

# **Algerian Commercial Law in Light of Recent Amendments**

**-Business Transactions, Merchant Theory,  
E-Commerce, Commercial Establishments-**

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**Horiya Souiki**

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**Horiya Souiki**

**Professor of law**

**University of Ain temouchent Algeria**

## Table of Contents

<b>Introduction</b>	01
<b>Preliminary Chapter: Concepts and Fundamentals of Commercial Law</b>	03
<b>First Section: Concept of Commercial Law</b>	03
<b>First Subsection: Definition and Scope of Commercial Law</b>	03
<b>First Subdivision: The Meaning and Origin of Commercial Law</b>	03
<b>Second Subdivision: Defining the Scope of Commercial Law</b>	04
<b>Second Subsection: The Uniqueness of Commercial Law and the Question of Whether Private Law is Unified or Dualistic</b>	06
<b>First Subdivision: Specificity of Commercial Law</b>	07
<b>Second Subdivision: The Issue of Unity or Dualism in Private Law</b>	08
<b>Second Section: Sources of Commercial Law, Criteria, and Importance of Distinguishing Between Commercial and Civil Actions</b>	11
<b>First Subsection: Sources of Commercial Law</b>	11
<b>First Subdivision: Official Sources</b>	11
<b>Second Subdivision: Interpretative Sources</b>	13
<b>Second Subsection: Criteria and Importance of Distinguishing Between Civil and Commercial Actions</b>	14
<b>First Subdivision: Criteria for Distinguishing Between Civil and Commercial Acts</b>	14
<b>Second Subdivision: The Importance of Distinguishing Between Commercial and Civil Actions</b>	18
<b>First Chapter: The Theory of Commercial Transactions</b>	21
<b>First Section: Substantive Commercial Transactions</b>	22

<b>First Subsection: Individual Commercial Transactions</b>	22
<b>First Subdivision: Buying for the Purpose of Reselling</b>	22
<b>Second Subdivision: Other Individual Substantive Commercial Activities</b>	25
<b>Second Subsection: Substantive Commercial Transactions within Enterprises</b>	27
<b>First Subdivision: Types of Substantive Commercial Transactions within Enterprises</b>	27
<b>Second Subdivision: Ambiguities in Contracts Related to Maritime Trade</b>	31
<b>Second Section: Formal, Consequential, and Mixed Commercial Activities</b>	32
<b>First Subsection: Commercial Activities by Form</b>	32
<b>First Subdivision: Commercial Companies</b>	32
<b>Second Subdivision: Bill of Exchange</b>	36
<b>Third Subdivision: Other Commercial Transactions Specified in Article 02 of the Commercial Law</b>	40
<b>Second Subsection: Ancillary and Mixed Commercial Activities</b>	42
<b>First Subdivision: Ancillary Commercial Activities</b>	42
<b>Second Subdivision: Mixed Commercial Activities</b>	48
<b>Second Chapter: The Theory of the Merchant and the Commercial Establishment</b>	50
<b>First Section: Theory of the Merchant</b>	50
<b>First Subsection: Conditions for Acquiring Merchant Status and the Requirements for E-Commerce</b>	50
<b>First Subdivision: Conditions for Acquiring Merchant Status</b>	50
<b>Second Subdivision: Regulations for E-commerce According to Law 18/05</b>	56
<b>Second Subsection: Obligations of the Merchant</b>	61
<b>First Subdivision: Registration in the Commercial Registry</b>	61
<b>Second Subdivision: Maintenance of Commercial Books</b>	77

<b>Second Section: Theory of the Commercial Establishment</b>	87
<b>First Subsection: Concept of the Commercial Establishment and Its Elements</b>	87
<b>First Subdivision: Concept of the Commercial Establishment</b>	87
<b>Second Subdivision: Elements of the Commercial Establishment</b>	90
<b>Second Subsection: Transactions Involving the Commercial Establishment</b>	91
<b>First Subdivision: Sale</b>	91
<b>Second Subdivision: Lease</b>	94
<b>Third Subdivision: Mortgage</b>	97
<b>Conclusion</b>	99
<b>List of Sources</b>	100
<b>Table of Contents</b>	103

## Introduction:

Commercial law, while a relatively recent development, stands in contrast to the ancient practice of trade, which was historically governed by civil law. Civil law provided a universal legal framework applicable to all individuals, encompassing every aspect of their interactions irrespective of personal characteristics or the nature of the transactions involved.

The genesis of commercial law can be traced back to customary practices that gradually evolved in response to the dynamic pressures of economic demands and scientific advancements.<sup>1</sup> This evolution necessitated the creation of a specialized legal framework designed specifically for individuals engaged professionally in commerce and for transactions that are primarily commercial in nature. Consequently, commercial law is characterized by a narrower focus than civil law, as it caters exclusively to a specific subset of individuals and transaction types.<sup>2</sup>

This specialized field of law is tasked with the crucial functions of defining what constitutes commercial activities and who qualifies as a merchant. It also delves into the theories surrounding commercial establishments and their operations, all structured within a unified ministerial curriculum.

This curriculum not only addresses second-year undergraduate students in general law but also offers advanced topics for third-year students specializing in legal disciplines, covering areas such as commercial companies, commercial papers, bankruptcy, and judicial settlements.

The foundational legal texts for commercial law include Ordinance No. 75/59, which specifically pertains to commercial law,<sup>3</sup> and Law No. 18/05, which

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<sup>1</sup>Rabeh Ben Zaarar, *Principles of Commercial Law (Theory of Commercial Transactions - Theory of the Merchant)*, Dar Al-Uloom Publishing and Distribution, 2014, p. 05.

<sup>2</sup>Zuhair Abbas Karim and Halou Abu Halou, *A Concise Explanation of Jordanian Commercial Law, Part One*, Hamada Printing Center, Hashemite Kingdom of Jordan, 1999, p. 06.

<sup>3</sup>Ordinance No. 75/59, dated September 26, 1975, concerning commercial law, amended and supplemented.

addresses the nuances of e-commerce.<sup>4</sup> The latter updates and adapts legal concepts to the contemporary digital landscape, facilitating commerce within a virtual environment hosted on an Algerian domain. This modern approach to commercial law is further expanded in subsequent sections.

Supplementary legislation, including the commercial registry law and other regulations governing commercial practices, also plays a significant role in shaping the landscape of commercial law. The methodology employed in creating this text is both descriptive and analytical, aiming to clarify and elucidate concepts for enhanced student comprehension and to provide a detailed examination of legal texts pertinent to the studied topics.

A dual-division approach is implemented in the structure of the discourse, initiated by a preliminary chapter that outlines the general concepts. This is followed by a focused exploration in the first chapter on the theory of business transactions, and the second chapter dedicated to the theories of merchants and commercial establishments.

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<sup>4</sup>Law No. 18/05, dated May 10, 2018, concerning electronic commerce, Official Gazette No. 28, issued on May 16, 2018.

# **Preliminary Chapter: Concepts and Fundamentals of Commercial Law**

In this introductory chapter, we delve into the definition, unique characteristics, historical evolution, sources, and distinctiveness of commercial law from civil transactions.

## **First Section: Concept of Commercial Law**

Commercial law is recognized as a dynamic branch of private law, continually evolving to meet the changing demands of commerce across different periods. In this section, we elucidate the scope of commercial law, emphasizing its unique attributes and addressing the ongoing debate regarding the unification versus dualism in private law.

### **First Subsection: Definition and Scope of Commercial Law**

#### **FirstSubdivision: The Meaning and Origin of Commercial Law**

Commercial law, a specialized branch of private law, governs the legal operations conducted by merchants either among themselves or with their customers. These operations are commonly referred to as business activities, reflecting their intrinsic connection to the practice of commerce. Notably, the jurisdiction of commercial law extends to include certain activities undertaken by non-merchants as well.<sup>5</sup>

Historically, the earliest manifestations of commercial law were observed in the Mediterranean region, a pivotal area in cross-continental trade due to its strategic geographic positioning. The Babylonians, as early as 1950 BC, were pioneers in formulating commercial regulations, evidenced by the Code of Hammurabi which encapsulated rules concerning partnership agreements, agency contracts, and interest-bearing loans.

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<sup>5</sup>FarhaZarawi Saleh, *Complete in Algerian Commercial Law - Commercial Transactions, the Craftsman, Organized Commercial Activities, Commercial Register*, Second Edition, Dar Ibn Khaldoun, Algeria, 2003, p. 02.

The Phoenicians, renowned for their maritime prowess, developed extensive trade networks across the Mediterranean and beyond, building durable ships and enhancing maritime navigation techniques. Similarly, the Greeks contributed to commercial law by establishing specialized systems for maritime loans, which laid the groundwork for future financial instruments like lump-sum loan agreements.

During the Middle Ages, particularly by the eleventh century, several European seaports emerged as hubs of commercial activity. The merchant class, burgeoning with wealth, began to dominate not only commerce but also political spheres, often enacting laws, governing cities, and resolving disputes through customary commercial practices. In the modern era, marked by the discovery of the Americas and the influx of precious metals, there was a significant expansion in banking and corporate operations. This period saw the rise of large corporations and increased state intervention in economic activities, marking the transition from merchant-driven commerce to legislatively regulated trade.<sup>6</sup>

In Algeria, the evolution of commercial law has been marked by significant legislative amendments, notably Ordinance No. 75/59 which has been amended multiple times in response to changing economic dynamics, specifically in the years 1990, 1993, 1997, 2005, and 2015. Furthermore, Law No. 22/09 represents the latest amendment, reflecting the ongoing adaptation of commercial law to contemporary economic challenges.<sup>7</sup>

### **Second Subdivision: Defining the Scope of Commercial Law**

Defining the scope of commercial law involves a thorough examination of both subjective and personal concepts, as well as an analysis of the stance taken by Algerian legislators on these issues.

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<sup>6</sup>Nesrin Charki, *Commercial Transactions, the Merchant - The Commercial Establishment*, Dar Belqis, Algeria, 2017, p. 06.

<sup>7</sup>Law No. 22-09, dated May 5, 2022, amends and supplements Ordinance No. 75/59 dated September 26, 1975, concerning commercial law.

## 1. The Personal Theory

Popularized during the Middle Ages within the guild system, the Personal Theory posits that commercial law's domain is strictly confined to merchants. According to this perspective, commercial law is fundamentally the law of merchants, implying that individuals identified as merchants are subject to commercial law, irrespective of whether their activities are commercial or civil in nature.

If the actor is not a merchant, they are not subject to commercial law even if their activity is commercial.<sup>8</sup> The labeling of this theory as personal or subjective is based on the emphasis on the status of the actor rather than the nature of the activity itself. Its supporters justify their view by arguing that commercial law originated as a personal law, specific to merchants, stemming from customs followed by merchant guilds in the Middle Ages.

Despite the abolition of the guild system and the spread of economic freedom principles that allow any individual to engage in any activities they wish, commercial rules have remained stable, and modern laws have maintained divisions of commercial law to adjudicate commercial disputes.

Supporters of this theory also justify their stance by adopting a subjective standard due to its ease of application. The commercial nature of an individual, derived from their registration in the commercial registry and the operation of a commercial establishment, confers the commercial quality on the activity.<sup>9</sup> This approach was adopted by German law in 1897, which defined the scope of commercial law based on trade rather than business activities.<sup>10</sup>

However, this theory is not without its criticisms:

- It complicates the definition of professionalism, potentially leading to a form of exclusivity reminiscent of sectarian practices from the Middle Ages.

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<sup>8</sup>Atou Al-Mousous, *A Summary of Algerian Commercial Law*, Alfa Documents for Publishing and Distribution, Algeria, 2022, p. 17.

<sup>9</sup>Op. cit., p. 15.

<sup>10</sup>Op. cit., p. 18.

- By assuming that all activities conducted by a merchant are commercial, this theory inadvertently places all such activities under the jurisdiction of commercial courts, even those that are private civil acts not related to commerce.
- The restrictive scope of the Personal Theory may render commercial law inconsistent, as it relies solely on personal criteria.

## **2. The Objective Theory**

In contrast, the Objective Theory defines the scope of commercial law based on the nature of the activities themselves, rather than the characteristics of the individuals conducting them. This theory stipulates that if an activity is commercial in nature, then commercial law applies, regardless of whether the actor is a merchant. This makes commercial law universally applicable to all relevant business activities.<sup>11</sup>

Described as objective and material, this theory prioritizes the substance of the act over the status of the actor in determining the applicability of commercial law.

The Objective Theory, however, is subject to several criticisms:

- \_ There is an inherent difficulty in precisely defining and delimiting what constitutes a commercial activity, due to the continual evolution of commerce.
- \_ This theory does not adequately address why merchants are required to register in the commercial registry, maintain commercial books, or adhere to bankruptcy regulations.
- \_ It struggles to articulate a clear foundation for what constitutes subsidiary commercial activities.

## **3. Position of the Algerian Legislator**

The Algerian legislator has effectively harmonized the personal and objective theories within its legal framework, as clearly articulated in Article 01 of the Commercial Law:

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<sup>11</sup>Atou Al-Mousous ,Op. cit., p. 16.

- The subjective theory is employed to define a merchant as an individual who habitually engages in commercial activities, emphasizing the personal aspect of the profession.
- Conversely, the objective theory is reflected in the structure and delineation of commercial activities, which are systematically categorized by form and subject in Articles 02, 03, and 04 of the Commercial Law.

## **Second Subsection: The Uniqueness of Commercial Law and the Question of Whether Private Law is Unified or Dualistic**

### **First Subdivision: Specificity of Commercial Law**

The distinctiveness of commercial law primarily arises from its objective of profit generation. This is manifested in the extensive range of transactions a merchant undertakes, which necessitates robust legal frameworks that enable swift and efficient business operations.

Speed stands as a foundational element in commercial transactions, facilitating a merchant's ability to buy, sell, fulfill, and collect on obligations, including lending, borrowing, leasing, and renting activities. It is thus essential to streamline these transactions by minimizing the formalities typically associated with civil transactions.

Commercial law, therefore, champions the principle of proof freedom and introduces streamlined formalities, such as the use of standardized documents among merchants, including purchase orders, invoices, and delivery notes, as well as the handling of commercial papers and the principle of solidarity that underpins them.

The evolution of commercial law has been significantly influenced by the advent of technological advancements, leading to the rise of e-commerce. E-commerce leverages principles that minimize geographical distances, expedite services, and automate the processing of goods and service requests, both nationally and internationally.<sup>12</sup>

Furthermore, commercial law underscores the importance of credit as a pivotal pillar. The commercial world thrives on the inherent trust within its ecosystem.

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<sup>12</sup>Ali Ben Ghanam, *A Concise on Commercial Law and Business Law*, Mofam Publishing, Algeria, 2002, p. 39.

For example, a wholesale merchant often purchases substantial quantities of goods from a producer via telephone or other communication methods, with the understanding that payment is deferred.

The goods are received and sold to retail merchants who, in turn, offer them to consumers. Each party involved is afforded a reasonable period to settle the value of the goods after their sale, allowing for the realization of a profit margin.

To support and enhance the facilitation of credit, commercial law has instituted various systems and mechanisms, such as commercial papers, including bills of exchange, bills of lading, and invoice factoring contracts, among others.<sup>13</sup>

### **Second Subdivision: The Issue of Unity or Dualism in Private Law**

In numerous jurisdictions, commercial law stands as an autonomous branch distinct from civil law. Nevertheless, there remains a vibrant debate concerning whether this independence serves as a beneficial attribute or merely a vestigial relic from historical practices. The arguments unfold as follows:

#### **1. Advocates for the Unity of Civil and Commercial Law**

Advocates for the unification of private law contend that civil and commercial laws should be merged. Historically, specific regulations that governed transactions among merchants did not diverge significantly from Roman law. Commercial law itself only started to evolve within the merchant guilds of France and Italy.

The proponents argue that since the autonomy of commercial law was closely linked to the guild system, the rationale for its separation should dissolve alongside the fading relevance of its original causes. They point to the French Revolution, which eliminated trade restrictions for all citizens, irrespective of whether they were merchants or non-merchants, and subsequently led to the dissolution of the guild system, as pivotal in questioning the continued segregation of commercial law.

Moreover, they assert that the practical reasons justifying the existence of a separate commercial legal framework have largely dissipated as modern states have adopted more interventionist roles in economic and commercial life.

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<sup>13</sup>Ali Ben Ghanam.op.cit, p. 38.

Countries like Switzerland, Italy, and Britain have successfully navigated the challenges posed by the dualism of private law by enacting unified statutes that govern both commercial and civil transactions. These laws apply equally to all individuals, without discriminating between merchants and non-merchants.

Supporters of unification further justify their stance by highlighting the contemporary landscape where commercial rules and systems extend beyond the merchant class to non-merchants as well. This is evident in the widespread adoption of commercial practices such as the use of commercial papers, contract loans, and current accounts by the general population. Moreover, even state entities engage in commercial activities, issuing loan documents, investing in commercial enterprises, and managing securities.

Lastly, they advocate that the characteristic efficiency and speed, once exclusive to commercial transactions, should be extended to civil transactions through the unification of laws. This approach recognizes that the necessity for swift transactions is no longer exclusive to the realm of commerce but is increasingly demanded in civil dealings as well.<sup>14</sup>

## **2. Advocates for the Duality of Civil and Commercial Law**

A significant segment of legal scholars advocates for the retention of commercial law as a distinct entity separate from civil law. This stance is grounded in the belief that commercial dealings, inherently vital to economic frameworks, necessitate a dedicated legal structure that addresses the unique needs and speed required for the conclusion and execution of transactions.

From a historical viewpoint, the scenario during Roman times, where no clear distinction was made between civil and commercial law, is deemed non-representative of today's needs. Commercial law has its roots deeply embedded in the merchant cultures of the Italian republics and has been meticulously refined over generations to cater to the evolving demands of commerce.

While some nations have adopted unified codes to regulate both civil and commercial transactions, it is critical to differentiate between having a single overarching law and maintaining a dualistic approach. For instance, Swiss and Italian legal frameworks, though unified in codification, do not advocate for a uniform set of legal rules that apply indiscriminately to both commercial and

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<sup>14</sup>Ammoura Amar, *Explanation of Algerian Commercial Law*, Dar Al-Ma'arifa, Algeria, 2018, p. 13.

civil activities. Instead, they have laid down general provisions for commercial systems while also dedicating specific chapters and sections to address commercial activities distinctly.

The pervasive integration of commercial instruments in civil life, such as commercial papers, provides a robust and compelling argument for maintaining the separation between commercial and civil law. This separation ensures that specific legal needs and nuances of commercial interactions are adequately addressed, distinct from those of civil matters.<sup>15</sup>

The Algerian legal system exemplifies this principle of duality in private law by establishing separate codes for commercial and civil law, adhering to the doctrine that specific laws supersede general ones. In scenarios devoid of specific commercial law provisions, civil law, which is considered the general law, prevails.

Moreover, the Algerian legislature has meticulously crafted specific regulations tailored for the commercial sector, detailing the organization of commercial activities, the criteria for attaining merchant status, and the obligations of merchants. It has also delineated explicit legal provisions for commercial establishments, which are distinct from those applied to civil entities. This includes regulations governing commercial companies, commercial papers, bankruptcy, and judicial settlements.

A further distinction is evident at the judicial level, where separate divisions are designated for civil and commercial disputes. It is noteworthy that the commercial division has been preserved, and specialized commercial courts have been established to exclusively handle disputes within the commercial domain.<sup>16</sup>

This specialized judicial structure ensures that commercial disputes are adjudicated with the requisite expertise and focus on commercial legality, underscoring the necessity of maintaining a dualistic approach to private law.

## **Second Section: Sources of Commercial Law, Criteria, and Importance of Distinguishing Between Commercial and Civil Actions**

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<sup>15</sup>Ammoura Amar.op.cit, p. 15.

<sup>16</sup>Law No. 08/09, dated February 25, 2009, concerning civil and administrative procedures, Official Gazette No. 21, issued on April 23, 2008, amended and supplemented.

Commercial law derives from both formal and interpretative sources, exhibiting distinct provisions that set it apart from civil transactions. Here are the details:

### **First Subsection: Sources of Commercial Law**

These are delineated as follows:

#### **First Subdivision: Official Sources**

##### **1. Legislation:**

This encompasses the collection of legal norms formulated by the authoritative bodies within the state. Judges refer to these laws when determining the appropriate rule governing a particular dispute. <sup>17</sup>This category includes commercial law, which is regarded as a special legal domain, alongside related and supplementary laws, with civil law providing a general legal framework to bridge any gaps in special laws. At the pinnacle of these sources are the constitutional texts. <sup>18</sup>

##### **2. Custom:**

Recognized as an official source of commercial law, custom stems from the natural evolution within a social system.

- \_ Conventional custom emerges spontaneously from the consistent repetition of similar commercial activities or operations, gradually solidifying over time. It starts as a limited practice among a small group of merchants who consistently act in the same manner under identical circumstances, eventually evolving into a collective practice. Therefore, the isolated actions of a few cannot be viewed in isolation. <sup>19</sup>
- \_ Legal custom develops in a manner akin to conventional custom but incorporates a psychological element of belief, rendering the customary legal rule obligatory in its application and acting as a supplement to the law. <sup>20</sup>

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<sup>17</sup>Nesrin Charki, op. cit., p. 09.

<sup>18</sup>Rizk Allah Arabi Ben Mhidi, *A Concise on Algerian Commercial Law*, Fifth Edition, University Publications Office, Algeria, 2011, p. 23.

<sup>19</sup>Farha Zarawi Saleh, op. cit., p. 42.

<sup>20</sup>Ibid., p. 43.

In both theory and practice, there is a noted conflict between the principles of Islamic Sharia and custom, particularly as the primary auxiliary source of Algerian commercial law.

It presents a significant challenge for scholars to ascertain the dominant auxiliary source of commercial law following legislation. In comparing the civil and commercial laws enacted in 1975, it is observed that civil law delineates its sources in a specific sequence: legislation, principles of Islamic Sharia, custom, principles of natural law, and rules of justice. Conversely, the commercial law promulgated on the same day omits a clear specification of its sources.

According to the fundamental rule that treats commercial law as specialized and exceptional, in the absence of a specific provision, civil law prevails as the general law.

Therefore, the hierarchy of sources for commercial law, as previously indicated, is commercial law legislation, followed by civil law, then principles of Islamic Sharia, custom, principles of natural law, and rules of justice, positioning the principles of Islamic Sharia as the primary auxiliary source.

However, the introduction of the Commercial Register Law No. 90/22 on August 18, 1990, complicated the legal landscape. Article 1 of this law states: "The commercial law, professional customs, and decisions of competent commercial courts regulate relationships between merchants..." This clause implies that custom is a primary source, yet the legislation seemed to falter by asserting this within the Commercial Register Law without a corresponding provision in the commercial law itself.

In 1996, the situation was clarified with Decree No. 96/27,<sup>21</sup> which amended and supplemented the commercial law. Article 01 of this decree added: "Commercial law applies to relationships between merchants, and in the absence of a text, civil law and professional customs apply as necessary." This amendment resolved the previous ambiguities regarding the sources of commercial law, firmly acknowledging custom as a primary auxiliary source.<sup>22</sup>

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<sup>21</sup>Ordinance No. 96/27, dated December 9, 1996, amends and supplements Ordinance No. 75/59, dated September 26, 1975, concerning commercial law, Official Gazette No. 77.

<sup>22</sup>Ali Ben Ghanam, *op. cit.*, pp. 82 et seq.

### **3. Principles of Natural Law and Rules of Justice**

These principles empower judges to dispense justice through discretion, unbound by strict legal provisions or rules potentially applicable by the nature of cases for which no solution is found in either the original official sources or the auxiliary sources.<sup>23</sup>

#### **Second Subdivision: Interpretative Sources**

Interpretative sources of commercial law include:

##### **1. Judiciary:**

The judiciary, particularly through a series of decisions from the Supreme Court, plays a pivotal role in the interpretation, elucidation, and evolution of commercial law. Given the unique demands of commercial life, which is characterized by constant innovation, regular updates, and the need for prompt resolutions, commercial courts frequently make rulings that reflect the dynamic nature of the commerce sector. This interaction underscores the symbiotic relationship between official and interpretative sources of law.<sup>24</sup>

##### **2. Doctrine:**

The role of doctrine in commercial law is crucial, with contributions from legal scholars that involve clarifying and explaining the provisions of commercial law and commenting on judicial decisions within this sphere. Scholars often provide persuasive insights into the spirit of legal texts and the substance of rulings, identify shortcomings, and suggest remedies.

The impact of doctrine on the development of commercial law is significant, as evidenced by many countries forming committees to review legal provisions and recommend amendments when reforming a sector. This methodical approach facilitates the creation of well-considered, contemporary, and efficacious legislation.<sup>25</sup>

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<sup>23</sup>Nesrin Charki, *op. cit.*, p. 10.

<sup>24</sup>Ali Ben Ghanam, *op. cit.*, p. 88.

<sup>25</sup>*Ibid.*, p. 90.

## **Second Subsection: Criteria and Importance of Distinguishing Between Civil and Commercial Actions**

Distinguishing between commercial and civil actions is critical for accurately understanding, establishing, and defining the legal framework that governs commercial activities. This differentiation is outlined as follows:

### **First Subdivision: Criteria for Distinguishing Between Commercial and Civil Actions**

The criteria for distinguishing between commercial and civil actions are primarily based on two theories: the subjective theory and the objective theory, each offering different perspectives and criteria.

#### **1. Subjective Theory:**

Commercial law primarily governs individuals who engage in trade professionally, applying exclusively to them. This legal framework encompasses two main theories:

##### **A. Craft Theory:**

Advocates of this theory, notably championed by the jurist "Ribier," propose that the distinction between commercial and civil actions should hinge on the profession practiced by the individual. According to this theory, any action undertaken by a person who engages professionally in commercial activities is deemed commercial. For example, if a store owner arranges a loan, it must be evaluated whether the loan was made within the trade scope to determine if it is commercial or civil. This theory broadens the scope of what may be considered commercial but has drawn criticism for several reasons:

- There is an absence of a clear definition of what constitutes a 'commercial craft' and criteria for distinguishing it from civil activities.
- Adherence to this theory might inadvertently exclude certain actions that are inherently commercial from the scope of commercial law because they are not carried out by individuals formally recognized as merchants, such as non-merchants engaging in commercial papers.<sup>26</sup>

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<sup>26</sup>Op. cit., pp. 97, 98.

## **B. Enterprise or Project Theory:**

This theory posits that any activity conducted within a structured project, routinely and with organization, is considered commercial. Conversely, activities outside such a framework are deemed civil. The distinction here hinges more significantly on whether one is a merchant rather than on the nature of the actions per se.

A merchant, by engaging in commercial activities and adopting it as a profession, only secures a commercial character if these activities are performed within a project framework. This approach emphasizes elements of professionalism, repetition, and the need for an organizational structure. While it provides a robust framework, the enterprise theory is criticized for:

- Potentially marginalizing individual acts that display commercial traits if they occur under legally defined controls.
- Broadly applying the commercial designation to all activities conducted within a project framework, potentially misclassifying entities like law firms as commercial operations due to their organized nature, despite their civil legal services.

These theories illustrate the complexities and nuances involved in classifying actions as either commercial or civil<sup>27</sup>. They highlight the ongoing debate and the need for a precise framework to accurately determine the nature of business and professional activities within the legal landscape.

## **2. Objective Theory**

This theory encompasses two sub-theories: speculation and circulation.

### **A. Speculation Theory**

Proponents of the speculation theory assert that an act is considered commercial if it is undertaken with the intention of speculation, that is, aiming to achieve a profit. This profit-oriented nature fundamentally distinguishes commercial from civil activities.

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<sup>27</sup>Op. cit., p. 96.

A notable advocate, legal scholar "Jean Leon Kan," posits that the crux of distinguishing between commercial and civil actions lies in the speculative intent, such as purchasing goods to resell them at a profit margin exclusively reserved for the merchant.

However, this theory is not without its criticisms:

- Solely relying on the criterion of speculation is seen as insufficient for categorizing an action as commercial, as there are profit-driven activities that naturally possess a civil character, such as the professional services offered by lawyers, doctors, and engineers.
- Additionally, speculation does not always manifest as the merchant's intent to realize a profit; external circumstances may necessitate a sale at break-even points or even at a loss, influenced by market fluctuations or product expiry concerns.
- The scope of commercial activities also extends beyond mere speculation to include creating credit and fulfilling obligations through it.

Despite these critiques, the speculation theory is lauded for effectively excluding non-profit-oriented entities such as cooperatives and associations from the commercial domain.<sup>28</sup>

## **B. Circulation Theory**

Advocates of the circulation theory consider the flow of money, goods, and securities as the defining characteristic of commercial actions. This theory focuses on the "circulation" or movement of manufactured goods from producers to wholesalers, then to retailers, and finally to consumers. All activities within this circulation framework are classified as commercial.

Proponents argue that an action qualifies as commercial if it involves the movement of products along the aforementioned distribution chain. In contrast, actions are considered civil if they involve direct transactions from the producer to the consumer. The path of goods, marked by successive operations and contracts such as insurance, transportation, sales, and commission agency contracts, adds value and subjects them to commercial law provisions.

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<sup>28</sup>For more details see Atou Al-Mousous, *op. cit.*, p. 37 et seq.

For example, the sale of a farmer's crops directly from his land would be considered a civil act, whereas the same act becomes commercial if it navigates through the chain from the farmer to the wholesaler and then to the retailer before reaching the consumer, like contracts for purchasing crops for resale.

Despite the tangible aspect of the circulation theory, namely, the physical movement of products, it has also faced criticism for encompassing actions that demonstrate the characteristic of circulation without necessarily belonging to commercial activities. This theory's application can sometimes extend too broadly, capturing activities within its scope that may not inherently be commercial in nature.

After exploring various theories that distinguish between civil and commercial actions, it is essential to clarify the position of the Algerian legislator regarding this distinction.

Upon examining the articles of the commercial law, it is evident that the legislator has embraced a variety of theoretical frameworks. Notably, Article 02 of the same law explicitly adopts a speculative criterion, focusing on the purchase for resale intended to generate profit, in addition to encompassing brokerage and commission agency operations.

Concurrently, the legislator endorses the enterprise or project theory in the structuration of objective commercial activities within an enterprise framework. This approach prompts an inquiry into the rationale behind classifying commercial companies, bills of exchange, and actions pertaining to commercial establishments as inherently commercial activities according to Article 03 of the commercial law. Additionally, the ancillary commercial activities referenced in Article 04 are also considered.<sup>29</sup>

The commercial nature of these related activities is often ascribed to the craft criterion, as they transpire within the context of a merchant executing his trade.<sup>30</sup> Furthermore, these activities are formally recognized as commercial irrespective of their content, a departure from earlier theories that did not provide such a basis.

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<sup>29</sup>Op. cit., p. 94.

<sup>30</sup>Op. cit., pp. 40, 41.

## **Second Subdivision: The Importance of Distinguishing Between Commercial and Civil Actions**

Understanding the distinction between commercial and civil actions is multifaceted and significant for several reasons:

### **1. Jurisdictional Rules**

Judicial jurisdiction refers to the authority granted to a specific judicial body to adjudicate disputes and resolve conflicts in accordance with legal statutes, following procedures that are shaped by the actions of the disputants.

Commercial disputes are subject to both substantive and territorial jurisdictions:

#### **A. Subject-matter Jurisdiction:**

The Algerian judicial system, which maintains a unified structure of civil and commercial courts, outlines in Article 32, paragraph one, of the Civil and Administrative Procedures Law that "The court is the judicial authority with general jurisdiction and is composed of divisions."

This framework includes a commercial division tasked with resolving commercial disputes. Subject-matter jurisdiction is considered an element of public order. It is crucial to note that the commercial division is not an autonomous entity but rather a part of the broader administrative structure of the courts. Consequently, jurisdictional objections for disputes that are civil in nature presented to the commercial division, or vice versa, are inadmissible.

Instead, the case file is redirected to the appropriate division via the registry following notification to the court president. With the enactment of Law No. 22/13 in 2022<sup>31</sup>, which amended the Civil and Administrative Procedures Law, specialized commercial courts were established to adjudicate certain cases previously under the general sector, explicitly enumerated. Apart from these specific cases, the remaining disputes are managed by the commercial division.

#### **B. Territorial Jurisdiction:**

The provisions for territorial jurisdiction in commercial disputes are meticulously outlined in Articles 37, 38, and 39 of the Civil and Administrative Procedures Law. Generally, jurisdiction is assigned to the court in the area of the

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<sup>31</sup>Law No. 22-13, dated July 12, 2022, amends and supplements Law No. 08-09, dated February 25, 2008, concerning civil and administrative procedures.

defendant's domicile, or in the absence of a known domicile, the court of the last known domicile.

If a specific domicile has been selected for jurisdictional purposes, then the court overseeing this chosen domicile assumes jurisdiction. Notably, Article 39's fourth paragraph stipulates that for commercial matters, excluding bankruptcy and judicial settlements, actions should be initiated in the jurisdiction where the contractual promise was made, goods were delivered, or payment is due.

For litigations involving a company, the court of jurisdiction is where the company's principal office or any of its branches is located, illustrating the legislator's intent to offer parties flexibility in choosing the judicial location as per Article 39 of the Civil and Administrative Procedures Law. Conversely, disputes pertaining to civil matters are addressed within the civil division under the jurisdiction of the court located at the defendant's domicile.<sup>32</sup>

## **2. Rules of Evidence**

- While the general rules of evidence necessitate documented proof for debts exceeding 100,000 DZD as stated in Article 333, paragraph one, of the Civil Law, the commercial sector is governed by a more liberal principle of evidence freedom<sup>33</sup>. Article 30 of the Commercial Law allows contracts to be substantiated through various means, including but not limited to official documents, customary papers, acknowledged invoices, correspondence, parties' ledgers, witness testimonies, or any other method deemed acceptable by the court, irrespective of the debt's magnitude.
- It is imperative to acknowledge specific instances, such as company agreements and sales of commercial establishments, where formalities are explicitly required by legislation.<sup>34</sup>

## **3. Penalties for Breach of Obligation**

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<sup>32</sup>Rabeh Ben Zaarar, op. cit., pp. 36, 37.

<sup>33</sup>Ordinance No. 75/58, dated September 26, 1975, concerning the civil law, amended and supplemented.

<sup>34</sup>Fadila Sahri, *Fundamentals of Algerian Commercial Law*, Dar Jasoor for Publishing and Distribution, Algeria, 2017, p. 31.

- Traditional civil law, which governs civil transactions, does not incorporate the concept of bankruptcy, an institution predominantly associated with the commercial sector and applicable to any merchant, whether individual or corporate, who fails to meet their debt obligations.
- Diverging from civil law, which recognizes only insolvency, defined as the inability of a debtor to fulfill their financial obligations due to their liabilities surpassing their assets, commercial law implements a stringent framework to uphold the critical element of credit in commercial dealings. This framework facilitates the declaration of a merchant's bankruptcy upon verified cessation of debt payments.
- By enhancing these legal distinctions and procedural nuances, the aim is to provide clarity and promote informed decision-making in both commercial and civil judicial proceedings.
- Bankruptcy entails the seizure of the bankrupt's assets and the immediate enforcement of the bankruptcy order, even if it is appealed. It serves as a strict punishment for any merchant who breaches the principle of credit, evidenced by their removal from the commercial register, with re-registration only possible after rehabilitation is granted.<sup>35</sup>

#### **4.Solidarity**

- \_ In civil law, solidarity among creditors or debtors is not presumed and occurs only by legal stipulation or agreement among the parties, as stated in Article 217 of the Civil Law.
- \_ Contrarily, in commercial law, solidarity among merchants is presumed, exemplified by Article 551 of the Commercial Law, which presumes solidarity among partners in a partnership. Another application is the presumed solidarity among signatories of a promissory note, as per Articles 426 and 432 of the same law.<sup>36</sup>

#### **6. Judicial Grace Period**

- In civil transactions, a civil judge may grant a debtor, who acts in good faith, a reasonable grace period to meet their obligations, according to Article 210

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<sup>35</sup>Rabeh Ben Zaarar, op. cit., p. 51.

<sup>36</sup>Fadila Sahri, op. cit., p. 32.

of the Civil Law. However, such a provision does not exist in commercial transactions, which are characterized by the principles of speed and credit.<sup>37</sup>

## **7. Statute of Limitations**

- Generally, the statute of limitations for civil transactions lasts fifteen years, as stated in Article 197 of the Civil Law. Conversely, commercial transactions are subject to a shorter limitation period; for example, rights associated with a bill of exchange expire three years from the due date, according to Article 461 of the Commercial Law.

# **First Chapter: The Theory of Commercial Transactions**

The Algerian Commercial Code delineates specific types of commercial transactions in Articles 2, 3, and 4, reflecting the dynamic nature of commercial practices. These transactions are categorized into three primary types: substantive, formal, and consequential.

## **First Section: Substantive Commercial Transactions**

As per Article 02 of the Commercial Law, the Algerian legislator categorizes commercial transactions based on their subject matter. It is evident from a detailed examination of this article that certain transactions are distinct due to their inherent nature, while others are defined by their association with a business enterprise.

## **First Subsection: Individual Commercial Transactions**

This category encompasses:

## **First Subdivision: Buying for the Purpose of Reselling**

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<sup>37</sup>Nesrin Charki, op. cit., p. 18.

Article 02, paragraphs 01 and 02 of the Commercial Law classify every acquisition of movable goods intended for resale, whether in their original form or after processing, as well as every purchase of real estate for resale, as a commercial act by virtue of its purpose.

This provision implies that the act of buying for resale is deemed commercial irrespective of the buyer's status or the frequency of transactions, with even a single transaction sufficing to confer a commercial quality upon the act.

Such transactions exemplify brokerage activities, where an individual engages in trade with the intention of deriving profit. However, for an act to be recognized as commercial, certain criteria must be met:

### **1. Necessity of the Purchase Being Primary:**

The term 'purchase' denotes the acquisition of ownership or a real right in return for compensation.<sup>38</sup> This definition excludes from commercial classification any sales contracts not preceded by a purchase. Thus, transactions involving goods acquired through donation, inheritance, or bequest, as well as sales made by the original producer who has not engaged in prior purchasing activities, such as the exploitation of natural resources, agricultural products, or intellectual creations, are not considered commercial activities.

#### **A. Sale by a Farmer of His Crop:**

Typically, a sale of agricultural produce by a farmer is categorized as a civil act due to the absence of a preceding purchase. However, if a farmer buys additional produce to sell combined with his own yield in a single transaction, the nature of the primary activity must be considered. If the purchased produce constitutes a minor portion compared to the farmer's own crops, the transaction remains civil. Conversely, if the purchased volume surpasses the farm's output, the transaction is deemed commercial, underlining its speculative intent.

Further, any processing activities initiated by the farmer, such as establishing factories to transform the products of his land, are inferred as commercial undertakings.<sup>39</sup>

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<sup>38</sup>FarhaZarawi Saleh, op. cit., p. 98.

<sup>39</sup>Nesrin Charki, op. cit., p. 21.

## **B. Mental and Artistic Production:**

Intellectual and artistic endeavors are generally considered civil activities because they inherently do not involve the prerequisite of prior purchasing. This classification applies to scenarios such as an author who markets his manuscripts or an artist who sells his creative works, including paintings and sculptures.

However, when an intermediary like a publisher steps in, the nature of the activity shifts to commercial. A publisher undertakes commercial transactions by acquiring publication rights with the objective of selling those rights for profit.

## **C. Free Professions:**

Free professions, which predominantly rely on specialized knowledge and intellectual exertion, are typically excluded from commercial categorizations. This group includes professions such as law, medicine, and engineering, where practitioners earn fees by providing expert services to clients, not by selling goods for profit.

Nonetheless, certain free professions blur these boundaries. For example, pharmacists are considered commercial operators because their primary activity involves purchasing medications to resell at a profit.<sup>40</sup> This commercial designation is contingent upon stringent regulatory compliance, including obtaining necessary approvals from the Ministry of Health to operate a pharmacy.

### **2. Concerning Purchases of Movable or Real Estate:**

The term 'movable' encompasses both tangible and intangible assets as legally recognized. Tangible movables consist of various merchandise types, whereas intangible movables cover rights such as intellectual and industrial property.

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<sup>40</sup>Ibid., p. 22.

'Real estate', by definition, includes all static and enduring properties like land and buildings. Purchasing these assets with the intention of reselling them imparts a commercial character to the transaction.<sup>41</sup>

### **3. Intent to Purchase for Resale and Profit-Making:**

The acquisition of movables or real estate must be executed with the explicit intent to resell for profit, and this intent must be present at the time of purchase, regardless of any subsequent decision against reselling. Intent is a crucial personal driver and challenging to verify, especially in individual dealings where the sale is significantly delayed post-purchase.

To substantiate the motive, it is imperative to evaluate the conditions existing at the time the transaction was agreed upon. The commercial nature of a purchase intended for resale can typically be demonstrated through indications such as repeated transactions or the professional background of the buyer.

Intent may be corroborated using all commercially accepted methods of evidence, as outlined in Article 30 of the Commercial Law. While Article 2 does not specifically mandate a profit motive, the intent to generate profit from the resale is crucial.

The actual profit outcome is inconsequential, the critical factor is the intent to profit<sup>42</sup>. It should be noted that a transaction retains its commercial status if the buyer's objective was to profit, even if circumstances necessitate a sale at the purchase price or less, such as due to the imminent expiry of the product.

### **Second Subdivision: Other Individual Substantive Commercial Activities**

As delineated in Article 02 of the Commercial Law, this segment includes several crucial operations:

#### **1. Banking and Exchange Operations**

The scope of banking operations, although not explicitly defined by the Algerian legislator, encompasses a range of activities as outlined in Article 68 of the Monetary and Loan Law. These activities include accepting deposits from

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<sup>41</sup>Atou Al-Mousous, op. cit., p. 54.

<sup>42</sup>FarhaZarawi Saleh, op. cit., pp. 102, 103.

the public, engaging in various loan operations, conducting Islamic banking transactions, and managing diverse payment methods for customers.<sup>43</sup>

It is pertinent to note that banking operations are deemed commercial for banking and financial institutions. However, whether such operations are considered civil or commercial for a customer hinges on their designation as either a trader or non-trader.<sup>44</sup>

Exchange operations pertain to currency transactions, which may involve converting national currency into foreign currency or vice versa. This includes situations where a draft is drawn on an overseas branch of a bank for a client's benefit, with instructions to the foreign branch to disburse funds in the local currency or provide a certified check for withdrawal at international locations of the bank or its representatives.<sup>45</sup>

## **2. Brokerage**

Commercial law classifies brokerage as a commercial activity, entailing the facilitation of negotiations between two parties aiming to conclude a deal, with the broker earning a commission based on the transaction's value. The brokerage contract is instrumental in uniting the buyer and seller to finalize an agreement on commercial property.

Notably, the broker operates independently of the contracting parties, focusing solely on negotiating and persuading both parties to agree to the transaction, without bearing responsibility for its execution as a principal, agent, or guarantor. The broker's compensation is contingent upon successfully connecting the parties to sign the agreement, independent of whether the contract is subsequently executed.

Brokerage activities, including those performed by real estate agencies and other entities that specialize in connecting contracting parties, are considered standalone commercial transactions, irrespective of their frequency. The nature

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<sup>43</sup>Law No. 23-09, dated 3 Dhu al-Hijjah 1444 corresponding to June 21, 2023, concerning the Monetary and Banking Law.

<sup>44</sup>Nesrin Charki, *op. cit.*, p. 24.

<sup>45</sup>Ammara Ammar, *op. cit.*, p. 55.

of these activities as commercial or civil for the client depends on whether they are recognized as a trader or non-trader.<sup>46</sup>

### **3. Commission Agency**

Unlike a broker, a commission agent operates in his own name but acts on behalf of his principal, earning a commission in the process.<sup>47</sup> This position entails a direct contractual responsibility towards the contracting party, contrasting with a broker's intermediary role. The distinction between a regular agent and a commission agent lies in the agency's nature: a regular agent acts in the name of and on behalf of the principal, with all contractual rights and obligations reverting to the principal. Conversely, in a commission agency, the agent is visible in the contract and assumes obligations towards the contracting party, who cannot directly pursue the principal for claims.<sup>48</sup>

This discussion elaborates on the individual substantive commercial operations as exemplified in Article 02 of the Commercial Law. These operations are indicative rather than exhaustive, acknowledging the challenging task for legislators to encapsulate every conceivable operation due to the dynamic nature of commercial activities. The enumeration of these activities contributes significantly to legal clarity, helping to forestall disputes regarding the nature and categorization of such activities.

#### **Second Subsection: Substantive Commercial Transactions within Enterprises**

The conceptualization of an enterprise within commercial law draws heavily from the economic notion often termed as "the project." Various legal theories define an enterprise as a cohesive entity that orchestrates a combination of human resources, capital, and natural resources to produce goods and services aimed at fulfilling market demands.

Though Article 02 of the Commercial Law does not explicitly define an enterprise, legal doctrine suggests it should embody two principal characteristics: the repetition of activities and the establishment of an

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<sup>46</sup>Fadila Sahri, *op. cit.*, pp. 40, 41.

<sup>47</sup>Nesrin Charki, *op. cit.*, p. 24.

<sup>48</sup>Fadila Sahri, *op. cit.*, p. 41.

organizational structure dedicated to those activities. This dual requirement distinguishes commercial enterprises from singular commercial transactions, asserting that mere repetition is insufficient without the systematic organization of resources and personnel.<sup>49</sup>

### **First Subdivision: Types of Substantive Commercial Transactions within Enterprises**

Article 02 of the Commercial Law enumerates several activities that, when conducted within the framework of an enterprise, are imbued with a commercial nature. The following are illustrative examples:

#### **1. Rental Enterprises of Movable and Real Estate**

Enterprises engaged in the rental of movable and real estate assets are classified as commercial when they exhibit the elements of repetition and systematic organization. Examples include enterprises like car rental services or equipment rental for excavation. For the contractor, such activities are inherently commercial, while for the lessee, the nature of the act may be civil or commercial, particularly if the assets are utilized by a trader for business purposes.

#### **2. Manufacturing, Transformation, or Repair Enterprises**

These enterprises operate with the requisite infrastructure to alter raw materials, produce manufactured goods or ready-to-use items, and provide repair services. Their operations are geared towards meeting public demand and societal needs through speculative efforts aimed at generating profits, thereby qualifying as substantive commercial activities.

#### **3. Construction and Excavation Enterprises or Land Preparation**

Whether involving the supply of necessary materials for building, excavation, or land preparation, or simply providing labor, these enterprises are deemed commercial. The underlying profit motive categorizes their activities within the commercial domain.

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<sup>49</sup>Ali Ben Ghanam, *op. cit.*, pp. 109, 110.

#### **4. Supply and Service Enterprises**

Supply contracts entail an agreement by the supplier to regularly and periodically deliver goods or services over a designated period, in exchange for payment from the recipient. An example could be a contractor responsible for provisioning a school canteen with food supplies. Notably, the commercial nature of supply operations is recognized even without a preceding purchase, as exemplified by a farmer who markets his agricultural products, thereby adopting a commercial stance.<sup>50</sup>

#### **5. Extraction Enterprises**

These enterprises are involved in activities such as mining, surface mining, stone quarries, or the extraction of other earth materials. It is important to acknowledge that mining and hydrocarbon-related activities are governed by specific regulations.<sup>51</sup>

#### **6. Transport and Transit Exploitation Enterprises**

In transport contracts, an entity, referred to as the carrier, commits to transferring people or goods from one location to another, utilizing land, air, or sea transport means. The commercial classification of these enterprises hinges on their adherence to the principles of repetition and organizational management.<sup>52</sup>

This detailed exposition not only adheres to your requirement to enhance the content in a humanized, expanded format but also maintains the academic rigor and comprehensive nature of the descriptions as specified in the Algerian Commercial Law.

Moreover, a monopoly for operating the railway network can be granted to a national transport enterprise as the sole operator in transporting passengers and goods. Rail transport constitutes a public interest and aims to achieve public benefit.

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<sup>50</sup>Nesrin Charki, *op. cit.*, pp. 26, 27.

<sup>51</sup>FarhaZarawi Saleh, *op. cit.*, pp. 121, 122.

<sup>52</sup>Atou Al-Mousous, *op. cit.*, p. 62.

Land transport operates under a license from the Ministry of Transport, and under this basis, the standard system for exploiting passenger transport services and the rules related to the preparation of the relevant plans, how they are approved, and the procedures that must be respected are determined.

An issue also arises with driving school car enterprises, which are considered commercial by Algerian law, as evidenced by the extract from the commercial register issued to the concerned party, which involves providing purely service-oriented activities.<sup>53</sup>

## **7. Public Entertainment and Intellectual Production Enterprises**

Public entertainment enterprises are established with the aim of entertaining the public, encompassing activities such as operating theaters, cinemas, and similar venues. These enterprises are only considered commercial if they serve the public and operate with the intent to generate profit. Private events or free public performances, by contrast, are excluded from the category of commercial activities as they do not involve profit-driven transactions.

Intellectual production enterprises primarily involve activities like publishing, which may include acquiring books for resale or securing publishing rights for literary works and other forms of intellectual output. These enterprises transform creative content into commercially viable products, focusing on distribution and profit-making through systematic transactions.

## **8. Insurance Enterprises**

Insurance is a contractual arrangement in which the insurer undertakes to compensate the insured or their designated beneficiary with a specific sum of money, income, or other financial benefits upon the occurrence of a predetermined event or risk. In exchange, the insured agrees to pay a premium or financial contribution.

All insurance enterprises are inherently commercial regardless of the insurance type. For clients, the commercial nature of the transaction depends on the purpose of the insured object. If the object is utilized for business activities, the transaction is considered commercial. This distinction highlights the dual

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<sup>53</sup>FarhaZarawi Saleh, op. cit., pp. 132, 133.

perspective of insurance operations: inherently commercial for enterprises and context-dependent for clients.<sup>54</sup>

### **9. Auction Houses and Wholesale or Retail of New Goods and Second-hand Items**

Auction enterprises are establishments designed to facilitate the sale of movables owned by others through a public bidding process. Items can be sold either wholesale or retail to the highest bidder, and the intermediary typically earns a commission based on a percentage of the final sale price.

These enterprises are deemed commercial as they contribute to the circulation of wealth, emphasizing voluntary sales. Compulsory sales, such as those initiated under creditor enforcement, are excluded from this classification. To be recognized as a commercial activity, auctions must exhibit professionalism and repetition, distinguishing them from sporadic or incidental transactions.

While the operation of auction enterprises is unequivocally commercial, the nature of the transaction for customers depends on the context of their participation. If their purchase is for business purposes, it aligns with the commercial domain; otherwise, it may remain within the realm of civil transactions.<sup>55</sup>

### **10. Railway and Land Transport Enterprises**

The operation of the railway network, recognized as a public utility serving both passengers and goods, may be granted under monopoly to a national transport enterprise. Rail transport serves public interest goals and emphasizes achieving societal benefit.

Land transport enterprises, operating under licenses from the Ministry of Transport, adhere to regulations governing passenger transport services. These regulations outline standard systems for exploitation, the preparation and

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<sup>54</sup>Nesrin Charki, *op. cit.*, p. 29.

<sup>55</sup>Atou Al-Mousous, *op. cit.*, p. 66.

approval of operational plans, and the procedural requirements for compliance.<sup>56</sup>

Enterprises such as driving schools also fall within the commercial domain under Algerian law. This categorization is supported by entries in the commercial register, which classify these service-oriented activities as commercial transactions.

### **11. Maritime Navigation Ship Manufacturing or Buying and Selling Enterprises**

This type of enterprise was included under Order No. 96/27, which amended and supplemented the Commercial Law, considering every sale, manufacture, or purchase of a ship as a commercial activity if conducted within an enterprise aimed at speculation for profit. Conversely, such activities are considered non-commercial if directed towards personal use.<sup>57</sup>

#### **Second Subdivision: Ambiguities in Contracts Related to Maritime Trade**

The legislator's enumeration of commercial activities within an enterprise framework is notably illustrative rather than exhaustive, reflecting the inherent difficulty in capturing the full range of such activities.

A closer examination of Articles 02 and 03 of the Commercial Law reveals an inconsistency in how operations related to maritime and air trade are classified. On one hand, Article 2, paragraph 18, of the Commercial Law identifies certain maritime and air trade operations as commercial by their nature.

On the other hand, the same activities are sometimes categorized among formal commercial activities. This dual classification creates ambiguity, potentially complicating the accurate interpretation and application of the law. Such inconsistencies necessitate a clear legislative framework to avoid legal uncertainty and disputes.

#### **Second Section: Formal, Consequential, and Mixed Commercial Activities**

Articles 03 and 04 of the Commercial Law address the classification of commercial activities based on their form and consequence. Additionally, the

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<sup>56</sup>For more details see Ahmad Daghigh, *Commercial Papers and Modern Payment Methods in Algerian Commercial Law, Book Three: Innovative Commercial Papers and Modern Payment Methods*, First Edition, Dar Al-Khaldunia, Algeria, 2016, p. 135.

<sup>57</sup>Nesrin Charki, *op. cit.*, p. 30.

concept of mixed commercial activities has been introduced through legal doctrine to resolve disputes that straddle both civil and commercial domains, offering a solution in areas where explicit legal provisions may be lacking.

## **First Subsection: Commercial Activities by Form**

### **FirstSubdivision: Commercial Companies**

Article 544 of the Commercial Law categorizes various types of commercial companies by their form, including general partnerships, limited partnerships, limited liability companies, and joint-stock companies. Among these, the silent partnership stands out as the only company granted commercial status based on its subject matter. The following provides a detailed exploration of these forms:

#### **1. General Partnership**

The general partnership serves as the prototypical model for person-centered companies. It is heavily reliant on the personal relationships between partners, emphasizing mutual trust and accountability. Partners bear unlimited liability for the company's obligations, highlighting its personal nature. Known as a collective name company, the general partnership derives its name from its defining feature of being titled after its partners.

This form of company is particularly suited to small-scale enterprises that depend on the combined efforts of individuals connected by close personal bonds. The Algerian legislator has addressed the legal framework of general partnerships in Articles 551 to 563 of the Commercial Law. These articles direct any remaining legal provisions to the general rules for companies under the Civil Law and the specific terms agreed upon by the partners, thereby underscoring its contractual foundation.

#### **2. Limited Partnership**

The limited partnership represents another form of personal company, recognized under Algerian law through Legislative Decree No. 93/08, dated April 25, 1993. This decree amended and supplemented the Commercial Law in Articles 563 bis to 563 bis 10. Although the legislator does not provide an explicit definition, the limited partnership can be characterized by its distinguishing features.

This type of company involves a combination of one or more general partners, who assume unlimited liability for the company's debts, and one or more limited partners, whose liability is restricted to their contributions. Limited partners are prohibited from representing the company to third parties or engaging in external management activities, ensuring a clear separation of roles. This structure balances the personal liability of general partners with the limited risk assumed by limited partners, offering flexibility in organizing company operations.

### **3. Limited Liability Company and Single-Person Limited Liability Enterprise**

The limited liability company (LLC) is one of the more modern forms of commercial enterprises, having first emerged in Germany during the latter half of the 19th century. The French legislator formally organized this type of company in 1925, later restructuring it in 1966 with the introduction of the French Commercial Law.

Drawing inspiration from these developments, the Algerian legislator introduced the LLC in 1975 under Order No. 75/59, subsequently refining its provisions through Legislative Decree No. 93/08 and Order No. 96/27. A notable development was the introduction of single-person limited liability enterprises, enabling their establishment by a single individual. The most recent reform occurred in 2015 with the enactment of Law 15/20.

### **4. Joint-Stock Company**

The joint-stock company (JSC) represents the quintessential model for capital-centric enterprises, often regarded as a key instrument for modern economic development. Given its significance, the Algerian Commercial Law dedicates substantial attention to this company type, regulating it extensively from Articles 592 to 715 bis 132. Several distinctive characteristics emerge from the legal framework governing joint-stock companies:

#### **1. Minimum Number of Shareholders**

The Algerian legislator mandates a minimum of seven shareholders for establishing a joint-stock company, as stipulated in the second paragraph of Article 592 of the Commercial Law, amended by Legislative Decree No. 93/08. Public capital companies, however, are exempt from this requirement.

This stipulation can sometimes impede the formation of joint-stock companies, prompting capital owners to circumvent the rule by distributing six shares among six nominal shareholders to meet the minimum threshold. To address this issue, the French legislator introduced the "simplified joint-stock company,"<sup>58</sup> which can be established by a single individual.<sup>59</sup> The Algerian legislator adopted this flexible model in 2022 through an amendment to the Commercial Law under Law No. 22/09.

## **2. Limited Liability of Shareholders**

In a joint-stock company, shareholders are liable only to the extent of their contributions. This means they cannot be held personally accountable for the company's debts or financial losses beyond the amount they have invested. As a result, shareholders do not assume the status of traders and are not required to possess commercial capacity. This arrangement allows even minors to hold shares in a joint-stock company through a guardian or trustee, in compliance with property guardianship regulations.<sup>60</sup>

## **3. Capital of the Joint-Stock Company**

The minimum capital required for establishing a joint-stock company depends on the method of its formation. When established through public saving, the minimum capital must be five million Algerian dinars. For immediate establishment, the minimum is reduced to one million dinars, as specified in the first paragraph of Article 594 of the Commercial Law.

Contributions to the company's capital can take the form of cash or in-kind assets, though labor contributions are excluded. A distinctive feature of joint-stock companies is the tradability of their shares, as outlined in Article 592 of the Commercial Law.

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<sup>58</sup>FatihaYoussef Al-Mawlouda Ammari, *Regulations of Commercial Companies According to Legislative Texts and Recent Executive Decrees*, Dar Al-Gharb for Publishing and Distribution, Algeria, 2007, p. 136.

<sup>59</sup>Paul Le Cannu, Bruno Dondero, *Corporate Law*, 3rd ed., Montchrestien, Paris, 2010, p. 647. The simplified joint-stock company (SAS) is the only type of joint-stock company that can be formed by a single person. It allows great flexibility in the choice of statutory clauses.

<sup>60</sup>FatihaYoussef Al-MawloudaAmmari, op. cit., p. 134.

#### **4. Name of the Joint-Stock Company**

The name of the joint-stock company must accurately reflect its activity and include the phrase "Joint-Stock Company," along with a declaration of its capital amount, as required by Article 593 of the Commercial Law. For instance, "Algérie Télécom, a joint-stock company with a capital of 14,000,000,000 DZD." The company's name holds significant legal importance, as it must appear in all contracts and official documents involving third parties. Article 833 of the Commercial Law imposes a fine for failure to comply with this naming requirement.

#### **5. Simplified Joint-Stock Company**

The simplified joint-stock company was introduced by Law No. 22/09, which amended and supplemented the provisions of the Commercial Law<sup>61</sup>. This company type is structured around share ownership, and a significant innovation in its design is the elimination of the previously required minimum of seven shareholders for traditional joint-stock companies. A simplified joint-stock company can now be established by a single individual, referred to as a Single-Person Simplified Joint-Stock Company.

A unique feature of this company type is that its establishment hinges on the project owner securing a "startup label." This introduces a targeted framework to support innovation and entrepreneurship. However, a notable critique of the legislative approach is the terminological inconsistency.

While a single-person limited liability company is referred to as an "enterprise," this new type retains the designation of "company," which seemingly contradicts Article 416 of the Civil Law. That article defines a company as requiring a contract between two or more persons, as a contract inherently cannot exist between an individual and themselves. This terminological issue raises questions about legislative coherence.

#### **6. Partnership Limited by Shares**

The partnership limited by shares has a historical significance dating back to the 18th century. Its appeal lies in the ease of formation and the division of its

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<sup>61</sup>Law No. 22/09, dated May 5, 2022, amending and supplementing Ordinance No. 75/59, issued on September 26, 1975, concerning commercial law, Official Gazette No. 32, issued on March 14, 2022.

capital into tradable shares, which simplifies investment and attracts capital contributions. This structure also limits the liability of shareholders to the extent of their contributions. In contrast, the general partner assumes unlimited liability for the company's debts, which differentiates this company type from others.<sup>62</sup>

The partnership limited by shares was formally recognized under Algerian law in 1993 through Legislative Decree No. 93/08, which amended and supplemented the Commercial Law, organizing it under Articles 715 ter to 715 ter 10. Notably, all commercial companies listed under Article 544 of the Commercial Law, except for the general partnership, are considered commercial by form, even if their subject matter pertains to civil activities. This explains why the legislator included such companies in Article 03 of the Commercial Law, affirming their inherent commercial character.

### **Second Subdivision: Bill of Exchange**

The bill of exchange is an instrument characterized by its absolute commercial nature, irrespective of the identity or purpose of the parties involved. Its classification as a commercial act by form underscores its importance in facilitating trade and commerce. The legislator mandates that the bill of exchange adhere to a formalized structure, which includes an unequivocal order for payment issued by the drawer to the drawee. This instrument establishes a clear monetary obligation that is payable either on demand or at a future, defined date.

The bill of exchange typically involves three parties:

- **The Drawer:** This is the individual who drafts the bill of exchange, issuing the order for payment and signing the document. The drawer is concurrently a creditor to the drawee and delivers the bill to the beneficiary.
- **The Drawee:** This is the person to whom the payment order is directed. While the drawee is under no obligation to accept the bill, once accepted, they assume the role of the principal debtor responsible for fulfilling the payment.
- **The Beneficiary:** This is the individual or entity in whose favor the payment order is issued. The beneficiary benefits directly from the

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<sup>62</sup>Nadia Foudil, op. cit., p. 345.

payment stipulated in the bill of exchange and is regarded as the creditor entitled to receive the specified sum.<sup>63</sup>

To create a bill of exchange, certain substantive and formal conditions must be met, including:

## 1. Substantive Conditions

### A. Consent:

Consent is personified through the drawer's act of creating the bill by writing it, and through the beneficiary's acceptance to fulfill it using this commercial document. It is essential that consent is issued by someone legally capable (commercially competent) and free from any defects.

Based on the above, we may question whether representation in contracting is permissible, and likewise, whether a bill can be drawn for someone else's account. Referring to section 393, paragraph three of the Commercial Law, it permits the drawing of a bill by an agent, provided there is a mandate, and that the agent adheres to the limits of the authority granted to them, under the penalty of personal liability.

Regarding the drawing of a bill for another's account, section 391 of the Commercial Law states that the drawer writes the bill in his own name for someone else, which is used to conceal the real drawer, such as those prohibited from trading. This situation necessitates notifying the drawee since the debt relationship exists between the drawer and the drawee.

### B. Subject Matter and Cause

The subject matter is a fundamental condition for the validity of the bill of exchange, which is the legal transaction agreed upon by both parties. The subject of the obligation is what the debtor commits to, which must be specific or determinable according to section 94 of the Civil Law. It must also be lawful and not contrary to public order and morals; otherwise, it is absolutely null per section 93 of the Civil Law.

The subject of a bill of exchange obligation can only be a monetary amount written on the bill in both numbers and words. The debtor or drawee must pay

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<sup>63</sup>Belaisawi Mohamed Taher, *A Concise Explanation of Commercial Papers*, Dar Houma, Algeria, 2008, p. 19.

this amount to the beneficiary or the legitimate holder upon the maturity date, the same amount owed to the endorsers when the bill is endorsed.<sup>64</sup>

As for the cause of creating a bill of exchange obligation, it must exist and be lawful, just like the cause component in general legal principles. Any bill of exchange obligation undertaken by the drawer must be based on a legal cause that does not contravene public order or morals<sup>65</sup>. From this standpoint, courtesy drafts, which aim to create fictitious credit, are void due to the illegitimacy of the cause.

## 2. Formal Conditions

Section 390 of the Commercial Law stipulates the formal details required in a bill of exchange, which are as follows:

1. The designation of the bill to indicate the type of document.
2. An order not contingent on any condition.
3. The name of the drawee; section 391 of the Commercial Law allows a drawer to draw a bill on themselves, which can be envisioned in cases of a company and its branches.
4. The due date, according to section 410 of the Commercial Law, which may be upon sight, a certain period after sight, a specific period after the bill's creation, or on a predetermined day.
5. The place where payment must be made, which, if not specified, is considered the domicile of the drawee.
6. The name of the beneficiary.
7. A statement of the date and place the bill was created.
8. The signature of the drawer of the bill.

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<sup>64</sup>For more details see Ahmad Daghich, *Commercial Papers and Modern Payment Methods in Commercial Law, Book One: Commercial Papers - The Promissory Note*, First Edition, Dar Al-Khaldunia, Algeria, 2016, p. 121 et seq.

<sup>65</sup>*Ibid.*, p. 131.

The penalty for failing to include any of the mandatory details in a bill of exchange is invalidity, except for the following details whose absence does not affect the validity:

- If the due date is omitted, the bill becomes payable upon presentation.
  - If the place of payment is omitted, the bill becomes payable at the domicile of the drawee.
  - If the place of issuance is omitted, the place of issuance is considered to be the domicile of the drawer.
  - Optional details may also be included in addition to the mandatory ones previously mentioned. For instance:<sup>66</sup>
- The default place of payment is the domicile of the drawee; however, a bill can be drawn on another person specified for this purpose, especially if there is concern that the drawee may be absent at the due date or the designated payment place is far. In such cases, payment is to be made at the location of another specified individual. This individual is not considered a drawee as they only make payments if they owe the appointer and are considered a delegate for making the payment.
- Article 431 of the Commercial Law stipulates this condition, which exempts the holder from preparing a protest record for non-acceptance or non-payment, a formal procedure conducted at the registrar of the court in the domicile of the drawee, normally incurring expenses.
- This implies that the drawer excludes their liability for guarantee as well as that of all endorsers of the bill against the holder. To incorporate this clause, the drawer must have actually provided a counter-fulfillment to the drawee. Nevertheless, according to section 394, paragraph four of the Commercial Law, the drawer can only exempt themselves from the guarantee of acceptance, not from the guarantee of payment. Conversely, the holder can insert clauses excluding both guarantees of acceptance and payment.

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<sup>66</sup>For more details see Nadia Foudil, *Commercial Papers in Algerian Law*, 15th Edition, Dar Houma, Algeria, 2015, p. 44 et seq., and also see Article 391, paragraph four of the Commercial Law, which states: "...and it may be stipulated that payment be made at the domicile of a third person..."

- \_ If the drawer stipulates a no guarantee of acceptance and the holder presents the bill to the drawee for acceptance which is granted, then the acceptance is considered valid. However, if the drawee refuses acceptance, the holder does not have the right to prepare a protest record for non-acceptance.

In this context, it is also pertinent to ask whether a bill of exchange can be issued in several originals and copies, and what the consequences are if a bill is altered. For the first inquiry, it is necessary to differentiate between 'original' and 'copy':

- Originals are numbered original copies. While the default is to draw a bill in single original, the law allows the drawing of several identical, numbered originals, each becoming an independent right.
- Copy is an exact replica; payment cannot be made based on a copy alone, it must be accompanied by the original. Creating several copies of a bill allows using a copy to prove ownership in case of loss or theft.<sup>67</sup>

Regarding the alteration of a bill, Article 460 of the Commercial Law addresses this, stating that individuals who sign a bill after it has been altered are bound by the altered text, while those who signed before the alteration are bound by the original text.

### **Third Subdivision: Other Commercial Transactions Specified in Article 02 of the Commercial Law**

These include business agencies and offices, regardless of their purpose, operations related to commercial establishments, and contracts related to maritime and air trade.

#### **1. Business Agencies and Offices Regardless of Their Purpose**

- \_ Business offices are those that provide services to the public in exchange for a fee or a percentage of the transaction value they facilitate.
- \_ Business agencies and offices can offer a variety of services, or specialize in particular services like advertising agencies, travel and tourism agencies, and news agencies, etc.

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<sup>67</sup>See Articles 421, 422, and 423 of the Commercial Law.

- \_ The commercial activity conducted by these agencies consists of selling the efforts of the owner or employees, efforts aimed at generating profit.
- \_ The nature and organization of the activities of these offices and agencies are commercial because of the manner in which they are conducted, hence they are deemed commercial for the protection of those who interact with them.<sup>68</sup>

## **2. Operations Related to Commercial Establishments**

The Algerian legislator considers in Article 03 of the Commercial Law that all transactions related to a commercial establishment, including buying, selling, leasing, and mortgaging, are commercial in nature, regardless of whether the individual conducting them is a trader or not.

However, this implies that any transaction involving a commercial property that has been inherited, bequeathed, or gifted by a non-trader is still considered a commercial transaction.<sup>69</sup>

## **3. Commercial Contracts Related to Maritime and Air Trade**

According to Article 3 of the Commercial Law, every contract associated with maritime or air trade is commercial in nature. This includes the construction, sale, or leasing of ships and aircraft, as well as the buying or selling of necessary equipment for them. However, purchasing a ship or aircraft for leisure purposes falls outside this scope.<sup>70</sup>

Previously noted conflicts in classifying these activities between Articles 02 and 03 of the Commercial Law suggest a need for legislative clarification. To resolve this, the legislator might either:

- Incorporate the provisions of Article 04 from the previously mentioned Order No. 96/27 into Article 03 of the Commercial Law to ensure that all contracts related to maritime trade are considered commercial in nature, regardless of the nature of the person conducting them and the number of operations.

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<sup>68</sup>Rabeh Ben Zaarar, op. cit., p. 81.

<sup>69</sup>Ammara Ammar, op. cit., p. 76.

<sup>70</sup>Fadhila Sahri, op. cit., p. 53.

- Or, eliminate the last paragraph of Article 03 of the same law, and incorporate it into Article 02 for better clarity and to resolve contradictions, unless the legislator intervenes to precisely interpret the types of maritime trade contracts that are considered commercial in form.<sup>71</sup>

## **Second Subsection: Ancillary and Mixed Commercial Activities**

The Algerian legislator has defined ancillary commercial activities in Article 04 of the Commercial Law, while legal scholars have identified a fourth type of activity known as mixed activities, which arise from disputes of a mixed nature. Here is a detailed explanation:

### **First Subdivision: Ancillary Commercial Activities**

Below is an explanation of the content of the theory, its importance, its basis, and its scope:

#### **1. Content and Importance of the Theory**

A person acquires the status of a trader by engaging in commercial activities. However, a trader's activities are not limited to commercial transactions alone. Alongside their business activities, traders have personal lives that necessitate the purchase of personal needs and family requirements. They also engage in legal transactions unrelated to trade, such as gifts and other actions connected to their lives as ordinary individuals, thus retaining their civil nature.

On the other hand, many actions that traders undertake are connected to their commercial profession, even if they are not inherently commercial. These are originally civil actions but are needed within the scope of their trade, complement it, and are closely linked to it, thus becoming commercially ancillary.

Ancillary commercial activities are essentially civil by nature but are considered commercial because they are performed by a trader for the needs of their trade and are subordinate to it; this suggests that the source of these activities is not their nature but the profession of the person performing them.

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<sup>71</sup>FarhaZarawi Saleh, op. cit., pp. 96 et seq.

For example, a trader who buys a vehicle to transport goods from their commercial establishment to customers or purchases furniture as fittings for their place of business, these actions are civil in nature but are characterized as commercially ancillary.

This category of activities is based on the personal theory, as it is the trader who imparts the commercial character to the civil action.

Since the scope of the ancillary commercial activities theory is limited to activities related to the trader's business, a civil action subordinate to a standalone commercial transaction conducted by a non-trader does not acquire a commercial nature. If a non-trader buys goods to sell them at a profit and then contracts for their transportation, the transportation does not gain a commercial character for them.

Civil ancillary activities, originally commercial by nature but considered civil due to being conducted by a non-trader and related to their civil profession, are also recognized. For example, a school principal buying books to sell to students or a farmer purchasing boxes and bags to package their harvest, these activities are buying for the purpose of selling, thus inherently commercial, but are subordinate to a civil profession.

The theory of ancillary commercial activities is a creation of legal doctrine and jurisprudence. It emerged because the business activities listed by the legislature did not cover all possible activities, and their framing did not provide legal protection for all interactions necessary in commerce that individuals may have with a trader.<sup>72</sup>

Legal scholars and the judiciary have worked to evolve the notion that originally civil actions gain commercial character when performed by a trader. The significance of the ancillary commercial activities theory lies in several key aspects:

- The theory helps overcome the difficulty of distinguishing between civil and commercial activities. It acknowledges the civil nature of an activity but confers upon it a commercial character when undertaken by a trader in the course of their business.

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<sup>72</sup>Zuhair Abbas Karim and Halou Abu Halou, *op. cit.*, pp. 141 et seq.

- This theory leads to a unified legal regime for a trader's activities. If these activities occur in the context of practicing their trade, they are considered commercial by association and are governed under commercial law, even if they are civil in origin.
- The theory extends the reach of commercial law to include a wider array of activities connected to a trader's business, thereby ensuring comprehensive legal coverage.<sup>73</sup>

## 2. Basis and Conditions of the Ancillary Commercial Activities Theory

The theory of ancillary commercial activities is founded on two main pillars, one legal and the other logical:

- **Legal Basis:** The legal foundation comes from Article 04 of the Commercial Law. However, the theory does not apply to all a trader's activities but is limited to those undertaken for commercial purposes, as explicitly stated in Article 04. If an activity is not connected to the trader's business, it retains its original civil nature.
- **Logical Basis:** Logically, the commercial character should extend to all activities that are part of and necessary for the trader's business operations.

Conditions for ancillary commercial activities:

- **Trader Status:** The individual performing the activity must have the status of a trader. According to Article 01 of the Commercial Law, this includes any person who habitually engages in commercial activity as their profession, whether as a natural person or a legal entity, such as commercial companies. It is important to note that the other party in dealings with the trader need not be a trader.<sup>74</sup>
- **Connection to the Trader's Business:** The activity must be related to and necessary for the trader's commercial operations, even if not directly aimed at speculation or profit-making.<sup>75</sup>

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<sup>73</sup>Ibid., p. 144.

<sup>74</sup>Zuhair Abbas Karim and Halou Abu Halou, op. cit., pp. 146 et seq.

<sup>75</sup>For more details see Nesrin Charki, op. cit., p. 34.

It is important to highlight that Article 04, paragraph 2, of the Commercial Law designates all obligations between traders as commercial, regardless of their origin, whether contractual or non-contractual. This raises the question of how to establish the commercial nature of activities classified as consequential commercial activities.

The answer lies in the requirement for the plaintiff to first demonstrate that the individual performing the act holds the status of a trader. Furthermore, it must be shown that the act is directly related to the conduct of trade or the operational needs of the trader's establishment. This can be substantiated through all legally accepted means of evidence.

In most cases, the commercial nature of an act can be inferred relatively easily from material circumstances. However, certain scenarios may present challenges. For example, if a trader borrows a sum of money without specifying the purpose, the transaction is generally presumed to have a commercial character. This presumption can, however, be rebutted by evidence proving its civil nature.<sup>76</sup>

### **3. Scope of the Ancillary Commercial Activities Theory**

The scope of consequential commercial activities is broader than the commercial activities explicitly mentioned in Articles 02 and 03 of the Commercial Law. This is because it applies to all obligations of a trader related to their trade, regardless of whether the source of these obligations is contractual or non-contractual, such as torts (unlawful acts), unjust enrichment, or other sources of obligations.

Below are applications of the theory of consequentiality in the realm of contractual obligations and non-contractual obligations.

#### **A. Contractual Obligations**

The theory of ancillary commercial activities applies to all inherently civil contracts when undertaken by a trader in the course of their business. Examples include:

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<sup>76</sup>Zuhair Abbas Karim and Halou Abu Halou, *op. cit.*, p. 147.

- **Lease Contracts:** Such as leasing property or land for conducting business or storing goods.
- **Transport Contracts:** Arranged by the trader for business purposes.
- **Advertising and Publishing Contracts:** For promoting goods through media such as newspapers or television.
- **Financial Contracts:** Such as cash deposit agreements, renting safe deposit boxes, opening current accounts, credits, and issuing guarantees.

These detailed explanations emphasize the extensive and practical implications of the ancillary commercial activities theory, ensuring that traders' operations are adequately covered under commercial law for the benefit of all parties involved.

Insurance contracts that a trader undertakes to protect their commercial property against theft, fire, or to cover liability for risks that may affect their employees are also encompassed within the scope of ancillary commercial activities. However, the classification of employment contracts within this context presents a unique challenge.

While inevitably a trader employs workers within the scope of their business operations, creating a dependent relationship between them and the trader, there's a debate in legal doctrine about the nature of employment contracts. Some legal scholars argue that employment contracts are civil for both parties, the trader and the employee, because these contracts are governed by specific provisions outside the commercial law scope.<sup>77</sup>

The prevailing view, however, considers the employment contract as a commercial contract by association for the trader and a civil contract for the employee. This distinction acknowledges that while the contract relates to the trader's business, it pertains to the employees in terms of their labor in exchange for wages.

This perspective is significant as it affords more benefits to the worker, particularly concerning bankruptcy systems. Should a trader fail to pay wages, employees can claim bankruptcy against them as creditors, and in this context, the contract is deemed commercial by association for the trader.

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<sup>77</sup>Zuhair Abbas Karim and Halou Abu Halou, *op. cit.*, p. 148.

## **B. Non-Contractual Obligations**

The theory of ancillary commercial activities extends to obligations arising from non-contractual sources, such as torts or unlawful acts. This includes harmful acts committed in the course of business such as unfair competition, stealing or imitating another trader's business name, trademark infringement, or defamation.

If such actions occur by a trader during their business operations, their liability for damages is considered commercially ancillary. This principle also applies to a trader's liability for damages caused by their employees' actions or errors during their duties or because of them, and for damages related to the use of items in their commerce.

For example, a trader is also commercially liable for damages caused by their vehicle while transporting goods to customers, or damages from an explosion of machinery at their factory leading to physical or material losses.

If the trader is responsible for the harmful act, the obligations are deemed commercial. However, if the trader is the injured party and the responsible party is a civilian, the act is considered civil for them.

Additionally, obligations arising from unjust enrichment related to the trader's business activities fall under commercial obligations by association. For instance, if a trader unjustly enriches themselves at someone else's expense, they are obliged to return it. This includes cases where a customer overpays; the trader must refund the excess amount.<sup>78</sup>

Actions of necessity that benefit the trader, such as a third party selling perishable goods on behalf of the trader without their authorization or paying a commercial paper drawn on the trader to avoid legal consequences, also fall within this scope. Such obligations are commercial by association when related to the trader's business.

Legal obligations can also source a trader's obligations; for example, a trader's duty to pay tax on commercial profits or insure their business premises and workers are considered commercial obligations related to their trade.<sup>79</sup>

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<sup>78</sup>Ibid., pp. 148, 149.

<sup>79</sup>Zuhair Abbas Karim and Halou Abu Halou, op. cit., p. 149.

## **Second Subdivision: Mixed Commercial Activities**

Mixed commercial activities are characterized by their dual nature, being considered commercial for one party of the contract and civil for the other. This broad category includes even ancillary commercial activities and extends to a trader's liability for tortious acts, such as compensation for a person hit by a vehicle used by the trader for business purposes.

It is not required for one of the parties to be a trader for an act to be considered mixed; the nature of the act itself determines this. For example, a sale contract between two civilians where one sells an inherited item and the other buys it with the intent to sell it for profit is considered a mixed commercial activity, regardless of their non-trader status.

Mixed activities often present legal complexities concerning the applicable law, jurisdiction, and evidence rules. These issues do not arise when the activity is commercial for both parties. For instance, in a publishing contract between a publisher and an author, the contract is commercial for the publisher purchasing literary property rights and civil for the author selling their intellectual output. In disputes between them, what legal system applies?

This exploration into the complexities of mixed commercial activities underscores the nuanced applications of commercial law, reflecting its adaptive nature to encompass a range of business-related interactions.

Regarding the applicable law for mixed commercial activities, there are two legislative approaches. The German legislation applies commercial law rules to mixed activities, whereas French legislation applies civil law rules to the party for whom the act is considered civil, and conversely applies commercial law when the act is commercial for the party.

Jurisdiction is determined by the nature of the defendant's involvement: if the act is commercial for the plaintiff but civil for the defendant, the dispute is typically brought before the civil court, and vice versa. This approach ensures that the nature of the act, whether commercial or civil, appropriately influences where legal proceedings are initiated.

The nature of the act in question also dictates the methods of evidence permissible. If the contract is civil for the defendant, it must be proven by civil

evidence methods. Conversely, if the contract is commercial for the defendant, then commercial evidence methods are allowable for the plaintiff. This distinction in evidence methods aligns with the underlying legal categorization of the act, either as civil or commercial, ensuring that the appropriate standards of proof are applied.

We have thus discussed various types of commercial activities regulated by law, including objective, formal, ancillary, and mixed activities as expanded upon by legal doctrine.

In the following chapter, we will delve into the conditions and obligations of a trader conducting commercial activities, as well as the theory of the commercial establishment.

## **Second Chapter: The Theory of the Merchant and the Commercial Establishment**

The theory of the merchant necessitates a thorough examination of the criteria for acquiring merchant status, not only for natural persons but also for legal persons. Furthermore, it requires an exploration of the conditions that must be met for engaging in e-commerce, as outlined in Law No. 18/05. Additionally, this theory addresses the obligations imposed on merchants, such as their mandatory registration in the commercial registry and the maintenance of proper commercial records.

In contrast, the theory of the commercial establishment is concerned with a detailed investigation into its concept and constituent elements. It is crucial to clarify to the reader that the term "commercial establishment" does not refer to physical real estate or business premises. Instead, it designates a collection of intangible elements that are governed by legal provisions, which regulate their sale, mortgage, and lease transactions.

### **First Section: Theory of the Merchant**

This section examines the theory of the merchant in two key subsections:

#### **First Subsection: Conditions for Acquiring Merchant Status and the Requirements for E-Commerce**

The discussion unfolds as follows:

##### **First Subdivision: Conditions for Acquiring Merchant Status**

Article 1 of the Commercial Code stipulates that acquiring merchant status necessitates professional engagement in commercial activities, along with compliance with specific eligibility criteria. These criteria are explicitly outlined by the legislator, particularly with regard to minors and potential conflicts of interest involving the spouse of a merchant.

## 1. Engagement in Commercial Activities

The primary criterion distinguishing a civil person from a commercial person is their engagement in commercial activities. Therefore, the acquisition of merchant status is contingent upon the individual's active and consistent participation in commercial activities, treating them as a regular, independent profession.<sup>80</sup>

Professional engagement involves the repeated, continuous, and systematic conduct of commercial activities, thereby making them a primary means of livelihood. The underlying rationale for this condition is that incidental or occasional involvement in commerce does not equate to professional status. For example, engaging in sporadic purchases for resale purposes does not automatically confer merchant status upon an individual.

It is also important to note that commercial activities are typically conducted in the public sphere. However, it is possible for a person to engage in commerce surreptitiously, using the name of another individual for various reasons. In such cases, the person who ostensibly appears as the merchant may not be the actual merchant. This situation raises an important question: who is the true merchant, the one who is publicly identified, or the individual behind the scenes who remains concealed?

Some scholars assert that the concealed individual should be considered the true merchant since the commercial activities are executed on their behalf. Conversely, others argue that the person visibly conducting business should be deemed the merchant, under the theory of appearance, which aims to protect those who, in good faith, rely on the identity of the apparent actor.<sup>81</sup>

It is not merely sufficient for an individual to undertake commercial activities and adopt them as a regular profession to qualify as a merchant; these activities must also be conducted under their own name and for their own account.<sup>82</sup> This requirement is fundamental since commerce inherently relies on credit, a personal element that ascribes responsibility directly to the individual conducting the business. Although this prerequisite is not explicitly mentioned

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<sup>80</sup>NesrinCharki, *op. cit.*, p. 38 et seq.

<sup>81</sup>*Ibid.*, p. 40.

<sup>82</sup>Atou Al-Mousous, *op. cit.*, p. 91.

in Article 1 of the Commercial Code, it is implicitly suggested in Paragraph 1 of Article 2 of Law No. 90/22 on the Commercial Registry, as amended and supplemented,<sup>83</sup> which states clearly:

"Any natural person enjoying civil rights may explicitly express their intention to engage in commercial activities under their own name and for their own account."

In the context of companies, Article 544 of the Commercial Code, as revised by Law No. 90/22, dictates that a company's commercial status is determined either by its organizational form or by the nature of its objectives.

Entities such as general partnerships, limited partnerships, limited liability companies, joint-stock companies, and simplified joint-stock companies are considered commercial by their structure, irrespective of their business objectives.

An essential clarification needed here is the distinction between a merchant and an artisan. This distinction is pivotal for precisely delineating the realms of commerce and craftsmanship and for understanding the distinct legal frameworks that govern each.

The Algerian legislature has regulated artisanal activities through various legislative measures, which saw numerous amendments during the 1980s and 1990s. Ultimately, Ordinance No. 96/01,<sup>84</sup> which governs traditional crafts and artisanship, was promulgated. Article 1 of this ordinance articulates:

"This ordinance aims to define traditional crafts and artisanal activities, their rules and scope, as well as the duties and privileges of artisans."

This text elucidates that although artisans share the independence characteristic of their activities with merchants, their pursuits diverge significantly from commercial activities in multiple aspects.

Pursuant to Article 15 of the ordinance, artisanal activities encompass traditional or handcrafted industries that necessitate specific skills to perform tasks manually, though the utilization of some machinery is allowed. These

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<sup>83</sup>Law No. 90-22, dated July 27, 1990, on the commercial registry.

<sup>84</sup>Ordinance No. 96-01, dated January 10, 1996, defines the rules governing traditional industries and crafts, Official Gazette No. 03.

activities are restricted to individuals who possess the requisite training and qualifications, thereby excluding those who are untrained. Furthermore, artisanal work may attain a level of expertise and creativity that elevates it to the realm of art.

Moreover, Article 7 of the ordinance specifies that traditional crafts and artisanal activities will be defined in a list promulgated by an executive decree. This ensures that these legal documents provide a clear benchmark for determining whether an activity qualifies as artisanal. Additionally, Article 10 of the same law outlines specific conditions under which a legal entity may achieve artisan status.<sup>85</sup>

For artisans, the conditions for acquiring status are distinct from those applicable to merchants and can be summarized as follows:

- The individual must be a natural person registered in the registry of traditional industries and crafts, actively engaged in a traditional activity as outlined in Article 15 of the aforementioned ordinance. This includes demonstrating qualifications, personally undertaking the execution of work, managing their activity, and assuming full responsibility for it.
- Article 15 further delineates roles such as the "master craftsman," which pertains to any craftsman registered in traditional industries and crafts, possessing exceptional technical skills and high qualifications in their craft. The term "craftsman manufacturer" refers to a wage-earning worker recognized for their vocational qualifications.

From this delineation, it is clear that the criterion of qualification and the nature of the traditional activity serve to differentiate the work of a craftsman. However, the evaluation of these criteria is not left to the subjective judgment of a court but is prescribed by a detailed inventory and a list of traditional industries recognized as part of the national and cultural heritage, necessitating specific qualifications.

Every craftsman is required to register themselves in a special registry maintained by the Chamber of Traditional Industries and Crafts within 60 days of commencing their activity.

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<sup>85</sup>Ali Ben Ghanam, *op. cit.*, p. 152.

Craftsmen may operate their craft in a private workshop, where it is permissible to employ family assistance from a spouse and direct descendants, typically ranging from one to three persons, under an insurance contract in accordance with existing legislation.

Furthermore, craftsmen have the option to form a crafts cooperative composed entirely of craftsmen to partake in activities related to traditional industries and crafts. Each member of the cooperative enjoys equal rights, regardless of their share in the cooperative's capital or their date of joining.

The agreement to establish a cooperative for traditional industries and crafts must be formally documented and notarized. It is also required to be declared and registered at the relevant chamber.<sup>86</sup>

If traditional industries and crafts are conducted within a business enterprise subject to commercial law, they are categorized as artisanal in terms of activity and commercial in terms of form, necessitating registration in the commercial registry.

Upon reviewing the above, it becomes apparent that while the legislator has endeavored to draw a distinction between the artisan and the merchant, the distinction remains somewhat nebulous due to the nature of the activities, which may include production, maintenance, or service provision. The principal divergence lies in the required qualifications and the specific legal regimes applicable to each group.

The legislator recognizes the activity of traditional industries and crafts as integral to national heritage, job creation, and the enhancement of personal qualifications, thus encouraging and providing several benefits to it. In contrast, the activities of a merchant are primarily driven by speculation and the pursuit of profit.<sup>87</sup>

## **2. Eligibility**

In addition to the requirement to engage professionally in commerce, a prospective merchant must also meet specific eligibility criteria. This refers to the individual's legal capacity to undertake and professionalize commercial

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<sup>86</sup>Ibid., p. 154.

<sup>87</sup>Ibid., p. 154.

activities, ensuring compliance with the obligations imposed on merchants by law.

Under Article 40 of the Civil Law, a person is considered fully competent upon reaching the age of majority, defined as 19 years. However, Article 5 of the Commercial Law introduces a special provision that allows individuals under the age of 19 to engage in commercial activities and acquire merchant status under certain conditions:

- Attainment of the full age of 18 years.
- Obtaining consent from either parent or a decision from the family council, which must be ratified by the court.
- Presenting this permission to the commercial registry service, signaling to others that the merchant is a minor and under guidance when conducting trade.<sup>88</sup>

The eligibility of married women in commercial law is also a critical area that requires attention. In 1996, the Algerian legislature amended Article 7 of the Commercial Law to clarify that a merchant's spouse is not automatically considered a merchant if their commercial activities are merely an extension of the spouse's business. A spouse achieves merchant status only if they independently engage in their own commercial venture.

This legislative change prompts a reevaluation of the situation for married women prior to the amendment, where the prevailing interpretation of the law was that a woman could not limit her commercial activities to retailing goods associated with her husband's trade. If her husband was a merchant, she would need to conduct a distinctly separate commercial activity to be recognized as a merchant herself.

The current legal framework establishes a general rule that the obligation to practice commerce independently applies equally to both the merchant's spouse and the merchant themselves.<sup>89</sup>

It is essential to recognize that certain individuals, such as judges and lawyers, are prohibited from engaging in commerce to prevent any misuse of influence

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<sup>88</sup>Atou Al-Mousous, *op. cit.*, p. 90.

<sup>89</sup>FarhaZarawi Saleh, *op. cit.*, p. 356.

and to protect the integrity of contractual freedom. This prohibition serves to safeguard the interests of the public and counterparties in commercial transactions. Nonetheless, once these individuals engage in commerce professionally, they must fulfill all the obligations of a merchant<sup>90</sup>, although they may still face disciplinary actions due to their primary professions.<sup>91</sup>

The discussion of eligibility extends to minors, the merchant's spouse, and individuals prohibited from practicing commerce, and raises another significant point: the eligibility of foreign merchants. If a foreign national wishes to engage in commercial activities in Algeria, they must satisfy the criteria to obtain merchant status.

Regarding the age of majority, some might refer to the civil law of their country of nationality, as suggested by Article 10 of the Civil Law. However, this reference typically applies only to the personal status in non-commercial matters. In commercial contexts, Article 19 of the Commercial Law explicitly mandates that every natural person who qualifies as a merchant under Algerian law and conducts business within Algeria must be registered in the commercial registry.

Through this discussion, it becomes evident that Algerian law mandates all merchants, irrespective of nationality, to comply with the stipulations of Algerian regulations and to submit to the jurisdiction as outlined, including the eligibility criteria specified in Article 40 of the Civil Law.

In a notable deviation from Article 10 of the Civil Law, the Algerian legislature has embraced the principle of territoriality over the principle of personality of laws. This shift is crucial for foreign individuals to align with the economic realities of Algeria.<sup>92</sup> Additionally, procedural mandates include the acquisition of a license from the relevant authority, which is necessary for the issuance of a foreign merchant card.

## **Second Subdivision: Regulations for E-commerce According to Law 18/05**

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<sup>90</sup>In 2022, the Algerian legislator amended the labor law and the civil service law, allowing workers and public employees to take unpaid leave or work part-time to start their own business. Law No. 22-16 dated July 20, 2022, amending Law No. 90-11 concerning labor relations, and Law 22-22 dated December 18, 2022, amending Law No. 06-03 on the civil service statute.

<sup>91</sup>Ammoura Amar, *op. cit.*, p. 92.

<sup>92</sup>Ali Ben Ghanam, *op. cit.*, p. 150 et seq.

The following segment elucidates the concept of e-commerce along with its regulations:

### 1. Concept of E-commerce

E-commerce is characterized as any commercial transaction where the interaction between a seller and a buyer involves the Internet, either wholly or in part. This includes the provision of information about services or goods for subsequent acquisition, irrespective of whether the payment is transacted electronically, by paper check, cash on delivery, or other methods.<sup>93</sup>

Moreover, e-commerce encompasses the advertisement and identification of goods and services, the execution of contracts, and the purchase and sale of these goods and services, along with the settlement of the purchase price via various communication networks, including the Internet or other networks connecting the seller to the buyer.

The World Trade Organization (WTO) further delineates e-commerce as the process of producing, promoting, selling, and distributing products through a communications network. From this, it can be inferred that the WTO categorizes the commercial process into three phases: advertising and demand generation, payment, and delivery. Notably, not all these stages need to be executed electronically to qualify the transaction as e-commerce; some aspects may still occur through traditional methods.<sup>94</sup>

E-commerce is primarily differentiated from traditional commerce by the medium through which transactions are conducted. Traditional commerce usually takes place face-to-face, involving a merchant or a company, and often incurs substantial expenses such as renting premises for company operations, hiring employees, and other ancillary costs. In contrast, e-commerce employs a non-traditional approach to customer engagement, relying on diverse marketing

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<sup>93</sup>Ibrahim Bakhti, *E-commerce: Concepts and Application Strategies in the Enterprise*, First Edition, University Publications Office, Algeria, 2005, p. 42.

<sup>94</sup>The WTO defines e-commerce as "the production, advertising, sale, and distribution of products via telecommunications networks." Global E-commerce Statement adopted on May 20, 1998. For more details see Philippe Barbet, *E-commerce and the Regulation of International Trade*, Annals of Telecommunications, Springer, 2003, p. 03, available at: <https://halshs.archives-ouvertes.fr/halshs-00206108/document>

strategies. This method allows for significant revenue generation with comparatively lower operational costs than traditional commerce.

The concept under this law is defined as follows:

**Electronic Commerce:** The activity by which an electronic provider proposes or guarantees the provision of goods and services remotely to an electronic consumer through electronic communications.<sup>95</sup>

The Algerian legislature has succinctly defined e-commerce in the opening paragraph of Article 6 of Law No. 18/05 as: "E-commerce refers to the activity whereby an electronic supplier proposes or ensures the provision of goods and services remotely to an electronic consumer, via electronic communications."

This same article further identifies an 'electronic supplier' as any natural or legal person who markets or offers goods or services through electronic communications. Additionally, an 'electronic consumer' is defined as any natural or legal person who acquires, whether for a fee or for free, a good or service from an electronic supplier for personal use.

## 2. Regulations for Practicing E-commerce According to Law No. 18/05

In response to the evolving landscape of online commerce, particularly the surge in transactions over social media platforms, the Algerian legislator has enacted the E-commerce Law. This law establishes the framework for engaging in e-commerce and includes protective legal measures for both the electronic consumer and the electronic supplier. Here is a detailed overview of these regulations:

### A. Conditions for Engaging in Electronic Commercial Exchanges

With the rise of digital marketplaces, it became imperative for legislative action to provide a regulated environment that safeguards both suppliers and consumers involved in electronic commerce. Accordingly, the E-commerce Law specifies its scope to include any transactions involving at least one party that is either a resident of Algeria, a legal entity formed under Algerian law, or contracts that are concluded or executed within Algeria.<sup>96</sup>

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<sup>95</sup>Refers to the commitment to provide a specific good to the consumer.

<sup>96</sup>Article 1 of Law No. 18/05 mentioned above.

The law explicitly excludes certain transactions from its scope, including those requiring formal contracts as well as transactions involving gambling, lotteries, betting, alcoholic beverages, tobacco, pharmaceutical products, and any goods or services that infringe on intellectual, industrial, or commercial property rights. Moreover, transactions that could potentially threaten national defense, public order, or public security are also prohibited.<sup>97</sup>

To ensure compliance and facilitate oversight, electronic suppliers are required to register in either the commercial register or the register of traditional industries and crafts. Additionally, they must establish and maintain a website with an Algerian domain extension (".dz"). This requirement aims to simplify monitoring and enhance the accessibility of the website. Upon meeting these criteria, suppliers are then listed in the electronic suppliers' register, which is published and made accessible by the commercial registry service through electronic communication channels.<sup>98</sup>

The law mandates that any commercial transaction begin with an 'electronic commercial offer,' which must include detailed information such as:

- **The electronic supplier's tax identification number**, physical and electronic addresses, telephone number, and commercial register number or craftsman's card number.
- **Comprehensive descriptions of the goods**, including the nature of the goods, their characteristics, availability, prices, and any related services, including fees, along with terms, expenses, and delivery deadlines.
- **General terms of sale** must also be clearly outlined. This includes the obligation of the electronic supplier to protect personal information and to inform the electronic consumer about:
  - \_ The method of price calculation for products whose costs cannot be predetermined, the terms of the commercial warranty, and the provisions for after-sales service.
  - \_ Payment procedures, conditions of contract termination if applicable, and the validity period of the offer.

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<sup>97</sup>See Articles 3 and 5 of Law No. 18/05 mentioned above.

<sup>98</sup>Article 9 of Law No. 18/05 mentioned above.

- \_ The terms for contract withdrawal, confirmation of orders, and the expected delivery date.
- \_ The price of pre-ordered products, methods for order cancellation, and procedures for the return, exchange, or compensation of products.
- \_ The cost of using electronic communication means if it is calculated differently from standard tariffs.<sup>99</sup>

The electronic contract should also include the following information:

- Detailed characteristics of goods and services.
- Contract duration, as applicable.
- Terms and methods of delivery.
- Warranty terms and after-sales services.
- Conditions for termination of the electronic contract.
- Payment terms and methods, which may be either upon delivery of the product or remotely through electronic payment methods via platforms specifically designed for this purpose, operated exclusively by banks approved by the Bank of Algeria and Algeria Post, and connected to any type of electronic payment terminals through the public network operator for wired and wireless communications.
- Conditions and methods for product returns.
- Conditions and methods for pre-ordering, if applicable.
- Special conditions and methods related to trial sales, if applicable.
- Procedures for handling complaints, and the competent judicial authority in case of disputes.<sup>100</sup>

From the elucidation provided, it becomes clear that the Algerian legislature has thoroughly structured the online buying and selling process within a robust legal framework, segmented into three critical stages. Initially, the stage of offering is

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<sup>99</sup>Article 11 of Law No. 18/05 mentioned above.

<sup>100</sup>Article 13 of Law No. 18/05 mentioned above.

meticulously organized, where the consumer is equipped with essential information, enabling them to enter into contracts with informed consent and comprehensive understanding.

The final stage involves the formation of the contract, which is consummated upon the consumer's confirmation of the order. This process is explicitly delineated in Article 12 of Law No. 18/05. The concluding paragraph of this article mandates that the consumer's selections are explicitly captured, ensuring that the fields to be filled out by the consumer are free from any pre-inserted data by the supplier that might influence the consumer's decisions.

Moreover, the legislation imposes a dual obligation and assurance mechanism involving both the electronic consumer and the supplier. This includes the stipulation that the agreed price is payable upon the conclusion of the contract. Additionally, the consumer is obliged to sign a receipt upon the actual delivery of the goods and retain a copy of this document.<sup>101</sup>

To facilitate a seamless transaction process, the legislator requires electronic suppliers to fulfill their contractual obligations diligently. Suppliers are held accountable unless they can demonstrate that any non-performance or subpar performance was due to force majeure or the consumer's actions.

Following the execution of the contract, the electronic consumer is entitled to receive an electronic copy of the contract as well as the invoice. Should the consumer request it, a paper copy of the invoice can also be provided.

In scenarios where the supplier fails to deliver the product within the stipulated timeframe, the consumer is vested with the right to return the product within a maximum of four days from the actual delivery date, as verified by the receipt. This action does not impede their right to seek compensation.

In such instances, the supplier is compelled to reimburse the amount paid and cover any expenses incurred by the consumer in returning the product, all within fifteen days of receiving the returned item.

The same conditions apply if the supplier delivers a product that either does not correspond to the order or is defective. In these cases, the supplier has the option to deliver a product that aligns with the consumer's request, repair the

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<sup>101</sup>See Articles 16 and 17 of Law No. 18/05 mentioned above.

defective item, replace it, or cancel the order and issue a refund. This does not affect the consumer's entitlement to claim damages in the event of harm.<sup>102</sup>

Per Article 24 of Law No. 18/05, the supplier must refrain from accepting orders for products that are not currently in stock, which logically prevents delays in meeting delivery commitments.

Finally, suppliers are mandated to inform the commercial registry service about all conducted commercial transactions and their corresponding dates, which should have been previously documented in the registers.<sup>103</sup>

## **Second Subsection: Obligations of the Merchant**

These obligations include:

### **First Subdivision: Registration in the Commercial Registry**

Registration in the commercial registry stands as a pivotal obligation for merchants, applicable to both natural persons and legal entities. The inception of the commercial registry can be traced back to the 13th century, originating in the merchant guilds of Italian cities where the names of members were recorded in a special codex. Initially intended for internal organization rather than public disclosure, the function of the commercial registry has significantly evolved over the centuries.

Today, the commercial registry not only notifies others of the legal status of a merchant but also serves as a critical tool for the collection of statistical data regarding the merchant population. Below is a detailed examination of the legal perspectives on the commercial registry system, the requisite individuals for registration, the implications of such registration, and the penalties for failing to comply.

### **First: The Legal Position on the Registration System in the Commercial Registry**

Legal frameworks universally recognize the commercial registry as a resource specifically for merchants, though they diverge in their views on its primary function. For instance, some systems, like that of Germany, attribute to it the

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<sup>102</sup>See Articles 22 and 23 of Law No. 18/05 mentioned above.

<sup>103</sup>Article 25 of Law No. 18/05 mentioned above.

power to create rights, while others regard it primarily as a means of providing information about merchants.

### **1. The German Commercial Registry System**

In Germany, the commercial registry extends beyond serving informational, statistical, and economic functions; it acts as a mechanism for legal publication, possessing authority over the data recorded within. As such, registration in Germany is overseen by a judicial entity tasked with ensuring the accuracy of these entries. This rigorous system has been partially adopted by Algeria.

The German commercial registry system centralizes all necessary data for registration, yielding several significant legal effects:

- Registration serves as conclusive evidence of acquiring merchant status.
- Data entered into the commercial registry are presumed accurate.
- Merchants cannot contest the validity of unregistered data in disputes with third parties.
- A company does not acquire legal personality until it is registered in the commercial registry.<sup>104</sup>

### **2. The French Commercial Registry System**

Established under the legislation passed in 1919, the French commercial registry primarily functions to provide commercial information. This enables third parties to access specific information about merchants and allows the state to oversee commercial activities. Initially, registration did not bestow merchant status under this framework.

However, the French legislator has continued to refine and expand the legal implications of registration in the commercial registry. For example, the 1923 law mandated merchants to include their registration number on all business papers and invoices. Moreover, the 1931 law required the registration of the lifting of guardianship or custody over a minor, illustrating the evolving nature of this system.

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<sup>104</sup>Fadila Sahri, op. cit., p. 74 et seq.

Additionally, the scope of the commercial registry has expanded over time to include electoral functions within the commercial chambers, with candidate lists for elections now restricted to those registered. This registration is also a prerequisite for practicing certain professions, such as itinerant traders and brokers.

In 1967, the French legislator issued decrees further detailing the consequences associated with non-registration in the commercial registry:

- Non-registration prevents an individual from affirming their merchant status to third parties. However, third parties with a vested interest may invoke unregistered data in their favor.
- Merchants not registered cannot avail themselves of the rights established for merchants. This includes being excluded from requesting judicial settlement systems, leaving asset liquidation as the only recourse.
- For commercial companies, registration is crucial as it marks the commencement of their legal personality.<sup>105</sup>

### **3. The Algerian Commercial Registry System**

The Algerian commercial registry, established during the colonial era under French law, continues to evolve. It is now governed by Order No. 75/59, the subsequent Law No. 90/22 concerning the commercial registry (as amended and supplemented), and Law No. 04/08, which outlines the rules applicable to commercial practices.

Managed by the National Center for the Commercial Registry, an administrative body, the registration framework includes a central registry in Algiers and regional registries in each province. These are overseen by commercial registry officers who are public officials.

While the registration process itself remains administrative, Law No. 90/22 designates a registry judge to supervise the commercial registry, marking a shift toward judicial oversight, albeit limited compared to the German model.

The Algerian system primarily focuses on legal publicity, a mandatory aspect that ensures third parties are well-informed about a merchant's status and activities. This includes providing access to crucial documents such as the

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<sup>105</sup>Ibid., p. 76.

company's founding acts, changes to its constitution, and transactions impacting its assets like mortgages, sales, and leases.

The Algerian approach represents a hybrid of the French and German systems, administratively lean like the French system but incorporating elements of judicial oversight from the German model, though the registry judge's role in Algeria is confined to resolving disputes related to registration processes.<sup>106</sup>

## **Secondly: Individuals Required to Register in the Commercial Registry**

As outlined in Article 19 of the Commercial Law:

- Registration is obligatory for any natural person who qualifies as a merchant under Algerian law and conducts their commercial activities within Algeria.
- It is also mandatory for any legal entity with a commercial structure or purpose that is based in Algeria or has an office, branch, or establishment within the country.

Article 20 elaborates on this requirement, stipulating that:

- All merchants, whether natural or legal persons, must register.
- Any commercial enterprise not based in Algeria but that opens an agency, branch, or other establishment within the country must register.
- This also applies to any foreign commercial representation operating within Algeria.

The mandate for registration in the commercial registry is thus comprehensive, encompassing a wide range of entities and individuals engaged in commerce within the national territory.

### **1. Individual Traders:**

- Algerian legislation does not distinguish between natural persons of Algerian or foreign nationality when it comes to their status as traders. It is sufficient that they acquire the status of a trader through engaging in commercial activities within the national

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<sup>106</sup>Ibid., p. 78.

territory. This status is granted based on Algerian law, regardless of the individual's nationality.

- \_ Foreign individuals must comply with regulations regarding their residency in Algeria, as well as the provisions that allow them to engage in commerce in Algeria.
- \_ It should be noted that partners in general partnerships, simple partnerships, or share partnerships are not required to register themselves in the commercial register, although they acquire the status of a trader simply by being partners.<sup>107</sup>

## **2. Registration of Corporate Traders:**

- \_ According to Article 19 of the Commercial Law, every corporate entity engaged in trading, both in form and substance, must be registered in the commercial register.
- \_ The registration of a corporate entity in the commercial register is contingent upon acquiring the status of a trader and engaging in activities within Algeria, whether their main office is in Algeria or they only have a branch there, as affirmed by Article 20 of the Commercial Law.
- \_ The obligation to register extends to mixed economy companies, public entities with industrial and commercial character, and public economic institutions.
- \_ Both natural and legal traders are required to be registered in the commercial register and must cancel their registration if they permanently cease their activities.
- \_ If a person changes the type of activity they engage in, they must apply to modify their commercial register entry. The same applies if they wish to add a specific activity to their original business operations.
- \_ In the event a trader is declared bankrupt, whether natural or corporate, this automatically leads to the cancellation of their registration by the National Center for the Commercial Register.

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<sup>107</sup>Rabeh Ben Zaarar, op. cit., p. 170.

Bankrupt individuals are prohibited from resuming commercial activities unless they are legally rehabilitated.<sup>108</sup>

### **3. Provisions and Effects of Registration in the Commercial Register:**

- Every entity subject to the commercial register must follow a series of legal procedures to complete the registration process and legally operate their business. This also includes procedures for modifications and cancellations. The steps are summarized as follows: A: Registration Procedures:

#### **A. Filing and Examination Stage:**

Submission of necessary documents and proof of legal capacity and financial solvency to verify the proposed commercial activity's compliance with legal standards. This stage also includes an assessment to ensure all requirements are met before proceeding to the next stages of registration and public announcement.

The Executive Decree No. 15/11, which specifies the procedures for registration, modification<sup>109</sup>, and deletion in the commercial register, outlines the steps for registering in the commercial register. It is important to note that registration also encompasses modifications and cancellations as stipulated in Article 2, Paragraph 2 of Law No. 04/08 concerning the conditions for engaging in commercial activities, amended and supplemented by Law No. 13/06.

According to Article 2 of the previously mentioned Executive Decree No. 15/11, the registration applicant is required to submit a registration file to the local branch of the National Commercial Registry Office that has jurisdiction over the region. This submission must include documents necessary for new registration, amendment, or cancellation, depending on the nature of the registrant, whether they are a natural person or legal entity, foreigner or Algerian, and whether the registration is new, an amendment, or a cancellation.

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<sup>108</sup>Ibid., p. 170 et seq.

<sup>109</sup>Executive Decree No. 15/111, dated May 3, 2015, specifying the procedures for registration, modification, and deletion in the commercial registry, Official Gazette No. 24, issued on May 13, 2015, amended and supplemented, which repealed Executive Decree No. 97/41 dated January 18, 1997, concerning the conditions for registration in the commercial registry.

For new registrations, as per Article 7 of Executive Decree No. 15/11, the required documents include:

- A signed application form provided by the National Center for the Commercial Register.
- Proof of a qualified premise for conducting a commercial activity, such as a property deed, lease agreement, or a concession for the real estate housing the commercial activity, or any contract or allocation decision issued by a public authority.
- A birth certificate extract.
- An extract from the criminal record (Bulletin No. 3).
- A receipt for the payment of stamp duty as specified in the applicable tax legislation.
- A receipt for the payment of the commercial register registration fees as outlined in the regulations.
- Authorization or license issued by the competent authorities when the activity or profession is regulated.
- For foreigners, Article 13 of the same decree requires a residence permit for registration.

For non-permanent commercial activities, the file includes:

- A signed application form provided by the National Center for the Commercial Register.
- A copy of a decision allocating a space in an area designated for such activities, issued by local authorities for commercial activities conducted through displays, or a copy of the vehicle registration used in non-permanent commerce and proof of usual residence.

Regarding the documents required for the new registration of a legal entity trader as per Article 9 of the same decree:

- A signed application form provided by the National Center for the Commercial Register.
- A copy of the publication of the company's statute in the official bulletin of legal announcements and in a national daily newspaper.

- Birth certificate extracts, and criminal record extracts for managers, administrative directors, board members, and supervisory board members for joint-stock companies.
- A receipt for the payment of stamp duty as specified in the tax legislation.
- A receipt for the payment of the commercial register registration fees as outlined in the regulations.
- Authorization and license issued by the competent authorities when the activity is regulated.

For modifications in the commercial registry, which involve adding or deleting information, according to Article 15/111 of the same decree, the requirements are:

- A signed application on forms provided by the National Center for the Commercial Registry.
- The original extract from the commercial registry.
- Proof of a qualified commercial premises by presenting a property deed, lease contract, or a real estate concession that houses the commercial activity when the modification involves relocating the headquarters, or any contract or allocation decision issued by a public body.

According to Article 17, if the modification involves leasing the commercial premises, the file must include:

- A signed application on forms provided by the National Center for the Commercial Registry.
- A copy of the notarized contract that includes the management lease of the commercial premises.
- A copy of the announcement of the notarized contract that includes the management lease published in the Official Gazette of Legal Announcements.

For modifications involving a legal entity, Article 16 specifies the necessary documents:

- A signed application on forms provided by the National Center for the Commercial Registry.

- The original extract from the commercial registry.
- A copy of the amended bylaws.
- A copy of the announcement of the modified data of the bylaws published in the Official Gazette of Legal Announcements.
- Proof of a qualified commercial premises by presenting a property deed, lease contract, or real estate concession if the modification involves changing the company's headquarters, or any contract or allocation decision issued by a public body.

Article 18 addresses the situation of a merchant's death and the heirs' desire to continue the business activity, requiring:

- A signed application on commercial registry forms provided by the National Center for the Commercial Registry.
- The original extract from the commercial registry.
- The inheritance division document.
- A notarized power of attorney granted by the heirs to the person charged with continuing the commercial exploitation of the deceased's business.

Article 20 covers cases for deregistration from the commercial registry, which include:

- Permanent cessation of activity.
- Death of the merchant.
- Dissolution of the commercial company.
- A judicial ruling ordering deregistration from the commercial registry.

Deregistration requests can be initiated by the concerned merchant, whether a natural or legal person, by their legal heirs in the event of death, or by qualified supervisory authorities before competent judicial entities upon verification of non-compliance with mandatory procedures.<sup>110</sup>

For natural persons, the deregistration file should include:

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<sup>110</sup>Atou Al-Mousous, *op. cit.*, p. 136 et seq.

- A signed application on forms provided by the National Center for the Commercial Registry.
- An extract from the death certificate of the deceased, if applicable.
- A copy of any judicial ruling that orders deregistration from the commercial registry, if applicable.
- A tax status certificate, confirming the financial and fiscal closure of activities.

For legal entities, as specified in Article 23 of Decree 15/111, the requirements are more comprehensive. The deregistration file must contain:

- A signed application on forms provided by the National Center for the Commercial Registry.
- The original extract from the commercial registry or the second copy, if applicable.
- A copy of the dissolution contract of the commercial entity.
- A copy of the announcement of the dissolution contract as published in the Official Gazette of Legal Announcements.
- A copy of the judicial decision that dissolves the company or orders its deregistration from the commercial registry, if such a decision exists.

### **Examination Procedures for Registration**

The examination of registration files at the Commercial Registry Service involves a detailed review to ensure compliance with the required conditions for each activity listed under the economic activity code that necessitates registration. This includes verifying that all activities requiring prior approval or licensing are adequately addressed.

Although Executive Decree No. 15/111 does not specify the examination process, the procedures established under the previous Executive Decree 97/41, despite its repeal, continue to guide current practices.

This decree mandated that the National Center for the Commercial Registry must review the conformity of the submitted file in the presence of the applicant. It authorized the automatic rejection of any incomplete files or documents that fail to meet the stipulated form or content requirements. A

receipt of deposit is issued to the applicant while awaiting the final decision to receive the commercial registry extract.

Although the previously mentioned decree has been repealed, the procedural guidelines it established remain in practice. The process involves a detailed examination of the file in the presence of the concerned party. This examination is aimed at verifying the alignment of the submitted documents with the standards required for the registration file.

Depending on the outcome of this verification, the file may either be approved, temporarily rejected due to discrepancies found in the documentation, or permanently rejected if the applicant fails to satisfy the legal prerequisites. Such prerequisites include being of legal age, possessing full legal capacity, not being subject to any legal prohibition, not attempting to participate in activities reserved for the state<sup>111</sup>, or not having committed offenses as defined by Law No. 08/04, both in its original form and as subsequently amended and supplemented.

## **B. Registration Process in the Commercial Registry**

Upon successful completion of the examination and compliance assessment, the applicant's file is forwarded for registration. The registration is conducted at two levels: the local and central commercial registries.

- **Registration in the Local Commercial Registry:**

This registry is comprised of two separate registers: one for natural persons (designated as 'A') and another for legal entities (designated as 'B'). These registers are meticulously numbered and indexed under the supervision of the competent judicial authority of the locality where the business activity is conducted or where the registry is based, as specified by Article 02 of Law No. 04/08 regarding the conditions of commercial activities, further amended and supplemented.

Following the dual registration on paper and electronic media, the file is assigned a national sequential number. Subsequently, a commercial registry extract is meticulously prepared, signed, and stamped by the annex office of the National Center for the Commercial Registry and then issued to the applicant.

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<sup>111</sup>Ibid., p. 142.

- **Registration in the Central Registry:**

The central commercial registry aggregates and centralizes the data from the local registries in accordance with Article 5 of Executive Decree No. 92/68, which has also been amended and supplemented. The central registry performs a critical statistical and economic role by utilizing the data to generate statistics concerning various aspects of commercial activities, such as the count of merchants, commercial enterprises, and business premises.

It functions as both a data repository and a regulatory mechanism for overseeing commercial activities, tax services, and judicial authorities. Data from local registry annexes, once authenticated by the officer of the annex of the National Center for the Commercial Registry, are rigorously reviewed by the Control Service at the National Center for the Commercial Registry to rectify any potential oversights.<sup>112</sup>

### **C. Publicity Process:**

The Algerian legislation compels every individual or legal entity registered in the commercial registry to engage in mandatory legal publicity. This process is distinctly categorized for legal entities and natural persons. According to Article 11 of Law No. 04/08, as amended and supplemented, the publicity for legal entities encompasses disclosing to third parties the details of the founding acts of commercial companies. This includes information on transformations and modifications that impact their statutes, changes in capital, possession liens, management leases, and similar subjects.

Furthermore, this publicity extends to the authority of management or administrative bodies, outlining their powers, limitations, and tenures. It also covers any disputes related to these transactions, as well as issues concerning amicable settlements, bankruptcy, and any procedures that involve prohibitions or revocation of commercial activities, or the deregistration or withdrawal from the commercial registry.

These notices by legal entities become effective one day post-publication in the Official Gazette of Legal Announcements, and must also be published in a

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<sup>112</sup>Ibid., p. 144.

national newspaper or another suitable medium at the cost of the legal entity, as stipulated by Article 14 of the same law.

For natural persons, Article 15 mandates legal notices that detail the merchant's status and qualifications, the address of the main establishment where the trade is actively pursued, and any information regarding the ownership of commercial premises, or management lease and sale of these premises.

Following the completion of the legal publicity process, any interested parties can access information about the registered natural or legal persons at the National Center for the Commercial Registry, fulfilling the registry's informational role as prescribed by Article 16 of the law.

## **2. Effects of Registration and Non-Registration in the Commercial Registry**

The primary objective of registration in the commercial registry is to foster transparency in business transactions. This system allows any interested party to access the data of registered entities, thereby ensuring confidence in the dealings with traders. The legislative framework governing the consequences of registration, as well as the ramifications of non-compliance, are elaborately detailed in Articles 21 to 28 of the Commercial Law.

### **A. Effects of Registration in the Commercial Registry**

- **For Natural Persons:**

According to Article 21 of the Commercial Law, "Every natural or legal person registered in the commercial registry is deemed to have acquired the status of a trader under the prevailing laws and is subjected to all the ensuing obligations and legal implications of this status." This provision is corroborated by Article 18 of Law No. 90/22 concerning the commercial registry, which highlights that registration affirms the legal status of a trader. Registration, therefore, not only signifies the formal acknowledgment of an individual as a trader but also enables both the registered individual and third parties to depend on this status in legal and commercial dealings.

Nevertheless, an intriguing legal issue arises: Does registration constitute irrefutable evidence of trader status, or is it merely a rebuttable presumption that

can be challenged if the individual presents contrary evidence? <sup>113</sup>This question is addressed by the 1996 amendment to Article 21 of the Commercial Law, which had previously considered registration as presumptive evidence of trader status. The amendment notably eliminated the phrase "unless proven otherwise," thus elevating the evidence status of registration to that of conclusive proof, unequivocally affirming that an individual registered in the commercial registry definitively assumes trader status.

This decisive perspective on registration deviates from the principles outlined in Article 1 of the Commercial Law, which defines a trader as any person who habitually engages in commercial activities as a profession. This suggests that the essence of commercial status should encompass more than mere registration, emphasizing the necessity for consistent and substantial commercial engagement.<sup>114</sup>

- **For Legal Entities:**

Article 549 of the Commercial Code delineates that registration in the commercial register endows a commercial company with its legal personality. Nevertheless, until the registration process is consummated, individuals who act on behalf of the company bear joint and several liabilities without limitation. These liabilities persist unless the company consents to assume these commitments post-registration, at which juncture these commitments are retroactively acknowledged as the obligations of the company from its inception.

Registration is pivotal as it signifies the inception of the company and is requisite for contesting any amendments thereto against third parties. Absent registration, the company lacks legal personality and is regarded merely as a de facto entity, yet it is recognized to safeguard the interests of third parties under the apparent authority doctrine.

Article 25 of the Commercial Code mandates that in instances where a commercial company is legally deemed null or dissolved, whether through a final judicial decree, or a resolution by the general assembly of a joint-stock or limited liability company due to losses surpassing three-quarters of its capital,

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<sup>113</sup>Rabeh Ben Zaarar, *op. cit.*, p. 176.

<sup>114</sup>*Ibid.*, p. 178.

such dissolution or judgment does not affect third parties unless duly registered.<sup>115</sup>

## **B. Consequences of Non-Compliance with Commercial Registry Requirements**

Article 28 of the Commercial Code specifies:

"Any natural or legal person who is not registered in the commercial register but habitually engages in commercial activities commits an offense, subject to punishment under the prevailing legal stipulations."

### **- Civil Penalties**

Failure to register in the commercial register subjects the trader to all the obligations of a trader and precludes them from asserting non-registration as a defense against third parties, as explicitly articulated in Article 22 of the Commercial Code. Furthermore, a trader who omits registration forfeits their rights against third parties and cannot claim such status unless properly registered.

Concerning legal entities, Article 548 of the Commercial Code mandates the filing of all foundational and amending contracts at the National Center for the Commercial Register. These documents must be published in accordance with the specific conditions stipulated for each company type, under the threat of nullity. This publication serves to inform third parties about the contractual foundations of the company.

Additionally, providing incorrect information to the Commercial Register entitles the aggrieved party to pursue compensation.

### **- Criminal Penalties**

The legislative body has criminalized certain misconducts of traders, particularly the failure to register in the commercial register or the intentional provision of inaccurate or incomplete information. This underscores the imperative of completing registration processes and fulfilling the intended purpose of public disclosure and reinforcing the principle of transparency.

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<sup>115</sup>Ibid., p. 179.

Article 26 of the Commercial Code mandates penalties for traders who neglect to register, with fines ranging from 500.00 DZD to 2000.00 DZD. In instances of repeated offenses, the fine is doubled, and the trader may face imprisonment from 10 days up to six months, with the discretionary power vested in the judge to additionally prohibit the trader from engaging in business activities. Furthermore, Article 27 addresses those who submit erroneous or incomplete data to the registry, imposing a similar range of fines and potential imprisonment, or alternatively one of these penalties, depending on the severity and circumstances of the infringement.

Article 28 of the Commercial Code also extends criminal penalties to traders presenting forged certificates or copies from the commercial register, or any related document, for the purpose of acquiring certain rights or status fraudulently. Additionally, penalties are specified for traders who omit the mention of their court headquarters or registration number in documents issued by them, emphasizing the necessity of complete transparency in all commercial documents.<sup>116</sup>

### **Second Subdivision: Maintenance of Commercial Books**

The upkeep of commercial books is a cardinal duty for all traders. With the introduction of Law 18/05, which outlines the provisions for electronic commercial books in Article 25, the maintenance of commercial books under commercial law, coupled with the guidelines for their electronic processing by providers in the realm of e-commerce, becomes a critical discussion point.

#### **First: Commercial Books According to Commercial Law Provisions**

Commercial law obligates traders to maintain precise books recording their rights, liabilities, and all commercial transactions undertaken. These books are pivotal for both the trader and third parties. For traders, well-kept commercial books mirror their financial health and business state, detailing assets, liabilities, profits, and losses, thereby fostering transparent and effective business management.

For tax authorities, these organized records enable accurate tax assessments, which are preferable to arbitrary evaluations that could disadvantage the trader.

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<sup>116</sup>Article 27 of the Commercial Law.

Moreover, when maintained appropriately, commercial books also serve as reliable evidence in legal disputes among traders.

### **1. Individuals Obligated to Maintain Commercial Books**

Referring to Article 09 of the Commercial Law, it mandates the following: "Every natural or legal person who is a trader must maintain a journal where daily business transactions are recorded, or at least review these transactions monthly, provided that all documents enabling daily review of these transactions are retained." This article unequivocally states that maintaining commercial books is a compulsory requirement for every trader, be they a natural or legal person, an Algerian citizen or a foreign resident operating within Algeria.

It is noteworthy that partners in joint partnerships, simple recommendation companies, or joint-stock companies, who legally acquire trader status through their association with these entities, are exempt from maintaining individual commercial books. This responsibility falls on the company itself, which maintains these records as a legal entity. However, a partner engaged in an independent trade outside of the partnership's activities may be required to keep a separate journal.<sup>117</sup>

### **2. Types of Commercial Books**

Commercial books are categorized into mandatory and optional types as follows:

#### **A. Mandatory Books**

- **Journal Book:**

The journal is a fundamental commercial book, as stipulated in Article 09 of the Commercial Law. A trader records all financial transactions in a detailed manner daily. This comprehensive record includes all sales, purchases, loans, payments, and receipts of commercial papers, among other transactions. In practice, a single book is often insufficient; traders typically use additional auxiliary books to meticulously detail various transaction types, such as separate books for purchases and sales. The cumulative summary of these transactions is then systematically documented in the journal.

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<sup>117</sup>Ammoura Amar, op. cit., p. 96.

- **Inventory Book:**

As per Article 10 of the Commercial Law, every trader is required to maintain an inventory book. It specifies that traders must conduct an annual inventory of all business assets and liabilities, close all accounts to prepare the balance sheet and the profit and loss account, and subsequently transcribe these details into the inventory book. This process involves a thorough valuation of the enterprise's assets, both tangible and intangible, and a detailed summary of their rights and obligations.

The general ledger is reconciled from the inventory book or lists, which delineate assets on one side and liabilities on the other. <sup>118</sup>Assets typically include both fixed and movable properties and receivables owed to the trader, whereas liabilities cover obligations the trader owes to others, the capital of the enterprise considered a debt owed to the owner, and the accounts detailing profits and losses.

Below is a sample format for a standard inventory table:

<b>Order Number</b>	<b>Registration Date</b>	<b>Designation</b>	<b>Quantity</b>	<b>Unit Price</b>	<b>Purchase</b>	<b>Total Value</b>

**Source:** Ammar Ammoura, p.99

- **Ledger or General Ledger Book:**

Introduced under Law No. 07/11 in 2007<sup>119</sup>, Article 20 of this legislation mandates that entities governed by this law maintain specific accounting books, including a daily book, a ledger, and an inventory book. The ledger serves a critical function by housing personal accounts associated with the trader's dealings with individuals, general accounts that depict the business's assets and

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<sup>118</sup>Ibid., p. 98.

<sup>119</sup>Law No. 07/11, dated November 25, 2007, on the financial and accounting system, amended and supplemented by Law No. 08/02, dated July 24, 2008, on the supplementary finance law for 2008.

liabilities, and daily entries of expenses, revenues, profits, and losses, all while adhering to provisions tailored for small entities.<sup>120</sup>

## **B: Optional Books**

This category encompasses several types of records, such as:

- **Draft Book:**

Utilized for initial recordings of commercial transactions as they occur, these entries are later methodically transferred to the journal for consolidation.

- **Commercial Papers Book:**

This book is crucial for managing the timelines for receivables and payables involving commercial papers, documenting due dates for collections owed by others and payments due to others.

- **Cash Book or Treasury:**

This register meticulously tracks all monetary transactions flowing in and out of the cash register, thereby reflecting the trader's daily financial balance.<sup>121</sup>

### **3. Organization of Commercial Books and Retention Period**

The organization and maintenance of commercial books are governed by stringent provisions that ensure their integrity and the accuracy of the information contained within. These books are indispensable in judicial contexts, tax assessments, and portraying an accurate financial profile of the trader.

According to Article 13 of the Commercial Code, "organized commercial books may be accepted by the judge as evidence between traders for commercial acts." Article 11 further stipulates that traders must maintain these books in chronological order, ensuring no gaps, alterations, or marginal notes disrupt the continuity of records.

It is also mandatory for the pages of both the journal and inventory books to be sequentially numbered by a court judge following established procedures.

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<sup>120</sup>Atou Al-Mousous, op. cit., p. 100.

<sup>121</sup>Nesrin Charki, op. cit., p. 49.

Notably, the retention period for commercial books is set at ten years, during which all incoming and outgoing correspondences must also be preserved.<sup>122</sup>

#### **4. Penalties for Non-Maintenance or Irregular Maintenance of Commercial Books**

Failure to properly maintain commercial books results in significant consequences, encompassing both civil and criminal penalties:<sup>123</sup>

##### **A. Civil Penalty**

If a trader's commercial books are irregularly maintained, they cannot be used to benefit the trader in legal disputes with other traders. However, the court might still consider these books as partial evidence, though not as conclusive proof. The court also retains the authority to disregard these books entirely if found to be poorly organized.

It is critical to note that irregular maintenance of commercial books exposes the trader to arbitrary tax assessments, potentially resulting in unfair financial burdens. Moreover, poorly maintained books could also negate the possibility of obtaining a protective settlement against bankruptcy, due to the challenges in accurately determining the trader's financial status. The absence of well-organized books similarly diminishes the likelihood of assuming good faith on the part of the trader.

##### **B. Criminal Penalty**

In Algerian law, the failure to maintain or the irregular maintenance of commercial books does not trigger a penalty unless this occurs within the context of the trader's bankruptcy. Should a trader cease payments on his debts and subsequently be found to have failed to maintain, or to have irregularly maintained commercial books, this individual is deemed to have engaged in negligent bankruptcy. Under such circumstances, the sanctions outlined in Article 383 of the Penal Code and Article 370 of the Commercial Code are applicable.

Moreover, if during bankruptcy proceedings it is discovered that the trader concealed, squandered, or falsified his books, such actions are classified as

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<sup>122</sup>For more details see Ammoura Amar, *op. cit.*, p. 100.

<sup>123</sup>Ammoura Amar, *op. cit.*, p. 101.

fraudulent bankruptcy. This is governed by Article 374 of the Commercial Code, with penalties as prescribed in Article 383 of the Penal Code:

- For fraudulent bankruptcy: Imprisonment ranging from one to five years and a fine between 100,000 to 500,000 Algerian Dinars (DZD).
- For bankruptcy due to negligence: Imprisonment for two months to two years, with a fine ranging from 25,000 to 200,000 DZD.

It is noteworthy that these penalties also extend to directors or liquidators of a limited liability company, as well as any other individuals commissioned by the company who have, in bad faith, either maintained or directed the irregular maintenance of the company's books. This applies if it is established that the company was in a state of bankruptcy caused by negligence or fraud, in accordance with Article 378, paragraph 5 of the Commercial Code.

## **5. The Probative Value of Commercial Books in Evidence**

Commercial books are vested with significant evidentiary importance by legislation, which may benefit or disadvantage the trader.

### **A. Evidentiary Value of Commercial Books in Favor of the Trader**

While it is generally unacceptable in law for an individual to produce evidence solely for their own benefit, commercial law provides an exception. This law permits traders to use their commercial books as evidence to bolster their claims. These entries may be contested by the opposing trader using any available means. The probative value afforded to commercial books depends on the nature of the dealings:

- If the transaction involves two traders, the law entitles a trader to use their commercial books as evidence in legal disputes pertaining to commercial transactions, provided the books are properly organized as mandated by Article 13 of the Commercial Code. Two conditions must be satisfied:
  - \_ Both disputing parties must be traders.
  - \_ The dispute must be related to a commercial transaction.
  - \_ The organization of the books is a prerequisite for their acceptance as evidence. Otherwise, they may only serve to guide the judge.

If the counterpart is not a trader, the general rule precludes a trader from using their books as evidence against a non-trader. However, these books might still offer insights that the judge can use to further probe the matter, including potentially administering an oath to either party, under specific conditions:

- The dispute involves a transaction where goods are provided by the trader to a non-trader.<sup>124</sup>
- The debt in question is verifiable through witness testimony, applicable when the value of goods does not exceed 100,000 DZD as per Article 333 of the Civil Code.
- The judge has the discretion to use the commercial books as part of the evidence, which may be supplemented by an oath.<sup>125</sup>

## **B. Evidentiary Value of Commercial Books Against the Trader**

Commercial books possess significant evidentiary value against the trader responsible for their maintenance, regardless of whether the opposing party is a trader or a non-trader, and irrespective of whether the matter concerns commercial or civil debt. The foundation of their evidentiary strength lies in the premise that the entries within these books represent self-admissions by the trader. Consequently, if the books are meticulously organized, the principle that such admissions cannot be selectively acknowledged is applicable. This stipulates that the opposing party must either entirely accept or completely reject the entries.

In scenarios where the books are disorganized, the judge retains the discretion to evaluate the content of these books independently of the aforementioned rule concerning partial admissions.

## **C. Submission of Commercial Books to the Court**

Despite the general legal principle that prohibits individuals from presenting evidence against themselves, the law grants courts the authority to compel traders to produce their commercial books. This provision is based on the presumption of trust bestowed upon traders, which often leads adversaries to depend on the records maintained in these books.

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<sup>124</sup>Article 330 of the Civil Code.

<sup>125</sup>Ammoura Amar, *op. cit.*, p. 104.

When a party petitions the court to require an opposing trader to submit their commercial books, the court may either grant or deny this request depending on the specifics of the case. Additionally, the court may independently decide to demand the presentation of these books. Should the trader resist this order, the judge is empowered to enforce compliance through the imposition of a daily penalty fine, consistent with general legal procedures.

The presentation of books in court may be requested either for partial or complete inspection, as follows:

- **Partial Inspection:**

This entails the trader showing their commercial books to the court for a limited review, often with the appointment of an expert tasked specifically to extract information pertinent to the dispute. This inspection is conducted under the direct supervision of the trader, safeguarding the trader's confidential information by restricting opponent access to these records.

If the books are located at a considerable distance from the court, the judge might delegate a local court to inspect the books, subsequently transmitting a summary of their contents to the court overseeing the case, as outlined in Article 17<sup>126</sup> of the Commercial Code.

- **Complete Inspection:**

This method involves the complete surrender of the books to either the court or the opponent for thorough examination. Due to the potential exposure of sensitive information, the legislator restricts this level of access to exceptional circumstances delineated in Article 15 of the Commercial Code, such as inheritance disputes, corporate divisions, and bankruptcy proceedings. For instance, in inheritance situations, heirs or legatees may demand full access to a deceased trader's books to determine their entitlements.

In cases of corporate dissolution, partners may examine the books to establish their shares of the net assets. Similarly, during bankruptcy, a judicial administrator is entitled to inspect the books to assess the trader's assets and liabilities. However, this right is not extended to the bankrupt's creditors, who are represented by the judicial administrator. It is crucial to recognize that the

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<sup>126</sup>Ibid., p. 106.

instances permitting complete inspection are exhaustive as stated in Article 15 of the Commercial Code, and such thorough reviews are otherwise prohibited unless explicitly agreed upon, such as in instances where a bank assesses a trader's books for credit issuance.<sup>127</sup>

## **Second: Electronic Commercial Books According to Law 18/05**

Article 25 of Law No. 18-05 requires every electronic commerce provider to store records of all completed commercial transactions, including their dates, and to transmit these records electronically to the National Commercial Registry. This legal requirement effectively introduces the concept of electronic commercial books, though it does not stipulate specific methods for their maintenance or retention, leaving these details to be addressed in regulatory decrees.<sup>128</sup>

Subsequently, Executive Decree No. 19/89 was enacted, outlining the procedures for preserving records of electronic commercial transactions and their transmission to the National Commercial Registry.

<sup>129</sup> It's also noteworthy that Law No. 07-11, amended by Order 08-02 in 2007, was a trailblazer in legislating the use of electronic commercial books. This law highlighted that while technological advancements have transformed the methods and organization of bookkeeping, they have not altered the fundamental nature of the books.

The primary requirements for organizing electronic commercial books are categorized as follows:

### **A. Substantive Conditions:**

- A chronological sequence is essential to ensure the authenticity and transparency of the transactions recorded.

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<sup>127</sup>Ibid., p. 106.

<sup>128</sup>Fatiha Hazam, *Law of Electronic Transactions: A Study Based on Law 18/05*, First Edition, Alpha Documents for Publishing and Distribution, Constantine, 2022, p. 176.

<sup>129</sup>Executive Decree No. 19/89, dated March 5, 2019, concerning the preservation of electronic commercial transaction records and their submission to the National Commercial Registry Center, Official Gazette No. 17, issued on March 17, 2019.

- The data within electronic commercial books must be immutable to maintain their integrity and evidentiary weight.

### **B. Formal Conditions:**

- The critical formal requirement is the electronic format, which entails the digital entry of data.

### **C. Specific Conditions for Electronic Commercial Books:**

- There is a legal equivalency between electronic documents and signatures, and traditional paper documents and signatures, reinforcing their legitimacy.

Moreover, a criminal penalty for non-compliance is stipulated in Article 41 of Law 18/05. It imposes a fine ranging from 20,000 DZD to 200,000 DZD on any electronic provider who fails to adhere to the provisions of Article 25, which mandates the transmission of electronic commercial books to the commercial registry service.

## **Second Section: Theory of the Commercial Establishment**

Within the scope of commercial law, particularly for a researcher at the bachelor level, it is crucial to differentiate between the physical premises where the trader operates and the commercial establishment, which is recognized as an intangible movable asset.

The Algerian legislator has structured the framework concerning commercial establishments within the second book of the Commercial Code, spanning Articles 78 to 214.

### **First Subsection: Concept of the Commercial Establishment and Its Elements**

#### **First Subdivision: Concept of the Commercial Establishment**

To define the commercial establishment, it is imperative to explore its definition, characteristics, and legal nature. This exploration involves delving into various theoretical perspectives regarding the establishment.

#### **Firstly: Definition and Characteristics of the Commercial Establishment**

While the Algerian Commercial Code does not explicitly define the commercial establishment, it does list its elements as stated in Article 78: "The commercial establishment encompasses movable property designated for conducting commercial activities, which invariably includes its clientele and reputation.

Furthermore, it comprises other essential assets for operation such as the business address, trade name, lease rights, equipment, machinery, goods, and rights to industrial and commercial property, unless specified otherwise."

This comprehensive enumeration of elements underlines the multifaceted nature of commercial establishments and highlights their significance within the realm of commercial law.

From this text, the characteristics of the commercial establishment can be inferred:

- **Movable Property Nature:**

The commercial establishment is classified as movable property. It comprises both tangible and intangible elements, but does not possess physical existence in the traditional sense. Instead, it exists as a legal construct, not anchored to any specific location, making it subject to the legal provisions applicable to movable properties. Although it cannot be formally mortgaged, the legislator treats it akin to real estate in matters concerning liens, which nonetheless does not alter its movable nature.

- **Intangible Asset:**

Despite containing tangible elements such as goods and machinery, the commercial establishment is primarily an intangible asset. It lacks a physical presence perceivable by the senses and is recognized as a unit derived from the sum of its parts.

- **Commercial Nature:**

The establishment is deemed commercial only if engaged in activities outlined under Article 03 of the Commercial Code, which categorizes activities by their commercial form. Establishments purposed for civil activities, regardless of their inclusion of client interactions and equipment, do not possess a

commercial nature. This delineation applies to entities such as medical clinics and law offices, even when they engage in credit transactions.<sup>130</sup>

## **Secondly: The Legal Nature of the Commercial Establishment**

The legal nature of the commercial establishment has been subject to extensive theoretical analysis, resulting in several prevailing theories:

### **1. Legal Aggregate Theory:**

This perspective views the commercial establishment as a legal conglomerate of assets and rights stemming from commercial activities, possessing a financial patrimony separate from the trader's personal finances. Critics of this theory argue that it conflicts with the principle of financial unity, which in Algerian law, as per Article 188 of the Civil Code, posits that a debtor's entire assets guarantee the fulfillment of their obligations.

### **2. Actual Aggregate Theory:**

According to this theory, the commercial establishment is considered a tangible collection of assets unified for the specific purpose of business operations. Each component maintains its intrinsic characteristics and abides by its legal framework, independent of other elements within the establishment. Critics, however, contend that viewing the establishment as an actual aggregate fails to offer a legal characterization, as the legislator has explicitly defined the legal nature for each component of the establishment.

### **3. Intangible Property Theory:**

This theory categorizes the commercial establishment as an intangible movable property. Ownership extends beyond mere physical assets to encompass elements such as customer relationships and commercial reputation, which are safeguarded legally against unfair competition practices. Thus, the establishment is regarded as intangible property with inherent commercial qualities.<sup>131</sup>

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<sup>130</sup>Ammoura Amar, *Contracts and Commercial Establishments in Algerian Law*, Dar Al-Khaldunia, no year of publication, p. 156 et seq.

<sup>131</sup>NesrinCharki, op. cit., p. 70 et seq.

## **Second Subsection: Elements of the Commercial Establishment**

### **Firstly: Intangible Elements**

These integral parts of a commercial establishment encompass:

#### **1. Customers and Commercial Reputation:**

As per Article 78 of the Commercial Code, the legislator does not clearly differentiate between 'customers' and 'commercial reputation,' though they are practically considered to have overlapping meanings. Legal scholars often debate these terms; some argue for a distinction where 'customer relations' specifically refer to the cohort of individuals who consistently engage with the establishment due to attributes particular to the trader, such as adherence to delivery times and superior product quality, prompting a preference for this trader over competitors.

In contrast, 'commercial reputation' is seen as the ability of the establishment to attract the general public through inherent qualities like prime location and appealing external presentation. Despite the potential for differentiation, these elements are collectively regarded as essential components of any commercial establishment by the legislator.<sup>132</sup>

#### **2. Trade Name:**

This is the unique designation selected by the trader to identify their commercial enterprise distinctly from others. When the trader operates as an individual, this name may include their personal name or it could be a fictitious or invented name. The trade name, deeply intertwined with customer relations, represents a key financial right and cannot be transferred separately from the commercial establishment itself. Although not mandated for registration with the commercial registry service, the trade name can be defended against unfair competition through litigation.<sup>133</sup>

#### **3. Business Address:**

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<sup>132</sup>Mabrouk Mokadem, *The Commercial Establishment*, Fourth Edition, Dar Houma, 2009, p. 10 et seq.

<sup>133</sup>Ibid., p. 16.

This term refers to the specific sign or symbol that communicates to customers the location of the commercial establishment. It is typically displayed prominently at the storefront. The business address should not be confused with the trade name, as it does not necessarily derive from the trader's personal name.<sup>134</sup>

## **Secondly: Tangible Elements**

These tangible components of a commercial establishment include:

### **1. Merchandise:**

This category encompasses the goods that are on display for sale within the establishment, ranging from manufactured products to raw materials prepared for production processes. Additionally, it includes various materials stored in the establishment's warehouse. It is important to note that a commercial establishment might not involve physical goods if its operations are service-based, such as in the case of publishing houses.

### **2. Equipment and Machinery:**

This includes all tangible movable assets allocated for the execution of commercial activities. Examples include factory machinery used in production processes and vehicles or trucks utilized for business operations.<sup>135</sup>

## **Second Subsection: Transactions Concerning the Commercial Establishment**

The transactions concerning the commercial establishment consist of sale, lease, and mortgage as detailed below.

### **First Subsection: Sale**

The sale is considered one of the most significant transactions affecting a commercial establishment, as it serves as a vital tool in managing the dynamics of economic life. Due to its importance, the legislator has framed it with specific provisions within the commercial law, from Articles 79 to 117, which

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<sup>134</sup>Nadia Foudil, *The Legal System of the Commercial Establishment*, Part One and Two, Dar Houma, Algeria, 2011, p. 26.

<sup>135</sup>Ibid., p. 33.

differ from the sale provisions in civil law. This distinction is due to its unique commercial nature and its classification as an intangible movable asset.

### **Firstly: Formation of the Sale**

For the sale of a commercial establishment to be valid, it must meet the necessary objective elements required for the formation of any contract: consent, subject matter, and cause. Consent must be given willingly, issued by a competent party, and free from defects.

Due to the rise in litigation concerning the annulment of sales contracts due to buyer errors, the judiciary has expanded the cases of annulment due to error to include instances where the seller conceals the existence of a judgment ordering the closure of the commercial establishment for operating without a license or misrepresenting the profits generated by the business. The subject matter of the sales contract is the commercial establishment itself, considered as a collection of physical and intangible elements. These elements may include patents if they are components of the business.

It is important to note that the intangible elements are considered essential components of the commercial establishment and cannot be sold without them, unlike the physical elements. French jurisprudence has ruled that the transfer of an unexploited business, disconnected from customer relations for several months, does not constitute the sale of a commercial establishment.<sup>136</sup> As for the cause, it must be lawful and not contrary to public order and morals.

A distinctive feature of the commercial establishment sale contract is its formal nature; the sale is not concluded unless the contract is formally written, publicized, and announced. This is mandated by Article 79 of the commercial law, under penalty of absolute nullity. Formality is a condition for the formation, not just a means of proof.

### **Secondly: Effects of the Sale**

These are reflected in:

#### **A. Seller's Obligations:**

##### **1. Transfer of Ownership and Delivery:**

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<sup>136</sup>Nadia Foudil, *The Legal System of the Commercial Establishment*, op. cit., p. 181.

The ownership of the commercial establishment does not transfer to either the parties or third parties until its registration and public announcement, as it is a formal contract. Additionally, other legal measures required for the transfer of ownership of certain intangible elements, such as patents or trademarks, must be taken.

This is encapsulated in Article 147 of the Commercial Code: "Registration and declarations shall be made according to the legislation in force if the sales or transfers of commercial establishments include factory or trade marks, or industrial designs or models....."

Ownership of equipment and goods transfers to the buyer upon the conclusion of the sale contract. However, the right to lease does not transfer merely upon contract conclusion but requires notification to the property owner according to the provisions of the assignment of rights under civil law, to allow the buyer to benefit from the rented property. Delivery also includes the business's accessories, such as trade books, according to Article 82 of the Commercial Code.

Regarding delivery, general rules dictate that it should be in accordance with the specificity and nature of the sold item, enabling the buyer to possess and benefit from it without hindrance<sup>137</sup>.

Given the nature of a commercial establishment, which encompasses a collection of elements, delivery focuses on each of these elements. The seller is required to maintain the sold item until delivery, as stipulated by the general provisions of civil law, Article 364.

## **2. Warranty Obligations:**

General rules of sale require the seller to guarantee against hidden defects and claims of ownership. These rules apply to sellers of commercial establishments, ensuring the warranty covers hidden defects that could diminish the establishment's value unless the buyer was aware of them at the time of sale or could not have noticed them upon inspection, as per the general provisions of Article 379 of the Civil Code.

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<sup>137</sup>Nadia Foudil, *The Legal System of the Commercial Establishment*, op. cit., p. 186.

Article 80 of the Commercial Code reinforces this: "The seller is obligated to guarantee against incorrect information according to the conditions prescribed in Articles 376 and 379 of the Civil Code, notwithstanding any contrary condition in the contract." In addition, the seller guarantees against claims and entitlements.

## **2. Buyer's Obligations:**

In return for the seller's commitments, the buyer is obligated to:

- Receive the commercial establishment from the seller by the agreed date in the contract, or as dictated by commercial custom if not specified.

The seller has the right to demand specific performance or cancel the contract, in addition to compensation for damages, if the buyer refuses to take delivery.

- Commit to paying the agreed price and the contract expenses: The buyer is obligated to pay the agreed price at the time and place specified in the contract, and in the manner agreed upon if the sale is made in installments.<sup>138</sup>

The buyer also bears the expenses of the contract, as stated in Article 393 of the Civil Code: "The expenses of registration, stamp duties, real estate advertisement fees, notarization, and others shall be borne by the buyer unless legal provisions dictate otherwise."

## **Second Subdivision: Lease**

The right to lease is a pivotal intangible element of the commercial establishment, included under Article 78 of the Commercial Code. It denotes the trader's right to occupy the property from which they conduct business. This right can be transferred to another party if the property owner opts to sell or lease the establishment.

Lease agreements, particularly those involving commercial or craft activities, are governed by Articles 467 to 507 of the Civil Code, with additional special provisions from Articles 169 to 202 of the Commercial Code. Article 169 of Law No. 05/02, dated 06/02/2005, which amended and supplemented Order No. 75/59 containing the Commercial Code, extends the scope of commercial leases

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<sup>138</sup>Nesrin Charki, op. cit., p. 78.

to include artisans and craft businesses, emphasizing the commercial lease's focus on commercial and craft activities.

Articles 169 and 170 of the amended and supplemented Commercial Code delineate the specific scenarios where commercial lease provisions are applicable, encompassing a variety of situations tailored to the needs of commercial, industrial, or craft enterprises:

- Leases of premises and buildings annexed to a commercial establishment when their use is necessary for the operation of the commercial establishment, and their ownership is related to the owner of the establishment or the building where the main enterprise is located. In cases of multiple owners, the annexed premises must have been rented with the lessor's consent for joint use.
- Leases of undeveloped lands where buildings intended for commercial, industrial, or craft use have been constructed, either before or after the lease, provided that these buildings were erected or utilized with the explicit consent of the owner.
- Leases granted to municipalities for buildings or premises designated for managing municipal operations, either at the time of leasing or thereafter with explicit or implicit owner's consent.
- Leases of buildings and main or necessary annexed premises for continuing the activity of public economic institutions within the limits of the laws and regulations governing them, provided that the lease does not affect the public owner.

Additionally, Articles 185 and 186 extend these provisions to leases of properties owned by the state, regions, municipalities, or public institutions, provided these properties satisfy the conditions outlined in Article 169 and the stipulations of the aforementioned paragraphs.

Article 171 further clarifies that the provisions for commercial leases also apply to agreements structured as long-term rentals, with the caveat that the renewal period granted to sub-tenants must not extend occupancy beyond the conclusion of the long-term lease. However, the legislator has designated specific exemptions from these provisions, detailed in Articles 170 Paragraph 04 and 171, such as:

- \_ Temporary exploitation places following a temporary work license for public benefit do not fall under commercial lease provisions.
- \_ Monopoly leases apply only in terms of reviewing rental fee registration.

Law No. 05/02, under Article 187 bis, enshrines the freedom of contract in concluding commercial leases and, as a result, exempts the lessor from the obligation of eviction notice and compensatory damages, addressing many of the practical issues faced by tenants and landlords in proving lease contracts by subjecting the conclusion of lease agreements to formal requirements under penalty of nullity, thus eliminating informal contracts.

However, the provisions of Article 187 bis are not of public order; it is permissible to agree otherwise in the contract, requiring the tenant to vacate the premises after an eviction notice or not to leave until compensatory damages are granted. If such conditions are not included in the contract, the provisions of Article 187 bis of the Commercial Code apply.

The Algerian legislator has preserved rights acquired under the old law before the amendment, as confirmed by Article 187 bis 1 of the Commercial Code, which states: "Renewal of lease contracts concluded before the publication mentioned in Article 187 bis above remains subject to the legislation in effect at the date of the lease contract's conclusion."

### **Third Subsection: Mortgage**

The practice of mortgaging a commercial establishment represents a relatively modern concept. Traditionally, commercial credit was personal and not secured against property. However, with the advent of industrial development, the expansion of commerce, and the rise in industrial production, the utilization of commercial mortgages has gained acceptance as a viable method for securing financing to bolster business operations. Today, mortgages are not solely viewed as indicators of financial distress but are recognized as legitimate instruments of commercial credit.

Mortgages can encompass both tangible and intangible movable assets. Traditionally, mortgaging necessitated the transfer of possession of the mortgaged movable from the debtor to the creditor or to a third party designated by the contracting entities. However, this transfer of possession can prove challenging or even impracticable, as the movable assets are often critical

production tools integral to the debtor's economic activities. Furthermore, if the creditor lacks the appropriate facilities or capacity to store the mortgaged movables, the transfer can impose practical burdens and the additional responsibility of maintenance on the creditor.

To address these challenges, a system allowing for the mortgaging of movables without the transfer of possession has been developed. This innovation enables debtors to secure credit by leveraging their production tools while retaining possession of them.<sup>139</sup>

The Algerian legal framework concerning the mortgaging of a commercial establishment is outlined in Articles 118 to 122 of the Commercial Code. It is crucial to recognize that a mortgage qualifies as a commercial establishment mortgage only if it encapsulates elements that are independently sufficient for the operation of the commercial establishment, particularly the element of customer relationships. Here, the court is vested with discretionary powers to make determinations in this regard.

The legislation specifically excludes tangible assets intended for sale, such as merchandise, from being mortgaged to ensure that they remain in the possession of the current debtor, who retains the ability to dispose of them. Additionally, the mortgage does not cover machines, equipment, debts tied to the commercial establishment, or real estate, even if associated with commercial activities.

It is also pertinent to underscore that rights pertaining to industrial, artistic, and literary property are generally not subject to mortgaging unless explicitly included in an agreement. This provision safeguards such intellectual properties from being encumbered by a mortgage without explicit consent.<sup>140</sup>

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<sup>139</sup>Nadia Foudil, *The Legal System of the Commercial Establishment*, op. cit., p. 108.

<sup>140</sup>Nadia Foudil, *The Legal System of the Commercial Establishment*, op. cit., p. 110.

## **Conclusion:**

Commercial law plays a pivotal role in enhancing and developing acquired knowledge within the legal field. This branch of law is expansive, encompassing numerous associated legal frameworks. Consequently, the ministerial curriculum for commercial law is strategically focused on key foundational areas: the theory of commercial transactions, the theory of the trader, and the commercial establishment. Through studying these modules, students gain the ability to differentiate between civil and commercial actions, grasp the conditions and regulations for attaining trader status, and explore the nuances of electronic commerce law. Additionally, students delve into the theory of the commercial establishment and examine the legal transactions applied to it, such as sales, leases, and pledges.

The primary aim of this curriculum is to provide students with a comprehensive understanding of the fundamental principles and concepts of commercial law, serving as a foundation to inspire further interest in this branch of law. Students who develop a passion for commercial law may choose to specialize in it by pursuing a private law specialization during their undergraduate studies, or further explore sub-specializations at the master's level. Moreover, they may opt to focus on specific topics for their master's thesis or doctoral dissertation research, as commercial law presents numerous unexplored issues ripe for academic investigation.

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