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## **Technological Development as a Necessity for Adopting a New Perspective in the Business Environment**

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### **Abstract**

The legislator has adopted the issue of protecting the freedom of e-commerce within the digital market, by adopting a policy and law on e-commerce, the main objective of which is to achieve the effectiveness and competitiveness of national trade and the welfare of the consumer. All of this cannot be achieved unless the conditions for the free practice of e-commerce in order to enter the business markets and electronic transactions are framed by effective legal guarantees that will create an environment of trust between e-commerce sites and electronic consumers.

**Keywords:** Freedom of trade, e-commerce, e-business and transactions, e-supplier.

### **Introduction**

The State's orientation toward the liberal system has been largely focused on dismantling state monopolies over economic activities and moving toward economic freedoms. This direction was further reinforced by Algeria's adoption of the market economy system, which was explicitly enshrined by the constitutional legislator under Article 37 of the 1996 Constitution, which states: "Freedom of trade and industry is guaranteed and exercised within the framework of the law." This principle was reaffirmed in Article 43 of the 2016 constitutional amendment, and later in Article 61 of the latest constitutional amendment of 2020. These constitutional provisions establish the recognition of the principle of freedom of trade, and consequently the freedom of electronic commerce, the practice of which is guaranteed by the State within the framework of the law.

On the other hand, the right to freedom of electronic commerce is considered an economic right, and many states, including Algeria, have explicitly included such rights in their constitutions, given their close link to freedom of initiative. The Algerian legislator has also explicitly enshrined this principle in the Constitution, as well as in a specific legal framework, namely Law 18-05 on electronic commerce, separate from commercial transactions governed by the Commercial Code, which constitutes the subject of our discussion.

In light of the above, we raise the following research question:

**What framework enshrined the principle of freedom of electronic commerce? And to what extent has this principle contributed to the practice of business activities and commercial transactions in the electronic environment under Algerian law?**

In order to cover the various aspects of the topic and reach an answer to the research problem, we adopted both the descriptive and analytical approaches, by describing and clarifying the key concepts of the study and analyzing the provisions of the Constitution and the Electronic Commerce Law.

We also relied on a two part structure, where the study was divided into two main sections preceded by an introduction. The first section is entitled “The Principle of Freedom of Electronic Commerce in Algerian Law”, and the second section is entitled “The Practice of Electronic Commercial Activities in Algerian Law”. The study concluded with a conclusion that included the main findings and recommendations.

### **Section One: The Principle of Freedom of Electronic Commerce in Algerian Law**

The exercise of freedom of electronic commerce in any market requires the availability of the necessary infrastructure. The constitutional enshrinement of freedom of trade, as established by the constitutional legislator, implicitly recognizes the freedom to conduct commercial activities through technological means or modern communication technologies. It also provides for the regulation of such activities through clear legal rules set out in a specific and independent law.

#### **Subsection One: Constitutional Enshrinement of the Principle of Freedom of Electronic Commerce**

In light of the transition from a centrally planned economy to a free market economy, freedom of trade has gained significant practical space, reflected in major economic openness. Algerian commercial activity has, in the course of asserting its freedom, produced many active institutions within the commercial market.

Accordingly, the principle of freedom of trade is considered one of the most important principles first introduced in Article 37 of the 1996 Constitution, which states: “Freedom of trade and industry is guaranteed and exercised within the framework of the law.”<sup>1</sup> Despite Algeria’s major economic reforms aimed at shifting toward a market economy and abandoning the planned economic system based on liberalizing trade and relying on the freedom of initiative for economic actor’s such as traders, companies, and economic institutions the Constitution has consistently reaffirmed respect for the principle of freedom of trade, even-through successive constitutional amendments. This is also reflected in Article 43 of Chapter Four of Part One, which states as follows:

“Freedom of investment and trade is recognized and shall be exercised within the framework of the law. The State works to improve the business climate and encourages the flourishing of enterprises without discrimination in the service of national economic development. The State ensures market regulation. The law protects consumer rights. Monopolies and unfair competition are prohibited by law.”<sup>2</sup>

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<sup>1</sup> As stated in Article 37 of the 1996 Constitution of 28 November 1996, published under Presidential Decree No. 96-438 dated 7 December 1996 (Official Gazette No. 76), as amended and supplemented by Law No. 02-03 of 10 April 2002 (Official Gazette No. 25), further amended and supplemented by Law No. 08-19 of 15 November 2008 (Official Gazette No. 63), and amended again by Law No. 16-01 containing the 2016 constitutional amendment, as well as Presidential Decree No. 20-442 of 30 December 2020 relating to the constitutional amendment (Official Gazette No. 82).

<sup>2</sup> Law No. 16-01 of 6 March 2016 containing the constitutional amendment, Official Gazette No. 14, [www.joradp.dz](http://www.joradp.dz)

Subsequently, constitutional amendments continued, and despite changes in the Algerian constitutional legislator's priorities, each time giving precedence either to industry, investment, or entrepreneurship the principle of freedom of trade was never excluded, and its respect was consistently reaffirmed in line with the State's adoption of a market economy system. Accordingly, Article 61 of the 2020 Constitution provides for this principle.<sup>1</sup>

It is worth noting that placing freedom of trade in a secondary position is due to the fact that freedom of electronic commerce constitutes an important branch of constitutionally guaranteed freedom of investment and entrepreneurship, given its economic nature and its significant role in promoting diversification

Economic development and the improvement of production, as well as the fact that trade constitutes a cornerstone of the free enterprise system and a strong incentive for success and high performance.

<sup>2</sup>Electronic commerce freedom means the State's abstention from restricting electronic commercial activities or favoring one trader over another for example, by granting financial assistance that would disrupt the rules of free commercial practice.<sup>3</sup>

In addition to the constraints imposed on the State by the principle of freedom of trade and investment, this principle also imposes obligations on private actors to respect it when exercising their freedom in electronic commerce. For instance, it prohibits agreements whereby a person refrains from engaging in commercial activity, such as renouncing a profession or trade.<sup>4</sup>

In reality, there is no scope for discussing electronic commerce freedom except in a country that adopts economic freedom and competition across various business activities, i.e., a free environment.

Thus, it can be said that electronic commerce freedom represents the main driving force of investment and trade freedom; these freedoms cannot exist without free trade in its broad sense. Furthermore, the exercise of electronic commerce freedom can be justified when analyzing the commercial operation itself, as electronic commerce is essentially an exercise of economic freedoms on the one hand and the right to freedom of initiative on the other.

From the above constitutional provisions, it is clear that the Algerian legislator has affirmed the continuation of a policy of expanding the economic sphere. Moreover, since the field of entrepreneurship now extends to almost all sectors of private activity, it becomes necessary to precisely define the concept of "entrepreneurship" intended in constitutional texts and determine its limits and scope in relation to the administration, as well as in relation to other fundamental rights and public freedoms guaranteed by the Constitution.

Accordingly, the Algerian Constitution of 2016 has enshrined freedom of trade in general, thereby strengthening the freedom of electronic commerce. Since Algeria adopted the market economy system in the early 1990s, the economic landscape has undergone unprecedented changes, driven by the restructuring and rebuilding of state institutions at various levels.

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<sup>1</sup> Presidential Decree No. 20-442 containing the constitutional amendment, *ibid.*

<sup>2</sup> Tawfiq Mohamed Abdel Mohsen, *Marketing Research and the Challenges of International Competition*, Arab Renaissance House, Beirut, 2001, p. 125.

<sup>3</sup> See Article 04 of Law No. 04-08 of 14 August relating to commercial activities, as amended and supplemented, Official Gazette No. 52.

<sup>4</sup> Jalal Messaad, *The Principle of Free Competition in Positive Law*, Master's thesis in Law, Business Law branch, Faculty of Law, Mouloud Mammeri University, Tizi Ouzou, 2002, pp. 152–153.

Electronic commerce is one of the fields intended to be enshrined both constitutionally and through specific legislative provisions.

Therefore, the Algerian legislator enacted a law regulating electronic commerce<sup>1</sup>, which includes a set of legal rules and provisions that enshrine the freedom of electronic commerce and organize it within a clear legal framework, which will be addressed in the second section. It is certain that constitutional recognition of the right to electronic commerce will lead to enhancing the position of the private sector in economic activity, while the State retains control over strategic sectors and traditional activities. This approach also served as a preparation for the issuance of laws governing and regulating electronic commerce. Thus, the right to engage in electronic commercial activities is considered to have a constitutional value closely linked to the freedom of initiative enshrined in the Constitution and embodied in legislation. Trade, in its essence, is not an end in itself but rather a means used to achieve economic development<sup>2</sup>, by ensuring the availability of the largest possible number of commercial transactions within the market, which ultimately guarantees full freedom of choice for consumer.<sup>3</sup>

### **Subsection Two: The Legal Framework of the Principle of Freedom of Electronic Commerce**

Creating an appropriate legislative and legal environment for the requirements of electronic commerce is one of the essential factors for its success. Algeria has enacted several legal provisions that relate, directly or indirectly, to one of the applications of electronic commerce, such as the law governing Internet users under Executive Decree No. 98-257 of 25 August 1998, and the law on cybercrime under No. 09-04 of 5 August 2009, which establishes rules for protection and combating such crimes.<sup>4</sup>

Within this framework, the Algerian legislator has established a modern legal system to regulate various commercial activities based on data systems and modern information and communication technologies<sup>5</sup>, embodied in Law No. 18-05 of 24 Sha'ban 1439, corresponding to 10 May 2018, relating to electronic commerce:<sup>6</sup>

**Article 3:** Electronic commerce is exercised within the framework of the applicable legislation and regulations. However, any transaction carried out through electronic communications relating to the following is prohibited:

- gambling, betting, and lotteries,
- Alcoholic beverages and tobacco products,
- Pharmaceutical products,

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<sup>1</sup> Ibrahim Yama, *The Legal Regulation of Electronic Commerce in Algeria: A Study in Light of Law 18/05*, Journal of Law and Political Science, University Center of Naâma, Faculty of Law, Vol. 5, No. 2, pp. 01–09.

<sup>2</sup> Michel Pédamon, *Commercial Law: Trader and Business Assets, Competition and Commercial Contracts*, Dalloz Publishing, 1994, p. 445.

<sup>3</sup> Jean-Pierre Casimir and Alain Cauret, *Business Law*, Sirey Publishing, 1987, p. 383.

<sup>4</sup> Executive Decree No. 98-257 of 25 August 1998, which sets the conditions and procedures for establishing and operating Internet services, Official Gazette No. 63; or the law relating to cybercrime, No. 09-04 of 5 August 2009, which sets out rules for its protection and combating, Official Gazette No. 47.

<sup>5</sup> Bouzana Ayman and Hamdouch Wafaa, *Electronic Commerce in the Context of Law No. 18-05 and the Executive Decrees Related to the Electronic Commercial Register in Algeria*, Journal of the Researcher Professor for Legal and Political Studies, University of El Oued, Faculty of Law, Vol. 6, No. 1, pp. 1832–1863.

<sup>6</sup> Law No. 18-05 of May 2018 relating to electronic commerce, Official Gazette No. 28.

- Products that infringe intellectual, industrial, or commercial property rights,
- Any goods or services prohibited under applicable legislation,
- Any goods or services requiring the establishment of an official contract.

All transactions carried out through electronic communications are subject to the rights and fees provided for by the applicable legislation and regulations.<sup>1</sup>

**Article 6:** Within the meaning of this law, the following terms are defined as follows:

1\_ Electronic commerce: the activity through which an electronic supplier offers or ensures the provision of goods and services remotely to an electronic consumer, via electronic communications.

2\_ Electronic contract: A contract within the meaning of Law No. 04-02 of 5 Jumada Al-Awwal 1425, corresponding to 23 June 2004, which sets out the rules applicable to commercial practices, and which is concluded remotely without the simultaneous physical presence of the parties, using exclusively electronic communication technology.<sup>2</sup>

3\_ Electronic consumer: any natural or legal person who acquires, for consideration or free of charge, goods or services through electronic communications from an electronic supplier for the purpose of final use.

4\_ Electronic supplier: any natural or legal person who markets or offers goods or services through electronic communications.

5\_ Pre-order: a sales commitment that may be offered by the electronic supplier to the electronic consumer in the event that the product is not available in stock.

6\_ Domain name: a standardized string of letters and/or numbers registered in the national domain name registry, which allows identification and access to a website.<sup>3</sup>

As for Chapter Two, the Algerian legislator, under the aforementioned law, has defined the conditions for exercising electronic commerce in Article 8, which states as follows:

“Electronic commerce activity is subject to registration in the commercial register or in the register of traditional crafts and artisanal activities, as the case may be, and to the publication of a website or web page on the Internet hosted in Algeria with the “.com.dz” extension.”<sup>4</sup>

“The electronic supplier’s website must include means that allow verification of its authenticity.”<sup>5</sup>

**Article 9:** A national register of electronic suppliers shall be established at the National Centre of the Commercial Register. It shall include electronic suppliers registered in the commercial register or in the register of traditional crafts and artisanal activities.<sup>6</sup>

“The activity of electronic commerce may only be carried out after depositing the domain name with the services of the National Centre of the Commercial Register. The national register of electronic suppliers is published through electronic communications and is made accessible to the electronic consumer, in accordance with the requirements of electronic commerce.

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<sup>1</sup> Article 3 of the same reference.

<sup>2</sup> Law No. 04-02 of 23 June 2004 establishing the rules applicable to commercial practices, Official Gazette No. 41.

<sup>3</sup> Article 6 of Law No. 18-05 of 10 May 2018 on electronic commerce, Official Gazette No. 28.

<sup>4</sup> Article 8 of the same reference.

<sup>5</sup> See the website: [sidjilcom.cnrc.dz](http://sidjilcom.cnrc.dz)

<sup>6</sup> Article 9 of the same reference.

The Algerian legislator has focused on the electronic commercial register mechanism as one of the requirements for exercising this type of trade. In this regard, Article 08 of Law No. 18-05 on electronic commerce provides that: ‘Electronic commerce activity is subject to registration in the commercial register or in the register of traditional crafts and artisanal activities, as the case may be...’<sup>1</sup>

Thus, all commercial transactions in this field are based on the requirement of registration in the electronic commercial register, as an innovative and mandatory alternative to the traditional commercial register.

In support of the Algerian legislator’s intention to promote the electronic commerce sector and ensure proper legal regulation of its requirements, and to consolidate the use of the electronic commercial register as one of its key prerequisites, Executive Decree No. 18-112 was issued, setting out the model of the commercial register extract issued through electronic procedures.<sup>2</sup> Among the new measures introduced in this area:

\* Since June 2014, the National Centre of the Commercial Register has integrated a secure code into the commercial register extract, allowing its authentication and ensuring its validity, as well as enabling online verification of its data.<sup>3</sup>

This secure code can be read using a free application available on the electronic portal of the National Centre of the Commercial Register, installed on devices equipped with image-capturing systems such as smartphones and tablets.

Thus, the reader can verify and confirm commercial register information online (via the Internet). The information that enables verification of the validity of the commercial register includes:

- \* Commercial register number;
- \* Name and surname of the trader / company’s legal name;
- \* Registration province;
- \* Status of the trader/company (active or struck off).

Moreover, within the framework of generalizing the adoption of the electronic commercial register to facilitate electronic commerce transactions in Algeria, the Algerian legislator, through Executive Decree No. 18-112 mentioned above, has required traders who do not possess a commercial register containing the aforementioned code to request the modification of their commercial register extracts at the territorially competent branches of the National Centre of the Commercial Register, in order to obtain the electronic code “C.R.E.” (electronic commercial register).

From the above provisions, the following can be observed:

The issue of electronic commerce has generated wide debate within legal circles, as the rapid development of information and communication technologies has produced various challenges that require the establishment of a legal framework defining the scope and mechanisms for regulating this form of trade. National legislation has sought to keep pace with these developments by updating its legal systems, namely through the legal regulation of electronic

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<sup>1</sup> Article 08 of the same reference.

<sup>2</sup> Executive Decree No. 18-112 of 5 April 2018, establishing the model of the commercial register extract issued through electronic procedure, Official Gazette No. 21.

<sup>3</sup> See the website: [www.commerce.gov.dz]

commerce in Algeria under Law No. 18-05 on electronic commerce, and the regulatory framework it establishes in this regard.

## **Section Two: The Practice of Electronic Commercial Activities in Algerian Law**

The term electronic commerce refers to all forms of transactions related to commercial activities involving individuals and companies, etc., based on the electronic processing and transmission of data, particularly texts, sounds, images, and other means of communication and technology.<sup>1</sup> It also refers to all types of transactions related to commercial activities between traders and companies,<sup>2</sup> relying on the use of communication and technology tools, etc., which can be conducted in the digital space. However, there are certain other electronic commercial transactions that cannot be carried out within this digital environment.

### **Subsection One: Electronic Commercial Activities According to Subject Matter**

The Algerian legislator has not ignored the developments occurring in the commercial field and their impact on electronic commerce; rather, it has been influenced by them and taken them into consideration within its legal provisions regulating both civil and commercial transactions. It has enacted several laws confirming its alignment with modern technology and all matters related to electronic infrastructure in Algerian commercial law<sup>3</sup>, including:

- \* The introduction of electronic payment methods in 2005;
- \* The electronic commercial register in 2013;
- \* And in 2015, the issuance of a specific law on electronic signature and electronic certification.<sup>4</sup>

Accordingly, it is important to raise the following questions: what are the commercial activities provided for in the Algerian Commercial Code? Are they the same as electronic commercial transactions? And can traditional commercial activities be subject to the same rules set out in the Electronic Commerce Law?

Commercial acts are defined as a set of legal operations carried out by merchants among themselves, or with customers or non-merchants, whose subject matter is related to the practice of trade. Upon examining the Algerian Commercial Code<sup>5</sup>, we find that the legislator did not provide a specific definition of commercial acts; instead, it classified them into types under Articles 2, 3, and 4 of the Algerian Commercial Code<sup>6</sup>, namely: commercial acts by subject

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<sup>1</sup> Rekabi Adel and Bouchoucha Mohamed, Requirements for the Application of Electronic Commerce in Algeria, *Journal of Economics and Sustainable Development*, University of El Oued, Faculty of Economic, Commercial and Management Sciences, Vol. 4, No. 1, pp. 220–230.

<sup>2</sup> Farid Abbas and Saif Eddine Rehali, Conditions for Practicing Electronic Commerce in Light of Law No. 18-05, *Journal of Legal and Political Research and Studies*, University of El Oued, Faculty of Law, Vol. 4, No. 8, pp. 69–93.

<sup>3</sup> Ordinance No. 75-59 of 26 September 1975 containing the Commercial Code, as amended and supplemented, *Official Gazette* No. 101.

<sup>4</sup> Law No. 15-04 of 1 February 2015 laying down the general rules relating to electronic signature and electronic certification, *Official Gazette* No. 06.

<sup>5</sup> Tetta Khaled, Ben Doud Ibrahim, and Chettouh Anfal Hibat Allah, The Concept of Technology and the Role of Commercial Companies in Its Transfer, *Journal of Cognitive Issues*, University of Djelfa, Humanities and Social Sciences, Vol. 2, No. 3, pp. 117–126, see website: [www.asjp.cerist.dz](http://www.asjp.cerist.dz)

<sup>6</sup> Articles 2, 3, and 4 of Ordinance No. 75-59 containing the Commercial Code, as amended and supplemented, *ibid.*

matter, commercial acts by form, and commercial acts by accession (or by nature of dependency).

### **First Branch: Individual Commercial Acts**

Recently, there has been much discussion about the Internet and information and communication technologies due to the advantages and greater convenience they provide to society across various fields of life, as no sector remains unaffected by them<sup>1</sup>. The commercial field, for instance, has been significantly influenced by developments in information technology, leading to the emergence of commercial operations conducted through electronic exchanges, known as electronic commerce<sup>2</sup>. As a result, traders and others have begun using this mechanism to conclude contracts and communicate with their customers, thereby abandoning traditional methods of dealing.

Commercial acts by subject matter are defined as those acts that are considered commercial regardless of the person performing them. Most of these acts relate to the circulation of movable goods for profit-making purposes, while others, although not related to trade circulation, acquire a commercial character. These are listed exhaustively, not by way of example, and include individual commercial acts such as purchase for resale, banking operations, brokerage or intermediary activities, and commercial operations in the form of enterprises (commercial enterprises).

### **First: Purchase for Resale**

The Algerian legislator has not remained detached from these developments in the commercial field; rather, it has been influenced by them and reflected them in other legal texts beyond the Commercial Code, confirming that it takes into account all electronic commerce and commercial transactions conducted through technological means such as the Internet and others, including individual commercial acts.

Article 2 of the Algerian Commercial Code states that: “Shall be considered commercial acts by their subject matter any:

\* Purchase of movable goods for resale, either in their original form or after transformation or processing;

\* Any purchase of immovable property for resale.”

Thus, the element of purchase is considered a necessary condition for an act to be classified as commercial, and consequently for acquiring ownership of the purchased item, which grants its holder the rights of use, enjoyment, and exploitation for the purpose of making a profit.<sup>3</sup>

Purchase, in the sense defined above, is therefore a prerequisite for considering an act as commercial. Accordingly, sales that are not preceded by a purchase such as those involving goods produced by a person are not considered commercial acts. Likewise, the purchase of movable or immovable property is not considered a commercial act unless it is carried out with

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<sup>1</sup> Lazhar Ben Said, *The Legal System of Electronic Commerce Contracts*, Dar Houma, Algeria, 2012, p. 63.

<sup>2</sup> Saleh Hamidato, Sara Messi, and Attia Al-Arabi, *Electronic Commerce in Algeria: Reality and Challenges*, Algerian Journal of Economic and Administrative Studies, University of Setif 1, Faculty of Economic, Commercial and Management Sciences, Vol. 2, No. 2, pp. 46–61.

<sup>3</sup> Article 2 of Ordinance No. 75-59 containing the Commercial Code, as amended and supplemented, *ibid*.

the intention of resale or profit-making, particularly when such transactions are conducted through electronic means, such as purchasing for resale on marketplace platforms.

### **Second: Banking Activities**

The Algerian legislator, under Article 66 of Ordinance No. 03-11 relating to credit and currency<sup>1</sup>(now repealed by Law No. 23-09 containing the Monetary and Banking Law), provided that: “Banking operations include receiving funds from the public, credit operations, as well as making payment instruments available to customers and managing these instruments.”

Accordingly, banks and financial institutions aim to generate profit and play a vital role in the circulation of money and negotiable instruments. The commercial nature extends to all their operations, including the issuance of commercial papers and even banking activities in general.<sup>2</sup> In this context, Law No. 23-09 on monetary and banking regulation was enacted with the aim of governing the banking system, particularly the Bank of Algeria, improving its transparency, and granting the Monetary and Credit Council new powers enabling it to accompany the transformations occurring in the banking environment. It also expanded its competencies in the accreditation of investment banks, digital banks, payment service providers, and independent intermediaries, as well as licensing foreign exchange offices, in addition to strengthening the role of the Banking Commission as a supervisory authority, etc.<sup>3</sup>

One of the new developments brought about by information and communication technologies, and the emergence of electronic commerce<sup>4</sup>, is the appearance of so-called electronic banks. These banks rely on all forms of electronic payment and settlement systems and provide services via the Internet on a global scale.<sup>5</sup>

In addition, so-called electronic money has emerged. It is non-physical currency that takes the form of electronic units stored in a highly secure location, such as the customer’s computer hard disk, also known as an electronic wallet. Furthermore, bank cards have appeared, such as Visa cards and PayPal cards.<sup>6</sup>

### **Third: Brokerage or Intermediation**

Brokerage is considered a commercial act under Article 2, paragraph 13 of the Commercial Code<sup>7</sup>, regardless of the nature of the transaction, whether the broker is a professional who practices this activity as a habitual profession or not. This is clearly reflected in the current electronic environment, where such commercial activities are characterized by speed and trust, as seen in platforms such as Ouedkniss.

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<sup>1</sup> Ordinance No. 03-11 of 26 August 2003 on currency and credit (repealed), Official Gazette No. 52.

<sup>2</sup> Law No. 23-09 of 12 June 2023 containing the Monetary and Banking Law, Official Gazette No. 43.

<sup>3</sup> Ibid.

<sup>4</sup> Srarma Maryam, Electronic Commerce in Algeria: Obstacles and Activation Mechanisms, *Shua'a Journal of Economic Studies*, University of Tissemsilt, Faculty of Economic, Commercial and Management Sciences, Vol. 6, No. 1, pp. 57–61.

<sup>5</sup> Hind Rim and Abdel Hakim Boujani, Electronic Commerce, University of Ain Temouchent, Faculty of Law, *Al-Basa'ir Journal for Legal and Economic Studies*, Vol. 1, No. 3, pp. 170–184, [[www.asjp.cerist.dz](http://www.asjp.cerist.dz)](<http://www.asjp.cerist.dz>)

<sup>6</sup> Nouri Mounir, *Electronic Commerce and Electronic Marketing*, Office of University Publications, 2nd ed., Algeria, 2017, p. 219.

<sup>7</sup> Article 2, paragraph 13, of the Commercial Code, as amended and supplemented, *ibid.*

A broker or intermediary is a person who acts as an intermediary between two or more contracting parties in order to conclude a specific transaction in exchange for consideration, usually in the form of a percentage of the value of the transaction concluded<sup>1</sup>. The broker does not intervene in the legal relationship that directly arises between the contracting parties; rather, his role is limited to bringing the parties closer together to facilitate the completion of the transaction.

#### **Fourth: Maritime Activity**

Article 02 of the Algerian Commercial Code provides that the following are considered commercial acts by their subject matter:

- \* Any enterprise involving the manufacture, purchase, sale, or resale of vessels intended for maritime navigation;
- \* Any purchase or sale of ship supplies and equipment;
- \* Any maritime lease, borrowing, or loan operations involving risk;
- \* Any insurance contracts and other contracts related to maritime trade;
- \* Any agreements relating to crew wages and hiring;
- \* All maritime voyages.<sup>2</sup>

Thus, according to the Algerian legislator, any purchase, sale, leasing, or borrowing related to ships, their equipment, or ship supplies for maritime navigation is considered a commercial act by its subject matter, as well as agreements related to crew wages and maritime voyages, etc. Most of these commercial activities can now be carried out through electronic means and concluded remotely. Consequently, they may also qualify as electronic commercial transactions when conducted through digital platforms.<sup>3</sup>

#### **Second Branch: Commercial Acts in the Form of a Commercial Enterprise**

Under Article 2, paragraph 13 of the Algerian Commercial Code, the Algerian legislator identified a number of enterprises that possess a commercial character and that may also operate in an electronic form, including:

- \* Any enterprise engaged in the leasing of movable property;
- \* Any supply or service enterprise;
- \* Any enterprise involved in the wholesale sale of new goods through public auction or the retail sale of used goods.

Legal doctrine defines an enterprise as a contract whereby one party undertakes to manufacture something or perform a specific task in return for compensation promised by the other party. Such a contract is generally considered a consensual and negotiated agreement under which the contractor commits to producing a product or carrying out a service, while the other party undertakes to provide previously agreed monetary consideration<sup>4</sup>. For the activity to acquire

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<sup>1</sup> Rochou Abdelkader, *The Legal Foundation for the Practice of Electronic Commerce in Algeria: An Analytical and Evaluative Study in Light of Law No. 18-05*, Journal of Research in Contracts and Business Law, University of Constantine 1, Faculty of Law, Vol. 8, No. 2, pp. 129–142.

<sup>2</sup> Article 02 of the Commercial Code, as amended and supplemented, *ibid.*

<sup>3</sup> Hamoudi Farida, *Electronic Commerce in Algerian Law*, Hawliyyat Journal (Annals Journal), University of Algiers 1, Faculty of Law, Vol. 34, No. 5, pp. 7–24.

<sup>4</sup> El Amri Salima, *A Conceptual Introduction to Electronic Commerce*, Journal of Human and Social Studies, University of Oran, Faculty of Humanities and Social Sciences, Vol. 13, No. 1, pp. 486–142.

the character of a commercial enterprise, it must be carried out repeatedly or habitually and within an organized structure intended to conduct the activity on a continuous basis.

### **Second Requirement: Electronic Commercial Acts by Form**

Article 3 of the Algerian Commercial Code defines commercial acts by form as follows: the handling of bills of exchange between persons, commercial companies, business agencies and offices regardless of their purpose, transactions relating to commercial establishments, and any commercial contract connected with maritime, air, or land trade.

### **First Branch: Dealings in Bills of Exchange between Persons**

Article 3 of the Algerian Commercial Code classifies certain acts as commercial by form and provides as follows:

— The following shall be deemed commercial acts by form:

Dealings in bills of exchange between all persons; Commercial companies; Business agencies and offices, whatever their purpose; Any commercial contract relating to maritime and air trade.<sup>1</sup>

A bill of exchange is defined as a negotiable commercial instrument that complies with a legally prescribed form. Through this instrument, a person known as the drawer orders another person, called the drawee whether a natural person, a legal entity, or a financial institution to pay a specified sum of money to a third person, known as the payee (beneficiary), or to another person designated by the beneficiary, either on a specified date or upon presentation.<sup>2</sup>

The electronic bill of exchange is considered a modernized traditional means of payment and does not differ in substance from the paper bill of exchange, although it was primarily developed to enhance banking operations. This model was introduced by the banking sector itself without direct legislative intervention, in order to avoid the problems arising from the use of traditional bills of exchange. It is also among the issues for which the Algerian legislator has not yet provided a specific legal solution. In practice, electronic negotiable instruments are generally processed only through banks. However, there is no legal rule preventing individuals from dealing with this type of instrument; therefore, the possibility of electronic bills of exchange between private persons remains legally conceivable.

The purpose of the electronic processing of data relating to negotiable instruments (cheques, bills of exchange, and promissory notes) is to enable the bank that issued the instrument, or its lawful holder, to request payment from the bank obligated under the instrument through electronic means of communication. However, the Algerian legislator did not require that a bill of exchange be issued on paper; it may also be issued electronically, provided that it contains the particulars specified in Article 390 of the Commercial Code<sup>3</sup>. In such a case, it is referred to as an electronic bill of exchange. In legal doctrine, one jurist defines the electronic bill of exchange as “An instrument drawn in accordance with the conditions prescribed by law, containing specific mandatory particulars, and embodying an order issued by the drawer to the

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<sup>1</sup> Article 3 of the Commercial Code, as amended and supplemented, *ibid.*

<sup>2</sup> Sami Abd Abu Saleh, *Electronic Payment of Debts Arising from Commercial Transactions*, Dar Al-Nahda Al-Arabiya, Egypt, 2004, p. 35.

<sup>3</sup> Article 390 of the amended and supplemented Commercial Code, previously cited.

drawee to pay a determined or determinable sum of money to the order of a third person, namely the beneficiary, on a specified date.”<sup>1</sup>

It should also be noted that the Algerian legislator made an implicit reference to the electronic bill of exchange through Article 414, paragraph 3, of the Commercial Code<sup>2</sup>, as amended by Law No. 05-02, which provides as follows: “The holder of a bill of exchange payable on a fixed date or within a certain period after sight must present it for payment either on the due date or on one of the two working days following that date.”<sup>3</sup>

The physical presentation of the bill of exchange to the clearing house shall be deemed equivalent to presentation for payment. Such presentation may also be made through any electronic means of exchange provided for by the applicable legislation and regulations.<sup>4</sup>

With the emergence of electronic commerce, which relies on electronic means of payment, electronic commercial instruments have also appeared as one of these payment methods. These instruments are defined as documents processed electronically, either wholly or partially, representing a right whose subject matter is a sum of money<sup>5</sup>. They are negotiable through commercial methods, payable either on demand or after a short period, and serve as a substitute for cash in the settlement of obligations.

### **Subsection Two: Commercial Companies**

The end of the last century witnessed a significant transformation from the traditional system of commercial companies to the modern system of electronic companies, driven by the emergence of electronic commerce and the rapid development of information technology<sup>6</sup>, which has affected virtually every field of commercial activity. As a result, it has become possible to establish commercial companies remotely<sup>7</sup>. This technological and digital reality has enabled the incorporation of commercial companies at a distance through the use of modern technological means.

Although the Algerian legislator has not expressly provided for the possibility of concluding a company's memorandum of association electronically, there is no legal impediment preventing the incorporation agreement of commercial companies from being concluded by electronic means.

The Algerian legislator has not defined electronic commercial companies. However, it has defined a company as a contract in Article 416 of the Civil Code<sup>8</sup>, as well as an electronic contract in Article 6, paragraph 2, of Law No. 18-05 relating to electronic commerce.<sup>9</sup>

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<sup>1</sup> Amineh Bourtal, “The Legal Provisions Governing the Electronic Bill of Exchange in Algerian Law,” *Journal of Law, Society and Authority*, Faculty of Law, University of Oran, Vol. 12, No. 2, pp. 156–175.

<sup>2</sup> Article 414, Paragraph 3, of the amended and supplemented Commercial Code, previously cited.

<sup>3</sup> Law No. 05-02 of 6 February 2005 amending the Commercial Code, *Official Gazette (J.O.R.A.)*, No. 11.

<sup>4</sup> Sanaa Khamis, “Electronic Commercial Transactions in Algerian Legislation,” *Journal of Legal Studies and Research*, Faculty of Law, University of M’Sila, Vol. 2, No. 2, pp. 250–266.

<sup>5</sup> Khader Misbah Al-Tayti, *Electronic Commerce and E-Business: A Technical, Commercial, and Administrative Perspective*, Dar Al-Hamed Publishing and Distribution, Jordan, 2008.

<sup>6</sup> Mohammad Nour Saleh Al-Jadayah and Sanaa Joudat Khalaf, *Electronic Commerce*, 1st ed., Dar Al-Hamed Publishing and Distribution, Jordan, 2009, p. 272.

<sup>7</sup> Ahmed Belkacem Brahim, “The Incorporation of Electronic Commercial Companies,” *Journal of Legal Studies*, Faculty of Law, University of Saïda, Vol. 8, No. 2, pp. 137–165.

<sup>8</sup> Article 416 of Ordinance No. 75-58 of 26 September 1975 containing the Civil Code, *Official Gazette (J.O.R.A.)*, No. 78.

<sup>9</sup> Article 6, Paragraph 2, of Law No. 18-05 relating to Electronic Commerce, previously cited.

As for legal doctrine, commercial companies are defined as the contract concluded between two or more persons, whether natural or legal persons, remotely for the establishment of a commercial enterprise, with the aim of making a profit, provided that it carries out its activities through electronic means, particularly the electronic network.<sup>1</sup>

In this regard, the question arises as to the extent to which the traditional rules governing commercial company contracts can accommodate commercial companies that may be established electronically, particularly in light of Law No. 15-04 relating to electronic signatures and electronic certification, and Law No. 18-05 relating to electronic commerce<sup>2</sup>, given that electronic companies may take several forms: companies established in a traditional manner and having only a promotional website; companies established in a traditional manner and carrying out their activities electronically for promotional purposes while providing certain services; and purely electronic companies.<sup>3</sup>

### **Subsection Three: Agencies and Business Offices Regardless of Their Purpose**

These are offices that provide services to the public in return for a specified fee, and the majority of these offices now provide their services electronically, such as travel agencies and business agencies specializing in travel services. It is well known that agencies and business offices professionally provide services to others, similar to business offices that offer various services to facilitate the activities of third parties. Examples include advertising agencies, as provided for in Article 03 of Law No. 99-06 of 04 April 1999<sup>4</sup>. Therefore, the Algerian legislator intended agencies and business offices to be governed by commercial law, regardless of whether their purpose is civil or commercial, and irrespective of the status of the person dealing with them. It should be noted that the term “agencies and offices” is a broad concept encompassing all commercial activities and operations that fall within this category and involve the pursuit of profit. In view of these agencies' efforts to develop their profit-making activities, they currently seek to promote their services through information and communication technologies and the use of the Internet, thereby adopting every new development that may be beneficial to them.

### **Subsection Four: Any Commercial Contract Relating to Maritime, Air, or Land Trade**

The legislator considers all contracts relating to maritime or air trade to be commercial acts by form, whether the contract concerns the purchase of ships, aircraft, or other means for commercial exploitation, their mortgage, repair, insurance, or contracts for the employment of crew members, provided that these acts take the form of contracts satisfying their formal and substantive requirements. Furthermore, these contracts must relate to ships and aircraft used for commercial purposes. If they are used for civil purposes, such as military operations or scientific research, the act is not considered a commercial act. Likewise, obligations arising from a ship or aircraft are regarded as civil acts, such as compensation for damages caused by

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<sup>1</sup> Osama Majdoub and Ghaniya Batli, “The Electronic Company Contract,” *Journal of Law and Political Science*, Faculty of Law, University of Khenchela, Vol. 9, No. 1, pp. 973–987.

<sup>2</sup> Law No. 15-04 relating to Electronic Signature and Electronic Certification, and Law No. 18-05 relating to Electronic Commerce, previously cited.

<sup>3</sup> Osama Majdoub and Ghaniya Batli, \*op. cit.\* (previously cited).

<sup>4</sup> Article 03 of Law No. 99-06 of 4 April 1999, establishing the rules governing the activities of travel and tourism agencies, *Official Gazette (J.O.R.A.)*, No. 24.

the aircraft or ship<sup>1</sup>. A maritime or air commercial contract is considered a commercial act within the meaning of Algerian commercial law regardless of the nature of the contract, its subject matter, or the person carrying it out. It is sufficient that maritime or air trade takes the form of a contract for it to be deemed a commercial act. Consequently, the general rules governing contracts and contracting, which apply to any contract in its traditional sense, must be satisfied. The same applies to electronic contracts when such contracts are concluded through electronic means and media.

It should be noted that there are certain commercial transactions that cannot be carried out within this digital environment or by electronic means. These are generally transactions for which the Algerian legislator requires an official formal instrument executed before a notary, such as transactions relating to real estate and commercial establishments. A commercial establishment constitutes a collection of tangible and intangible assets, such as goods, the trade name, business reputation (goodwill), and customer connections. In other words, it is a legally independent unit upon which the trader relies in conducting his commercial activity. According to the provisions established by the legislator, any transaction affecting the commercial establishment

Commercial establishments, whether subject to a mortgage, sale, lease, or other transactions, are considered commercial acts, notwithstanding the Algerian legislator's explicit recognition of electronic signatures and electronic certification through the enactment of the relevant legislation.

## **Conclusion**

In conclusion, it can be said that the principle of freedom of electronic commerce has been enshrined within the framework of the Algerian Constitution, pursuant to Article 61 of the 2020 Constitution. This is based on the principle of "respect for the freedom to engage in trade." The content of the constitutional provisions reflects the intention of the constitutional framers to promote and encourage free enterprise by traders, whether in traditional commerce or in commerce conducted through modern technological means.

This principle has contributed, to a considerable extent, to the practice of electronic commercial activities and transactions under Algerian law, although their regulation remains somewhat imprecise, particularly prior to the enactment of a dedicated legislative framework, namely Law No. 18-05 on Electronic Commerce.

In fact, the legal rules governing and regulating the conduct of electronic commercial activities and transactions do not include a definition of "commercial acts" by the Algerian legislator. Instead, the legislator has identified their categories in Articles 2 and 3 of the Algerian Commercial Code, classifying them as commercial acts by nature (subject matter) and commercial acts by form.

Commercial activities can now be carried out, by their very nature, within the digital environment. However, the Algerian economic public order requires electronic commerce to operate within the limits imposed by the principle of legality. Accordingly, electronic suppliers,

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<sup>1</sup> A Group of Researchers, *Contracts and Agreements in Electronic Commerce*, Publications of the Arab Administrative Development Organization, Egypt, 2007, p. 161.

while seeking customers, must not abuse this right the freedom of electronic commerce. If they depart from this principle, their transactions become unlawful (*pratiques déloyales*).

Therefore, for electronic commerce to fulfill its role as a regulator of commercial and economic transactions in general, it must be both free and lawful. It may be conducted within the digital environment regardless of those electronic commercial transactions that cannot be carried out in cyberspace.

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