DEFINING TRADERS

- WHO IS TRADER, WHO IS NOT?
- WHO MUST BE TRADER?
- WHO CANNOT BE TRADER?

- In a nation where a commercial code is distinct from the general private law (civil code), **scope of application of the civil code on the one hand and the Commercial Code on the other hand has to be specified.**
- In determining to whom or to what the Commercial Code applies we have seen that there two principal approaches: the subjective criterion; the objective criterion.
- Under the subjective approach commercial law is the **law for those practicing in commerce.**
- Therefore, the scope of application of commercial law is determined by the **definition of that class category** i.e. definition of traders and business organizations.
- The Commercial Code thus regulates the legal status of these categories and incidentally regulates the activities they carry out.

- In objective approach, commercial law primarily regulates certain legal transactions which are classed as commercial acts ***whosoever carries out them and regardless of how frequently or rarely one carries out them.***
- Therefore, the **scope** of application of commercial law is **delimited by the definition of commercial transactions.**
- **Do you think following each of the above approach has any practical implication?**

- With respect to determining to whom or to what the Commercial Code applies, the drafters of our commercial code **opted for the subjective approach.**
- **Hence, identification of traders from non-traders is essential** in that traders are primarily subject of commercial law while **non-traders are subject of the civil code** as their activities are not commercial but civil ones.
- Then, who are regarded as traders under the Ethiopian law?

General Conditions

- Two conditions are provided in article 5 in determining whether a person who engages in a certain economic activity can be regarded as a trader or not.
  - **General Condition**
  - **Special Condition**
- **These are also termed as positive definitions.**
- **The general condition consists**
  - **Existence of an enterprise or business,??**
  - **Existence of a profession,**

  The goal of realizing profits

General Conditions

Business

- **Even if it is not explicit, the business requirement can be read into Article 5 without difficulty for two reasons:**
- **One can get this from cumulative reading of article 107 & 106 (new)** and 5.
  - **As per article 106 "**A **business** is an incorporeal movable consisting of all movable property brought together and organized ***for the purpose of carrying out any of the commercial activities in Article 5 of this Code***.
  - Articles **107** stipulates that "Every trader operates a business."
- From this, it appears that there is no trader who does not operate a business.

General Conditions

Business

- According to art. 107 (1) "Every trader operates a business."
- Do you think a contrary reading of this provision holds true?
  - i.e., every person who operates a business is trader?
- Read sub-article 2 of the same provision which reads:
  - *A trader may operate a business in the capacity of owner, usufructuary or lessee; only the person who operates the business shall be deemed to be a trader and* ***the owner or lessor*** *of the business shall not be regarded as a trader.*
- What do we mean by operating a business? The

Profession

- **The second requirement of the general condition says that one who operates a business has to do so professionally.**
- The dictionary meaning of the term profession presupposes **a person who has acquired some kind of learning or training** in certain defined field of study or occupation requiring **high level of training and proficiency.**
- **However, under art. 5 profession requirement refers to something different from its regular definition/meaning.**
- **Rather, it refers to a principal calling, vocation, or employment.**
- In other words, a person who operates a business as a par time or in her leisure cannot be counted as

Profession

- So, what matters is whether:
  - **The activity is a source of livelihood**:
    - Accordingly, a trader is one who opted carrying out activities mentioned in art. 5 as his own career and livelihood.
  - **Frequency/repetition**
    - Should be understood to mean that the person should spend all or most of his working time on it and gets livelihood from that activity.

Profit

- The third requirement tells us that one who starts a business and engages herself in such business professionally does not become a trader **unless she does so for profit.**
- This parameter inquires into **the motive for carrying on the activity.**
- It requires that the activity should be one giving economic benefit or profit.
- The nature of gain should not be of moral or other indirect psychological satisfaction but only of material benefit (profit).

Special Conditions

- According to the special condition, a person does not become a trader the moment she runs a business professionally and for gain.
- **The business objects** of such person has to be to carry out activities identified as commercial acts.

Special Conditions

- The activities that would vest a person the status of trader are provided in Art .5.
  - **N.B.** The enumeration of activities under art. 5 has the purpose to provide the definition for traders.
- Traders as subject matter of commercial law are not defined in their own but **in light of the activities** that they should carryout to qualify as trader.

- The amended Code has followed the same approach in defining traders that are governed under it but expanded the list of business activities.
- All of the activities listed in the ECC have been kept intact and 16 more activities have been added.
- The amended Code also indicated clearly that the list is illustrative rather than exhaustive by using the words: “similar activities”.

- Further Proc 980/2016 defines
  - *“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; (art. 2 (2))*
- *Making the list under art.5 illustrative.*

Negative Definition

- **A negative definition of the trader is also to be found in several provisions.**
- **These are the circumstances that negate a person from a definition of traders.**

Negative Definition

Depending on the scale of operation

- If the scale of operation is large it renders the author a trader. If it is small scale, he would not be a trader.
- There is no automatic exclusion, rather it depends on the scale of operation.
  - **Farming and forestry (Art. 8)**; Persons, who carry on activities relating to agriculture, forestry, plant nursery, cattle breeding or maintaining pasture land, shall not be deemed to be traders whether the exploitation is individual or collective.
  - But, there are conditions:
    - *The rule applies only where they sell the products of the land they exploit or use, or animals or the products of animals bred mainly **from the resources of the land which the said persons exploit** or use or crops and processed animal products produced from the same land.*

Negative definition

Handicraftsmen (art. 7)

- The provisions of this code relating to traders shall not apply to handicraftsmen.
  - Who are handicraftsmen? Compare art. 9 of the 1960 and art. 7 of the new code.
    - Have craftsmanship skills;
    - Who live mainly on their manual work;
    - Alone or with the assistance of members of their family;
    - Not more than three employees or apprentices;
    - Buy only such material as is necessary for carrying out their activities, without setting up stocks;
    - Use their hands and may also use as appropriate, small tools or machines.
  - Handicraftsmen already excluded by sub art. 5 sub-arts. 7, 8, 9, 10, 11, 12, 13, 15, 17, 32, 33, 35, 36 which declare that certain activities are not commercial if

Negative definition

Small-Scale Works (Art. 6)

- Persons who undertake activities under Sub-Articles (4), (5), (31), (32), (33), (35) and (36) of Article 5
- Who shall deemed as a small-scale workers?
  - uses his experiences or knowledge acquired through education or both;
  - by himself or with the assistance of not more than three employees or apprentices;
  - buys only such material as is necessary for carrying out his activities, without setting up stocks
- This article provides for exemption of persons who are traders by virtue of the definition in art. 5 but deliberately excluded (treated as non-trader) by the exclusion in art. 6.
- Both under articles 6 & 7, only small scale operations are exempted so that they would not be unduly encumbered with obligations imposed on traders.
- Others special laws are applicable to these category of people.
- Compare articles 6 & 7.

Negative definition

- **Certain categories of people are also not regarded traders:**
  - **Persons entitled to use rural land under the law art. 5 (4);**
  - **27 (2) commercial employees;**
  - **32 (2) manager;**
  - **36 (3) commercial travellers;**
  - **37 (2) commercial representatives.**

Negative definition

- **Institutions not governed by this law** even where they carry on activities under article 5 (art. 4)
  - Administrative organs that are bodies corporate under public law: Administrative institutions seem to refer to the various government ministries, commissions, authorities that do not have a profit making aspect but may do so incidentally.
  - Religious institutions,
  - Civil society organizations, and
  - Cooperative societies.
- **Read sub-art. 2 of art. 4 for exception.**
- **Comm. Code is applicable to** public

These institutions:

- Do not assume the status of trader whatever their activity may be.
- They are subject to special laws.
- Where bodies corporate carry on commercial activities, some provisions applicable to traders and business organization may apply to them but **only if there is a stipulation subjecting them to such rule.**
- Otherwise the presumption is that they are out of the scope of the law of commerce.

- **Certain categories of persons shall be regarded as traders though they do not d**irectly produce goods or render service;
  - Holding company (art. 9);
  - Commercial agent (42),
  - Commission agent (art. 58),
  - Commercial broker (art. 54),
  - Stock broker (art. 60) and any kind of agency

Membership to Business Organization: does all BOs render members traders?

Reading assignment:

- Which business organizations render the members the status of a trader and which do not?

Persons incapable/capable of carrying on a trade (engage in particular activity)

- Persons incapable under the relevant law may not be traders (art. 10)
- Tutors may not carry on a trade in the name and on behalf of a minor (art 11)
  - Compare this with the provisions of RVC
- Minors emancipated in accordance with the relevant law may carry on a trade (art. 12)
  - **What is the difference between** art. 12 of the new Code and art 13 of the old Code?
- Under the old code, minors are subject to a bit further incapacity in that even after emancipation there is no automatic capacity to act as a person of age in trade matters unlike the new Code.

Persons incapable/capable of carrying on a trade (engage in particular activity)

- **Effect of minority in Relation to Third Parties (Article 13.)**
  - Compare this with the provisions of RVC

Freedom to carry on Trade

- Art 41(1) of the FDRE Constitution provides that every Ethiopian has the right to engage freely economic activity and to pursue a livelihood of his choice anywhere within the national territory.
- Art 41(2) specifies that every Ethiopian has the right to choose his or her means of livelihood, occupation and profession.
- **Thus the principle is, obviously, every one is free to act as a trader.**
- But, as rights are often not absolute the law imposes some voluntary and compulsory restrictions or even prohibitions on the right to act as a trader.

Freedom to carry on Trade (art. 21) read cum with FDRE Constitution

- Any person has the right to carry on any trade subject to:
  - Restrictions specified by law (art. 22, 25 new code cum 513 of old code);
  - Prohibitions regarding unfair competition; (see arts. 11, 29 (1), 38 (1), 45 (1), 53 (1), art. 130 (1))

- **Right of married persons to carry on trade** (art. 15 - 20)
  - Compare with art. 16 of the 1960 code as well as the relevant provisions of RFC
  - Married persons are at liberty to carry on trade
  - If the other spouse wants to avoid the risk of speculative business the law has granted the option to object.
  - In fact the objection by a spouse would no restrict the freedom of trade of the other spouse.
  - It only restricts the recovery of debt to the personal estate of the trading spouse only.

- In general, the Commercial Code has attempted to distinguish persons that may be considered as traders and that are not.
- But, even after fulfilling the positive and negative conditions discussed so far, a person may need to go through other formality requirements which may affect his status as traders.

- See for instance,
- Art. 83.
  - A trader shall make his application and get registered before he begins to carry on trade.
  - Art. Failure to do so may even attract criminal liability.
- art. 100:
  - “Any person who fails to register in accordance with the provisions of this Code **may not hold himself out to be a trader** to third parties”

- A person ceases to be a trader after cancelling his registration from the register art 94 cum 99. Otherwise he shall be irrefutably presumed to be a trader.

Why would we care about the definition?

- The necessity to define business arises because only traders are subject to commercial law while non-traders are subject to civil law.
- Further, there are special obligations and some times probably privileges that traders are subject to or entitled as distinguished from non-traders.

- The major obligations of traders particularly from the perspective of Ethiopian law involves:-
  - The duty to keep books and accounts (arts. 61 ff)
  - The duty to register in the Commercial Register of at the ministry of trade and industry; (arts. 82)
  - Subject to bankruptcy proceeding (art. 705) as opposed to the ordinary rules of civil procedure on insolvency of civil debtors;
  - Subject to other specific rules of the Commercial Code as opposed to civil code where difference in content of the two exists. (art. 1)