



## Regarding the Notion of Subjective Commercial Deal

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**Abstract:** The report is dedicated to the so-called subjective commercial deals as used is the comparative legal method of study. Reviewed are the preconditions for their qualification as commercial, set in § 343 of the German commercial legislator (Handelsgesetzbuch), which is a reception source of art. 286, par. 1 of the Bulgarian commercial act. Special attention is paid to the requirement for relation between the deal and the enterprise of the trader with regards to which there is no unity in the Bulgarian theory and court practice. Reviewed is also the rebuttable presumption for the presence of such relation under art. 286, par. 3 of Commercial Act.

**Keywords:** Commercial Deals; Subjective Commercial Deals; Trader; Commercial Enterprise

### 1. NOTION ABOUT COMMERCIAL DEAL

The commercial deal is type of deal and it bears all its family marks. From economical aspect commercial are not only the deals servicing immediately the process of commodity turnover (purchase-sale) but also deals that are related to this process (transportation, warehouse, insurance, bank and other deals)<sup>1</sup>.

The notion about commercial deal is related to the concept about the essence of commercial law<sup>2</sup>. In accordance with the subjective system the commercial law is right of the trader and commercial are the deals concluded by trader and related to its occupation<sup>3</sup>. Those commercial deals are called subjective because their determination as commercial is related to the quality of the subject performing them. In accordance with the objective system commercial law is the right of commercial exchange and commercial are the deals of trade exchange regardless of the entity concluding them<sup>4</sup>. Those are the so-called objective commercial deals. With them, pursuant to the legislator, the main mark of trade (intermediation upon exchange of goods aiming profit) so strongly points out that every separately concluded deal is commercial, regardless of who concludes it<sup>5</sup>. In the Bulgarian legislation set are both criteria, i.e. adopted is the mixed system for qualification of the deal as trade one. The objective commercial deals that are not subject of this research are stated in par. 1, point 1 of Commercial Act as the listing is claiming comprehensiveness<sup>6</sup>.

### 2. MEANING

The qualification of deal as trade is of significance for the application of the general terms for commercial deal prior to the common part of the Contracts and Obligations Act<sup>7</sup>; of the special part of

<sup>1</sup> Gerdzhikov, O. Commercial deals. Fourth revised and completed issue. S., 2015, p. 26

<sup>2</sup> Katsarov, K. Commercial law. Lectures. S., 1937, p. 283.

<sup>3</sup> In accordance with art. 286, par. 1 of Commercial Act commercial deal is deal concluded by trader which is related to the occupation he practices. Sources of reception is § 343 of the German commercial legislator Handelsgesetzbuch (HGB), which will be analyzed further.

<sup>4</sup> Art. 286, par. 2 of Commercial Act: Commercial are also the deals under art. 1, par. 1 of Commercial Act regardless of the capacity of people performing them. The objective criteria is set in the legislations of France, Belgium, Spain as well as some Latin America countries.

<sup>5</sup> Dikov, L. Course in commercial law. Third photo type issue. S., 1992, 503.

<sup>6</sup> Exception is made in point 13 regarding services. Besides, as "purchase" under art. 1, par. 1, point 1 of the Commercial Act understood shall be every paid acquisition made with speculative aim – Dzhidrov, P. Comment on the Commercial Act. Volume 4. Photo type issue. S., 1994, p. 1107.

<sup>7</sup> See art. 289 of Commercial Act, art. 292-294 of Commercial Act, art. 301-304 of Commercial Act, art. 309-310 of Commercial Act, and art. 315 of Commercial Act.

Commercial Act before the special part of Contracts and Obligations Act<sup>8</sup>. The commercial character of the deals reflects on the means for procedural defense<sup>9</sup>. Insolvency as a substantive legal prerequisite for the opening of bankruptcy proceedings associates with the impossibility for paying a required payable caused by or regarding to the commercial deal<sup>10</sup>. Among the legitimate, in accordance with art. 625 of Commercial Act, to file claim for opening a bankruptcy proceeding are only those creditors of the trader having relations on the commercial deal.

### 3. PRECONDITIONS OF THE SUBJECTIVE COMMERCIAL DEAL

*Commercial* is the deal concluded by a *trader* which is *related* to the occupation he practices – art. 286, par. 1 of Commercial Act.

#### 3.1. Deal

In Bulgarian theory and court practice the term “deal” used in art. 286, par. 1 of Commercial Act is understood in its legal and technical sense. In the literature written upon the operation of the revoked Commercial Act (Commercial Act (revoked) underlined is that the notion “deal” is not equal to contract but the deal may also be unilateral judicial deed through which established may be legal relations<sup>11</sup>. In this sense commercial deal under art. 286, par. 1 of Commercial Act may be unilateral deal, for example public promise of reward<sup>12</sup>. In Germany adopted is that the term “deal” shall be understood in wider sense and includes legal-relevant behavior – not only for legal deals and will expressions but also for deal-like acts (for example invitations, defining terms) and such actual actions pursued by the actor (for example processing an item, mixing items, sending of goods). Also possible is an act having as consequence claim for doing third party business without being authorized, unjust enrichment or tort without being deal in this sense<sup>13</sup>.

#### 3.2. Trader

The deals under art. 286, par. 1 of Commercial Act are called subjective because their announcement as commercial is related to the capacity of the subject concluding them. The subjective commercial deals are deals which are neither commercial nor may have commercial capacity of the individual concluding them. It is sufficient the person to be trader at the moment of concluding the deal, i.e. subsequent dropping of this capacity does not disqualify the deal as commercial. No matter how the trader-natural person has signed the contract – with the company or with the civil name. As commercial defined may be a deal that is concluded prior to the registration as long as it is related to the activity of the registered trader<sup>14</sup>. Pursuant to art. 1, par. 3 of Commercial Act as trader considered is every person having formed an enterprise which according to the subject and volume requires his actions to be kept commercially even if the activity does not include objective commercial deals. The deals of this enterprise that are not objective commercial deals under art. 1, par. 1 of Commercial Act shall also be accounted to the subjective commercial deals<sup>15</sup>. The fact that somebody, by reason their title or position or another reason, may not deal with trade, has no impact on the capacity and validity of the commercial deals – art. 285 of Commercial Act (revoked). Despite the lack of analogical rule in the new Commercial Act adopted shall be that the character or the capacity of the deal (whether it is commercial or not) is discussed objectively regardless of whether there are any obstacles for the

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<sup>8</sup> See for example art. 318, par. 1 of Commercial Act.

<sup>9</sup> Under art. 365, par. 1 of Civil-Procedure Code the disputes related to the conclusion, interpretation, validity, execution, non-execution and termination of commercial deal, the consequences of its termination as well as filling in blanks in the commercial deal or its adjustment to the newly-incurred circumstances are commercial disputes and are reviewed under the special claim proceeding.

<sup>10</sup> See art. 608, par. 1, point 1 of Commercial Act.

<sup>11</sup> Dzhidrov, P., quoted essays. p. 1142-1143.

<sup>12</sup> See Dikov, L., quoted essays, p. 520

<sup>13</sup> Brox, Hans Handels- und Wertpapierrecht. 18 bearb. Aufl. Verlag C. H. Beck, 2005, s. 123. Same applies in Austria - see Krejci, H. Unternehmensrecht, 2008. Wein, s. 262 quote of: Goleva, P. Commercial deals. Fourth revised and completed issue. S., 2012, p. 20

<sup>14</sup> So as for commercial companies and cooperation Stefanov, G. Issues of the commercial law, VT, 1997, p. 273. There is no reason the same not to apply for the sole owner. See also Dikov, L., quoted essays, p. 520, marking that the law does not require upon conclusion of the deal to be present existing or functioning commercial enterprise, sufficient is they to be performed with the intention to initiate and form such.

<sup>15</sup> Pavlova, M. Commercial deals – notion and types. Commercial law, issue 2/1997, page 17

person to deal with trade<sup>16</sup>. Deals belonging to the activity of the enterprise of an alleged trader shall be treated as commercial deals<sup>17</sup>.

### 3.3. Relation to the Enterprise of the Trader

For subjective commercial deals necessary is one of the parties to be trader and the conclusion of the deal to be in relation to his enterprise<sup>18</sup>. They are commercial when concluded by a trader to serve his trade<sup>19</sup>. In this sense understood shall be the requirement under art. 286, par. 1 of Commercial Act the deal to be related to the occupation practiced by the trader under art. 286, par. 1 of Commercial Act the deal to be related to the occupation practiced by the trader. The requirements comes from the translation of the expression „...zum Betrieb seines Handelsgewerbes gehören“from § 343 HGB. During the translation omitted is the noun der Betrieb, which in this case is a synonym of enterprise (die Unternehmen), and the term das Handelsgewerbe means activity of the commercial enterprise.

Not necessary is those deals to be performed as per occupation<sup>20</sup>. The requirement the deals to be concluded in relation to practicing by the trade occupation are not equal to the requirement under art. 1, par. 1 of Commercial Act the deals to be concluded as per occupation, i.e. systematically, not occasionally, which would give the capacity “trader” to the person having concluded them this way. Historically we shall mark that even with regards to the relative deals under art. 280 of Commercial Act (revoked) it was not necessary to conclude them by occupation so they can be commercial deals<sup>21</sup>. In this relation more precise is art. 281 of Commercial Act (revoked) under which all deals of the trader regarding to the practicing and maintenance of his trade are considered commercial deals. Despite source of reception of art. 281 of Commercial Act (revoked) is § 273 is the revoked German legislator (ADHGB)<sup>22</sup>, the understanding about the connection between the deal and activity of enterprise is not changed after the acceptance of HGB. The deals are concluded in relation to the enterprise not only when they are an immediate object in the trader’s enterprise but when they make possible and facilitate his trade<sup>23</sup>. This is why the German theory distinguishes besides main commercial deals also auxiliary and accompanying commercial deals<sup>24</sup>. The auxiliary commercial deals (Handelshilfsgeschäfte) are the deals of the trader giving an opportunity to establish, continue or terminate the enterprise as the rent of the facility for commercial site, contracts for purchase of furniture or repair of the site, sale of commercial site. Accompanying commercial deals (Handelsnebengeschäfte) are deals concluded by the trader from time to time, which are related to the deals usual for the enterprise for example forwarding by the producer of the machine he has fabricated<sup>25</sup>.

In the Bulgarian theory expressed is the understanding that no commercial are deals under part III of Commercial Act the deals regulated in part II of the Commercial Act. The common with them is that they are not contracts of the commercial turnover – they are no contracts for exchange of inventories or contracts servicing the commercial exchange<sup>26</sup> – for example contracts for transfer of commercial enterprise, contracts for transfer of commercial shares, contracts for sale or donation of shares<sup>27</sup>,

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<sup>16</sup> Dzhidrov, P., quoted essays, p. 1154.

<sup>17</sup> Brox, Hans op.cit., s. 124.

<sup>18</sup> See judgment 212-2003 – V Supreme Court of Cassation and judgment 102-2009- II commercial panel of Supreme Court of Cassation

<sup>19</sup> In the literature written under the operation of the revoked commercial act those deals were called supplementary or accessory commercial deals and the subject were the deals under art. 280 of Commercial Act (revoked) that are commercial if not concluded as per occupation but by a trader in the field of its operation.

<sup>20</sup> The reversed is adopted in judgment 1-2009 of Supreme Court of Cassation with regards to privatization contract where one of the arguments that this contract is not a commercial deal is that it is not concluded as per occupation. See also Goleva, P., page 29, where adopted is that the deals under part second of the Commercial Act are not commercial for they are not concluded by trader’s occupation – the trader does not sell every day commercial enterprises, does not systematically convert himself.

<sup>21</sup> See Dzhidrov, P., quoted essays, p. 1141 and Dikov, L., p. 519

<sup>22</sup> See Dzhidrov, P., quoted essays, p. 1141.

<sup>23</sup> Dikov, L., quoted essays, p. 520. Krejci, H. Op.cit, s. 262.

<sup>24</sup> Brox, Hans op.cit., s. 124. In historical legal aspect of interest is the circumstance that with the adoption of HGB the absolute and relative commercial deals under art. art. 271 and 272 of ADHGB merged into the so-called Handelsgrundgeschäfte (basic commercial deals).

<sup>25</sup> Ibidem.

<sup>26</sup> Goleva, P., quoted essays, p. 28-29.

<sup>27</sup> – Such as judgment 602-2005- I commercial panel of Supreme Court of Cassation. In the German theory expressed is the view that the donation may qualify as commercial deal also – Wiland, K., Commercial law.

contracts for conversion of commercial companies, contracts for associations of traders<sup>28</sup>. I consider that doubts in relation to the possibility to be commercial deals may be present only with regards to the contracts for conversion and association of traders as far as those contracts are not for bilateral deals and do not service the commercial turnover<sup>29</sup>.

Subjective commercial deals are deals that usually are settled in the civil legislation (sale, barter, irregular deposit, fabrication, rent)<sup>30</sup>, consumer loan<sup>31</sup>, order, giving instead of execution and so on). In the court practice adopted is that the guarantee contract does not have character of commercial deal<sup>32</sup>, but it is permissible the trader to be announced insolvent for its payable as a guarantor<sup>33</sup>. Employment contracts are not commercial deals<sup>34</sup>. The receivable to limited liability company for return of supplementary cash contribution under art. 134 of Commercial Act do not arise in commercial deal<sup>35</sup>. Commercial deals may be also unilateral deals, not contracts – for example public promise for a reward. The deal concluded by a trader to service the trade of others is not a commercial deal – a commercial deal is only the deal that the trader has concluded for the practice or the maintenance of the trade<sup>36</sup>.

#### 4. REBUTTABLE PRESUMPTION FOR RELATION TO COMMERCIAL ENTERPRISE

In case of doubt it is considered that the deal made by the trader is related to his occupation – art. 286, par. 3 of Commercial Act. Established is rebuttable presumption that all deals that a trader concludes, when otherwise not stated, are considered concluded within his trade. In order to apply the presumption necessary is the person to have had trader's capacity at the moment of concluding the deal. The presumption does not apply if evident is that the deal is concluded without any relation to the trade. The assumption has an effect not only against the trader but also in his favor as well as in favor of his partner<sup>37</sup>. Those who claims that the deal is not commercial shall prove it as may use only such circumstances that are recognizable for the other party<sup>38</sup>.

#### 5. CONCLUSION

In the legislations where adopted is the mixed system for defining the commercial deal, the differences between the subjective commercial deals and the civil deals are not based on the peculiarities of their legal nature but the purpose they serve for. The sale, loan, rent in their legal structure are always the same, regardless whether concluded in the commercial turnover or outside of it, but the deal is commercial when it is concluded for performing trade.

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Translation from German. Book 1, 1926, p. 68. I consider this understanding may not be adopted for in the basis of the commercial deals is the idea of consideration for commercial relations.

<sup>28</sup> Such as with regards to the consortium contract as civil enterprise judgment 404-2008- Commercial Colleague, Supreme Court of Cassation.

<sup>29</sup> As evidence for the fact how widely in Germany grasped is the requirement for connection between the enterprise and the trader and the concluded deal L. Dikov states a case from court practice where adopted is that the acceptance of a member in the supervisory board is a commercial deal.

<sup>30</sup> judgment 127-2011-II commercial panel of Supreme Court of Cassation

<sup>31</sup> judgment 134-2015-II commercial panel of Supreme Court of Cassation

<sup>32</sup> judgment 994-2008-II commercial panel of Supreme Court of Cassation

<sup>33</sup> judgment 143-2015-I commercial panel of Supreme Court of Cassation

<sup>34</sup> judgment 120-2008-I commercial panel of Supreme Court of Cassation

<sup>35</sup> judgment 134-2003-V civil panel of Supreme Court of Cassation

<sup>36</sup> Dzhidrov, P., quoted essays, p. 1142.

<sup>37</sup> Dzhidrov, P., quoted essays, p. 1148.

<sup>38</sup> Brox, Hans op.cit., s. 125.