The Simplified Joint-stock Company … A Reading in Law 22-09

شركة المساهمة البسيطة ....قراءة في القانون 22-09

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Abstract:

The simplified joint stock company is considered to be one of the manifestations of the developments in company law, through which the legislator has recognized the complete freedom of the partners to determine the terms of its organization and operation in its articles of association, which makes it an attractive company. However, this company is fraught with risks, firstly for the partners who are not subject to the provisions of corporate law to protect their interests, but rather to the terms of the contract with all the shortcomings that this may entail. Secondly, it is perilous because the legal system to which this company is subject is unclear and requires a fine analysis of its provisions and calls on the researcher, the lawman and even the judge to set out a list of the provisions applicable to the simplified joint stock company, as well as those which should be excluded, given that this work falls under the competence of the legislator and not under their competence.

Keywords : joint stock Company; simplified joint stock company; Start-up; contractual freedom.

ملخص:

تعتبر شركة المساهمة البسيطة مظهرا من مظاهر التطورات التي يعرفها قانون الشركات، اعترف فيها المشرع بالحرية التامة للشركاء في تحديد كيفيات تنظيمها وسيرها في قانونها الأساسي، الامر الذي يجعلها شركة جذابة. ومع ذلك فان هذه الشركة محفوفة بالمخاطر، محفوفة بالمخاطر أولا بالنسبة للشركاء الذين لا يخضعون الى قواعد قانون الشركات لحماية مصالحهم بل الى قواعد العقد بما قد ينطوي عليه من نقائص، ومحفوفة بالمخاطر ثانيا كون ان النظام القانوني الذي تخضع له هذه الشركة غير واضح المعالم و هو يتطلب تحليلا دقيقا لأحكامه و تفرض على الباحث ورجل القانون بل و حتى على القاضي أن يضع بنفسه قائمة للقواعد التي تسري على شركة المساهمة البسيطة و كذا تلك التي يجب استبعادها، علما ان هذا العمل من اختصاص المشرع وليس من اختصاصه هو.

الكلمات المفتاحية: شركة المساهمة؛ شركة المساهمة البسيطة؛ المؤسسات الناشئة؛ الحرية التعاقدية؛

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Introduction:

In recent times, there has been a massive change in commercial life, linked to the phenomenon of globalization and the various developments on the world stage, and given the role that business law, including commercial law, plays in the economic sphere, it is now more than ever necessary to adapt it to keep pace with these new developments, the most important of which are those relating to commercial companies, because an effective company law plays an important role toward the economic expansion.

The adaptation of the law to economic circumstances requires the development of legal rules that are more flexible than they already are. In this context, and in order to better respond to the need of companies to develop their activities, or to cooperate in order to improve their competitiveness, the legislator has provided for the simplified joint stock company, which is a very flexible structure, which supports the contractual concept of the company. This hybrid form of company, which combines the financial power of the joint stock company with the almost absolute freedom enjoyed by the partners in order to manage and operate the enterprise, has been included in the Algerian Commercial Code since 2022 by Law No 22-09 of 5 May 2022, as a start-up form of business, because the forms of commercial companies provided for in the Commercial Code are not adapted to meet the flexibility requirements of innovative project owners.

The particularity of the simplified joint-stock company lies in its contractual character which distinguishes it from the joint-stock company and the limited liability company in particular, even if it shares with them its legal system at several levels. The freedom enjoyed by the partners to determine its organization and operation in its articles of association without the requirement of a minimum amount of capital for its incorporation allows them to create their own company, which makes it an attractive company. However, it is fraught with hazards for the partners who are subject to the terms of contract with all the shortcomings that this may entail, rather than the provisions of corporate law to protect their interests. Moreover, this company is perilous since the legal system to which it is subject is unclear and the legislator has regulated it by only a few provisions of Law 22-09 and has referred the remaining aspects to the joint-stock company provisions, as long as they are compatible to its particular provisions, despite the fundamental difference between the two companies. This method based on the adoption of a comprehensive approach in the constitution of the company's legal system requires a fine analysis of its provisions and call for the researcher, the lawman and even the judge, to set a list of provisions that are applicable to the simplified joint-stock company and those that must be excluded, being specified that this mission falls under the competence of the legislator and not under their competence. In this context, this research paper aims to show the failure of the legislator in the organization of the simplified joint-stock company and the difficulties associated to the application of the provisions of the joint-stock company to it, and the ambiguity raised by the reference to the joint-stock company's provisions, which requires the action of the legislator to adapt some of them or add other articles.

In order to address the problem, we adopted the descriptive analytical study method to highlight the reasons for which the simplified joint-stock company was included as a form of start-ups (first chapter), and then the simplified joint-stock company system between the provisions of the joint-stock company and the contractual freedom (second chapter) according to the following plan:

Chapter I: The simplified joint-stock company as a form of start-up

Section 1: Justifications for the enactment of Law 22-09

Section 2: Criteria of the start-up and distinguishing it from other enterprises

Subsection 1: Definition of the start-up

Subsection 2: Distinguishing start-up from other related concepts

Chapter II: Simplified joint-stock company between the joint-stock company provisions and the freedom of shareholders

Section 1: Difficulties related to subjecting the simplified joint-stock company to the provisions of the joint-stock company

Subsection 1: The legislator's failure to define the provisions of the joint-stock company excluded from the simplified joint-stock company system

Subsection 2: The condition that "the provisions of the joint stock company must be compatible to those of the simplified joint-stock company" ….. a vaguely worded phrase.

Section 2: The partners' freedom to organize the simplified joint-stock company... a double-sided coin

Subsection 1: Scoop of contractual freedom in the simplified joint-stock company

Subsection 2: R**isks associated with contractual freedom in the simplified joint stock company**

Conclusion

1 - The simplified joint-stock company as a form of start-up

The simplified joint stock company was recently adopted by the Algerian legislator and included among the types of commercial companies under Law 22-09, unlike other foreign legislations that have been leaders in this field, in particular the French legislation, from which the Algerian legislator has adopted the regulations. We will below explain the reasons for this trend by examining the justifications for the enactment of Law 22-09, and its specificity in terms of making this type of company exclusive to start-ups, which calls for an understanding of the latter.

1 - 1 Justifications for the enactment of Law 22-09

The emergence of the simplified joint stock company in the French law is linked to the entrepreneurial crisis in the mid-1990s[1]. It was first included in Act No. 94-1 of 3 January 1994, with the aim of conferring a 'contractual' character on the joint-stock company[2] as a tool for large companies to cooperate without being subject to strict mandatory legal provisions. At the beginning it was a "company of companies"[3], exclusively created by legal entities with a capital of more than 1.5 million French francs, and incorporated with a capital of at least 250,000 francs fully paid up and without public offering[4]. This strict framework is justified by the freedom given to the parties in the organization of the company, which loses all meaning if all the shareholders are not of the same level and not able to discuss all the terms of the contract without the majority imposing its opinion on the minority, as is the case in joint stock companies. Thus, the simplified joint stock company allowed for the separation between the capital and the freedom granted to the partners in its organizational and operational aspects. When companies create a common structure, they want to free themselves

from the provisions on quorum and majority and create structures with rapid decision-making powers, which the provisions of joint stock companies do not offer and do not allow. Through the promulgation of Law No. 99-587 of July 12, 1999, the scope of the simplified joint stock company was extended by allowing any natural or legal person to form it as a commercial company alongside the joint stock company and the limited liability company. It is even possible to form a single-person simplified joint stock company, similarly to a single-person limited liability company[5]. By virtue of Law No. 2008-776 of August 4, 2008, this company has become more attractive, since it has been no longer necessary to have a minimum capital, which became freely determined in its articles of association and making Industry contributions became possible unlike the joint stock company. Moreover, this law stipulates that the simplified joint stock company is exempt from the obligation to appoint a contribution auditor.

In Algeria, the emergence of the simplified joint-stock company mentioned in Law 22-09[6] as a form of commercial companies coincided with the emergence of innovative companies. They are incorporated exclusively by companies with the "start-up" label, and may include one person only. To encourage entrepreneurs, the Algerian government has taken many incentives, starting with the establishment of a ministry delegated to the Prime Minister in charge of the knowledge economy and start-ups[7], the establishment of a national committee within this ministry to grant the "start-up", "innovative project" and "business incubator" labels and to contribute to the diagnosis of innovative projects and to participate in the promotion of environmental systems of start-ups , and it includes representatives of several ministerial sectors[8], the establishment of the institution for the promotion and management of support structures for start-ups and fixing its missions, operation and organization[9] which is a public industrial and commercial institution with the acronym "Algeria Venture"[10]. In addition, the government has included a set of tax incentives in Law 20-16 of 31/12/2020 on the finance law for the year 2021[11], which provides for tax exemptions for enterprises bearing the “start-up” label as well as for companies bearing the "incubator" label. In accordance with its article 86, the first is exempted from the tax on professional activity, the tax on gross income or the tax on company profits for a period of 4 years from the date of obtaining the “start-up” label, with an additional year in the event of renewal, and the second is exempted in accordance with its article 87 from the tax on professional activity and the tax on gross income or the tax on company profits for a period of two years, as from the obtaining of the "Incubator" label. The support to these companies continued with the establishment of an “investment fund” dedicated to start-ups’ support and financing, the establishment of the “Higher Council of Innovation” that evaluates innovative ideas and initiatives and national scientific research capacities, and the implementation of a legal framework for the incorporation of start-ups, namely the simplified joint-stock company.

1 – 2 Criteria of the start-up and distinguishing it from other companies

“Start-up” is one of the popular terms of our time as a factor of economic progress and growth. It is also widely used among today's youth who have grown up in a digital environment, considering it as a new trend in order to bring such progress. So what is a start-up to a lawman, and what is its position among the other concepts that approach it, such as small and medium-sized enterprises and innovative projects?

1 – 2 – 1 Definition of start-up

A start-up is initially an enterprise.

- **An enterprise is defined as**: the set of material and human resources allowing the practice of an economic activity[12], whether for profit or not, to be conducted by an entrepreneur who is the owner

of its assets, and who may be a natural person or a legal person, public or private[13]. Article 3 of Law No 08-12 of June 25, 2008 amending and supplementing Ordinance 03-03 of June 19, 2003 on competition[14] defines it as "any natural or legal person, of whatsoever nature, engaged permanently in production, distribution, services or import activities". This definition shows that the enterprise is based on three elements:

- The organizational element: linked to the determination of the quality of the entrepreneur, which is any natural or legal person with legal personality. According to this criterion, the enterprise may be: individual, collective, civil or commercial, public or private,
- The material element: related to the nature of the activity it carries out, which is: production, distribution and service activity (those carrying out charitable, religious and export activities are excluded from the concept of economic enterprise)
- Sustainability: It is practiced permanently and continuously within a precise and organized framework

According to Law 17-02[15], the legislator has retained two criteria for the classification of enterprises in a specific category (small, medium-sized or microenterprise): the criterion of staff headcount and the criterion of turnover and annual balance sheet, prioritizing the second criterion if the enterprise is classified in a category according to the numbers of its staff and in another category according to its turnover and annual balance sheet[16], inspired by the European Directive that adopted the same criteria, and here we mean the Directive for the year 1996, which was then recommended to all the member countries. Algeria ratified the Bologna charter on small and medium-sized enterprises in June 2000 that embodies the European definition of small and medium-sized enterprises, amended in 2003 by virtue of the Directive of 6 may 2003 that became effective in 2005, using the same criteria but proposing new financial ceilings[17].

The enterprise may take the form of a company (a limited liability company (SARL) for example), it may also be incorporated without taking a legal form: in this case, it is an "individual enterprise" operated by a natural person called "entrepreneur" who is the owner of its assets, and signs in his own name, (employment contracts, supply contracts, loan contracts related to his activity, etc[18].)

As for the term "start-up"[19], it stands for an enterprise that is:

- Newly created
- Innovative
- Characterized by the potential for growth: since the innovative nature of the startup does not allow it to provide a business model from the outset, but allows it to grow significantly.
- and needs for funding: in order to expand and achieve a profitable business model[20].

At the legislative level, the Algerian legislator has not given a definition to start-up, but has laid down the criteria that allow the company to obtain the label of startup, which are according to Article 11 of Executive Decree No. 20-254[21]:

- the company must not have been in existence for more than four (4) years;
- the company's business model must be based on products, services, *business model* or any other innovative concept;
- the annual turnover must not exceed the amount set by the national committee;
- at least 50% of the share capital must be held by individuals, or by other enterprises with the "Start-up" label
- the company's growth potential must be sufficiently high;

- the company must not have more than 250 employees.

Additionally, there are four objective criteria to prove the innovative character of the start-up activity:

- To allocate 15% of the company's turnover for research and development,
- Half of the company's founding members must have a PhD or higher degree, in order to encourage researchers to create start-ups and build bridges between university and business,
- The opportunity to present a mock-up of the submitted innovation, whether it is a complete or experimental electronic platform (demo), or a product prototype in industry, or the latest experimental video,
- To obtain a patent or patented program, whether at national or international level.

It should be noted that it is enough for the enterprise to meet one of these objective criteria to obtain the "Startup" label.

1 – 2 – 2 Distinguishing start-up from other concepts

Startups are distinguished from many concepts that are similar to them on various aspects. They are distinguished from small and medium-sized enterprises despite their common name "enterprise" and they are distinguished from the innovative project despite the fact that both are based on the concept of creativity and innovation. To facilitate the distinction, we explain it in the following table:

START-UP	**SMALL AND MEDIUM-SIZED ENTERPRISE**	**INNOVATIVE PROJECT**
-An enterprise that has a legal form and a legal personality: it takes one of the legal forms specified in the Commercial Code	-An enterprise that has a legal form and a legal personality: it also takes one of the legal forms specified in the Commercial Code.	- An enterprise with neither legal form nor legal personality. It consists of a person or group of persons who have an innovative idea in the study or experimentation phase, or who hold a patent.
-Only the start-up that may take the form of a simplified joint stock company	- It cannot take the form of a simplified joint stock company	
-It is subject to the fiscal law, shall be registered with the trade register and hold a tax card	-It is subject to the fiscal law, shall be registered with the trade register and hold a tax card	-It is not subject to the fiscal law and shall not be registered with the trade register
-**Innovation is an essential element** for a start-up to be labeled as such, whether it is innovative in production, service, or in production process, marketing or business model[22].	-**The element of innovation is not required** in small and medium-sized enterprises, and they are often engaged in production, distribution, service or import activities	

- No official document is required, regarding the intellectual property or patent proving the innovation		-That the project holds, if applicable, any document proving intellectual property or a prize or award obtained,
-The age of the enterprise must not exceed 4 years, subject to renewal		

By the researcher

Although the legislator does not prescribe a specific form for startups, it is advisable to choose a flexible legal form that can be adapted to the changing needs of the startup, taking into account:

- The need for the startup to have a legal form that can accommodate many partners and shareholders,

- The need for the startup to have a legal form that limits the liability of partners or shareholders. In fact, the purpose of a start up is growth and profit; nevertheless, the project could be faced to failure. In such case, it must be one of the companies whose partners bear losses in accordance with the proportion of their capital contribution (alike a limited liability company, or a joint stock company) and not a general partnership in which the owners are jointly and severally liable for any legal actions and debts the company may face.

- The need for the start-up to have a legal form that allows for the entry and exit of shareholders through simplified procedures. It is also important to choose a form that allows for free drafting of the articles of association and provides for the opening of capital.

These conditions and advantages seem to be achieved by the simplified joint-stock company, as we will discover in the following section.

2 - The simplified joint-stock company between the joint-stock company provisions and the freedom of shareholders

The legislator made the simplified joint stock company governed by the provisions of the joint-stock company in Article 715 bis 135 of the Commercial Code, which stipulates: "*In so far as they are not incompatible with the provisions laid down in this Section, the provisions relating to joint stock companies, except those provided for in Articles 594 (paragraph 1), 601 (paragraph 1), 607, 610, 619 and 715 bis 15 of this code, shall apply to the simplified joint stock company* ". It also recognized the contractual freedom of the partners by defining its organization and operation in the Articles of Association in accordance with Article 715 bis 134 in order to provide a flexible system that meets the company's needs and evolutions.

2 – 1 D**ifficulties related to subjecting the simplified joint-stock company to the provisions of the joint-stock company**

The simplified joint-stock company is governed by the provisions of the joint-stock company if two conditions are met: that the provisions of the joint-stock company are not among those expressly excluded by Article 715 bis 135, and that the provisions of the joint-stock company do not conflict with the particular provisions of the simplified joint-stock company, noting that this method of determining the legal system of the simplified joint-stock company is surrounded by several difficulties, because, on the one hand, it calls for the researcher, the judge, the lawman and any other

person concerned to set a list of the provisions of the joint stock company that apply and of those that do not apply thereto. On the other hand, it calls for them to determine whether the provisions are "compatible" to it or not since the expression "*are compatible to the provisions laid down …*" is unclear and there is no doctrinal agreement about the meaning of "incompatibility ", as we will explain

2 – 1 – 1 Legislator's failure to define the provisions of the joint stock company excluded from the simplified joint stock company system

In accordance with article 715 bis 135 the legislator has explicitly excluded articles 594 (first paragraph), 601 (first paragraph), 607, 610, 619 and 715 bis 15, that do not apply to the simplified joint stock company. These articles cover the following:

The minimum capital of a joint stock company provided for in Article 594, first paragraph of the Commercial Code, which requires that the capital of the joint stock company be at least equal to (5) million DZD if it has recourse to incorporation by way of public offering, and one million (1) DZD in the case of incorporation without public offering, because the incorporation of a simplified joint stock company does not require a minimum capital in accordance with Article 715 bis 134.

-Valuation of the shares in kind by a contribution auditor in the joint stock company on the basis of a report attached to the articles of association: in accordance with **Article 601 (first paragraph)** of the Commercial Code, if the contributions are in kind, one contribution auditor or more shall be appointed by a court decision upon request of the founders, or one of them, to value the share in kind on the basis of a report attached to the articles of association under his responsibility (Article 607 CC). In the case of a simplified joint-stock company, the legislator has **allowed** the shareholders to decide to **dispense with a contribution auditor**, provided that two conditions are met:

* The unanimous agreement of the shareholders.

* The value of the shares which have not been previously valued by the contribution auditor must not exceed half of the share capital.

If the selected value of the shares in kind differs from the value proposed by the contribution auditor, the shareholders shall be severally liable to third parties for a period of 5 years for the value attributed to the shares in kind in the company's articles of association[23].

Management of the company in the presence of the board of directors: The joint-stock company may be managed in the presence of the board of directors in accordance with **Article 610**. This article has specified its composition, while **Article 619** specified the conditions that must be fulfilled by its members. Those provisions are excluded from the simplified joint stock company due to the freedom conferred by the legislator on shareholders to determine its organization and operation pursuant to Article 715 bis 134.

Provisions relating to the transformation of a joint stock company: The provisions relating to Joint Stock Company allow its transformation from one type to another, if two conditions are met[24]:

- If at least two years have elapsed since the date of its incorporation, and

- If the budget for the first two financial years is drafted by the joint stock company and approved by the shareholders.

These two conditions do not apply to the simplified joint stock company because its transformation shall be made by a collective decision in accordance with the provisions of the articles of association[25].

It should be noted that the legislator in Article 715bis135 has excluded the provisions concerning the transformation of the joint stock company which do not apply to the simplified joint stock company (Article 715bis15), and has introduced in the same time a specific provision for the transformation of the simplified joint stock company (715bis134). It is therefore important to amend Article 715bis135 by deleting this exception.

This method of fixing the provisions to which the simplified joint stock company is subject raises a number of issues:

- Since the legislator has explicitly excluded Article 610 and Article 619 on the management of the simplified joint stock company with a board of directors, as explained above, then we wonder about the reason for the exclusion of these two articles only. What about all the other articles relating to the conditions to be fulfilled by the members of the Board of Directors, and the powers of the latter? Do they remain valid even if the management with a Board of Directors is excluded? Why did the legislator not explicitly exclude the provisions of Articles 610 to 641 which are all linked to the Board of Directors?
- Since the legislator did not exclude from the scope of application to the simplified joint stock company the articles related to the management of the joint stock company with a Managing Board and a Supervisory Board, as it did not exclude in the text of article 715 bis 135, articles 642 to 674 regulating this issue, does it mean that these articles remain valid and applicable to the simplified joint stock company?

Similarly, and in the same context, the legislator has not excluded in the text of article 715 bis 135 , the articles 674 to 685 relating to Shareholders' Meetings, does this mean that they remain valid and may be applied to the simplified joint stock company?

We believe that these questions can be answered only after assessing whether or not these provisions (the provisions of the joint stock company) are compatible to the provisions of the simplified joint stock company as a second condition for their applicability.

2 – 1 – 2 The condition that "the provisions of the joint stock company must compatible with those of the simplified joint stock company".... a vaguely worded phrase

The text of Article 715 bis 135 requires that the provisions of the joint stock company apply to the simplified joint stock company, provided that they are compatible with the particular provisions governing the latter. So, what is meant by compatibility[26]?

In order to assess the compatibility, three elements are taken into account[27]: the provisions of the joint stock company, the provisions of the simplified joint stock company and the compatibility criterion. We consider whether there is a text for the simplified joint stock company that regulates a specific aspect; we will exclude the texts of Joint Stock Company which regulate the same aspect and conflict with it[28]:

- First element: the provisions governing the joint stock company allow for incorporation with a public offering
- Second element: the provisions governing the simplified joint stock company prohibit incorporation with public offering
- Third element: these two provisions are incompatible

Accordingly, it is not possible to apply the provisions of the joint stock company which allow incorporation by way of public offering, because article 715 bis 139 explicitly stipulates that this method of incorporation is prohibited for the simplified joint stock company.

On this basis, the provisions relating to the method of incorporation by way of public offering or the decisions relating to the increase, consumption and reduction of the capital of the joint stock company are excluded from the scope of the simplified joint stock company since there are special provisions relating to them.

However, this method of determining whether or not there is compatibility between the provisions of the joint stock company and those of the simplified joint stock company, without taking into account the contractual nature of the latter, makes it deficient. That is why some scholars consider that it is necessary to take into account the broad freedom enjoyed by the shareholders in the organization of the company in order to exclude the provisions of the joint-stock company which contradict or limit the exercise of this contractual freedom[29].

Thus, the provisions governing the joint stock company must not only conflict with the particular provisions for which a text has been made, but must also not conflict with the contractual spirit which characterizes this company. In case of conflict with this contractual spirit, the joint stock company's provisions are not applicable[30].

This criterion is also considered to be insufficient, as:

1- it refers to a subjective element in order to set aside mandatory rules, thus jeopardizing legal certainty[31], and secondly,
2- it does not provide solutions for all cases. It is enough to give the example of the text of Article 603 of the Commercial Code which was not excluded by the legislator in Article 715 bis 135, and for which no special provision has been made, is it excluded because it conflicts with the spirit of the simplified joint stock company, or shall it apply?

   Article 603 stipulates: "...*when the general meeting deliberates on the approval of a share in kind, the shares of the contributor of shares shall not be taken into account in the majority account. The contributor of shares has no vote in the deliberation, neither for itself nor in its capacity as proxy*". This article is compatible to the spirit of the simplified joint stock company but not for the sole-partner simplified joint stock company. The difficulty in applying this article arises in the case of a simplified joint stock company consisting of one person, since there is no general meeting to deliberate on the share in kind it contributes, due to the fact that it is the sole partner.

2 – 2 The freedom of the partners to organize the simplified joint stock company... a double-sided coin

Simplified Joint Stock Company is among the companies in which the members enjoy a great deal of contractual freedom, which is reflected in their recognized freedom to determine how to

organize and operate the company, which makes it attractive. But this freedom is at the same time a two-sided coin and entails many risks as a result of poor wording of the Articles of Association or of the silence of the latter on the regulation of certain important issues. The legislator has not made the provisions of the joint stock company as "suppletive rules" to the terms of the articles of association in the event of the silence of the latter. In a first point, we will show the extent of the contractual freedom granted to the partners, then its risks in a second point.

2 – 2 – 1 the extent of the contractual freedom granted to the partners

The simplified joint stock company is distinguished by being subject to a small number of mandatory rules regulating certain provisions, while for the remainder the partners are free to determine the organization and operation of the company in the Articles of Association, and this explains the difference in organization from one company to another. This freedom would strengthen the relations between the partners within the company and allow them to maintain their cohesion. Moreover, it would facilitate their compliance with the provisions of the articles of association they contributed to draft. The involvement of the partners in the company's organization is simply a consecration of the principle of autonomy of will over the relations that arise between them within the company, an enshrinement of the idea of the contractual nature of the company[32], and a consecration of the concept of company which considered to be a **'contract**...' according to Article 416 of the Civil Code. This is why Professor Jean STOUFFLET considers that : " the various laws on the simplified joint stock company demonstrate the entry into force of the principle of autonomy of will and of contract in the French law governing joint stock companies, which, since the 1940s, had given them only a limited place»[33].

The great flexibility offered by the legislator allows the partners to draft tailored articles of association, taking into account the number of shareholders in the company and the organization that suits them as well as the appropriate provisions for its operation[34].

Given the binding nature of the articles of association and the special place it occupies in this company compared to other commercial companies, embodying the common intention of the partners, consideration must be given to formality and clarity in order to avoid any misinterpretation and the consequences that may result from[35]. The partners may either entrust the task of drafting the company's Articles of Association to specialized legal experts or draft them themselves. In both cases the drafting must be strict: it must include the mandatory details required by the legislator, in addition to the terms particular to the company, in order to comply point by point with the decisions of the partners and their will and thus better anticipate developments and problems. On this basis, the legislator required that the articles of association include:

- The decisions to be made collectively by the partners and the terms of making them[36]
- Appointment of the president of the simplified joint stock company (Article 715 bis136)

- The methods of valuing industry contribution and its associated profits.
- The share capital (Article 715bis 138)
- The company's organization and operation (Article 715a 134), as the management bodies have no legal existence if they are not provided for in the company's articles of association which must contain a precise organization of the company and mention its management bodies and management modes, as decided by the French *Cour de cassation*[37].

However, this does not exclude the option of supplementing the organizational and administrative details contained in the articles of association with the provisions of the rules of

procedure, while giving priority to the articles of association provisions in case of contradiction between the both, because the rules of procedure, unlike the articles of association, are limited to their impact on directors, partners and employees exclusively due to the fact of not being subject to publication procedures[38].

The freedom of the partners in the simplified joint stock company is reflected in:

- **The enshrinement of the right of partner to make collective decisions**

It can be understood from Article 715 bis 137 that the legislator provides for the right of the partners to vote and to take collective decisions and gives them complete freedom in determining in the articles of association the decisions that must be made collectively and non-collective decisions. This means that the articles of association are the separator between collective decisions and other decisions[39]. The partners have also full freedom to decide on the terms of making these decisions (deliberation in general meeting, by written consultation...) and the quorum for their adoption (unanimity, majority...). However, for the decisions provided for in Article 715bis137, which are considered to be made collectively, the legislator did not mention their outcome if they are made contrarily to the provisions of this article, are they considered to be null and void since there are no nullities in the articles governing companies only if it is expressly provided for?

- **The partners freedom to choose the management bodies**

Unlike the joint stock company, in which the appointment of directors and management bodies is expressed in via mandatory rules that the shareholders may not override from, the simplified joint stock company is characterized by flexibility in the organization of it management . This flexibility is reflected in the possibility given to the partners of this company to choose the president, whether from among the partners or not, and they can set the conditions of his appointment and dismissal, his wage as well as his powers. The partners can also opt for collegial management.

The president of a simplified joint stock company is considered to be the only mandatory body of the company. He is subject to many provisions applicable to the chairman of the board of directors in a joint stock company (such as those related to powers and liability). In view of the silence of the provisions of Law 22-09 in terms of specifying whether the president is a natural or a legal person, it may be understood that both are allowed, but by extrapolating the text of Article 715 bis 135, which stipulates in its last paragraph that "*the provisions governing the joint-stock company shall apply to the simplified joint-stock company, provided that they are compatible with the provisions laid down in this section*", the president shall be a natural person[40] as in the case of a joint stock company (Article 635 CC[41] and Article 644 CC[42]).

And given the silence of the legislator on the definition of the powers of the president of the simplified joint stock company, the latter, like the president of the board of directors of the joint stock company,[43] ensures the general management of the company, represents it in its relations with third parties, and has broad powers to act in all circumstances on behalf of the company, taking into account the powers which the law expressly confers to the shareholders' meetings and within the scoop of the company's purpose[44]. In its relations with third parties, the company is bound even by the acts of the president which are not related to the company's purpose, unless it is proved that the third party knew that the act exceeded that purpose or could not have been unaware of as a consequence of the circumstances, excluding the fact that the mere publication of the articles of association is sufficient to establish such proof. Even though the articles of association may restrict the powers of the president (such as requiring him to obtain prior authorization from the shareholders before carrying out certain

operations or making certain decisions), such restrictions remain valid and effective in the relationship of the president, managing director or deputy managing director with shareholders, since the terms of the articles of association defining such powers are not enforceable against third parties.

2 – 2 – 2 Risks associated with contractual freedom in the simplified joint stock company

The drafting of a simplified joint stock company's articles of association is a crucial stage in its formation, as it defines the provisions applicable to the members in a very free manner, but this freedom may be a reason for loosing certain rights in the event of inaccuracy, or error in its drafting. In fact, the poor and deficient drafting of the conditions related to the partner's exit from the company for example, or the exclusion terms, or the conditions related to the partner's disposal of its shares, may lead to serious problems within the company.

The exclusion of the partner from the company, for example, affects his most important rights, namely his right to stay in the company, and he may be excluded only in the cases provided for by the legislator. He is excluded from the partnership in the event of his bankruptcy, or excluded due to his failure to fulfill his financial obligations towards the joint-stock company in accordance with article 715 bis 47, or may be excluded by the judge in order to preserve the existence of the company in accordance with the Civil Code. However, in the simplified joint stock company the legislator has not regulated this issue, which means that the partners may agree on the conditions and cases of exclusion of partners under the contractual freedom they enjoy and in cases other than those provided for by the law, insofar that they do not conflict with the public order rules. But this freedom requires that the articles of association define the persons to be excluded, the reason for exclusion (that this reason shall not be vague - for example: "a simple misunderstanding"), and the body that has the power to decide on the exclusion in detail, otherwise it would be a ground for loss of the partner's rights.

Unlike other companies, the privileges and rights of the shareholder in the simplified joint-stock company are not linked to the proportion of his participation in the company's capital. Their valuation is at the partners' discretion, which may be a source of conflict. Moreover, the poorly drafted articles of association may lead to disagreements on the terms on the appointment of the management bodies or on decision-making in such bodies, or in general on the terms for exercising powers within the simplified joint stock company.

In the same context, the legislator explicitly stipulated that shares resulting from industry contributions may not be alienated, but did not address the outcome of these shares in case of the death of their owner.

These issues are of paramount importance and could create a huge and damaging gap for business activity, especially as the legislator has not proposed any alternative solutions (suppletive rules). That is to say, there are no additional provisions to rely on in the event that the articles of association do not regulate a specific issue (unlike the limited liability company and others, for example).

Conclusion

Unquestionably, the simplified joint stock company is the most appropriate legal form for start-ups, owing to its legal flexibility and the freedom offered to the partners in order to organize their business. It is likely to achieve similar success to that experienced in foreign countries, but requires

a review of the legislative environment that regulates it. In this context, we consider that it is necessary:

- To amend article 715 bis 137, by specifying the outcome of the collective decisions made contrarily to its provisions and providing for their nullity because keeping this article as it is would lead to conflicts within the company.
- It can be noted that the legislator sometimes uses the term "partners" in (Art. 715 bis 133, 715 bis 134) and the term "shareholders" in (Art. 715 bis 137, 715 bis 141, 715 bis 142). We recommend adopting one of them.
- To explicitly exclude the provisions of Articles 610 to 641 related to the board of directors and not be restricted to the provisions of Articles 610 and 619.
- To explicitly exclude the provisions of Articles 642 to 674 relating to the managing board and the supervisory board,
- To exclude the articles on shareholders' meetings
- To delete the exception relating to the company's transformation from the text of Article 715 bis 135, since there is a special provision in this respect in Law 22-09.

The freedom given to shareholders to organize the company is appreciable, but the prudent legislator is the one who proposes a set of suppletive provisions to cover the shortcomings of the poorly drafted articles of association in order to prevent the conflicts that may arise.

- Since the simplified joint-stock company provides all the above-mentioned advantages in terms of freedom, why did the legislator limit it to start-up? And what prevent it from being considered as a form like any other form of companies that natural or legal persons are entitled to incorporate? This calls for a revision of the provisions of commercial law.

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[7] Article 1 of Presidential Decree 20-163 of July 15, 2020, appointing the members of government. Official Gazette No. 37 of July 27, 2020

[8] Executive Decree 20-254 of September 15, 2020, establishing a national committee to grant the "start-up", "innovative project" and "business incubator" labels, and fixing its missions, composition and operation. Official Gazette No. 55 of September 21, 2020

[9] Executive Decree 20-356 of November 30, 2020, establishing the institution for the promotion and management of support structures for start-ups, fixing its missions, operation and organization.

[10] In accordance with article 1 of Executive Decree 20-356

[11] Official Gazette No. 83 of December 31, 2020
[12] Bruno Bondero, Droit des sociétés , (*Corporate Law*), Dalloz 2013, p10
[13] Dr. CHELGHOUM Rahima « *mfhwm almwsst waltdabyr almsadt waldamt fy atar alqanwn altwjyhy lttwyr almwssat alsghyrt walmtwstt*,» (*The concept of enterprise and the auxiliary and accompanying measures within the framework of the Orientation Law on the Development of Small and Medium-sized Enterprises*), The Algerian Journal for Legal and Political Sciences. 3rd edition 2017 P545
[14] Law 08-12 of June 25, 2008 amending and supplementing Ordinance 03-03- of July 19, 2003 on competition. Official Gazette No. 36 of July 2, 2008
[15] Law 17-02 on the Orientation Law on the Development of Small and Medium-sized Enterprises (SMEs) (Official Gazette No. 2 of January 11, 2017) repealing, in accordance with article 38 thereof, the provisions of Law 01-18 of December 12, 2001 on the Orientation Law on the Promotion of Small and Medium-sized Enterprises (SMEs)
[16] In accordance with article 11 of Law 17-02.
[17] Small and medium-sized enterprise, regardless of its legal nature, is defined as an establishment producing goods and/or services: it has a staff of between 1 and 250 persons, and its annual turnover does not exceed 4 billion Algerian dinars or its total yearly balance sheet does not exceed 1 billion dinars, which meets the criterion of autonomy, i.e. its capital is not 25% or more held by an entity or groups of other entities that do not meet the definition of small and medium-sized enterprises (in accordance with article 05 of Law 17-02). The medium-sized enterprise has a staff of between 50 and 250 persons, a turnover of between 400 million DA and 4 billion DZD, and a total yearly balance sheet of between 200 million DZD and 1 billion DZD (in accordance with article 08 of Law 17-02). As for the small enterprise, it has a staff of between 10 and 49 persons, its turnover does not exceed 400 million DZD, and its total yearly balance sheet does not exceed 200 million DZD (in accordance with article 09 of Law 17-02). The number of employees in the microenterprise does not exceed 9 persons (it employs between one and nine persons). Its yearly turnover is less than 40 million DZD, or its yearly balance sheet does not exceed 20 million DZD (in accordance with article 10 of Law 17-02). In this law, the Algerian legislator did not define start-up, but only provided in Article 21 for the creation of loan guarantee funds and seed capital funds (at the level of the ministry in charge of small and medium-sized enterprises) whose purpose is to guarantee loans to small and medium-sized enterprises and to promote start-ups in the context of innovative projects.

[18] In this respect, the Algerian legislator promulgated law n° 22-23 of December 18, 2022 on the status of auto-entrepreneur. Official Gazette No. 85 of December 19, 2022
[19] For instance, the translation of "مؤسسة ناشئة" mentioned in Article 21 of Law 17-02 corresponds to the term "start-up". Similarly, Article 175 bis 133 of the Commercial Code mentioned under Law 22-09 has translated the sentence ".... mn trf alshrkat alhaslt ly lamt mwsst nashyt..." . by the sentence " des sociétés ayant été certifiées « start-up »."
[20] BOUKHORS Nadia "alahkam alqanwnyt alkhast alnazmt lshrkt almsahmt albsytt wfq alqanwn rqm » *(Special legal provisions regulating the simplified joint-stock company in accordance with Law No. 22-09)* Journla of Legal studies, Vol.09, 1st edition, p139
[21] Executive Decree 20-254 of September 15, 2020, establishing a national committee to grant the "start-up", "innovative project" and "business incubator" labels, and fixing its missions, composition and operation. (Official Gazette No. 55 of September 21, 2020
[22] BEN FADEL Ouassila : *alyat ttwyr qta almwssat alnashyt fy aljzayr(dirast tahlylya)*،(*Development mechanisms of the start-up sector in Algeria (analytical study*), Phd thesis , University of Abou Bakr BELKAID – Tlemcen, 2020/2021, p129.
[23] In accordance with article 715 bis 142 of Commercial Code
[24] In accordance with article 715 bis 15 of Commercial Code

[25] Contrary to the French legislator, who granted the shareholders the power to decide unanimously on the transformation of the company, as provided for in Article L227-3 of the Commercial Code which states: "The decision to transform the company into a simplified joint stock company is taken unanimously by the partners."

[26] It should be noted that compatibility does not mean conformity, see in this respect"

Guide de législation, PREMIER MINISTRE, CONSEIL D'ÉTAT, 3ém édition 2017, p 297 *" « conformité » et « compatibilité » ne sont pas synonymes : un rapport de compatibilité, tel qu'il est notamment pratiqué en matière d'urbanisme, tolère un écart avec la norme de référence, du moment qu'elle ne s'en trouve pas remise en cause, tandis qu'un rapport de conformité exige une adéquation parfaite ;" (* "Conformity" and "compatibility" are not synonymous: a compatibility relationship, as practised in particular in urban planning, tolerates a deviation from the reference standard, as long as it is not called into question, whereas a conformity relationship requires a perfect match*;)"*

[27] Pierre-Louis Périn, op. cit, p43, P. LE CANNU, Droit des sociétés-*(Corporate Law)*, Montchrestien, 2e éd., 2003, § 912

[28] Houda Alhoussari, L'autonomisation de la SAS, *(Empowerment of the SAS)*, University of Rennes I, 2019, p 47

[29] André Prum, La Transplantation de la SAS dans le droit des sociétés Luxembougeois, « …*le test de compatibilité ne se résumerait pas à une confrontation des textes propres à la SAS avec les articles de la loi régissant les sociétés anonymes, c'est-à-dire à une analyse fondée sur une sorte de modèle abstrait de la SAS désincarnée de son régime statutaire. L'appréciation tiendrait compte de la large place faite à la liberté des associés de déterminer le régime de leur SAS à travers les statuts pour écarter l'application de toutes les règles du régime de la SA qui viendraient contrarier ou restreindre l'exercice de cette liberté contractuelle* », (*The Transplantation of the SAS under Luxembourg corporate law)* (*...the compatibility test would not be limited to a comparison of the texts specific to the simplified joint stock company with the articles of the law governing joint stock companies, i.e. to an analysis based on a sort of abstract model of the simplified joint stock company disembodied from its statutory system. The assessment would take into account the large place given to the freedom of the partners to determine the system of their simplified joint stock company through the articles of association in order to exclude the application of all the provisions of the joint stock company system that would contradict or restrict the exercise of this contractual freedom)*.

https://orbilu.uni.lu/bitstream/10993/34395/1/M%C3%A9langes_Daigre_SAS.pdf

[30] Germain (M) et Périn (P.L), La société par actions simplifiée, Etudes – Formules (*simplified joint stock company Studies – Formulas*), 2013, Edition Joly, p62.

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[34] La société par action simplifiée, Les guides des avocats de France, (*The simplified joint stock company, The manuals of the French lawyers)*, 2005, p 5.

[35] Frank Elvis Ndjolo Vodom, op. cit, p 52

[36] relating to the increase, consumption and reduction of capital, merger, demerger, dissolution of the company, transformation of the latter into another form, the appointment of auditors of the annual accounts and income statements, shall be taken collectively by the shareholders (Article 715 bis 137)

[37] Cour de cassation, civile, Chambre commerciale, (*French Cour de cassation, civil, commercial division)* January 25, 2017, 14-28.792, https://www.legifrance.gouv.fr/juri/id/JURITEXT000033944225/

[38] Quelle est la valeur du règlement intérieur d'une société ?, (*What is the value of a company's rules of procedure*?) https://www.assistant-juridique.fr/reglement_interieur_societe.jsp

[39] G. Ripert / R. Roblot, Traité de droit commercial, Tome1, Volume2, Les sociétés commerciales, (*Treatise on Commercial Law, Tome1, Volume2, The commercial companies*), L.G.D.J 2002, p 703

[40] In French law, the article (l. 227-7 c.com) expressly stipulates that the president may be either a natural or a legal person. It specifies that if the legal person is appointed as a president of the simplified joint stock company, and in this case the manager acting on behalf of the legal person is subject to the same conditions, obligations and liability as if he had been appointed as a president in his name of the simplified joint stock company. It stipulates:

"*Where a legal person is appointed president or manager of a simplified joint stock company, the managers of the said person shall be subject to the same conditions and obligations and incur the same civil and criminal liability as if they were president or manager in their own name, without prejudice to the several liability of the legal person which they manage*".

[41] Article 635 CC stipulates: The Board of Directors shall elect from among its members a Chairman who shall be a natural person, failing which the appointment shall be null and void. It shall determine his remuneration

[42] Article 644 CC stipulates: "The members of the Management Board are appointed by the Supervisory Board, which appoints one of them as chairman. Under penalty of nullity, the members of the Management Board shall be natural persons."

[43] As provided for in article 638 CC.

[44] Contrary to the French legislator who regulated this issue in article L. 227-6 C. com

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