

BUSINESS LAW

ACTS OF COMMERCE / TRADERS

COMMERCIAL LAW CONCEPT

Normative-legal system based on rules, concepts and legal principles that, in the field of private law, regulate *legal business relations, acts and facts inherent to the commercial activity (business)*. It constitutes a special branch of private law with different rules from common law, existing as a separate branch of law.

Commercial Law regulates *all aspects of business*, including advertising, marketing, operation of companies and corporations, competition, insolvency, industrial property, banking, contracts and trade in general;

It can be defined as a classic, stabilized branch of Law that *regulates the activity of the most important economic features of the market*, the sole trader and commercial partnership companies, and every business that operationalizes the economic activity of traders and everything related to the exercise of that activity;

The object of the Commercial law is the commerce/trade, governing commercial relationships, i.e., acts and facts inherent to the commercial activity.

COMMERCIAL LAW PURPOSE

- a. System of organizational structures through which economic activities are made and subsumed to legal trade concepts;
- b. Sets out the rules for commercial entrepreneurs / traders;
- c. Set of legal rules, which regulate juridical acts structured by commercial life or derived from it (commercial acts);

It should be however clarified that the word *trade* is not always used in the same way; on one hand, there is the *economic trade concept*, as a set of activities between production and consumption, but, on the other hand this is not the trade meaning in the Commercial Law.

This branch of law applies *only to the activities described in article 230 of the Commercial Code*, i.e., trade in a legal sense).

Therefore, a company (*empresa*) is the one that develops one or some of the activities set out in article 230, namely:

- 1 Transforming, through factories or manufacturing, raw materials, used for that transformation, workers or workers and machines;
- 2 Providing supplies, in different eras, either by individuals or by State entities, according to a price agreement;
- 3 Negotiate [*agenciar*] businesses or auctions on behalf of others in public open offices, according to a stipulated salary;
- 4 Exploring any public performances; [*N.B.: this provision comprises theatre, cinema, concerts, sports*]
- 5 Editing, publishing or selling scientific, literary or artistic works; [*N.B.: this provision comprises music records, radio, cable*]
- 6 Building houses for others with materials provided by the businessman; [*N.B.: this provision comprises theatre, cinema, concerts, sports*]
- 7 Transportation for others, regularly and permanently, by water or by land, of any persons, animals, tools or goods. [*NB.:this provision comprises air transportation*].

With the following exceptions:

§ 1 **It shall not be understood as included in the activity of number 1** the owner or the rural explorer that only manufactures the land products that are ancillary to their farm; **and neither will** the industrial artist, master or mechanic official who works directly on their art, craft or industry, employs for those workers, or workers and machines.

§ 2 **It shall not be understood as included in the activity of number 2** the owner or the rural explorer who supplies products from their own property.

§ 3 **It shall not be understood as included in the activity of number 5** the authors who edit, publish and sell their own works.

The Commercial Law does not regulate all economic activities, the article 230 *excludes of the commercial activity the extractive industries, agriculture, the liberal professions and even artisans.*

Article 230 of the Commercial Code of 1888, entitled as “Das Empresas – Enterprises” although it seems to anticipate a conceptual theorization of business companies, merely limits to equate them to the two categories of traders set out in article 13 of the Commercial Code: the individual traders (*comerciantes*) and the company traders, i.e., companies and legal entities.

From article 230 of the Commercial Code emerges the structure of the Portuguese economy of the late nineteenth century, one with a traditional agrarian pattern and an organizational basis composed by agents whose activity was based mainly in primary and secondary sector.

The concept of the company, as was established in the Commercial Code, is merely an ancillary entity which allowed to expand the scope of the acts of trade – until then restricted to individuals who made from the trade their profession and commercial companies.

The evolution of economic science in the last decades of the twentieth century, has lead the law to assimilate business companies as an economic unit of production.

COMMERCIAL LAW CONCEPTIONS

Objectivist conception- branch of law which regulates trade acts performed by traders or non-traders (provided that these acts belong to one type of acts of trade act regulated in commercial law);

Subjectivist conception - branch of law consisting of a set of rules which regulate *the conduct or activities performed by traders exercising their trade*.

APPLICATION OF CIVIL LAW TO COMMERCIAL MATTERS

The Civil law is applicable to commercial issues, according to article 3 of the Commercial Code:

Should the questions regarding commercials rights and obligations can not be solved, neither by the text of the commercial law nor by its spirit, nor by analogous cases set for therein, shall be decided by civil law.

Article 3 of the Commercial Code allows the use of civil law to fill the gaps in the Commercial law –the Civil law is the subsidiary law in relation with Commercial Law.

However, the rules of commercial law are an autonomous branch of law, with the possibility of analogous application inside the Commercial Law itself. Article 3 of the Commercial Code seems to imply there is no need to previously exhaust all the possibilities of analogy within the Commercial Law, and only thereafter resort to the Civil Law. The Commercial Law rules do not have precedence over civil rules and the interpretation of commercial legal rules do not offer any specific problem, so they should be interpreted according to the rules of article 9 of the Portuguese Civil Code.

SOURCES OF THE PORTUGUESE COMMERCIAL LAW

(i) International Sources - *International Conventions* – Uniform Law for Bills of Exchange and Promissory Notes (1930) and Uniform Law for Checks (1931), the *Paris Convention on Industrial Property*; Primary European Law (treaties establishing the European Union); Secondary European Law (regulations and directives which are based on Treaties) – Article 8 of the Portuguese Constitution.

(ii) Internal Sources

Portuguese Constitution- contains rules relating to commercial law, e.g. articles 61 (*private economic initiative, cooperative and self-management*), 82 (*coexistence of property sector, Public, private, cooperative and social*), 85 (*cooperatives experiences and self-management*), 86 (*private enterprises*), 99 (*trade policy objectives*), 100 (*industrial policy objectives*) and 293 (*reprivatisation of companies*).

(a) Laws, decree-laws and regional legislative decrees:

- Commercial Code of 1888;
- Companies Code of 1986;
- Industrial Property Code of 2008;
- Portuguese Securities Code 1999;
- Commercial Registry Code of 1986;
- Insolvency and Corporate Recovery Code of 2004;
- Decree-Law 178/86 of 3 July – Agency Contracts Act;
- Decree-Law 149/95 of 24 June – Leasing Act;
- Decree-Law 171/95 of 18 July – Factoring Act,
- Government Regulations, Autonomous Regions, Local Government.

(b) Commercial usage (*usos comerciais*)

Article 3 of Commercial Code does not mention the commercial usage (*usos comerciais*) between the sources of Commercial law; however, the Commercial Code itself refers to commercial usage as a source of Commercial law, e.g., article 232 (*the remuneration shall be governed by the agreement between the parties and in its absence by the trade usage of the place in which the mandate is executed*), article 238 (*the content of the mandate agency is set out by the instructions of the principal and, in their absence or insufficiency, by the trade usage*).

The usage in commercial relationships has a contractual integration value, according to article 239 of the Civil Code, which as a rule corresponds to what the parties would have provided if they had taken into consideration such a situation.

(c) Case Law

(d) Doctrine

BUSINESS LAW

In more recent times, the evolution of commercial law has been marked by a tendency towards a *business law* conception. The expression “Commercial Law” is seen as being too reductive, because today it is not all about the trade figure, but the entrepreneur or company. The entrepreneur or company is the face of an organization’s resources and factors, through which they develop a profitable economic activity, regardless of its nature: commercial, industrial or services.

Currently, the terms ‘business company’ is legally used in several meanings:

- a. *Company as an agent or legal subject* – the company is reduced to the person who organizes and conducts all the economic production activity or goods and service distribution;
- b. *Company as an activity* - the company is reduced to the economic activity of the businessman in a professional and organized manner in order to achieve production objectives and the goods and service exchanges.
- c. *Company as an object* - the company is reduced to the organization’s set of inputs and other elements gathered by the businessman to pursuit its business (commercial establishment). In this meaning, we can say that business company and commercial establishment¹ are synonymous;
- d. *Company as the active set of elements* – broad sense of company that leads to an institution of economic and social character which acts on a set of things and rights, establishing legal relations.

¹ The commercial establishment is a set of goods, allocated to the exercise of an economic activity organized and unified by the same function and respective holder. The transfer of the commercial establishment *inter vivos* may be temporary or permanent. If temporary it is named assignment of exploitation (“cessão de exploração”) whereby the establishment holder provides to another the commercial exploitation of his establishment temporarily for cash. If the transfer is permanent it is named transfer of going concern (“trespasse”) and consists of the agreement by which the commercial establishment is transferred as a unit. The sale of a business as a going concern consists on the transfer (sale) of all or part of the business from one entity to another, involving the sale of the business, i.e., assets and liabilities related with the transferred business unit. In order to qualify as a transfer by way of a sale as a going concern it is required that the assets transferred form a “business unit”, i.e., a unit with productive capacity. The concept of business as a going concern, equivalent to the concept of commercial establishment, is an organized and complex multilayered economic unit, consisting of all elements pertaining to a business and generally recognized as a sui generis movable asset by the law.

COMMERCIAL ACTS

1. THE SCOPE OF THE COMMERCIAL CODE

Article 1 of the Commercial Code – the commercial law regulates the commercial acts practiced by traders or non-traders (*objective conception of acts of commerce*).

For Commercial Code to be applied it is necessary the existence of a commercial act, so the juridical relation (legal relationship) must be subsumed in what the Commercial code identifies as a commercial act (or at least which is triggered by a commercial act).

The Commercial Code applies to all acts and commercial agreements, not being exclusive of a certain professional class, i.e., independently of those who perform them.

However, this objective conception is mitigated by article 13 of the Commercial Code, whereby certain entities are directly qualified as being traders (e.g., corporate companies) and by the recognition of the commercial nature of all acts they perform and in general by the qualification of commercial of all commercial activities with an economic nature, in which the production of goods and assets and the rendering of services to the market comprises the *risk of capital*.

2. COMMERCIAL ACTS CONCEPT

Article 2 of the Commercial Code sets out:

It will be deemed as commercial acts *all the acts which are especially regulated by this Code, [first part]* and, beyond them, all contracts and obligations of traders *which do not have an exclusive civil nature, if the contrary does not expressly result from the act itself [second part]*.

The commercial acts are (i) juridical facts specially regulated in commercial law and (ii) those performed by traders, pursuant to the conditions set out at the end of article 2 of the Commercial Code.

3. OBJECTIVE AND SUBJECTIVE COMMERCIAL ACTS

What are commercial acts? We know which they are but not what they are. Therefore, we have to resort to the basic characterization of the commercial acts – article 2 of the Commercial Code:

- (i) *Objective commercial acts* – first part of article 2, i.e., it will be deemed as commercial acts all the acts which are especially regulated by this Code, whether or not the trader is the person who performs them, i.e., irrespectively of those who perform it, even if it is not a trader (e.g., sale of something for resale, article 463 (1) of the Commercial Code);
- (ii) *Subjective commercial acts* – second part of article 2, i.e., all contracts and obligations of traders which do not have an exclusive civil nature, if the contrary does not expressly result from the act itself. The second part of article 2 of the Commercial Code opens the possibility that they may exit acts performed by traders, which although not having an exclusive civil nature (being therefore commercial), *may not be commercial if such results from the act itself*.

Therefore, all the acts performed by traders shall be commercial if they *do not have an exclusive civil nature* (e.g., the purchase and sale agreement set out in article 874 of the Civil Code can be either commercial or not and therefore it does not have an exclusive civil nature and it will be commercial if it is performed by a trader *and* in connection with his commercial activity) and *if the contrary does not result from the same act* (this would only make sense in respect to individuals who are traders not to corporate companies to the extent their acts are commercial by definition). Therefore, the law sets out a *double presumption*² that can be rebutted (in the sense that evidence of the contrary may demonstrate otherwise) in a double degree.

(i) Objective Commercial Acts

Interpretation of article 2, first part of the Commercial Code

The objective commercial acts are defined by implied enumeration or catalog – article 2 of the Commercial Code does not expressly identify the commercial acts, it refers to other regulatory provisions, as follows:

² A legal presumption is a conclusion based upon a particular set of facts, combined with established laws, logic or reasoning. It is a rule of law which allowing a court to assume a fact is true until it is rebutted by the greater weight (preponderance) of the evidence against it.

- Guarantee (article 101 of the Commercial Code);
- Business Companies (article 230 of the Commercial Code);
- Agency (article 231 of the Commercial Code);
- Current account (article 344 of the Commercial Code);
- Bank transactions (article 362 of the Commercial Code),
- Transportation (article 366 of the Commercial Code);
- Loan (article 394 of the Commercial Code);
- Collateral security or pledge (article 397 of the Commercial Code);
- Commercial deposit (article 403 of the Commercial Code).
- Goods bailment in a warehouse (article 408 of the Commercial Code);
- Insurance (article 425 of the Commercial Code);
- Sale contract (article 463 of the Commercial Code);
- Reporting (article 477 of the Commercial Code);
- Barter of exchange (article 480 of the Commercial Code);
- Rent (article 481 of the Commercial Code);
- Transmission and reform of commercial debt instruments (article 483 of the Commercial Code);
- Acts related with maritime commerce (Book III of the Commercial Code).

E.g., David, professor, buys a classic car for resale. He is performing an *objective commercial act* because the buy-resell agreement is set out expressly in the Commercial Code as a commercial contract and therefore a commercial objective act. If David was a trader the situation will be exactly the same.

For most of the above identified commercial acts (for example, commercial buy and sell agreement, commercial mandate, commercial pledge, commercial deposit, commercial transportation, etc.), the Commercial Code establishes a specific regime.

Are objective commercial acts only those specially regulated in the Commercial Code? The expression ‘this Code’ set out in article 2 of the Commercial Code must be extensively interpreted to incorporate other commercial laws. When can a law be classified as being commercial?

The law which replaces rules from the Commercial Code will be classified as commercial, according to article 4 of the Charter Law of 28 June, 1988: ‘In the future any change made in the matters regulated in the Commercial Code will be considered as part of it and will be classified as commercial’.

They are objectively commercial:

- Companies incorporation acts provided by the Portuguese Company Code, which replaced the articles 104 *et seq.* of the Commercial Code;

- Business related to bills of exchange , promissory notes and checks provided by Uniform Law of Bills of Exchange and Promissory Notes and Uniform Law of Checks, which replaced article 278 *et seq.* of the Commercial Code;
- Stock exchange set out in Portuguese Securities Code, which replaced article 351 *et seq.* of the Commercial Code.

Not all the laws which replaced provisions from the Commercial Code are qualified as commercial or considered as commercial acts (e.g., Chapter II of Decree-Law 231/81 of 28 July, association with participation agreements where, contrary to what is set forth by the article 224 of the Commercial Code, it does not require that the trader or his activity be considered as commercial.

Law which qualifies itself as commercial or which classifies acts as commercial: the European Economic Interest Groups – R (EEC) 2137/85 of 25 July – it may have civil or commercial purpose. When the subject of an EEIG is commercial, its incorporation contract is qualified as an objective commercial act.

Laws which do not qualify themselves expressly as commercial – to know if the laws under analysis are commercial it is necessary to verify if they are related with analogous subject to the matters regulated in the Commercial Code or in other laws classified as commercial.

The meaning of article 230 of the Commercial Code in the context of the commercial acts

The purpose of article 230 is to determine the companies (*empresas*) as acts of commerce. The acts set forth in article 230 to be commercial must be executed on a daily basis, using an organization with a speculative purpose.

If the company is commercial then the entrepreneur is commercial. There is a *risk of capital* undertaken by the trader, and not a mere risk of land or risk of the labor factor. That is why some activities are excluded by article 230.

What is the meaning of the word ‘company’ in the article 230 of the Commercial Code? The ‘company’ concept in article 230 of the Commercial Code comprises series of acts (activities objectively commercially performed in the context of trade organizations), because:

- a) Chapter II – ‘The traders’ – Title II (articles 13 *et seq.* from the Commercial Code) sets out who is and who is not a trader, so it does not make sense that article 230 of the Commercial Code attributes directly this quality to certain businessmen;
- b) We can someone (legal entities, e.g., associations, foundations, state) exploring a commercial activity set out in article 230 of the Commercial Code, without acquiring the trade quality.

What is the scope of 230 of the Commercial Code? Will objective commercial acts only be the contracts where the exercise of the company typically develops [supply contracts (2), agency (3), editing (5), building contract (6), and transport (7)] or all the acts performed in the exploration of the business company? They should be considered as objective all the commercial acts performed in the operation of the companies listed in article 230 of the Commercial Code.

(ii) Subjective Commercial Acts

Second part of article 2 of the Commercial code – intends to qualify under the Commercial Law the commercial acts and obligations connected with the professional commerce and performed by traders not because they are regulated by commercial law. This requires the prior identification of the subjects that perform a certain commercial activity.

The subjective commercial acts are the acts practiced by traders. To be qualified as subjective commercial acts, the acts and obligations of the traders can not have an exclusive civil nature (such a marriage, adoption, affiliation, making a will), i.e, they have to be in connection with the exercise of commerce.

They can also be subjective the commercial unlawful acts that do not have an exclusively civil nature, but which results from commerce practice (example – a trader who dedicates his activity to freight transport negligently causes an accident with his truck from which results multiple damage).

It can also be considered subjective the commercial acts or obligations when the nature is not exclusively civil, if the opposite does not result from the same act (if it is shown that they do not have a connection with the exercise of the commerce of the trader performing them).

Therefore:

- If from the same act results a connection with the trade, the act is commercial (e.g., a grocer buys a van to transport the fruit of this grocery);

- If from the same act does not result a non connection with commerce, the act is also commercial (e.g., a grocer buys a van without declaring anything about its purpose);
- If from the same act results a non connection with commerce, the act is not commercial (e.g., a grocer buys a van to take his family on holidays).

The second part of article 2 of the Commercial Code establishes as *commercial* the acts which fulfil three requisites:

- Being performed by traders;
- Not having an exclusively civil nature (no connection with the exercise of commerce);
- If from the act itself there is no way to evidence that it is not connected with the commerce performed by the traders. Therefore, it is understandable that only traders may perform subjective acts of commerce.

E.g., purchase and sale set out in article 874 of the Civil Code; it can be either civil or commercial (such as the lease agreement, mandate, pledge). It shall be deemed commercial if performed by a trader in connection with its commercial activity.

The act *shall not be commercial*, although performed by a trader if:

- It is an act with an exclusive and intrinsic civil nature; or
- Although it may have a commercial nature, it is evidenced in a specific context that the act (and only the act) has no connection with the commerce of the person who performed it- if there is a doubt about this situation, the act shall be deemed commercial.

E.g., if a trader buys a mobile phone *for personal use* the act is not commercial, is merely civil, and is a civil buying and selling agreement provided in the Civil Code.

Absolute or autonomous commercial acts and ancillary or commercial acts by connection

Absolute or autonomous commercial acts – acts qualified as commercial by themselves, regardless their connection with other acts or commercial activities. Acts created to satisfy the needs of the commercial activity (e.g., buying for reselling).

Ancillary commercial acts (actos comerciais acessórios) – acts which are qualified as commercial because they are related or connected with the autonomous commercial acts – guaranty (article 101 of the Commercial Code; agency (article 231

of the Commercial Code): loan (article 394 of the Commercial Code); pledge or collateral security (article 397 of the Commercial Code); deposit (article 403 of the Commercial Code).

Substantial Commercial Acts and Formal Commercial Acts

Substantial commercial acts – commercial acts inserted in the commercial activity which confer the so called trade quality to those performing them professionally – sale of property for resale.

Formal commercial acts – acts which are not as commercial acts by themselves, but once they are specifically regulated by the commercial law they acquire the qualification of a commercial act – debt instruments (bill of exchange, promissory note, check).

Bilateral or Pure Commercial Acts and Unilateral or Mixed Commercial Acts

Bilateral or pure commercial acts – acts that are commercial relative to both parties, so both parties are traders – a trader buys from another trader a good for resale within his commercial activity;

Unilateral or mixed commercial acts – acts that are commercial relative to only one party (only one trader) whilst the other party is civilian – a trader buys from a farmer a good which was produced by the latter; only the purchase is commercial unless the contrary does not result from the act itself.

As per article 99 of the Commercial Code although the act is commercial *only in relation to one of the parties*, therefore an unilateral commercial act, it shall be governed by the provisions of commercial law in respect to all contractors, saved those provisions that are only applicable to the one / those in respect of which the act is commercial, being, however, all subject to the commercial jurisdiction. Therefore, commercial law shall apply to the unilateral commercial act, but the trader is subject to all legal specific provisions.

Special Acts of the Legal Obligations and Commercial Form

The consensual principle is assumed by the Civil Law (article 219 of the Civil Code), although it is applied more extensively in Commercial Law context, such as:

Article 96 of the Commercial Code establishes the freedom of the language in the commercial acts (diverging from article 365 of the Civil Code);

Article 97 of the Commercial Code establishes the admission of private telegraphic correspondence documents, in broader terms than those resulting from the rule in article 379 of the Civil Code.

Joint and several obligations (*obrigações solidárias*)

Joint and several obligations (*obrigações solidárias*) –each one of the debtors is liable for the full performance of the obligation releasing the remaining debtors, or when each one of the creditors have the right to require the performance by any of the debtors and this shall releases the debtor from all the other creditors [article 512 (1) of the Civil Code].

The solidarity may be among the creditors (*active solidarity*) or between debtors (*passive solidarity*).

Passive solidarity only exists if it results from the law or from the will of the parties (article 513 of the Civil Code).

Article 100 of the Commercial Code sets forth that in commercial obligations, unless otherwise stipulated, the co-parties are joint and severally liable (*solidariamente responsáveis*). *However, this provision does not extend to non-traders in respect to contracts that, for the latter do not constitute commercial acts.*

Article 101 of the Commercial Code sets out all personal guarantors (*fiador*) of a commercial obligation, although it is not a trader, will be joint and severally liable towards the one who benefits from the personal guarantee.

Commercial Law has special rules in comparison with the Civil Law, putting the debtors and the guarantors under the rule of passive solidarity (*solidariedade passiva*).

Traders (*comerciantes*)

As per article 13, it is a commercial entrepreneur those who have the capacity (see article 7 of the Commercial Code) to exercise acts of commerce, develop the latter in a *professional manner*. Those who trade as their job, who on a daily and regular basis execute acts of commerce (absolute acts of commerce), as a way of living, in a nutshell those who have and carry out a commercial company (*empresa comercial*).

What does “professional manner” mean for the purpose of article 13 (1)? *It means that the trader performs its activity on a day-to-day and regular and systematic*

manner, in an independent and autonomous manner, as an autonomous practice, on an (almost) exclusivity basis, exercised to seek profit and as the primary way of life.

According to article 13 (2) of the Commercial Code, the commercial corporate companies (*sociedades comerciais*) are also deemed as being traders.

As per article 18 of the Commercial Code, traders (commercial entrepreneurs) are especially obliged to: (i) to adopt a business name (*firma*), (ii) have commercial bookkeeping, (iii) provide for the entry in the commercial register of the acts subject to registration and (iv) render accounts.

The firm is one of the hallmarks of the traders, the name that he uses to identify himself in the exercise of the economic activity which must obey to the *principles of truth* (the elements of firms should be true and not misleading as to the identification, nature or activity of its holder), *novelty* (firms should be different and cannot be confused or mistaken with the registered or licensed in the same context of exclusivity) and *exclusivity* (after the final registration is granted the right to the exclusive use of firm in the territorial scope specially defined for the entity concerned). The trader must adopt one firm made up of its civil name, full or abbreviated as necessary to identify the person, and can add a nickname or an expression alluding to the activity.

The bookkeeping consists of recording the facts that can influence the operations and financial position of the traders, comprising also the registration of internal deliberations of companies.

The third obligation of the trader is to register relevant facts. Registration has the task of publicizing the situation of trader, corporations, individual establishments of limited liability, civil law partnership companies in commercial form, providing therefore the legal certainty of transactions. The registration is a condition of material effectiveness against third parties, but effectiveness may be dependent on publication. Registration is also a condition of existence and acquisition of legal personality by the corporations.

And fourth, render accounts consists on the synthesis of trader assets and liabilities.