Fusion and consolidation of a group of companies: tax treatment

اندماج وتوحيد مجموعة شركات: المعالجة الضريبية

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Abstract:
The increase in merger operations denotes the strong responsiveness of economic operators to changes in economic trends to face certain economic crises, offer more business opportunities, and a better valuation of results can only have a positive impact on the economic activity.The main result of this article is that the fiscal cost of restructuringoperations is excessive and can constitute a real obstacle. As a result, tax laws adopt mechanisms and parameters that allow these operations to take place without major constraints.
Keywords : Merger; group of companies; economic operators; tax section.

Jel classification code :H22, H30

الملخص:
تشير الزيادة في عمليات الاندماج إلى الاستجابة القوية للمتعاملين الاقتصاديين للتغيرات في الاتجاهات الاقتصادية لمواجهة أزمات اقتصادية معينة، وتوفير المزيد من فرص الأعمال، ويمكن أن يكون لتقييم النتائج بشكل أفضل تأثير إيجابي فقط على النشاط الاقتصادي. النتيجة الرئيسية لهذه المقالة هي أن التكلفة المالية لإعادة هيكلة العمليات عالية ويمكن أن تشكل عقبة حقيقية. نتيجة لذلك، تتبنى قوانين الضرائب آليات ومعايير تسمح بتنفيذ هذه العمليات دون قيود كبيرة.
الكلمات المفتاحية: الاندماج ، مجموع الشركات، المتعاملون الاقتصاديون، قسم الضرائب.
تصنيف Jel: H22, H30

1-Introduction

The phenomena of economic concentration of companies result in merger operations. These operations must be carried out according to precise regulations and according to different practical methods depending on the situations encountered (Gouali, 2017, P 167).

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The interests of third parties and partners or shareholders must be safeguarded. These operations must be absorbed according to different aspects: we will mainly retain the legal, financial, accounting and tax aspect.

Equity holdings can come from a process of making a subsidiary either of an activity or of a complete department of an existing company. In this case, the original company holds the majority of the share capital of the subsidiaries, or even all when they are constituted in EURL. The subsidiaries can themselves create sub-subsidiaries that they control. This building constitutes a pyramid-type structure in which the original company is known as the parent company, holding company or even holding company. The reason for this name comes from the fact that the original company aims to manage its financial holdings in the group. As the majority partner in its subsidiaries, it holds political power in their general assemblies as well as in those of the sub-subsidiaries through the subsidiaries over which it controls.

In this article, we are interested in the aspects and typology of fusion. The legal and fiscal regime of a group of companies will be the subject of study, in particular for Algerian companies, and we will end by discussing intra-group relations and what Algerian regulations run.

2- Merger: Aspect and tax treatment

The merger can be understood from several aspects: legal, financial, accounting and fiscal. In this first point, we base ourselves on the legal and fiscal aspect.

2.1 Aspects of the merger

The merger operations are presented under different aspects:

2.1.1 The merger according to the legal aspect

A business merger is defined as a concentration of the assets of two or more companies, which results in the formation of a new company or a takeover of it.

It is the result of the union of two or more legal persons. The assets, as well as the debts, then become those of the merged company. It is also defined as being "a contractual phenomenon whereby, for a plurality of companies, only one is replaced, in two possible variants by incorporation of a new company in which two or more pre-existing companies come together" (Article 744 of the Code of commerce, 2019, P 455).

2.1.2 The merger according to the financial aspect

Following a merger, the following operations are carried out:

- Negotiations between representatives of the companies concerned.
- A drafting of the merger project by the governing bodies of the companies which will already be done by identifying the existing companies before the merger, reasons, financial conditions of the merger. Then, the terms of allocation and exchange of securities according to their respective values will be taken. At the end, an assessment of the balance will be made and a merger premium is determined.

- Formalities of legal publicity of the merger project.
- Report of the merger auditor.
- Approval of the terms of the merger by extraordinary general meetings.
- Formalities for legal publicity of the merger, filing of the deed at the clerk of the commercial court, filing of changes in the trade and companies register.

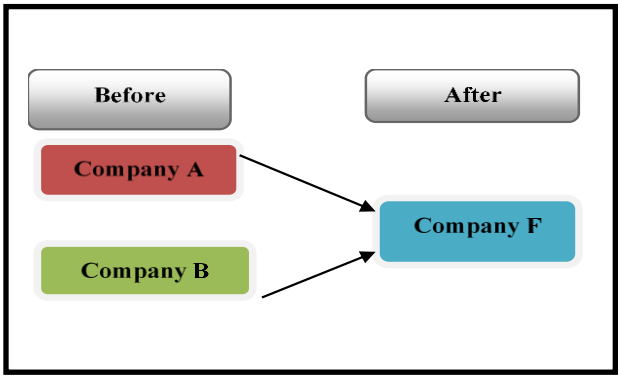
2.1.3 Type of merger

There are two types of merger: merger by reunion and by absorption.

- **Merger by meeting**

Company **F** is made up of contributions in kind from two companies **A** and **B**. In return for their contributions, the shareholders receive shares in the new company **F**. In this case, the dissolution of two companies **A** and **B** becomes effective, without liquidation. The merger by meeting is shown in the diagram belo

Figure N°01. Representation of the merger by the meeting



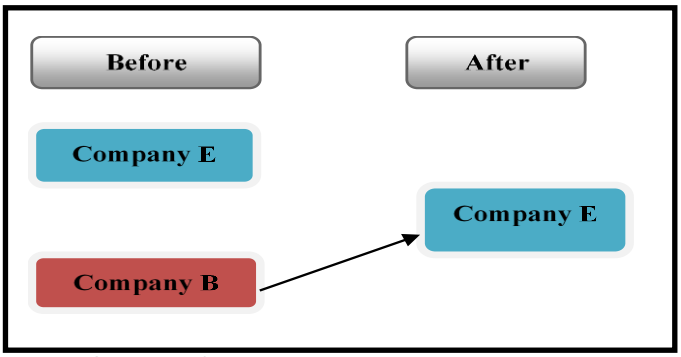
Source: CHADFAUX. M, (1999), Paris, p 22.**Merger by absorption**

There are two aspects to merger by absorption:

- **By independent companies**

The contributions in kind made by the partners of company B increase the capital of company E. In return for their contributions, the shareholders of company B receive shares in the new company E. The dissolution of company B becomes effective, without liquidation. The merger by absorption by independent companies is shown in the following diagram

Figure N ° 02. Representation of merger by absorption by independent companies

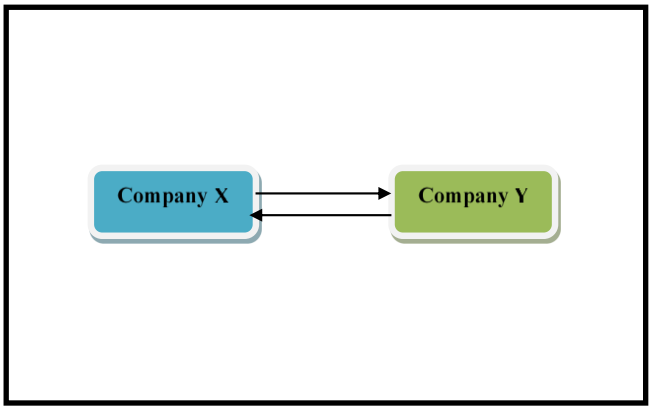


Source: CHADFAUX. M, (1999), Paris, p 23.

- **With equity investment**

Most often, the acquiring company holds shares in the company being acquired as part of an equity investment. It is also possible to find a participation of the absorbed company in the acquiring company or cross-shareholdings between the absorbed company and the absorbing company as shown in the diagram below:

Figure N ° 03. Representation of merger by absorption with equity investment



Source: CHADFAUX. M, (1999), Paris, p 23.

2.2 Group of companies

Even if the concept of group of companies is more a tax concept than a legal one, the Algerian commercial code also attaches important legal effects to the relations between a parent company and its subsidiaries.

Through the non-exhaustive texts governing the group of companies, it is indeed noted that there is no desire on the part of the public authorities to comprehend the group in a comprehensive manner while the group phenomenon exists. Therefore, it appears necessary to define what the group of companies is.

2.2.1 Legal aspect of a group of companies

The Algerian Commercial Code does not formally recognize the notion of group of companies. It focuses more particularly on the concepts of subsidiaries, holdings and controlled companies. The group has no legal personality; the companies that make it up have their own legal personality and are legally independent.

Thus, the parent company is not liable for the obligations contracted by its subsidiary and cannot set off as compensation for one of its debts to a creditor, the claim that its subsidiary has on this creditor.

The fictitious nature of a subsidiary allows the opening of collective proceedings against the parent company which acts under the guise of the subsidiary. In this regard, creditors can use the theory of appearance by requiring the parent company to pay its claim to its subsidiary, since it was justified in considering that the two companies do not in reality constitute only one.

A subsidiary is defined by the Commercial Code: as being a company in which more than 50% of the share capital is held by another company. When the fraction is between 10 and 50, then it is a stake.

From there, the group can be understood as "a set of companies legally independent of each other but in fact subject to a unit of economic decision".

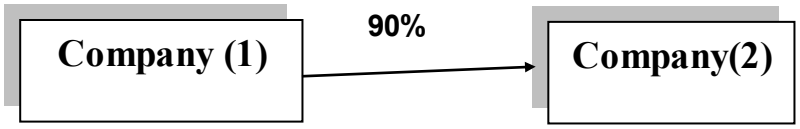
2.2.2 Tax aspect of group of companies

In the fiscal sense, “the Group of Companies” means any economic entity of two or more legally independent joint-stock companies, one of which called the “parent company” holds the others called “members” under its dependencies by directly holding 90% or more of the share capital and whose capital cannot be wholly or partially owned by these companies or 90% or more by a third party eligible as a parent company” (Article 138 bis of the tax code direct taxes and similar taxes, 2019, P67).

2.2.3 Eligibility conditions for the group of companies' schemes

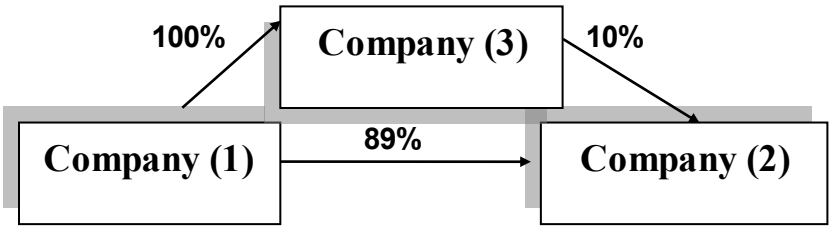
1. Only joint stock companies are eligible for the group of companies' regimes. Are therefore excluded, SARL, SNC, EURL etc.;
2. The share capital of the member company must be held directly (and not through other companies) at least 90% by the parent company.

- **1st scenario:**



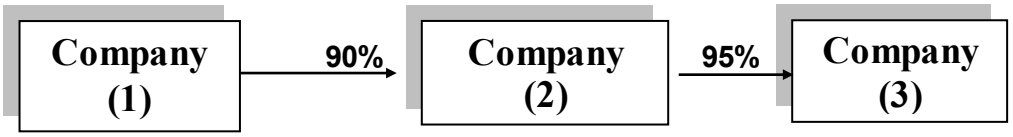
The company (1) can form a group with the company (2) because it holds the minimum of 90% of its capital.

- **2nd Scenario:**



The company (1) can form a group with the company (3). However, it cannot form a group with the company (2) because it has not reached the threshold of direct holding of its capital of 90%, although it holds 10% of it through the company (3);The share capital of the parent company must not be directly owned 90% or more by a third party eligible as a parent company.

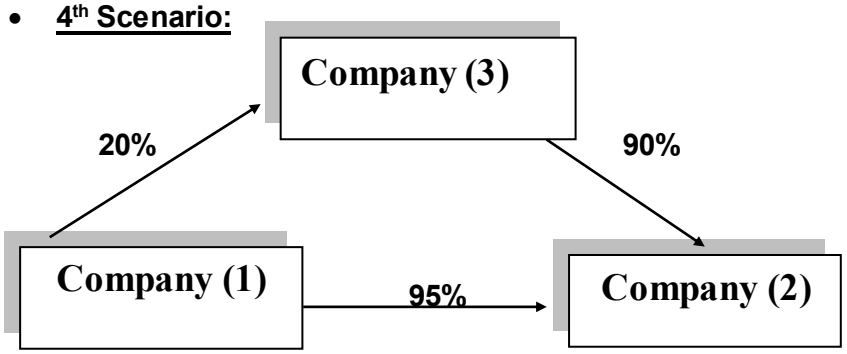
- **3rd Scenario:**



Even if it holds more than 90% of the capital of the company (3), the company (2) cannot form a group with the company (3) because it is itself 90% owned by the company (1).

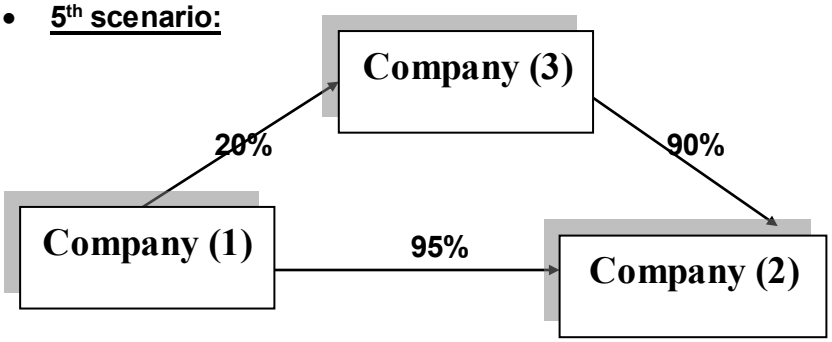
The share capital of the parent company must not be owned directly or indirectly in whole or in part by member companies.

- **4th Scenario:**



Even if it holds more than 90% of the share capital of the company (2), the company (1) cannot form a group with it, because its capital is partly held directly by this company (company 2).

- **5th scenario:**



The company (1) cannot form a group with the company (2) because its capital is partly held indirectly by the company (2).

The main object of the company must not be related to the field of exploitation of transport, processing or marketing of hydrocarbons and derived products. Oil companies and other companies whose activity is related to the above-mentioned object are therefore excluded;

The relations of the company must be governed exclusively by the Commercial Code.

In this regard, public holding companies and EPEs whose capital is held by the said holding company cannot constitute groups of companies because they are governed by ordinance n ° 95-25 of 25/09/1995 relating to the management of capital. State merchants (repealed by ordinance n ° 01-04 of August 20, 2001,

relating to the organization, management and privatization of public economic enterprises).

2.3 Consolidation of a group of companies

2.3.1 The legal regime

When a company takes a stake representing more than 50% of the capital of another company, or ensures the control of this company, this must be mentioned in the report submitted to the annual general meeting on the operations of the exercise.In that same report, an account must be made of the activity and results of the subsidiaries and companies it controls.

Companies must publish consolidated accounts and a report on the management of the group each year. These accounts bring together the balance sheet and the income statement of the companies concerned. The consolidation of the group's accounts is carried out according to the level of dependence by:

- **Full consolidation**

Consists of fully replacing the “equity securities” account of the so-called “consolidating” parent company with the balance sheet and income accounts of the consolidated companies concerned in order to draw up the balance sheet and the single consolidated income statement of the group. It applies to companies that the parent company controls exclusively.

- **Proportional integration**

Consists of substituting, up to the percentage of equity held, for the parent company's “equity securities” account, the balance sheet and income statements of consolidated companies, to establish the balance sheet and table of the group's single income statements. It applies to companies whose control is shared by a limited number of shareholders.

- **The equity method**

Consists of replacing the book value of the parent company's equity securities with its share in equity, including the profit or loss for the year of associates; it applies to companies in which the consolidating company exercises significant influence by holding a faction at least equal to one fifth of the voting rights.

2.3.2. The tax regime

The tax regime for groups of companies is a preferential regime granted on option. It offers the possibility of consolidating the taxable profits at IBS of all the member companies of the group and the benefit of certain tax advantages.

- **Applicable tax rate**

The complementary finance law for 2008 had rearranged the IBS rate per activity and instituted the following rates:

• 19% for the production of goods, construction, public works and tourism activities.

• 25% for trade and service activities.

The complementary finance law for 2009 determines the IBS rate to be applied to the consolidated profit within the framework of a group of companies in the fiscal sense.

In the event that the activities carried out by member companies of the group fall under different IBS rates, the profit resulting from the consolidation is

subject to tax at the rate of 19% in the event that the turnover falling under this rate is preponderant. On the contrary, profit consolidation is allowed by revenue category. The consolidation of profits, therefore consolidation of the accounts, is that of all the balance sheet accounts and not of the arithmetic addition of the results of the companies that are members of the group.

Thus, when the consolidated turnover falling under the 19% IBS rate exceeds 50%, it is this rate which applies to the consolidated taxable profit.

Otherwise, and so as not to penalize the consolidation regime, the complementary finance law for 2009 provides for the simultaneous application of the two IBS rates for each type of turnover.

The complementary finance law for 2015 set the corporate income tax rate at:

- 19% for goods production activities;
- 23% for building, public works and hydraulic activities as well as tourist and spa activities, excluding travel agencies;
- 26% for other activities.

In the event of the concurrent exercise of several activities, legal persons subject to the IBS must keep separate accounts for these activities, making it possible to determine the share of the profits for each activity at which the appropriate IBS rate must to be applied.

Failure to keep separate accounts will systematically result in the application of the rate of 26%.

The activities of producing goods are understood to be those which consist in the extraction, manufacture, shaping or processing of products, excluding the activities of packaging or commercial presentation for resale.

The term "production activities" does not also include mining and hydrocarbon activities.

By building activities and public and hydraulic works eligible at the rate of 23%, it is necessary to understand the activities registered as such in the trade register and give rise to the payment of social contributions specific to the sector.

- Consolidation of profits

- The consolidated balance sheet regime consists of the production of a single balance sheet for all the companies in the group and the keeping of single accounts representative of the activity and the overall situation of the companies constituting the group.
- The profit consolidation regime is granted only in the event of option by the parent company and acceptance by all member companies.
- By opting for the consolidated balance sheet regime, the group automatically integrates the tax regime for corporate groups. The option thus made is irrevocable for a period of 04 years.

- The tax advantages granted

- **In terms of corporate income tax (IBS)**

Under article 143 of the code of direct taxes and similar taxes:
- The tax regime for groups provides for an exemption from capital gains on disposals made in the context of asset exchanges between companies that are members of the same group.
- The main advantage granted by the group tax regime with regard to IBS results from the consolidation of profits which makes it possible to determine an overall restated result for the whole group, considering that it is a single entity economic and subsequently submit this result to the IBS. The latter is thus reduced overall in the event of a deficit, incurred by one or more member companies.

- **Regarding the tax on professional activity (TAP)**

Intra-group transactions are exempt from TAP.

- **In terms of value added tax (VAT)**

Intra-group transactions are exempt from VAT (Article 29 of the turnover tax code, 2019, P 36).

- **In terms of registration rights**

Aces relating to the transformation of companies eligible for the tax regime of the group of companies with a view to the integration of said group and deeds recording transfers of assets between companies' members of the same group are exempt from the registration fee.

- **Financial facilities granted to the group**

Cash transactions between companies of the same group are frequent. Article 79 of Ordinance No. 2003-11 of August 26, 2003 relating to money and credit derogates from the principle that only a bank or a financial institution can grant credit within the meaning of Article 68 of the law. Article 79 allows any company to "carry out treasury operations with companies having with it, directly or indirectly, capital relations conferring on one of them an effective power of control over the other".

- **Other tax provisions**

Under the terms of article 10 of the 2009 finance law, "transfers, for any reason whatsoever, of funds for the benefit of natural or legal persons not resident in Algeria must be previously declared to the tax services having territorial jurisdiction" (Article 29 of the turnover tax code, 2019, P 32)
The transfer of funds is defined there as:
- Payments and transfers of funds including the repatriation of capital income;
- Refunds, proceeds from disposal, divestment or liquidation;
- Income, interest and dividends.

As for the terms and conditions, fund transfers must be declared in advance on a form provided by the tax authorities.

2.3.3. Determination of the overall result, of the overall gain or loss

A number of conditions must be met to take advantage of the specific scheme.

The parent company and the subsidiaries that are members of the group must be subject to corporate income tax, automatically or optionally, under the conditions of common law.

Therefore, companies that are partially or fully exempt cannot be part of a group, as can partnerships that have not opted for corporate tax. Legal persons other than companies can benefit from the group regime if they meet the other conditions. Group member companies must have a 12-month financial year with the same opening and closing dates.

The parent company cannot be more than 90% controlled by another company which is itself liable to corporate income tax. It can own all of the companies in the group or only some of them. Holding 90% of a company's capital corresponds to full ownership of 90% of dividend rights and 90% of voting rights.

Rights held indirectly are rights owned through one or more companies even if the intermediary company, which is not a member of the integrated group, is located abroad. The condition of holding 90% of the capital by the parent company must be satisfied continuously throughout the financial year.

The overall result is determined according to certain mandatory rules:
- Taking into account all of the results of group companies;
- Neutralization mechanisms for certain internal group operations;
- A specific regime for capital gains or losses.

The overall group result is determined by the parent company by adding the results of all the companies in the group. Certain adjustments are made in order to ensure the neutrality of certain transactions or to avoid the accumulation of tax advantages, in particular:
- The parent company must increase the overall result by the amount of additional allocations to provisions made by group companies for receivables held on other companies in the group, securities held in other companies in the group and excluded from the regime of long-term capital gains or the risks they incur as a result of such companies;
- Abundance of debts and direct or indirect subsidies granted between group companies are not taken into account in determining the overall result;
- When a member company of the group purchases securities of a company called to become a member of the group from persons who directly or indirectly control it, the financial charges deducted by the member companies must be reported in the overall result for a faction their amount;
- Short-term net capital gains or losses resulting from the sale between group companies of a fixed asset item are not taken into account for the establishment of the overall result, but the supplements of any depreciation practiced by the transferee company is reintegrated. It is determined by the parent company by adding the net long-term capital gains or losses of all group companies with certain adjustments.

- Taxation of the overall result, of the overall gain or loss and payment of tax

The overall result is determined by the parent company by taking the algebraic sum of the results of each group company and the adjustments it is

required to make. Overall profit is taxed according to tax rules at the normal rate of corporate income tax. The overall profit is after charging for the overall deficit for previous years.

The overall net long-term capital gains or losses is determined by the parent company by taking the algebraic sum of the net long-term capital gains or losses of each of the companies in the group corrected for adjustments. made by the parent company. They will be taxable on the professional capital gain or loss at the rate of 35% or 70% depending on the retention period of the property.

The parent company consults itself through its option, which alone is liable for the corporate income tax due on the overall result or the annual flat-rate tax due by each company in the group. The parent company is therefore required to pay the down payments and the liquidation balance of the tax, calculated on the overall result.

2.4 Intra-group relations

Simplified merger is governed by the French Commercial Code. The text applies to a merger operation between joint stock companies where the capital of the absorbed company is 100% owned by the acquiring company from the filing of the draft treaty at the registry of the commercial court until the completion of the transaction. fusion. The scheme applies, with certain reservations, to the absorption of a 90% subsidiary.

The regime of this merger has undergone two modifications. On the one hand, it is expected that the merger decision no longer requires the meeting of general meetings of the merging companies. There is an exception to this principle when one or more shareholders bringing together at least 5% of the share capital request the appointment of a proxy to convene the meeting to rule on the transaction.

On the other hand, the report of the board of directors or the management board of the merging companies to the shareholders or that of the merger auditor is no longer required.

3- Conclusion

In Algeria, the legal and regulatory framework relating to corporate restructuring operations, in particular mergers, has changed little due to the delay caused by the economic transition, which has delayed its completion. This weakness is also explained by the lack of financial, industrial and commercial opportunities to acquire mergers of companies. This situation can be explained in relation to the consistency of Algerian companies which, in the majority, are SMEs, SMIs and family businesses.

We can affirm that the Algerian legislation is very restrictive for the realization of this kind of operations by non-resident companies. On the tax side, merger transactions are "atrophied" due to incomplete and sometimes imprecise drafting which can lead to confusion or even the risk of sometimes leading to unnecessary litigation.

Indeed, few articles evoke the particular aspects inherent in the treatment of taxes owed by the taxpayer; the Algerian legislator not having specifically dealt with this type of transaction, which means that they do not have a preferential regime.

That is why we recommend enriching the tax system dealing with company mergers in Algeria. To this end, the Algerian legislator must insert a special regime called a "preferential regime" intended to facilitate the regrouping of companies liable to the corporate income tax (IBS), by reducing the fiscal cost of the operation. This regime has the effect of assimilating mergers to infill transactions.

The legal framework must also be adapted to the effect of subordinating the special regime for company mergers to certain conditions to preserve the Algerian economy and protect its interests.

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