SELALE UNIVERSITY
SCHOOL OF LAW

LAW OF TRADERS AND BUSINESS ORGANIZATION

Slide note

HUSSEIN KEBEDE

CHAPTER 1: GENERAL INTRODUCTION

1.1A brief Account : historical background

- It is difficult to put the time when people progressed the form of conducting business from sole trader to business organization.
- Historically, trade has evolved in different communities with its own distinct vigor.
- In ancient Romanian legislations, the law of business organization has originated from closely affiliated family organization known as partnership for orderly execution of succession of estate of a deceased person.

- This is known by latin phrase ***Jus fraternitatis*** though contractual in nature it is characterized by cooperative relationship of brotherhood.
- Unlike other contractual relation which has competitive interest among parties , partners have **cooperative interests** where by they agreed to share both profit and loss.
- Modern partnership laws of France , Germany as well as Ethiopia , share to what once known as *Societas(* **union for a common purpose; society, fellowship, partnership, association, community, union; affinity**) under roman law.

British Experience

- British legal system like other European countries was influenced by the roman law
- Yet , the development of business organization has taken its unique feature owing to collapse of Roman Empire as well as isolation from the rest of the world.
- There are two distinct development paths of B.O in Britain

- **Merchant guilds :** These were merchant association organized based on the area of trade specialty and responsible to control their respective members , collection of tax and expansion of business inexchage for monopoly right.
- In letter period , the expansion of international trade and increased demand for inputs led these guilds form business organization and raise capital.

- **Joint stock Company:** These are in response to the risk posed by transporting stocks on sea ways to ship wreck and piracy.
- Traders established joint stock to share both **profit and risk.**
- On the other hand ,the development of business organization is recent phenomena in Ethiopia.
- Generally trade and traders were despised.

- This has continued until the early 20th century.
- In early 20th Century some pioneer business entities were established.
- Prominent in this regard were:The Establishment of franco –Ethiopia rail way company ; Bank of Abyisinia , Agricultural and trade company

- Ethiopia had adopted Company law act; Law of loan and Bankruptcy.
- After the defeat of Italian invaders , there were many other companies established by public subscription of shares.
- Besides , there were successful legal codification project; and well organized stock market.
- Due to failure of transformation of the agricultural sector , these did not play out in to meaningful prosperity.

- To make things worse , following the 1974 revolution , much of the country's economic policy shifted to socialist-command economy.
- Following the over through of Dergue in 1991, it took long time to earn trust of the private sector.
- Yet with out much legal and institutional reform on the commercial code, securities market and fair trade and competitive business environment , the private sector has thrived to create capital and jobs since the adoption of free market economy in the post 1991 period.

- Following the change of administration of the federal government in 2018, the new leadership opted for more liberal and open economic policies in the telecom , airlines , Carriage etc..
- Investment law, commercial law, Communication law, energy laws…etc were amended between 2018 to 2021 as part of legal reform program; and home grown economic policy reform.

1.2 General Orientation of the Commercial Code.

- There are two approach when designing the commercial code with regard to its scope.
- **1st Subjective** :- regulates a community of '**persons**' designated as "**traders**" based on the exercise of generally defined profession.
- They receive an armband on which it is written the word 'trader' and who will automatically be regulated by the commercial code.

- **2nd Objective:-** regulates acts known as “acts of commerce”, as opposed to persons to which the commercial law applies no matter what the status of persons who carry out these acts.

- According to the drafter of the 1960 commercial code , Prof. Escara , the only logical system to determine the scope of coverage the commercial code is the subjective approach.

1.3. The civil and commercial Law Dichotomy

- There is ***general problem*** concerning the delimitation of commercial law on the very existence of this law as an independent discipline.

- The development of commercial law to supplement civil law is historic phenomena
- There is general movement which question whether the distinction between civil and commercial law is justified at present time.
- The dominant tendency was to ‘commercialize civil law’
- This is mainly because harsh out comes of treating similar juridical acts mainly contracts under different set of rules regarding formalities and standard of proof.

- Consequentially, the rules of civil law became less and less burdensome towards creation of one common rules of contract applicable to both traders and non-traders.
- Some states have gone far to abandon separate commercial law. Switzerland has no commercial code.
- Instead the civil law of obligation serves as common source while certain number of special institution for traders are incorporated in the civil law.
- The problem of autonomous commercial code is not mere theoretical subject.

- It is still conceivable a country could have two separate codes all more so because countries with a single code should regulate special commercial institutions.
- What are the approaches developed in Ethiopia? **Read page 12-13.**
- It can be inferred from Article. I of the commercial code of 1960 that commercial law is only supplementing the civil code that confirms the classic principle of the priority of the civil law in respect to the theory of obligation.
- The same approach is adhered in the New commercial code Proclamation No.1243/2021.

1.4 Scope of the code

- Territorial scope :The 1960 code was promulgated in 1960 when the Ethiopian empire is unitary.
- Do you think problem of territorial scope of the code as mere theoretical?
- Article 55(4) : HPR has the power to promulgate the commercial code.
- Hence , commercial law is excusive law making jurisdiction of the Federal government.
- Art. 52(2) : Stipulates the principle of residual power.
- Should C.C be uniform code?
- Art. 1: Civil code vs commercial code
- Art.2: Maritime code vs Commercial Code

- According to Art. 4(1) of the 1960 Commercial code : Body corporate under public law(such as Public enterprises,, administrative or religious institutions) are not traders though they carry out acts of commerce.
- Art.4(2): C.C shall apply where BC only participate to undertaking(B.O) as shareholder or partners.
- Public enterprise were subject to public enterprise proclamation unless they participate as shareholder or partner.
- Neverthess, the new commercial code subjected public enterprises to the commercial code except on those matters governed by public enterprise proclamation (Art.4(3).
- Article 25 of the New commercial code cases where trade may be carried out by those groups lited under Art.4(1) shall be determined by law.

1.5 Defining Traders

- **1.5.1 Positive Definition** : Traders are physical persons who operate sole proprietor.
- **Art.5** :-sets two conditions
- **General** :- Persons who professionally and for gain.
- Professional : Not requiring specialized knowledge or intensive and long academic training.
- It is rather a principal calling , vocation and employment.
- Art. 125(1)Every trader operates business. Art.107 of the new commercial code has similar provision
- Besides on *priori* one can not be traders with out operating business /enterprise.
- What is the status of persons who conduct acts of commerce as past time or additional source of income?

- **Special** :- Conducting acts of commerce/ Business activities listed under Art.5 of the C.C.
- The list under Art.5 of the old commercial code was meant to be exhaustive.
- However, it has been broadened by subsequent legislation to incorporate several sectors as business activities.
- Commercial Registration and Licensing Proclamation No 980/2016 Art. 2(2) "business person" means any person who professionally and for gain carries on any of the activities specified in the Commercial Code or who dispenses services, or who carries on those commercial activities designated as such by law"

- The list of business activities under Article 5 has indeed expanded.
- The 2010 Ethiopia Standard Industrial Classification (ESIC) directive prepared based on Proclamation No 686/2010 incorporates additional activities as business activities.
- The new commercial code has added many activities as business.
- **1.5.2 Excluded /Negative Definitions of Traders**
- **Art.6-9:**Excluded farmers, Artisans and Fishermen from scope of the code applicability weather they operate individually or collectively (cooperative/ community).
- The main element in the excluded list are the requirements of : **dealing** with **agricultural** , **forestry**, **cattle from Products of the their own land.**
- As regard fishermen and person who bread fish shall not be deemed to be traders where they sell products from their own fishing or breading.
- **Handicraft men : Are persons who carry on independent activity and manual or mechanical activity with their family and not more than three employee.**

- Assignment I: submission Nov16,2021

1. Compare and contrast the 1960 commercial code and 2021 with regard to excluded or negative definitions of traders as well as the justification for such exclusion.
2. Explain the rights and obligations of traders in Ethiopia.

- **Reason for exclusion:** To encourage small scale trade activities.
- The position of business community on the revision of the C.C of Ethiopia(PBRCC)
- “Given the state of current economic and social realities, it will still be advisable to follow the same legislative policy with regard to farmers and fishermen. However, handicrafts men should no longer be relegated to the status of farmers and fishermen in the face of today’s economic reality” page 9.

- Besides , PBRCC recommended Article 5 shall be formulated as follows
- "***Without prejudice to other activities that are or may be characterized as trade activities by another law***, persons who professionally and for gain carry out the following activities shall be deemed to be traders"
- PBRCC criticized unqualified inclusion of consultancy service as business activities owing to the distinct professional nature of the activity.

- The Draft Commercial Code which was released in 2012 to some extent has not complied with the recommendations of PBCRCC to .
- Read Article 1-8 of Draft Commercial code.

1.6 Right and duties of traders

1.6.1 Keeping books of account(Art.63-70)

- Any person or B.O carrying on trade has obligation to keep books and accounts in accordance with regulation and Business practice.
- Petty traders may be excepted from keeping account.

- Make Daily entries of dealings regardless of their nature and manner in which they were carried out(Art. 66(1)
- Undertake balance once in month the proceeds of such dealing
- Preserve all documents necessary for checking these dealing day by day.

- Trader has obligation prepare an inventory and balance sheets(assets , liabilities and capital) when beginning to carry on trade and at the end of each financial year and the books shall be kept in chronological order .
- Obligation to preserve all books and accounting documents including original or copies of all correspondences(letters , messages etc.) for ten years.

UNIT TWO :CONSUMER PROTECTION AND TRADE COMPETITION

- Introduction to consumer protection law and policies: historical development
- Legislative, institutional and policy framework on consumer protection in Ethiopia
- Anti-competitive and unfair trade practice and their effects
- Emerging issues on consumer protection and law

2.1 THE FOUNDATION /ESSENCE OF CONSUMER PROTECTION LAW AND POLICIES

- The defining the relationship between government and business marks the genesis of consumer protection law and policy.
- There two types of economic decision making.
- 1st : Market mechanisms :The allocation of scarce resources coordinated by the market mechanism which in theory is optimal.

- It is stated individual choice informed by self interest, exchange and competition brings efficient allocation of resource.

- Non –Market Mechanism : In practice the market may fail and the allocation of resource is not optimal requiring intervention or public choice. Market Failure occurs due to the following:
  i. Excessive competition : due to unbalanced market operation where not only price level sink below cost of production but also fluctuates more widely.

- In such circumstances government imposes business licensing restrictions to prune excessive capacity or sets minimum price.

ii. Information Problem: There are a number of scenarios with regard to information problem. One of such case is hidden information where there is asymmetric distribution of information with respect to prices , quality and quantity of such goods

- There are three types of goods with variant of information problem which calls for no or greater state intervention :
  - a) Search goods: Quality can be determined before use (Flower)
  - b) Experience goods : Quality can be determined after use(Second hand car
  - c) Credence goods : Quality can not be determined(Medical advice or legal advice)
- In case of type b and c goods , high quality goods will be driven out of the market as consumers are prepared to pay average price.
- As a result certificates; licenses ;and other trading regulation are imposed.

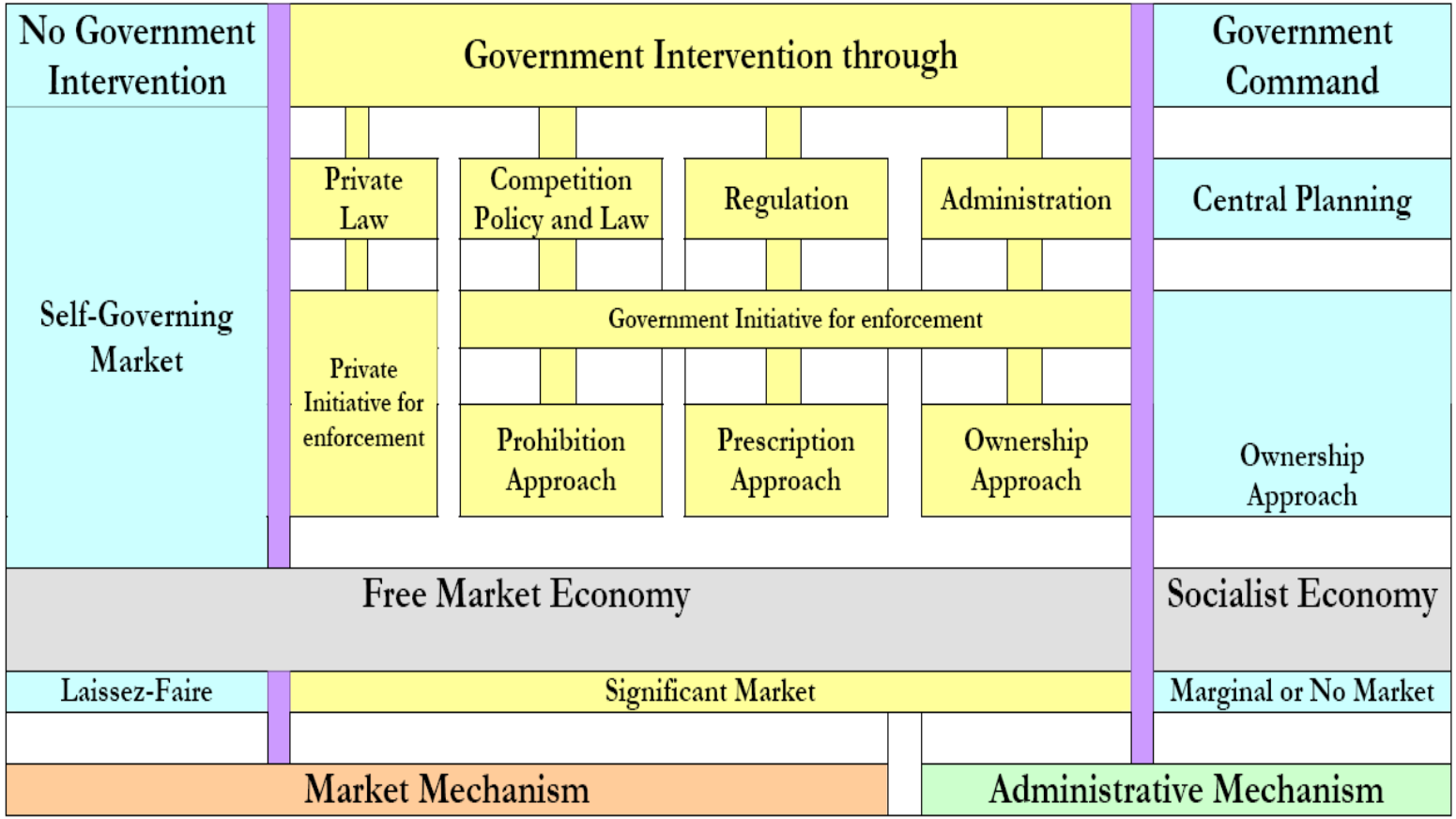
iii) External Effects : These are influences of economic actions having the consequences for the conditions of production or level of utility of third party.

- Transaction cost hinder the efficient use of environment .
- Discharge of waste on the environment by factory can harm downstream water consumers or water utility companies. The same can be said of substandard automobiles ; aircraft noise .
- Government intervenes to internalize external effect through safety regulation(goods);or limit for emission of hazardous substance above a threshold level.

iv. Public goods : Missing market may result when it is impossible or too expensive to exclude people from consumption(non –excludability) ; or when the consumption of this type of goods by one person is not at the expense of another person(Non –rivalness eg. Light house ; public order ;defense , street lightning ,television and radio signals).

- The market can not produce public goods in optimal quantity because of free riders problems and lack of willingness to pay.
- Hence government provide these goods as part of state expenditure through non-market mechanism.

Government –Business relationship Sheet



- Consumer protection is subject where by state implements legal and policy measures to benefit natural person who buys goods and services for his personal or family consumption, where the price is being paid by him or another person and not for manufacture or resale.
- Most often than not state implements combination of competition law and regulatory measures to protect consumer welfare depending up on the level of market failure.

- Competition law focuses on maintaining the process of competition between enterprises and tries to remedy behavioral and structural problems in order to re-establish effective competition in the market the consequences of which are higher economic efficiency, greater innovation, and consumer welfare.

- Consumer protection law, on the other hand, is concerned with the nature of consumer transactions by trying to improve market conditions for effective exercise of consumer choice.
- There is a strong nexus between competition law and consumer protection law.
- Both aim at maintaining well functioning market that promotes consumer welfare.
- However, they are conceptually distinct; and the two disciplines focus on different market failures and offer different remedies.

2.2 Legislative Framework for Consumer Protection

2.2.1 Regulatory Intervention

- The regulation of consumer protection denotes a body of law designed to protect the interests of consumers at the level of the individual transaction.
- To this end , Trade competition and Consumer Protection Proclamation 813/2014(TCCPP) contains several provisions that aim at the protection of consumers.
- Part three and section one of TCCPP prescribed protection of consumers at the level of individual trasaction.

II. Objectives and Scope of TCCPP

- The Proclamation was issued with the objective of creating a competitive and free market that at the same time safeguards the interests of consumers
- Regarding consumers, its goal is safeguarding them from misleading market conduct.
- Besides, it aims at ensuring the goods and services that consumers get are not only safe and suitable for their health but also fair in terms of prices.

- The Proclamation applies to 'any commercial activity or transaction in goods or services conducted in Ethiopia or *having effect within' Ethiopia*.

III) Specific Consumer Protection Rules

The following are rules regarding Consumer Protection under TCCPP 813/2014.

1. **Article 14 Right of consumer**
2. **Article 15 Display of goods and Services**
3. **Article 16. Labels of goods**

1. Article 17. Issuing Receipts and Keeping their Pads
2. Article 18 Self Disclosure
3. Article 19 Commercial Advertisement
4. Art. 20 Defect in goods and Services
5. Article 22 Prohibited Acts
6. Article 2

2.2.2: Competition Law and policy (CompetitionEnhancing Interventions)

2.2.2.1 Competition Policy

- Market functions perfectly under the following conditions:
  - There are many buyers motivated by self-interest and acting to maximize utility,
  - There are many sellers motivated by self-interest and acting to maximize profit,
  - Individual buyers and sellers are unable to exert control over market price but are price takers,
  - Price serves as means of communicating scarcity and guide for decision-making;

- Products are standardized (homogeneous) and substitutable,
- There are no barriers to entry and exit from product and factor markets,
- There is full market information to buyers and sellers,
- Resources are held in private property and all rights are defined and assigned,
- Prevailing laws and property rights are fully enforced.

- However, this is only ideal market which is different from real world. (Market Fails)

- Hence competition law controls the following risks :
  - Concentration of Market
  - Rise & abuse of economic power
  - Inefficiency
  - Economic Instability
  - Economic Inequity

- Benefit to promote by Competition law:
  - Business decentralization
  - Efficiency
  - Innovation
  - Economic stability
  - Equity
  - Consumer welfare
  - Economic development

- Alternative Policy Paradigm : **Competition vs Cooperation ? Which one of the choices results in better outcome?**
- Most Nation design competition as rule and cooperation as an exception based on results which otherwise could be lost(Eg. Merger)

2.2.2.2 : Competition Legislation

i. **The Usual Areas of Interest for Competition Law**

A. **Anti competitive agreement :**

- **Horizontal agreement between potential Competitors**

Eg. Out-put restriction; price –fixing, bid –rigging ,market division, customer allocation, boycotting agreements.

- **Vertical agreement : between suppliers and recipients in the trade chain.**

Eg. Resale Price Maintenance, Exclusive distribution, exclusive dealing, product tie-in ,

B. **Anti-competitive Megers**

C. **Abuse of Dominance and Anti – Competitive Unilateral Actions** :e.g Attack to good will, hoarding, regusal to deal with.

ii. Ethiopia's Competition rules

A. Abuse of Dominance

- The law proscribes abuse of dominance that a business person may have in the market.

Eg. limiting production, hoarding and selling at prices lower than the cost of production to harm competitors.

- It also prohibits directly or indirectly imposing unfair prices, and refusing to deal with others unjustifiably. ., Article 5(2)a to d.

- It regards the following conduct as abuse of dominance :
  - *imposing restrictions on the manufacture or distribution of competing goods or services, and limiting 'where, to whom, or in what conditions, or quantities, or at what prices the goods or services shall be resold or exported' without justifiable economic reason.(Article 5(2) g and h.)*

B. Anti-Competitive Agreements and Concerted Practices

- The law prohibits anti-competitive agreements, concerted practices and decisions by business persons and associations in a horizontal relationship. (Art. 7(3) c.)
- The outlawed acts include directly or indirectly fixing prices, 'collusive tendering, dividing markets by allocating customers, suppliers, territories or specific types of goods or services.' (Article 7(1)b)

- Even in a vertical relationship, agreements that have the ‘effect of preventing or significantly lessening competition’ or that ‘involve the setting of minimum resale price are prohibited.
- These are permissible if they are justified by technological or other pro-competitive gains that outweigh their anti-competitive effect.’ Article 7(2) and (3)

- *C. Mergers*
- The Proclamation outlaws agreements or arrangements of merger that cause or are ‘likely to cause significant adverse effect’ on competition.
- Merger is defined broadly to go beyond the amalgamation of two independent business entities into one.
- For instance, the joining of hands by two business organizations by pulling together part of their resources for the purpose of carrying on a certain commercial activity could be deemed as merger.
- Similarly, the direct or indirect acquisition of shares, securities or assets of a business organization is deemed as merger.[10]

- To ensure compliance with this rule mergers need approval by the Trade Competition and Consumers' Protection Authority.[11]
- The Authority does not automatically prohibit mergers just because the merger is likely to have significant adverse effects on competition.
- It will consider any remedial measures that may be taken to eliminate the adverse impact of the merger on competition.

- For this purpose, the businesses involved may be called upon to forward ideas. If measures to this end can be devised then the authority approves the merger subject to compliance with those conditions.[12]
- In the same vein, the Authority may approve a merger that is likely to have a significant adverse effect on competition if the merger is likely to result in technological, efficiency or other pro-competitive gains that outweigh the adverse impact of the merger on competition

2.4 INSTITUTIONAL FRAMEWORKS FOR CONSUMER PROTECTION.

TCCPP established the following organs

- Trade Competition and Consumers Protection Authority(TCCPA) (Art.27, 28 and Article 30 Power of the Authority
- TCCPA has the following organs
  - **Article 31** Director General of TCCPA
  - **Article 32** Adjudicative Bench of the authoirty.
  - **Article 33** Federal Trade Competition and Consumer Protection Appellate Tribunal

- Until the enactment of integrated consumer protection law June 8, 2010, consumer issues were addressed under different legislations such as the Criminal Code, Civil Code, and other specific legislations and were enforced by different institutions.
- Trade Practice Proclamation No. 329/2003 has failed to include consumer protection provisions in a right based interventionist manner. (It was limited to prevention of anti-competitive and unfair competitive behaviors)

UNIT THREE
BUSINESS ORGANIZATIONS(B.O)

- **3.1 Introduction(fundamentals of) to B.O**
- Business organizations are affected by the legal , political and economic environment in which they operate.
- Government , civil societies and businesses are responsible to satisfy societal needs.
- The relative role of these three agents is determined by political , economic and ideological mix.

- Laissez-faire capitalist ideology is know for small government on the other hand private businesses play bigger role.
- Communist /Socialist –The state plays central role while businesses have minimal existence
- In mixed models such social democracy and developmental state, the role of state and businesses is often balanced.
- The role of civil societies is determined mostly by the level of democratization
- Replacing the role of businesses is not simple undertaking.
- This very imperatives led states to adopt commercial code.

- Owing to the plurality of members /partners of business organization originating from partnership agreements, the law of business organization has objectives of :
  - Ensuring Healthy and equitable relationship among members of B.O
  - Preventing the management of a business organization do not take unfair advantage against members of B.O.
- Hence, the law of B.O determines the mechanisms of entry, operation and dissolution(exist) of a business organization.

3.1.1 Definition

- Article 172 of NCC defines
- "Business organization is an association established through a memorandum of association by persons who bring together contributions for the purpose of undertaking an economic activity in cooperation and of participating in the profit made"
- Besides Article 177 of NCC provides all business organization except joint venture shall only be established by memorandum of association.
- ***What is the significance of Article 177? Is it redundant to Art.172?***

- Article 185 of the NCC provides particulars of a memorandum of association.
- Main Elements of the definition of B.O under **Article.172:**
  - **Association Persons**(This is different from Art.404 Of the civil code)
  - **Contribution:**
  - **Economic Activity:**
  - **Cooperation, Participation :**
  - **Profit:**

- On the other hand , Article 210 of the old C.C defines a B.O as “any association arising out of a **partnership agreement”**
- **Partnership agreement** is defined under Art. 211 of C.C. Elements of the definition:-
  - **Contract:**
  - **To join together /cooperate:**
  - **Contribution:**
  - **Carrying out activities of economic nature:**
  - **Profit motive**

- There is more to the formation of a business organization ***de jure*** **than** the conclusion of a partnership agreement.
- Everett F. Goldberg remarked “a business organization has an institutional aspect with an existence dependent upon, but separate from, the partnership agreement.”
- **Distinguishing B.O and Association(Read Assignment and cooperatives).**

3.2 Classification of B.O

Partnership vs Company

i. **Partnership :** A partnership is an aggregate or collection of individual members.

- Paramount importance is personality of the individual partner.
- Loss of capacity or personality of member may result in dissolution of partnership.
- Close/intimate personal collaboration is expected of each partner(Mutual trust and confidence)
- It is suitable for small business

- Generally speaking , partners have unlimited liability.
- Transfer of share to third party is subject to the consent of all partners.

ii. Companies:-

- It is aggregate of shares/capital.
- The company has entirely distinct legal personality from members.
- Companies enjoy perpetual succession.
- In principle company share is freely transferable
- Shareholders except with role of director can not directly take part in the management of the company.
- PLC, SC and one Man Company are the three recognized company forms in Ethiopia.

- **Commercial vs. Non-Commercial Business Organization.**
- This distinction is no longer important under the NCC.
- The NCC deems all B.O as Commercial
- However, the old CC , commercial B.O have the character that the object under memorandum of association or in fact are to carry out any of activities listed under **Article 5**.(Art.10)

- **PLC and SC:-** are always commercial B.O irrespective of their business activities.(Art.10)
- **Ordinary Partnership:-**is always non-commercial B.O(Art.214).
- **General Partnership**, **Limited partnership** and **Joint venture** can be **commercial or non-commercial B.O**.(Art.214).
- Only **Commercial B.O** are required to keep account and bankrupt .
- Yet all B.O need to register and fulfill formation requirement.

- **3.3 Formation of B.O**
- Article 172(1) of the NCC states B.O is an association established through a memorandum of association by persons who bring together contributions for the purpose of undertaking an economic activity in cooperation and of participating in the profit made.
- One person Private limited company is B.O (172(3)
- On the other hand, joint venture is formed by an agreement among members that is not disclosed to third party(Art.172(2).

3.3.1 Memorandum of Association

- Memorandum of association shall contain the particulars under Art.185 of NCC.
- The old CC uses the term “partnership agreement” as well as Memorandum of association interchangeably in various sections.
- The Old CC explicitly deems , partnership agreement is contract. (211)
- The NCC does not provide such designation except under Art.173(3) where the freedom of contracting parties is guaranteed when drafting memorandum of association.

- So, it is safe to say Memorandum of association is contract.
- i. Contract : It is subject to rules of civil code Art.1675 et.Seq.
- The NCC does not explicitly declare memorandum of association to be in writing unlike Article 214 Old CC.
- In this regard the Amharic version of the NCC states Memorandum of association as “መመስረቻ ጽሑፍ”
- Besides , Article 173(1) cum 177 of the amaharic version of NCC indicates , it shall be in writing.

- As part of Validity requirement of partnership agreement , person incapable under the civil code is an area of great interest.
- Art.11(1) Civ.C: Person incapable may not carry on trade. If incapable person undertake trade activities , it shall be invalidated.
- Art.11 of Civ. Code applies mutatis mutandis to incapable member in a B.O
- Art. 12 Civ.Code : Tutor of minor /interdicted person may not carry on in the name and behalf of incapable person unless enjoined to do so by court. Art.288.(Rev.F.C)

- How third parties are protected ?
- Art.14 Civ.C:Minority may not be setup against third parties where the minor who carries on trade got himself in commercial registry as thought he /she was of age.
- Art. 15: Judicial interdiction can not be set up against third parties unless notice of incapacity is entered in the commercial registry.

- Generally speaking B.O can be a member of another B.O.
- Art.25 of Civil code states Associations may not carry on any trade.
- Article 4(2) of CC, allows association to participate as partner or share holder in B.O.
- ***Is it persuasive to argue an association can invest its fund as shareholder or partner Art. 25 of Civ.Cod?***
- There is no maximum limit of members in a B.O except for PLC and one person PLC.

ii. intent to Join together and Cooperate

- In general parties to the Partnership agreement have no competitive interest in contrast to other contract.
- The degree of collaboration required in the affairs of B.O ; and involvement in management of B.O varies depending on the form of B.O.

iii.Contribution

- In general, contribution can be made in forms of money,movable or immovable goods ,skills ,trade mark , good will, patent , copyright, lease right, usufruct and other contribution(Art.186 of NCC)

3.3.2 Publicity

- According to Article 219(1) of the 1960 Commercial Code “any business organization other than a joint venture shall be made known to third parties.”
- Publicity consist of three **essential elements:** publication of notice, deposit of documents, and registration in the commercial register(Art.219-222 Comm.Code)
- The requirement of publication of notice has long been removed since the adoption of the first Commercial registration and Business licensing Proclamation No.376/2003 under Art.2.2

- However, the most recent commercial registration and business licensing proclamation No. 980/2016 has reintroduced the requirements of publication.
- Art.7(2) Provides "Business organizations shall be publicized on a newspaper having nationwide circulation at the time of their establishment"
- It is not clear whether the new commercial code Proclamation NO.1243/2021 repealed Proclamation No980/2016 in general or abolished the requirement of publication all together.
- The new commercial code has detail rules regarding registration of traders and business organization (Article 78-105.)

- What is the consequences of registration in the commercial registry?
- All Business organization with the exception of Joint venture shall acquire legal personality up on registration in the commercial registry.(Article 175 of the new Commercial Code of Ethiopia) . Compare with Article 223 of the 1960 Commercial code. .

- **3.2.1 Attributes of Legal Personality**
- Legal personality, is a device whereby business organizations become the subject of rights and duties.
- **Capacity**: The fundamental importance of legal personality is that an entity with legal personality is capable of enjoying, rights.
- Any Person subject to the express prohibition by law or by the rules of unfair competition has the right to do trade(**Art. 21 of New**. C.C **(Compare with Art.20 of Old C.C).**

- B.O are capable of performing all the acts of civil life consistent with their nature unless declared incapable by law.
- It goes with out saying B.O are capable to own property, incur liabilities and be sue or sued.
- **Firm Name and Trade Name :** Another attribute of a legal person is name.

- The name of a business organization, firm-name, is chosen by the members in pursuance of the rules governing firm-names.
- Article 176 of New C.C provides”

  “A business organization shall have a firm name. Such name may neither be contrary to the interests of another trader or business organization nor contravene the law and public morality.”

- In this regard is the distinction between firm name and trade name is point of importance.
- Firm name is related to the registration of B.O while trade name is related to license of a B.O. Article 15(5) of Commercial Registration and Business licensing Proclamation No.980/2021.
- The new commercial code other than mentioning trade name does not seem to provide enough detail on essential attributes of trade name.

- Old commercial code provides under Article.135

“A trade-name is the name under which a person operate his business and Which clearly designates the business”

- **Besides,** Art. 139. Provides “The trade name may not be assigned except together with the business to which it refers”
- In this regard , Article 16 of Proclamation 980/2016 provides grounds to refuse registration of trade name in business licenses.
- It has to be emphasized trade name shall include the commercial sector of engagement(Article 14 Proc.No.980/2016.

- On the other hand the registration of Firm Name (የማህበር ስም) of B.O is subject to the rules of Commercial code for different business organization.
- According to Art.184 of New C.C the firm name of ‘ የጎበረት ሽርክና ማጎበር’ (which means general partnership) shall bear the name of at least two partners followed by “የጎበረት ሽርክና ማጎበር’
- Art. 213 Name of Limited partnership shall bear the name of two partners with unlimited liability followed by “limited partnership”
- Refer to Art. 246 and 497 of the New.C.C for different modalities of firm name of B.O

(c) Head Office: The head office of a business organization is the place where its principal organs of administration and management are situated.

- This has procedural significance in relation to jurisdiction of court and service process.

(c) Nationality: legal person with its head office in Ethiopia is presumably of Ethiopian nationality in spite of the absence of an express provision.

- An organization with its head office abroad is subject to Ethiopian law if it is formed in accordance with Ethiopian law or if its principal business object is in Ethiopia.

SOME NEW ADDITIONS FROM NEW COMMERCIAL CODE

- Article 172 used the term “**Memorandum of Association**”(መመስረቻ ጽሑፍ) as opposed to “**partnership agreement**” which used to be confusing phrase as the code put no further information if it is different from memorandum of association. Scholars assume they are synonymous. The change appears positive development.

- The clandestine nature of Joint venture and absence of plurality of members in one man PLC is explicitly an exception to the requirement of Memorandum of association for formation of Business organization.
- The code introduced one man company which led to the increase in types of of B.O in to 7.
- The code envisioned to establish one and nation wide trade registration information system under the ministry of trade and Industry(or fully or partially designated federal organs by the ministry). Article 70 cum 72 of NCC.

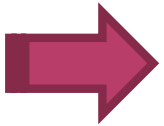
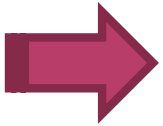
- Regional states shall designate their own trade registration administrative organ with its own function and mandate.(Art.71(1 &2)
- However, the trade registration at regional level shall be conducted in accordance with title 4 of the commercial code.(Art.71(3).
- Regions shall transfer all registration data to the ministry of trade and industry with out delay for registration in to the central trade registration system.Art.77.
- Trade registration information shall be accessible to the general public(Art.72(2) cum 75 of NCC.

- Traders(National /foreigners) and B.O have obligation of registration to conduct trade activities.
- Application in accordance with prepared formats is mandatory for registration.
- Trader /B.O shall register at the head office of business.(Art.85)
- A trader or B.O shall only have one trade registration file and registration number notwithstanding the trader may have more than one business activities.(86)
- Where the trader or B.O operates in another regional state through branch office or agent , the registration in another region shall only mention shortly the principal registration file.(Art.86(2) cum Art.88)

UNIT FOUR
GENERAL PARTNERSHIP

- The NCC used “የጎበረት ሽርክና ማኅበር” instead of Ordinary Partnership which has the Amharic equivalent “ተራ የሽርክና ማኅበር”.
- Business community has for long supported the removal of ordinary partnership from commercial code all together as it is non-commercial B.O.
- General Partnership : Partners shall be jointly and severally liable to debts of the partnership.(Art.183 NCC) Compare with **Art.255** OCC.

- The firm name General Partnership shall constitute the name of all partners or at least two followed by the term General Partnership . (**Art.184 NCC)**
- General Partnership shall have Memorandum of Association as per Art. **185 of NCC.**
- Partners shall have contribution in cash or in kind such as immovable , professional service , trade mark , good will(business), patent , copy right , right of lease , right of usufruct and others. (Art186(1)
- The partnership may have ownership right or use right on the contributed amount. **Art.186(2)**

- Contribution of partners shall be equal subject to the contrary agreement of partners.(Art.186(3)
- Value of contribution in kind shall be determined by the partners.(**Art/186(4)**
- The obligation of partner who contributed in kind except for professional service shall be same as the obligation of seller in contract of sales towards the partnership.(**Art.187(1).**
- Contribution of right of usufruct  duties of leaser under civil code towards the partnership.(**Art.187(2)**
- Contribution of right of cash payment  Duties of Borrowee towards the partnership.

- Risk shall be transferred to the partnership after delivery of goods where ownership is transferred in accordance with the law of contract of sale. **(Art.188(1) NCC).**
- Where right of usufruct is contributed, the partnership shall not be liable to any damage to goods occurred with out fault.**(Art.188(2) NCC).**
- Right of partner in General Partnership **(Art.190 NCC)**
- Duties of Partners in General Partnership **(Art.191 NCC)**

- Partners in **General Partnership** have the benefit of discussion to creditors of partnership except when partners have received profit without the partnership making profit.**(Art.191(2) NCC).**
- Partners in **General Partnership** shall have equal share in profit and losses of the partnership save agreement to contrary.**(Art.192(1).**
- **How do you understand Art.192(2) NCC?**

- Unanimous agreement of existing partners shall be required to introduce new partner subject to contrary agreement(Art.193 NCC).
- A partner can freely transfer his share to another partner save contrary agreement. (Art.194 NCC).
- Partner leaving partnership with out transferring to 3rd parties or one of partners shall receive cash payment agreed by the existing partners who opted to continue the partnership.

- What are duties of Departing partner to the debt and liabilities incurred by the partnership during the time of membership to the partnership? Read Art.196 of NCC).
- **Do you thing Art. 196 of NCC have anomalies?**
- Assignment of right and benefits of Partnership to third party. (Art.197).
- What is difference between transfer of share and assignment of right and befit to third party?

- Management of General Partnership shall be undertaken by one or more managers who are members or outsider.Art.198 NCC.
- Power of Manager/s : To execute any lawful activities to fulfill the objectives of the partnership.(Art.199(1).
- Does the power of manager exceeds power vested to General Agent?
- Protection of third parties in good faith in case of manager acting beyond power. Art.199(2), Art.200(1)

- **Do you think Art. 200(3) is compatible with Art. 200(1) and 199(2)? How can you reconcile?**
- ***Art. 201 NCC*** :Regulation of conflict of interest of managers.
- **What is the underlying presumption of the rule on Conflict of interest?**
- **Rule against Competition. Art.202.**
- **Removal of statutory and non-Manager. Art. 203.**
- **Decisions/Voting mechanisms of Partners :Unanimous vs. Majority vote (Art.204).**

Extraction of the following concepts

- Partnership Capital
- Partnership Property
- Express Authority
- Implied Authority
- Joint and several Liability
- Statutory Managers , subsequently appointed managers, Managers at law, Sole Managers; SEVERAL MANAGERS ,

- Reading Assignment : Dissolution and Liquidation of General Partnership

UNIT 5: JOINT VENTURE

Contents: Main contents of this unit includes the following sub-topics

- Basic characteristics of joint venture
- Formation
- Management
- Dissolution

5.1: BASIC CHARACTERISTICS OF JOINT VENTURE

- Article 234 of the NCC provides the principal characteristics of Joint venture form of business organization
- Joint venture is business organization formed by mutual agreement of two or more persons
- it is shall not be known to third parties.
- Joint venture is not subject to the requirements of registration unlike other business organization.
- Joint venture does not have legal personality.

- Where the existence of joint venture is known to third parties , it shall be considered as General Partnership as regard these parties starting from the day it is known. (Art.235).
- The rule under title 5(Joint venture) is not self contained.
- Art.244 states “Subject to the rules under this title ,the provision of the law regarding General Partnership mutatis –mutandis shall apply to joint venture business organization” ***Translation mine.***

5.2 FORMATION OF JOINT VENTURE

- Joint venture is formed by contractual between persons without fulfilling the requirement of registration and licensing.
- Should joint venture agreement be drawn up in the manner of Memorandum of Association ?
- Art.234 does not use the term memorandum of association which is the Amharic equivalent of “መመስረቻ ጽሑፍ”. Instead it used “agreement between persons” .

- Besides , Article 172(2),under general rules for all business organization, seems to indicate Joint venture is not formed by memorandum of association.
- Instead , it is formed by contract not known to third parties.

- However, it has to be noted , even if Joint venture contract is not strictly regulated, it does not mean the content should be entirely different from a memorandum of association.
- A joint venture contract will likely have many terms akin to memorandum of association on such matters as are related ***to the head office and branches if any of the partnership ; name , address and nationality of partners , objectives of the partnership, contribution of partner, manner of profit and loss sharing; statutory manager and its power; duration of partnership etc***..

- The capital of joint venture is raised by the contribution of partners.
- The rules of contribution under Art.186 for General Partnership shall apply to joint venture.
- Hence according to Art.186, contribution can be
  - Contribution can be in cash, in kind, and
  - Contribution of partners is presumed to be equal unless otherwise agreed.
  - Valuation of in-kind contribution shall be conducted by the partners.

- A partner who contributed in kind has obligation of warranty. (Art.244 cum 187).
- The rule on transfer of risk to contribution in kind shall be as provided under Art.188. (Art.244)
- Delay in payment of contribution shall give rise to obligation to pay interest starting from due date.(Art.189).
- Unless other wise agreed, new partners shall only be member of partnership if all the existing partners agree.(Art.193 Cum Art.244).

- Unless otherwise agreed transfer of share require unanimous consent of all partner. (Art.237)
- Does this rule should apply to transfer of share to other existing partner?
- One might argue , a partner has right to freely transfer his share to other partners subject to agreement to the contrary under joint venture contract. (Art.244 cum 194).
- Hence Art. 237 might be limited to transfer of share to a person who is not a partner.

- Note that , having made all the necessary changes as per Art.244 , the rules of General Partnership shall apply to Joint venture on such matters as are related to right of partners(Art.190);Sharing of profit and loss(Art.192);Payment to exiting partner(Art.195); Liability of Exiting Partner(Art.196).

5.3 MANAGEMENT

- A joint venture may be managed by one or more managers, who need not be ventures. Art.238(1).
- In the absence of an appointed manager, each venture shall have the status of a manager.(Art.238(2).
- The joint venture agreement may assign a statutory manager.

- Where two or more managers are assigned , the joint venture agreement should specify the power of each managers.(Art.199 cum Art.244).
- The power specified in the joint venture agreement shall not affect third parties as Joint venture is clandestine in its nature. (Art. 237(1)
- The manager shall account to partners and submit report thereof. No agreement to the contrary is admissible Art. 237(2&3) see also (Art.199(3) cum 244.

- Unlike other partnership Business organization ; third parties only know of the manager ; and he/she is fully liable to third party regarding all debts and obligations of the joint venture.(Art.242(1)
- Partners who are not manager shall be liable to the extent specified in the joint venture contract.(Art.241(2)
- Where a partner who is not manager takes part in the management of the partnership he /she is jointly and severally liable with the manager.(Art.241(3).
- The manager shall deal with third parties in his own name.(Art.241(4).

- A partner who is also a manager of joint venture can be removed for “good cause” Art. 240
- The proviso does not mention the organ that can remove the manager.
- In this regard we can apply Art.202 having made all the necessary changes. (Art.244)
- Art.202 provides three modalities (Amendment of Joint venture contract ; by majority vote of partners and court order)

- What can be cases of good cause ? Eg. Engaging in competitive business activities(Art.202 cum244); Conflict of interest(Art.200 cum244) embezzlement of fund; gross negligence, violation of laws; etc..
- A question that begs an answer is the case of a manager who is not partner.

5.4 DISSOLUTION OF JOINT VENTURE

- General provisions on dissolution of all business organization shall apply subject to special rules of dissolutions of joint venture.
- According to Art 181 of NCC a business organization shall dissolve up the following grounds :
  - Up on achievement or failure to achieve the objectives of Business organization.

- Unless the members decided to continue , up on expiry of life span of the organization.
- By mutual agreement of the members.
- By decision of court up on application of by members where there is good cause irrespective of contrary agreement.
- Up on declaration of bankruptcy by court.

- Do you think the list of ground for dissolution of any form of business organization under Article 181 are compatible with Art.242 which deals with dissolution of joint venture?
- The list under Art.181 should be read with Art. 242 in order to make sense to the peculiar nature of Joint venture. Hence the following are grounds of dissolution.
  - Hence , One of the most plain grounds of dissolution is unanimous consent of ventures(Art.242(1)(a).

- Up on request of a single member where the joint venture is created for undefined period(Art.241(1)(b).
- Where a single member owns all shares.
- Subject to contrary agreement where a member dies, bankrupt or declared incapable.
- Where joint venture contract authorize the manager to dissolve and the latter did the same.