the capital increase decision. Furthermore, management and accounting officials may face legal actions if found guilty of abusing their authority by denying shareholders their legitimate priority in subscription. This is articulated in Article 450 of the French Company Law, underscoring the serious implications of such misconduct.
- The preferential right to subscribe is not deemed a matter of public order according to Article 697 of the Algerian Commercial Code.[20] This classification permits parties to forge agreements that may either disregard or implement this right at their discretion. As such, it is characterized as an individual right available to any shareholder and can be extended to all or selectively to certain groups. Any decision to forgo this right must be authorized by the Extraordinary General Meeting, underscoring the discretionary nature of this right. This arrangement accommodates the scenario where a shareholder might choose to waive their right.
- As outlined in Article 694, Paragraph 4 of the Algerian Commercial Code, this right is distinctly transferable during the subscription period, separate from the share itself. The provision specifies: "This right is transferable during the subscription period if the bond is detached from the same traded shares and is transferable under the same conditions applicable to the share itself, if the opposite is true."[21]

2.1.3 How Existing Shareholders Can Benefit from This Right

This right is impartially granted to all shareholders, whether part of a minority or a majority, ensuring equitable treatment and preventing any group from being excluded. If the company elects to confer this right to a specific faction excluding others, such an act would be deemed arbitrary and could be contested by those adversely affected, demanding its annulment.[22]

The preferential right to subscribe is activated when the company opts to augment its capital with cash shares. It is crucial to recognize that shareholders are afforded only a 30-day window to subscribe to the new shares, as prescribed in Article 702, Paragraph 1 of the Algerian Commercial Code. This limitation prevents long delays in subscription that might arise from shareholder inattention.

Moreover, the dynamic nature of commercial operations and potential internal changes within the company necessitate quick decision-making processes. However, should some shareholders decline to subscribe to the new shares, these shares are then re-offered to the existing shareholders under what is known as the "Reducible Preferential Right". Reinforcing the conditions outlined in Article 694, Paragraph 4, this right remains transferable during the subscription phase if the bond is severed from the traded shares and can be relinquished either individually or jointly with the share.[23]

2.2 The Nature and Classification of the Preferential Right to Subscribe

This section delves into the essence and importance of the preferential right to subscribe, with a particular focus on minority shareholders. It will also address the legal categorization and the underlying reasons for establishing this right, structured into two distinct sub-sections.

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[19] Fatiha Ben Azzouz, op.cit., pp.188-189.

[20] Article 697 of the Algerian Commercial Code states: "The general assembly that decides to increase the capital may cancel the preferential right to subscription, and the deliberation on this matter is subject to annulment if it is not based on a report from the board of directors or the management board, as appropriate, and a report from the auditors."

[21] Karim Taibi, *The Legal Nature of Securities Issued by Joint-Stock Companies: A Comparative Study*, Master's thesis, Private Law specialization, Faculty of Law and Political Science, University of Abou Bakr Belkaid-Tlemcen, pp.68-69.

[22] Cash share: It is the portion that a shareholder commits to paying in cash, as stipulated in Article 699 of the Algerian Commercial Code.

[23] Fatiha Ben Azzouz, *Protection of Minorities in a Joint-Stock Company*, op.cit., pp.59-60.

2.2.1 The Nature of the Preferential Right to Subscribe and Its Importance for Minority Shareholders

In this section, we will explore both the nature of the preferential right to subscribe and the importance of this right for minorities as follows:

2.2.1.1 The Nature of the Preferential Right to Subscribe

According to Article 694 of the Algerian Commercial Code, the Algerian legislator deems this right as one of the fundamental rights of a shareholder, emphasizing its protection against infringement.

This right serves as a compensatory mechanism to offset any potential dilution of the interests of existing shareholders caused by the entrance of new shareholders and their potential impact on the company's outcomes. The definition and enforcement of this right vary across different legal systems.

For instance, the Algerian legal framework classifies it as a fundamental right underpinned by mandatory legal provisions, which neither the General Assembly nor the Board of Directors has the authority to abolish or limit, considering it an element of public order.

In contrast, the French legal system has evolved, no longer categorizing this right as a matter of public order, thus allowing the Extraordinary General Meeting the discretion to abolish this right based on recommendations from the Board of Directors or the auditor, if it aligns with the company's strategic interests. This reflects a significant divergence in approach between the Algerian and French legislations.[24]

2.2.1.2 The Importance of the Preferential Right to Subscribe for Minority Shareholders

The preferential right to subscribe is particularly vital for minority shareholders, providing them with a pathway to potentially enhance their stake in the company's capital. This right can be especially beneficial in scenarios where the majority shareholders choose not to subscribe to new shares, thereby offering minority shareholders the opportunity to increase their holdings. [25]

Such opportunities are crucial in companies with significant market influence, as they present a strategic avenue for minority shareholders to approximate the influence of majority shareholders, ensuring they do not miss out on potentially advantageous capital adjustments.

However, as stipulated in Article 697 of the Algerian Commercial Code, the Extraordinary General Meeting may decide to abolish the preferential right to subscribe if it is deemed beneficial for the company's overarching goals. This may occur in instances where the company seeks to enhance its capital through means other than preferential rights, such as tapping into international financial markets or issuing composite financial instruments, which could result in shareholders losing their preferential subscription rights.[26]

2.2.2 The Nature of the Preferential Right to Subscribe and Its Importance for Minority Shareholders

This subsection will delve deeper into the legal classification of the preferential right to subscribe and explore the rationale behind its establishment, highlighting how it serves as a critical tool for safeguarding minority shareholders in the dynamic landscape of corporate finance.

2.2.2.1 Classification of the Preferential Right to Subscribe

The classification of the preferential right to subscribe varies among scholars. Some view it as a direct right, particularly when it pertains to subscribing to new shares, typically cash shares issued during a capital increase of the company.

On the other hand, other scholars consider it an indirect right, especially in relation to subscribing to shares derived from the conversion of convertible debentures or debentures equipped with stock subscription warrants. It is important to note that shareholders maintain the preferential right to

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[24] Asma Ben Ouerad, op.cit., pp.61-62.

[25] Right to reducible subscription: It is the refusal of old shareholders to subscribe to the new shares offered for subscription.

[26] Fatiha Ben Azzouz, *Protection of Minorities in a Joint-Stock Company*, op.cit., pp.60-61.

subscribe in scenarios of capital augmentation via investment certificates, whether these are issued due to a capital increase or a split of existing shares.[27]

2.2.2.2 The Rationale Behind Establishing the Preferential Right to Subscribe

The establishment of this right aims to protect the interests of existing shareholders by preventing newcomers from subscribing to new shares during public offerings, which could dilute the existing shareholders' influence and share of profits. This right serves to limit the influx of shareholders, which inversely affects the profit share of the existing shareholders.

Additionally, it safeguards the rights of current shareholders by excluding new investors from partaking in reserves to which they did not contribute. Consequently, when the company expands its capital by introducing new shareholders, it results in a depreciation of the original shares' real value and an appreciation of the new shares' value. This situation means new investors buy into the new shares at a value that exceeds their nominal worth.[28]

2.2.3 Characteristics of the Preferential Right to Subscribe

The preferential right to subscribe stands as a right available to shareholders, rather than a compulsory obligation, offering them the choice to exercise it as they see fit. This right is distinguished by several key characteristics:

2.2.3.1 Transferability of the Preferential Right to Subscribe

This right is transferable, enabling shareholders to either trade or relinquish it, as detailed below:

- **First Clause: Trading the Preferential Right to Subscribe**

This provision allows shareholders to either personally exercise their right or trade it like any other movable asset. Unique to this right is its ability to be traded within a specified period. While the exercise of this right is generally tied to the subscription period associated with a capital increase, the legislation permits its trading during the open subscription period.

This trading might occur together with the share, be detached as a separate document, or inherently attached to it.[29] As prescribed by Article 694, Paragraph 4 of the Algerian Commercial Code, "This right is tradable during the subscription period if the bond is detached from the shares being traded, and can be transferred under the same conditions applicable to the share itself, unless stated otherwise."

This clause ensures that the right can be traded within a timeframe previously established by the Extraordinary General Assembly or the Board of Directors, and transferred according to the terms related to the bond.

- **Second Clause: Waiving the Preferential Right to Subscribe**

As a non-obligatory privilege, the preferential right to subscribe can be individually waived by shareholders, as stated in the last paragraph of Article 694 of the Algerian Commercial Code. Shareholders must formally notify the company of this waiver.

It's critical to recognize that such a waiver, whether made for personal reasons or for the benefit of another, can potentially disrupt the intended equilibrium of shareholder equity. A waiver by one or a few shareholders might realign shareholder dynamics and affect the majority composition, altering the balance of power within the company.[30]

2.3.2.2 Revocability of the Preferential Right to Subscribe

Despite its significance in safeguarding shareholders during a capital increase, the preferential right to subscribe can have unintended negative consequences. In scenarios where not all shareholders

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[27] Khadija Belarbi, *The Legal Features of Shares*, Master's thesis, Business Law specialization, Faculty of Law, University of Oran Belkaid, January 6, 2014, p.156.

[28] Mohammad As'ad Helmout, Mohammad Amin Issa Sidqi, and Huda Ismat Mohammad Amin, *The Financial Rights of Shareholders in a Private Joint-Stock Company: An Analytical Study*, Proceedings of the 3rd International Conference on Legal Issues (ILIC 2018) on Law and Politics, Faculty of Law, Ishik University-Erbil, May 10, 2018, p.411.

[29] Hind Qassi Abdallah, op.cit., p.173.

[30] Hind Qassi Abdallah, op.cit., pp.173-174.

opt to exercise their irreducible and reducible rights, concepts that will be further clarified, the campaign to subscribe all new shares might falter.

If an appropriate strategy is not implemented, the capital increase might fail to materialize, as per Article 696 of the Algerian Commercial Code. If the assembly anticipates potential shortfalls, or aims to secure the capital increase preemptively, it has the authority to revoke the preferential right to subscribe.

This decision must be based on a detailed report from the Board of Directors or the council of account representatives; otherwise, the deliberation is rendered void according to Article 697 of the Algerian Commercial Code. Such cancellation impacts all shareholders equally, and the subscription process is then directly opened to the public.[31]

3. Limits on Exercising the Preferential Right to Subscribe

Shareholders may exercise their preferential right to subscribe either on an irreducible or a reducible basis, as outlined in Article 695 of the Algerian Commercial Code. The procedures for exercising this right vary depending on the specifics of each case.

3.1 Methods of Exercising the Preferential Right to Subscribe

3.1.1 Exercising the Preferential Right on an Irreducible Basis

Shareholders are entitled to subscribe to a specific number of new shares proportional to the increase in capital. For instance, with a capital increase of 20%, for every 5 old shares held, a shareholder is entitled to 1 new share. If a shareholder possesses 25 old shares, they are thus eligible to subscribe to 5 new shares under this right, which is designated as the irreducible right. This right ensures that existing shareholders can maintain their proportional stake in the company, regardless of external subscription influences.

3.1.2 Exercising the Preferential Right on a Reducible Basis

When shareholders eligible for the irreducible subscription right choose not to subscribe due to unawareness, neglect, or disinterest, the shares allocated to them remain unclaimed. In such cases, those shareholders who have already exercised their irreducible rights may opt to subscribe to these additional shares on a reducible basis.

This opportunity is proportional to the value of their existing shares and contingent upon the scope of their subscription requests, known as "Le droit Réductible." If the aggregate of these subscriptions, both irreducible and reducible, fails to fulfill the total planned capital increase, the unclaimed shares may be allocated by the Board of Directors unless directed otherwise by the Extraordinary General Assembly.

Thus, unsubscribed shares might be offered to the public if approved by the General Assembly; without such approval, the capital increase cannot proceed. If this right was initially established to benefit existing shareholders, the Extraordinary General Assembly retains the discretion to either permit a capital increase or revoke this right for various strategic reasons.[32]

3.2 Suspension and Cancellation of the Preferential Right to Subscribe:

3.2.1 Suspension of the Preferential Right to Subscribe

Under Algerian commercial law, specifically Article 715 Repeated 49, the suspension of the preferential right to subscribe is limited to cases where a shareholder fails to meet the payment deadlines for their share installments. Shareholders may seek to regain this right if they settle the overdue amounts with interest before the expiry of the set deadline to exercise the subscription right.

However, if the payment is made after this deadline has passed, the claim to this right is forfeited, as the subscription right expires upon reaching the deadline.[33] This provision is in direct contrast with Article 693, which mandates that the capital must be fully paid up before any new shares can be issued, under threat of nullifying the entire operation.

[31] Hind Qassi Abdallah, ibid., p.174.

[32] Ait Mouloud Fateh, op.cit., p.89.

[33] Khadija Belarbi, op.cit., p.159.

3.2.2. Cancellation of the Preferential Right to Subscribe

At times, the broader corporate interests may require the abrogation of private shareholder interests. In such instances, the preferential right to subscribe may be cancelled through a decision by the Extraordinary General Assembly. This cancellation, affecting all shareholders uniformly, adheres to the principle of equality among shareholders.

Such a decisive measure is contingent upon stringent conditions and must be based on a detailed report from the Board of Directors or Management Board and the account representatives. Failure to adhere to these procedural requirements renders the deliberation void, thus nullifying the decision to cancel the preferential right to subscribe.[34] This approach directly contradicts Article 694, which declares any condition contrary to this as non-existent, reinforcing the protected nature of the preferential right under typical circumstances.

3.2.3 Scenario of Canceling the Preferential Right to Subscribe for One or More Shareholders

The legislature allows the General Assembly to cancel the preferential right for one or more individuals, who may be shareholders of the company or outsiders. For the validity of this assembly's deliberation, the beneficiaries of the cancellation decision, if they are shareholders, must not participate in the elections concerning the cancellation; their shares are excluded from the quorum and the majority required for the assembly to convene.[35]

This provision is affirmed by Article 700 of the Algerian Commercial Code, which allows the assembly that decided the capital increase the possibility to cancel the preferential right to subscribe to new shares in favor of one or more shareholders. Therefore, beneficiaries in this scenario, if they are shareholders, may not participate in the voting, or else the deliberation is invalidated, and their shares do not count towards the majority required to make the decision.[36]

3.2.4 Violation of Preferential Subscription Rights

The legislator has specified conditions under which a shareholder is deprived of their preferential right to subscribe, which, if not adhered to, would result in a civil sanction, namely nullification. Furthermore, resolutions passed by the extraordinary general meeting that cancel this right without adhering to the legal requirements stipulated in Articles 697 and 700(2) of the Commercial Code are subject to the same penalty. In addition, for breaches of preferential rights that lead to the nullification of a capital increase, the Algerian legislator has also established criminal penalties in Article 823 of the Commercial Code, which states:[37]

"Chairpersons, directors, and general managers of joint-stock companies who fail to grant shareholders their preferential subscription rights in proportion to their shareholdings during capital increases, who do not provide a minimum of 30 days from the opening of the subscription period for shareholders to exercise their rights, or who fail to distribute the remaining shares available due to a lack of sufficient preferential subscriptions proportionally among shareholders who have subscribed for a number exceeding their entitled amount, will be fined between 20,000 DZD and 400,000 DZD. These provisions do not apply if the general assembly cancels the preferential subscription right."

4. Conclusion:

The analysis of the preferential right to subscribe within the framework of Algerian legislation reveals its significance as one of the financial rights associated with share ownership. This right is a safeguard for existing shareholders, intended to protect their interests within the company and shield them from potential dilution by new shareholders.

The right is characterized as direct when it involves subscribing to new shares and indirect when related to shares issued through the conversion of convertible bonds and bonds with share subscription warrants. Moreover, existing shareholders hold a preferential right to subscribe to

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[34] Khadija Belarbi, ibid., p.159.

[35] Khadija Belarbi, ibid., pp.158-159.

[36] Hind Qassi Abdallah, op.cit., p.276.

[37] Khadija Belarbi, op.cit., p.160.

investment certificates generated from either capital increases or share splits. This right is versatile, allowing exercise on both an irreducible and reducible basis, and is protected by legal provisions that penalize violations, with options for its suspension or cancellation under specific conditions.

As subscription is fundamentally contractual between the company and the shareholder, it naturally bears the consequences of any contract. From our comprehensive analysis, several pivotal conclusions have been drawn that capture the essence and implications of this research:

- The preferential right to subscribe is considered a matter of public order; therefore, it cannot be contractually agreed upon to violate it.
- All shareholders enjoy this right without exception, and it cannot be granted selectively to one group over another.
- The preferential right to subscribe includes cash shares issued to realize a capital increase and does not apply to in-kind shares.
- The preferential right to subscribe is not inherently attached to the share; it is a right of the shareholder that can be sold independently of the share or together with it, an aspect overlooked by the Algerian legislator compared to its French counterpart.
- The privilege of the preferential right to subscribe becomes apparent in preferred shares, especially when this right is exercised on a reducible basis, providing priority to subscribe to the remaining shares not exercised under preferential subscription.

Despite the Algerian legislator's comprehensive and detailed regulatory efforts surrounding the preferential right to subscribe, there are still noticeable legislative gaps in how these provisions are applied. It is suggested that in scenarios involving the cancellation of the preferential right to subscribe, particularly during a capital increase in a joint-stock company, the cancellation should specifically target only the unsubscribed portion of the capital increase.

This nuanced approach ensures that the cancellation impacts only the remaining shares, rather than the entire proposed increase. Such a measure is critical, considering the substantial financial outlays companies endure while preparing for these capital adjustments. Furthermore, this targeted cancellation is vital to mitigate adverse effects on the company's market presence and the share price, which could suffer significant depreciation, particularly with shares that are publicly traded.

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