

Conditions for the Acquisition of Merchant Status in Algerian Legislation

شروط اكتساب صفة التاجر في التشريع الجزائري

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Abstract:

A merchant is defined as the natural or legal person who undertakes commercial activities with the aim of earning his livelihood, which he considers as a profession, and is therefore governed by the rules of commercial law. Under this definition, the Algerian legislator has stepped in and set conditions for a person, whether natural or legal, to be considered a merchant. These conditions include the exercise of a profession consisting of commercial activities and the need to have the legal capacity to carry out commercial activities, particularly that the merchant undertakes them on his own account.

Keywords: Legal Capacity, Professional Practice, Merchant, Commercial Acts, Commercial Law.

Introduction:

Commercial law is a branch of private law, and it is a relatively modern field compared with civil law. While civil law is applicable to all persons regardless of their status and regardless of the legal acts they perform, it appears, from a practical point of view, that the scope of commercial law is not as wide as civil law, as it is only applicable to a specific field, namely, the field of commerce, as well as the acts of commerce and traders.

Traders, whether individuals or companies, are subject to common rules. Thus, it is essential to identify who has the capacity to be a trader in order to identify the extent of commercial law. There are some rules of commercial law that apply upon the occurrence of a commercial act, whereas other rules of commercial law apply upon the occurrence of a commercial act performed by a trader. Thus, it is essential to identify the conditions for a person to be a trader.

Moreover, the legislator of Algeria has established a special regime for traders and has regulated the profession that traders practice.

The Algerian legislator has established in Article 1 of its Commercial Code that

“Any natural or legal person who carries out a commercial activity and adopts it as his or her habitual profession shall be deemed a trader, unless otherwise provided by law.”

From the above article, we can see the conditions that have to be satisfied in order to take the status of a trader.

Based on these considerations, the problem of the present study revolves around the identification of the conditions that must be fulfilled by the individual in order to acquire the status of trader?.

In order to answer the research problem of the present study, the present research will first examine the condition related to the professional involvement of the trader in the conduct of business activities under his or her own name, for his or her own account, and in an independent

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manner. Then, it will analyze the legal capacity that must be present in natural and legal persons in order for them to be able to acquire the status of trader. The present research will be based on the descriptive and analytical approaches, which will be explained successively.

1- Firstly :Professional Engagement in Commercial Activities by the Trader for His Own Account

Commercial activities will be conducted and form an essential requirement to become traders. This means that an individual, whether natural or legal, should habitually pursue commercial activities to be considered a trader. The concept of a commercial act is an act related to the circulation of wealth and has an objective of making profits. Sometimes, the act should be conducted via an enterprise and be repetitive in nature.

Alongside these commercial acts, which are by nature (i.e., by reason of their subject matter), we can also find the commercial acts by form, i.e., the commercial papers. Then, there also exists a third type of act which, while being civil by nature according to their subject matter, becomes commercial by being constituted by a trader and for purposes of trade. These acts by accessory (or by reason of dependence) refer to commercial acts.

1.1- Professionalization of Commercial Activities

Professionalization is defined as directing human activity toward the practice of commercial activities on a regular and continuous basis to such an extent that these activities become a profession that a person practices as a way of livelihood and attaining income, without requiring these activities to be the only ones involving income. All of the above apply whether such activities are or are not a business project and whether or not such a person owns a business establishment. In this way, the meaning of professionalization is the repetition, continuity, and systematic nature of an activity in an independent manner. An individual starts to professionalize in the trade profession by completing the first act in the commerce, including preparation work, and then stops with withdrawal from commerce and the death of the merchant.

With regard to commercial companies, the acquisition of merchant status does not require the actual practice of commercial activities. It is enough for a company to merely adopt any of the legal forms prescribed by law, irrespective of the nature of the business being civil.

Nevertheless, the acquisition of merchant status by the company does not necessarily imply that all of its partners have the same type of status. The exception is for partners of general partnerships and for general unlimited partners of limited partnerships, who acquire merchant status due to the nature of the company. This is because the relationship with third parties is established under the company's name. The name of the company compulsorily embraces the names of all its partners. In this regard, they acquire merchant status and become jointly, personally, and unlimitedly liable for its debts out of their own assets.

Accordingly, there are situations in which an individual may indirectly acquire the character of a merchant, such as in the case of a general partner in a general partnership company or a limited partnership company. This acquisition is the result of the legal nature of the company.

The difference between professional engagement and mere habitual practice of commercial activities follows from the fact that professional engagement means carrying out commercial work continuously and regularly. That is to say, commercial activity must constitute a person's principal occupation, his main source of livelihood, and his means of earning a living.

Where an activity of a commercial nature is repeated as an incident of profession, no inquiry as to the intention to make profit need be made, for such intention comes with the making of profession. On the other hand, the concept of habitual practice is merely defined as the repetition of the performance of acts of commerce from time to time, without rising to the standard of continuity and regularity of engagement that is professional. In essence, habitual practice is of a lower

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standard than professional engagement and is not adequate enough for an individual who merely develops a habit of engaging in commerce.

Generally, the commercial acts whose practice is required by law are those provided for in Articles Two and Three of the Commercial Code. These are commercial acts by virtue of their subject matter, inasmuch as they concern the circulation of wealth and are aimed at speculation and the realization of profit.

These acts may be classified under two categories. The first category comprises those that possess a commercial character even when performed once, irrespective of whether the performer is a merchant or a non-merchant (isolated commercial acts), such as purchasing with a view to resale, banking operations, exchange transactions, brokerage, and agency.

The second category includes those acts that are not regarded as commercial unless they are effected by way of an enterprise or in the form of a business undertaking. In Article 02 of the Commercial Code, these acts are referred to by way of example and not limitation. The concept of "enterprise" or "undertaking" is based upon the assumption of repetition.

The undertakings referred to in the above Article Two are the projects that require some form of organization in the conduct of the economic activities. Such organization requires the presence of the elements of speculation and professionalism.

Among these, we can mention the following:

- Enterprise for renting movable and immovable property: This refers to those who rent out cars, motorcycles, and houses.

Production, transformation, or repair enterprise: e.g., olives; the activity of extracting iron and manufacturing machinery to be sold.

- Construction, excavation, or land development enterprise: e.g., construction of buildings, bridges, tunnels, digging of canals, etc.

- Supply and service enterprise: e.g., food supplies, fuel, etc.

- Enterprise for the exploitation of mines, surface mines, stone quarries, and other natural products: e.g., mineral and agricultural enterprises, etc.

Besides these commercial acts and commercial enterprises, the Algerian legislator has, through Article 2 of the Algerian Code of Commerce, introduced a new category of commercial acts called "Maritime Commercial Acts." This was introduced through Order No. 96-27 of 9 December 1996, amending and supplementing the Code of Commerce adopted in 1975. These are cited as examples:

- Any enterprise for the manufacture, purchase, sale, or resale of ships destined for maritime navigation.

- Any purchase and sale of equipment and supplies destined for ships.

- Any chartering, borrowing, or maritime loan on bottomry.

- All insurance contracts and other contracts related to maritime trade.

- All agreements and arrangements related to the wages and hiring of crew members.

- All maritime voyages.

Regarding commercial acts by form, these are acts that give the quality of a merchant to a person if they are practiced on a professional and habitual basis. Article 3 of the Algerian Commercial Code states:

“Commercial act by form shall comprise negotiations of bills of exchange between all persons, commercial companies, agencies, and business offices regardless of their purpose; operations concerning commercial premises; and any commercial contract concerning maritime and air trade.”

Regarding **commercial acts by accession (or by dependence)**, these acts are referred to as such because they depend on the status of the person who practices them. If these acts are practiced by a civil (non-merchant) person, they are considered civil acts; but if they are practiced by a merchant, they lose their civil nature and become commercial in nature.

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These acts are civil in nature, but they become commercial in nature if practiced by a merchant and if they are related to the needs of his trade. The aim of this theory is to subject all acts issued by a merchant to a single legal treatment, as it is stated in the principle “the accessory follows the principal in legal ruling.”

Therefore, the acts of commerce through accession are not acts of commerce by their nature, since they are civil acts by their original nature. The person must be a merchant for the civil act to be a commercial act through accession, owing to the merchant's status and profession.

As for mixed acts, they do not constitute a fourth class of commercial acts, nor a new class independent from those commercial acts mentioned above. Rather, they fall under the above commercial acts. They are referred to as “mixed” because they are commercial by their nature with regard to one party and civil with regard to the other party.

Examples: a merchant’s purchase of agricultural products from a farmer, a theater owner’s contract with actors, a publishing house’s contract with an author and purchase of copyright, a retailer’s selling to a consumer, etc.

Therefore, when an act is commercial by its nature, performing it professionally qualifies the person performing it with the quality of merchant. However, when an act is commercial by accession, the person concerned must possess the quality of merchant as a preliminary condition for the act to be considered commercial with regard to him.

1.2- Carrying on Commercial Activities for One’s Own Account and Independently

The mere condition of carrying on and professionally practicing commercial activities is not sufficient for a person to acquire the status of a trader. Along with professionalism, it is necessary that the person carry on the commercial activity in his or her own name and for his or her own account; that is, the person should be independent from others in the matter of carrying on the activities.

The reason behind this is that the individual must assume the responsibility and risks involved in the commercial activity. Trade is based on credit and trust, which are of a personal nature and necessarily involve the assumption of liability and consequences. Thus, anyone who engages in commercial activities must do so in an independent capacity and must assume the consequences of such activities, whether good or bad.

As the nature of business activities is speculation with the intention of making profit, the individual who engages in such activities must be prepared to face the consequences that flow from them. Therefore, only the individual who assumes the risks of trade qualifies as a trader. Trade, by its nature based on trust and credit, involves independence in the performance of business activities and lack of subordination to another person in their performance.

Therefore, an individual who performs business acts on behalf of another and whom the trader relies upon in the management of the business is not a trader, such as workers and employees, since they engage in business activities not for their own account but for the account of the employer, who alone assumes the risks of such activities. They are subordinate to the employer, as they are under his control and supervision.

Similarly, the ordinary agents are not treated as traders since they do not act in their own name and for their own account but in the name and for the account of their principals. Nevertheless, commercial agents, such as commission agents, are treated as traders. Although they carry out the entrusted work for the account of their clients and principals as well as in accordance with their instructions, they do not place their professional activity of commercial agency under the control of another. Rather, they conduct it independently, which is sufficient to qualify them as traders if they professionally engage in such activities.

A broker is also treated as a trader since he carries out activities of brokerage and adopts them as a profession without being under the control of either party in entering into the contracts in which he acts as a mediator. He carries out his profession independently. Commercial agency and brokerage are treated as commercial acts since they help in the circulation of wealth.

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The question is raised as to who obtains the status of trader in the situation where a person carries out and professionally conducts commercial activities while hiding himself behind another person. Is it the apparent person (the ostensible trader) or the hidden person (the real trader)?

This situation typically arises when a person is banned from carrying out trade as a result of a law or regulation, or when he has a special interest in hiding himself. In this situation, we are dealing with an apparent trader and a real hidden person.

Jurists hold different views on whether the status of trader should be attributed to the hidden person on the grounds that the commercial business is actually conducted for his benefit. Others hold that the status of trader should be attributed to the apparent person on the grounds that third parties have no connection with the hidden person—who is unknown to them—and therefore the principle of legitimate expectations and trust created in favor of third parties requires that the apparent person be recognized as the trader.

The third opinion is that the status of a trader should be attributed to both the apparent and the concealed person. This is based on the fact that the concealed person is the true trader for whose account the business activity is carried out, while the apparent person, who has the outward appearance of a trader, can be considered as such with regard to third parties. As such, third parties, whenever they have an interest in doing so, may rely on either the true situation or the apparent situation.

consequently, it may be appropriate to attribute the status of trader to both the apparent person and the concealed person—that is, to both the ostensible and the hidden trader—in order to ensure full guarantees for the protection of the interests of third parties acting in good faith, who relied upon the apparent person while being unaware of the concealed person, the true owner of the enterprise and the provider of the capital.

This approach also prevents the apparent trader and the hidden trader, especially those who are prohibited from carrying out any commercial activity, from avoiding their obligations on the basis that they are prohibited from carrying out commercial activities. In this case, they are considered traders and are thus governed by the bankruptcy regime with regard to the liquidation of their assets and the restoration of the rights of the parties they have dealt with

There are certain persons who are not eligible for registration in the Commercial Register, as provided in Articles 07, 08, and 09 of Law No. 08-04, as amended and supplemented.

Thus, there is a group of persons who are not allowed to conduct any commercial activity due to the laws that regulate their profession, such as lawyers, physicians, engineers, and others. However, if they actually conduct any commercial activity on a continuous basis, there is no doubt that they will be considered as traders and will be bound by the obligations imposed on traders in order to protect third persons who rely on the apparent situation.

This is clearly provided in Article 09 of Law No. 08-04, which provides:

“No person may engage in a commercial activity if he is subject to a special regulatory regime establishing a situation of incompatibility. The burden of proving the existence of such incompatibility rests upon the person invoking it. Acts carried out by a person in a situation of incompatibility shall produce all their legal effects with respect to third parties acting in good faith, who may rely upon them, without the person concerned being entitled to benefit therefrom.”

The same applies to individuals who have been convicted of felonies or misdemeanors and have not been rehabilitated, such as bribery, drug trafficking, and the production and/or marketing of counterfeit and adulterated products for consumption, among others. Such individuals may use the trick of carrying on commercial activities in the name of another person, thereby hiding behind that person. In this scenario, the other person is deemed to be the apparent trader, while the prohibited individuals are the concealed traders.

In this scenario, the trader status is granted to the concealed individual despite the fact that he is prohibited from carrying on any commercial activity as a form of punishment. Nevertheless, he is treated as a trader only in relation to liabilities. In relation to rights, the trader status is not

fully granted to him; therefore, he cannot rely on his commercial accounts against third parties, since he is not actually recognized as a trader under the law.

Conversely, the so-called apparent trader acquires the status of trader in terms of rights and obligations, in view of protecting third parties who are dealing with him in good faith and are not aware that the commercial activity is being carried out for the benefit of another person.

(See Article 2 of Law No. 06-13 of 23 July 2013 amending Article 08 of Law No. 08-04 of 14 August 2004 relating to the conditions for the exercise of commercial activities

Under Article 07 of Law No. 08-04, it is also stipulated that:

“The following activities are excluded from the scope of application of the provisions of this Law: agricultural activities; artisans as defined by Ordinance No. 01-96 of 10 January 1996, which defines the rules governing traditional industries and crafts; civil companies and cooperatives whose purpose is not profit; liberal professions exercised by natural persons; and public institutions entrusted with the management of public services, with the exception of public institutions of an industrial and commercial nature.”

2- Secondly: Commercial Capacity

With regard to Article 1 of the Algerian Commercial Code, it is apparent that the first requirement for acquiring the status of a trader is the professional engagement in commercial activities, as previously stated. Nevertheless, the mere satisfaction of this requirement is not sufficient.

Articles 5 and 6 of the Commercial Code also provide that there must be legal capacity to engage in commerce. Therefore, the acquisition of trader status is dependent not only on the professional exercise of commercial activities but also on the existence of the legal capacity to engage in commerce

2.1- Capacity of the Natural Person

The Algerian Commercial Code does not provide a general regulation on commercial capacity; it specifically provides only for the situation of the emancipated minor (the minor authorized to trade) under Article 5 of the Commercial Code.

Therefore, under Article 40 of the same Code, one must refer to the general provisions established in the Algerian Civil Code. The age of majority is set at nineteen (19) full years. Thus, anyone who has attained this age and is not under any incapacity, such as insanity, mental deficiency, prodigality, or similar disability, can acquire the capacity of trader.

However, as an exception to the general provision, Article 5 of the Commercial Code allows a minor who has attained eighteen (18) full years to trade. Such a person is then called an emancipated minor, on the condition that he or she obtains an authorization from the father, the mother, or the family council, which is then validated by the competent court.

This authorization is not binding on third parties unless it is registered in the Commercial Register, in accordance with Articles 5 and 6 of the Commercial Code. The aim of this requirement is to protect third parties who may have dealings with the authorized minor, to ensure that they are aware of the issuance, limitation, or withdrawal of the authorization.

In theory, all commercial acts carried out by the minor within the framework of the granted authorization are valid and binding on third parties from the date of registration of the authorization in the Commercial Register. Nevertheless, if the minor carries out commercial acts outside the framework of the authorization or without any authorization at all, such acts shall not qualify the minor as a trader, even if he or she acts in a professional manner. Therefore, the minor shall not be bound by the obligations of traders, nor shall bankruptcy be declared against him or her.

Under Article 7 of the Algerian Commercial Code, a married woman who carries on commercial activities solely for the purpose of assisting her husband shall not acquire the status of a trader. In this regard, she shall be treated as no more than an employee or assistant to her husband.

If she wishes to acquire the status of a trader, she must conduct her commercial activities independently of her husband and fulfill all the necessary legal formalities.

As for foreigners, there is no specific provision in the Algerian Commercial Code that regulates their capacity to conduct trade within the Algerian territory. However, based on Article 10 of the Algerian Civil Code, and in accordance with the principle of personal law (*lex personalis*), the capacity of a foreigner shall be regulated by the law of the state to which he or she belongs by nationality. In this regard, issues pertaining to personal status and capacity shall be governed by the national law of the individual.

However, as an exception, financial transactions entered into by a foreigner in Algeria and having their effects within the country shall be governed by Algerian laws on capacity. In addition, if a financial transaction is entered into in Algeria and has its effects within the country, and one of the parties to the transaction is a foreigner with limited capacity due to a reason that is not easily determinable by the other party, then any defect in capacity shall not affect the capacity of the foreigner nor the validity of the transaction. In this regard, the foreigner shall be considered fully capable with regard to the transaction.

Generally, under Article 10 of the Civil Code, any foreigner who has attained nineteen (19) full years of age and is in full possession of his or her mental faculties shall be considered legally capable to carry on trade within Algeria, even if the foreigner’s law of nationality sets a higher or lower age limit for capacity.

2.2- Capacity of the Legal Person

Regarding companies, and prior to analyzing their legal and commercial capacity, it is essential to define them. According to Article 416 of the Algerian Civil Code, a company is a contract whereby two or more natural or legal persons undertake to contribute to a common enterprise by providing a share in the form of work, property, or money, with the aim of sharing the profits that may result, achieving savings, or attaining an economic objective of mutual benefit.

In order for a company contract to be validly concluded, the legislator demands the fulfillment of the general substantive requirements of contracts, namely consent, lawful object, and lawful cause, as well as specific requirements that are proper to the company contract, such as plurality of partners, intention to associate (*affectiosocietatis*), contribution of shares, and sharing of profits or achievement of a common economic objective. Moreover, formal requirements must be met, such as the written form of the company contract and its publication, as provided by Articles 417 and 418 of the Civil Code and Articles 545 and 548 of the Commercial Code.

Indeed, under Article 3 of the Commercial Code, only commercial companies—not civil companies—are considered commercial by virtue of their form. Moreover, under Article 2 of Law No. 22-09 of 5 May 2022 amending and supplementing Article 544 of Ordinance No. 75-59 of 26 September 1975, a company may be considered commercial either by virtue of its form or its object.

Companies that are considered commercial by virtue of their form, irrespective of their object, are general partnerships, limited partnerships, limited liability companies, joint-stock companies, and simplified joint-stock companies. Thus, under Algerian commercial law, any company that uses one of the above-mentioned forms will be considered a commercial company regardless of its activity.

Under Article 549 of the Algerian Commercial Code, a company obtains legal personality as from the date of its registration in the Commercial Register. As a result, it obtains a separate financial patrimony apart from that of its partners. It also obtains a name, domicile, and nationality that distinguishes it from other companies. It also obtains a legal representative who represents its will.

The company has the right to litigate and enjoys legal capacity within the limits defined by its memorandum of association and as prescribed by law. This means that it has a special capacity limited to the purpose for which it was established. As a result, it has the capacity to own property,

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enter into contracts with third parties, and as a result, it becomes both a creditor and a debtor. It has the capacity to buy, sell, and borrow. All these are done by the legal representative in accordance with the articles of association and within the powers delegated to him or her.

Consequently, the company falls under the obligations that traders are bound to. It is also liable in civil law and can be obliged to pay compensation for any damages caused to third parties as a consequence of actions taken by employees in the course of, or in connection with, the performance of their duties.

Historically, the doctrine and case law held that criminal liability cannot be attributed to companies and legal persons in general, based on the fact that criminal liability is personal and cannot be attributed to anyone other than the natural person who committed the crime. However, companies can be liable to financial penalties, such as fines.

Generally, and in accordance with Article 50 of the Algerian Commercial Code, the capacity of a legal person is limited to the acts necessary for the achievement of its corporate purpose. Therefore, it cannot act outside the object stated in its articles of association.

If the company wishes to amend its activity or corporate purpose, it must amend its articles of association to provide for the new activity or objective. This must be approved by all partners in accordance with the relevant legal provisions.

Thus, the capacity of a legal person is restricted to the object for which it was formed. The memorandum of association states the object of the company, and the company cannot engage in activities outside its object unless its constitutional documents are amended accordingly.

Conclusion:

A person obtains the status of a trader if and only if certain conditions are met, with professionalism in commercial activities being the most important of them. This activity should be conducted repeatedly, regularly, and continuously without any interruption.

Furthermore, the performance of commercial activity should be conducted independently, which means that the individual acts on his or her own behalf and for his or her own account, not on behalf of another person.

It should be noted, however, that mere satisfaction of the condition of professionalism is not enough to obtain the status of a trader. The individual should have full legal capacity and should not be affected by any legal incapacity, such as insanity, mental deficiency, prodigality, and so on.

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