The Commercial-Civil Dichotomy of Business Organizations and Its Legal Significance under Ethiopian Law

Gizachew Silesh[♦]

Abstract

The classification of business organizations into commercial business organizations and civil business organization (also known as non-commercial business organizations) is traditionally maintained in most civil law countries. The Ethiopian legal system, which maintains distinct civil codes and commercial codes, also upholds the classification of business organizations into commercial and civil business organizations. With respect to this classification, a host of issues remain blurred. What is the basis of the classification? Is the basis of the classification clear cut? What are the legal consequences of this classification? What legal frameworks do these categories of business organizations share and where do they differ? Do we necessarily need to sustain this dichotomy anymore? Has any subsequent legislation affected the earlier legal framework of the distinction in the Commercial Code of Ethiopia? These issues and other related matters deserve critical consideration in the Ethiopian context. Through analysis of these issues, this article concludes that the civil-commercial dichotomy of business organizations is somewhat old fashioned, at least in some respects, and under Ethiopian law it has put civil business organizations at a disadvantage.

Key Terms: Commercial Business Organizations, Civil Business Organizations, Commercial Activities.

[♦] LLB (Addis Ababa University), LLM (Addis Ababa University), Lecturer, Bahir Dar University, School of Law.

Introduction

Traditionally, a division of private law in to civil law and commercial law is maintained in the continental legal system.[1] However, whether there exists a compelling logic to divide the general private law in to civil law and commercial law has continued unsettled. The points of convergence and divergence between commercial and civil law remain contested. Scholars ponder on questions about what distinct category of subjects and/or transactions the two branches of private law distinctly regulate.[2] Do they significantly differ in content and then have differing consequences in regulation? The general response is that the two branches of private law have special subjects and transactions to regulate; commercial law specifically governs commercial transactions (as opposed to civil transactions) and/or merchants and business organizations (as opposed to other persons).[3] Nevertheless, there are no satisfactory scientific criteria to precisely demarcate these domains of commercial law in contrast to those that are the subject of civil law.[4] Indeed, cross-references between the two branches of private law whereby one recognizes the applicability of the other branch of private law as a gap filling law are common but this cross reference tends to

[1] See generally, Tallon, Denis, Civil Law and Commercial Law, in David, R *et al* (eds.), International Encyclopedia of Comparative Law, Volume VIII, Chapter 2(Martin Nijhoff Publishers,; the Hague, Boston, London; 1983).

[2] Ibid.

[3] Ibid.

[4] Enrique Lalaguna Domínguez, The Interaction of Civil Law and Commercial Law, 42 La. L. Rev. (1982)

Available at: http://digitalcommons.law.lsu.edu/lalrev/vol42/iss5/10 P.1634.

reduce their distinctness.[5] Along with this controversy, there comes the problem of delineating categories of subject matters regulated by the two. The classification of natural and legal persons as a primary subject of either of the two has posed a challenge.

In an attempt to demarcate the subjects of the two branches of private law, there arose the classification of business organizations into commercial business organizations and civil business organizations. It continues to be a point of contention as to whether the categorization of business organizations into commercial and civil would/should put them into the exclusive domain of commercial law and civil law respectively. The Ethiopian legal system, that has maintained distinct civil code and commercial code, has also adopted the classification of business organizations into commercial and civil business organizations.[6] This dichotomy has left a host of issues awaiting exposition but little or no research has done that so far. The distinction might be particularly perplexing in Ethiopia since both of these business organizations are regulated by the Commercial Code, unlike the case of many countries with similar distinction but that are regulated separately in the commercial codes and civil codes. This article aims to uncover the basis of such classification, the legal consequence of the distinction, as well as the importance or otherwise of maintaining the distinction with the pre-existing scope particularly in the Ethiopian context.

---

[5] Ibid.

[6] Commercial Code of the Empire of Ethiopia, 1960, Art.10, Proclamation No.166 / 1960, Neg. Gaz., Year 19, No.3 (Herein after Commercial Code).

Methodologically, the author heavily relied on review of literatures and laws in the continental legal system to explain the position of Ethiopian law on issues raised. This article is organized in to four main sections. The first section of this article, briefly explores the notion of business organizations in Ethiopia generally while the second section reviews major classifications of business organizations based on different parameters. Particular emphasis is given to the exposition of the distinction between civil business organizations and commercial business organizations for which section three is dedicated. Since classification partly depends on the nature of the economic activities in which they engage, this section has also provided a fair account of the distinctive feature of commercial activities and the non-commercial activities, with a separate portion on commercial activities in Ethiopian law. In addition, justifications for the distinction between commercial and civil business organizations based on their form of organization are offered. Section four is devoted to analysis of the legal significance of having the distinct category of business organizations. It constitutes a significant portion of this article. Finally, under section five, concluding remarks are provided, in which the writer forwards his appraisal of the relevance of the distinction. As the scope of this piece does not allow, this author does not claim to have undertaken exhaustive investigation of implications of the distinctions.

1. A Brief Overview of Business Organizations under Ethiopian Law

Commercial law plays a pivotal role in facilitating the business environment. Nations strive from to provide the utmost suitable legal environment for operation of business. Commercial activity may be carried out individually or

in groups where businessmen join hands to exploit the advantages from mobilizing capital, skill and other resources.

Commercial law has lent its hand in assisting the creation and operation of a number of alternative ways of doing business. A person may conduct business as a sole proprietor (trader). Alternatively, business people having the common goal of operating business by combining their capital and/or labor may avail business organizations may be employed as a way of doing business. The laws of many nations, including the Ethiopian Commercial Code, provide various alternatives of these business associations. These alternatives business associations are just like the menu from which the persons who intend to join hands for their business success would select according to their preferences. Each form of business association has its own advantages and disadvantages. Which form is best adapted to a particular venture depends on many factors such as the nature of the business, the number of associates, their relative ability and willingness to participate in management, the extent of their capital investments, etc.

The Ethiopian Commercial Code recognizes six forms of business organizations[7] namely, ordinary partnership, general partnership, limited partnership, joint venture, share company, and private limited company. The law defines business organizations in general by describing their common attributes, and then characterizes each of them separately. According to Art. 210(1) of the Commercial Code, a business organization is "any association

[7] Commercial Code, *supra* note 6, Art.212.

arising out of a partnership agreement." This definition simply tells us that there must be a voluntary association[8]/grouping between two or more persons. Needless to say, not all voluntary groupings are business organizations. A fair rectification of the limitation in this definition could be derived from its reference to 'partnership agreement' as a base for establishment of business organizations-that all business organizations are preceded by partnership agreement. A partnership agreement is defined as "a contract whereby two or more persons who intend to join together and to cooperate undertake to bring together contributions for the purpose of carrying out activities of an economic nature and of participating in the profits and losses arising out thereof, if any."[9]

Some important, and perhaps distinctive, attributes of business organizations are enshrined in this definition. First, it tells us that business organizations come in to existence by virtue of a contract implying that all requirements for validity of contract must be met. Also, as business organizations are groupings, we need at least two persons. This requirement of minimum of two persons is true for all business originations except a share company, in which at least five persons are required.[10] It also indirectly informs us that Ethiopian

[8] The use of the term 'association' in definition of business organizations as "any association arising out of a partnership agreement" might be misleading when seen in conjunction with the Civil Code provision on association. The term association is not used in the sense it is used in Art.404 of the Civil Code. Rather it is better to understand it as grouping of persons. See Civil Code of the Empire of Ethiopia, 1960, Art.404, Proclamation No.165 / 1960, Neg. Gaz., Year 19, No.2 (Herein after Civil Code).

[9] Commercial Code, *supra* note 6, Art.211.

[10] Ibid., Art. 307(1).

law does not recognize a business organization with a single member, unlike the case of some countries where a one person company is recognized.[11]

Moreover, the phrase "… intend to join together and to cooperate…" implies that the parties must have a community of interest and intend to collaborate. A business organization arises from deliberate act. It does not arise from possession of status such as being heirs to one person and joint owners of property. Commitment and intent to collaborate must be accompanied by contribution (in kind or in cash)[12] toward the capital of a business organization. An important element in this definition is the purpose of cooperation agreement- to carry out economic activity and thereby seek to earn profit. Yet engagement in business activity may entail loss. The parties

[11] See Commercial Company Act (of Portuguese), (Republished by Decree-Law No. 76-A/2006, of 29 March and amended by Decree-Law No. 8/2007, of 17 January and Decree-Law No. 357-A/2007, of 31 October), (herein after Commercial Company Act of Portuguese), Art. 270- A. For instance the Portuguese commercial code recognized Single-member Private Limited Companies. It prescribes in Article 270- A Establishment-that:

1) Single-member private limited companies shall be established by a single partner, an individual or legal person, who is the owner of the entire share capital.

2) Single-member private limited companies may lead to a concentration in the ownership by a single partner of the quotas in a private limited company, regardless of the reason for the concentration.

3) The conversion referred to in the previous paragraph shall be brought about by means of a declaration by the single partner, in which their will to convert the company into a single-member private limited company is expressed. The said declaration may form part of the document entitling the transfer of shares.

[12] Commercial Code, *supra* note 6, Arts. 229-232.

realize that and agree to share both in profits and losses.[13] These being the elements of the definition, it gives the impression that if there is a partnership agreement that fulfills all of the definitional elements elaborated here, there will be a business organization. This would relegate a business organization into a mere contractual relationship among persons. However, business organizations (except joint venture) are vested with institutional character that goes beyond contractual relationship. They do have their own legal personality.[14] They will acquire legal personality upon registration in the register of commerce.[15] Although business organizations share common characteristics as enshrined in the definition of partnerships agreement, each of them have unique attributes, some of them share several features not shared by others; they can be typified and classified in different ways.

[13] Ibid., Art. 215. The partnership agreement may never award all profits to some of the partners alone. All should have a share in profits. Similarly no partner may be exempted from losses that may accrue. All partners should take parts in the losses as well. Otherwise the partnership agreement is not valid. However, there is one exception. As per Art 254 a partner in ordinary partnership who contributed skill may be exempted from sharing in losses.

[14] Some of the requirements of the definitional elements do not apply to joint venture. A joint venture as a business organization is somehow unique than other business organizations. Thus even though there has to be a partnership agreement for formation of joint venture, it does not need to be in writing unlike other business organizations. Nor should it be registered. And hence it does not have legal personality. See Ibid., (Arts. 272(2) & (3).

[15] Ibid., Art. Art. 222; Commercial Registration and Business Licensing Proclamation, 2010, Art. 9, Proclamation No. 686/2010, Fed. Neg. Gaz., Year 16, No.42. This proclamation amended the publication requirement in the Commercial Code. It provides that "[b]usiness organizations shall acquire legal personality by registering in the commercial register without being publicized in a newspaper as provided for under Article 87, 219, 220, 223 and 224 of the Commercial Code for their establishment or amendments to their memorandum of association."

2. General Overview of the Classification of Business Organizations

Business organizations may be classified in various ways. Common classifications include personal versus capital business organizations; closed (private) versus open (public) business organizations; and commercial versus non-commercial/civil/ business organizations.[16]

The personal versus capital classification of business organizations corresponds to the distinction of Ethiopian business organizations into partnerships and companies respectively. Of the six business organizations, the category of partnerships embraces four of them namely, 'ordinary partnership', 'general partnership', 'limited partnership', and 'joint venture'. The remaining two i.e. 'private limited company' and 'share company' could be characterized as capital business organizations.

Personal business organizations (partnerships)are basically characterized by the central character of the partners and the greater simplicity of its internal organization and regulation. This personal element is clearly portrayed in the legally stipulated main features that liability of the partners for the partnership debts is unlimited though subsidiary,[17] minimum statutory capital is not required,[18] service is recognized as valid contributions,[19]

[16] See Antunes, José Engrácia, An Economic Analysis of Portuguese Corporation Law-System and Current Developments, at http://www.estig.ipbeja.pt/~ac_direito/antunes.pdf; >(consulted 5 November , 2014).

[17] For instance, See Commercial code, *supra* note 6, Arts.255&294.

[18] While the provisions dealing with companies stipulate minimum capital, no similar requirement exists in relation to partnerships. See Ibid., Arts.306(1)&512(1).

interests(share) in the partnership are not freely assignable,[20] the inclusion of the name of at least two partner in the partnership trade name is a requirement,[21] each partner plays prominent role in the management of the partnership[22] and equal voting right[23] (if no other wise agreement is provided). All these show the focus of partnerships is on the persons becoming partners and subsidiary nature of capital in partnerships.

Concerning capital business organizations, of which share company is the prototype under Ethiopian law, the element of capital comes to the forefront: shareholders are not liable to debts due by the company so long as they have made their promised contribution,[24] the company has a minimum mandatory equity capital,[25] shares are, as a rule, freely transferable,[26] and the corporate organization is complex and largely mandatory,[27] decision- making power depends on the amount of voting rights as measured by the capital

---

[19] Ibid., Arts. 254.

[20] Ibid., Arts. 250&302.

[21] Ibid., Ibid., Art.281(1).

[22] Ibid., Arts. 236&287.

[23] Ibid., Arts. 234&288(3).

[24] Ibid., Arts. 304&510(1).

[25] Ibid., Arts. 306(1)&512(1).

[26] Ibid., Arts. 333&523.

[27] Ibid., Arts. 347,368,388, 525. These provisions demand that there must be shareholder meeting, board of director, and auditors in case of share companies, and in case of private limited company there must be a designated manager and depending on the number of shareholder there may be shareholders meeting and auditors.

contribution of shareholders.[28]

Business organizations may also be categorized as Private (or closed) versus Open (or public). This distinction is also common in contemporary company law systems all over the world.[29] Definitions for this distinction might vary across legal systems. But the essential characteristic is that open corporations are open to public investment while private ones are not. For instance, according to Portuguese law, public (open) corporations *(sociedades abertas)* are defined in general as stock corporations whose equity capital is open to public investment.[30] The criteria of the legal definition might be several and alternative, including corporations incorporated through an initial public offering for subscription, corporations that issued shares or other securities granting the right to subscribe or to acquire shares that have been the object of a public offer of subscription, corporations that issued shares or other securities that are or have been listed on a regulated market operating in Portugal, corporations whose shares have been sold by public offer for sale or exchange in a quantity greater than 10% of their nominal capital, or corporations resulting from a the split up of, or a merger to, a public corporation.[31] In contrast, private or closed companies are defined negatively, as being all those companies whose parts of capital are not freely transferable

[28] Ibid., Arts 407&534(2).

[29] Antunes, supra note 17, p.11.

[30] Ibid.

[31] Ibid.

and which, therefore, cannot be admitted to listing on a stock exchange.[32]

A parallel distinction can be made in Ethiopian law though the absence of stock market in Ethiopia may render this comparison less full-fledged. It appears that only a share company qualifies as public company in Ethiopia. A share company may be formed by public offering for subscription in which case it becomes public company at the initial stage.[33] Or it can be formed among founders without offering for public subscription in which it remains private (closed) but can become public at later stage as Share Company is authorized to issue transferable security including debentures and increase capital by offering for public subscription.[34] But private limited company and all other business organizations in Ethiopia cannot issue transferable security or mobilize fund by public subscription,[35] and as such can only be private. Another distinction of business organizations is into commercial and non-commercial ones, which is discussed in detail next.

3. Classification of Business Organizations into Commercial versus Civil/Non-Commercial/ Business Organizations

3.1. The General Trend

The distinction between commercial and civil/non-commercial business organizations has long caused confusion, lending itself to diverse

[32] Ibid.

[33] Commercial code, *supra* note 6, Art. 317.

[34] Ibid., Arts.429-434

[35] Ibid., Art.513

understandings in different legal systems. At times, the classification of business organizations into commercial and civil is alien to some legal systems. This distinction is not familiar, or, if familiar, not very important in common-law jurisdictions.[36] Perhaps a common law lawyer may be surprised to learn that a certain company is civil and the other is commercial while both are engaged in profit making activities, and as such the civil one is not subject to bankruptcy proceeding while the other is. On the other hand, classification of business organizations into civil and commercial is made in French Commercial Code. Similarly, division between two basic sets of companies is held in many continental legal system adherents like Germany, Spain, Portugal, etc.[37] Also the Latin-American civil law countries distinguish between commercial partnerships and civil partnerships whereby the two classes of business organizations are subject to different legal requirements and consequences.[38]

The bases of distinction between civil and commercial business organizations and its justification could be explained perhaps more on historical ground than scientific inquiry. An inquiry into the origin of the distinction between

[36] Andenæs, Mads Tønnesson & Frank Wooldridge, European Comparative Company Law, p.101

[37] Ibid.

[38]See generally Cueto-Rua, Julio, Administrative, Civil and Commercial Contracts in Latin-American Law, 26 Fordham L. Rev. 15 (1957). Available at: http://ir.lawnet.fordham.edu/flr/vol26/iss1/2. Cueto-Rua noted that commercial partnerships are endowed with juridical personality while there is a serious question, at least in several Latin-American countries, as to whether civil partnerships (*sociedad* civil) have or have not a juridical personality.

civil law and commercial law will ultimately lead us to appreciation of the foundation of civil and commercial business organizations dichotomy. Historically, with the growth of commerce there appeared a body of customs and practices applicable to merchants as a class that constituted what is commonly known as *lex mercatoria* or law of the merchants.[39] The *lex mercatoria* then underwent a profound change due to state intervention that ultimately led into the codification of rules governing merchants (traders), on the one hand, and separate rules governing civil matters, on the other hand, that finally resulted in the codification of separate civil and commercial codes among the Romano-Germanic legal families. Notable in this regard is the Napoleonic codification (Civil Code of 1804 and Commercial Code of 1807) that opened the era of distinct codification of private law.[40] Accordingly, the economic engagement of some persons is governed by the commercial law while others are governed by the civil law.[41] On the other hand, in common law countries the *lex mercatoria* was absorbed, by and large, into the general private law-common law-without leading to separate commercial law codification though recent enactments of separate commercial legislation such as the 'Uniform Commercial Code' in United States raised doubts as to the total demise of the distinction.[42]

[39] Tallon, supra note 1, p.7-9

[40] Ibid, p.8.

[41] It assumes that the commercial law and civil differs in substantive content of the rule, the rules of evidence required to prove a case depending on whether a matter is governed by commercial law or civil law. See Cueto-Rua, *supra* note 38, p.24.

[42] Ibid, p.47-56.

However, in those countries where separate civil and commercial codes are adopted, a clear demarcation of the respective domain remained blurred. In determining to whom or to what the commercial law applies, as distinguished from to whom or to what the civil law applies, two different approaches have been employed: the objective and the subjective approaches.[43] Some countries, Germany[44] for example, adopted the subjective approach while others such as Spain[45] opted for the objective approach. The two criteria are never exclusive.[46] It is only a matter of which approach dominates in commercial law of a given country. Some other countries, like France, have mixed the two approaches without one being clearly more important than the other.[47]

In the objective approach, commercial law mainly regulates certain legal transactions which are categorized as commercial transactions.[48] In this approach, the basis of commercial law is the definition of these transactions irrespective of whoever carries out these transactions. The commercial transaction may be determined by providing an objective list of acts, though usually not exclusive, or setting forth some general statement that

[43] Ibid., 9.

[44] Ibid.10.

[45] Ibid.

[46] Ibid.

[47] Ibid.,29.

[48] Ibid., p.11.3

characterizes them objectively.[49] The substantive content of commercial law based on the objective criterion is primarily made up of rules governing these transactions.

The subjective approach holds that commercial law is the law for those practicing commerce.[50] In other words, it is the law for a determined social professional category known as merchants[51] (both individuals and legal entities). Thus commercial law regulates principally the legal status of merchants and as a subsidiary matter the operation they undertake. The commercial law being the law of merchants, the scope of commercial law in a

[49] Ibid., P.27. By way of definition, acts of commerce/ commercial transaction/, are those which are commercial in themselves, i.e., independent of the profession of whoever undertook them. An alternative definition is that 'acts of commerce'are either those which promote or facilitate the circulation of wealth or those which are performed for profit or speculation. In general, those doctrines have hinged upon the ideas of mediation between producer and consumer, profit and speculation.. Atypical "objective act of commerce" is the purchase of goods for resale, commercial transaction in itself, regardless of the profession or calling of the buyer.Ibid., P.25. But this definition failed to be comprehensive enough, it is admitted that some transaction should be subjectively defined even in these systems adopting the objective approach. Even the French Ordinance of 1763, where the objective criterion appeared for the first time, declared that business transactions(actes de commerce, actos de comercio), were those conducted by merchants. 25. Acts that are deemed to be commercial solely because they were undertaken or performed by merchants are subjective acts of commerce. Usually a merchant is described as one who: (1) performs acts of commerce, (2) in his own name, (3) as a profession. Ibid., P.38

[50] Talon, *supra* note 1,p.10.

[51] Ibid. Despite the absence of homogeneity in determining to whom or to what economic activities commercial law would apply, the Romano-Germanic legal families recognized duality of private law (dichotomy into civil and commercial) and agree that commercial law applies to merchants (broadly understood to embrace both individuals and organizations having legal personality that engage in certain activities).

given country depends on how merchants are defined. The usual criteria[52] for defining merchants are the "economic activities" in which the person engages, the form of organization (for business organizations), and the means employed.[53]

Individual merchants/traders are defined as those who carry on "commercial activities"[54] as a principal activity and for profit.[55] In relation to legal entities, 'economic activities' and the form of organization are alternative used as defining factors for identifying business organizations that qualify for status of merchant (to be subject of commercial law). For instance, the Portuguese commercial law prescribes that:

---

[52] Ibid. For example, in Germany, the definition of merchants depends upon the economic activities the person engages in, the means employed, the form of business organization, etc. Ibid, p.14. Based on economic activities, merchants/traders/ are defined as those who carry on commercial activities as a principal activity and for profit, accompanied by list of "commercial activities"- a list of 9 mercantile trades/commercial activities is provided.. See German Commercial Code (of1897), Translated and Briefly Annotated by A. F. Schuster, of the inner temple, barristek-at-law 1911, digitized in 2007, Art.1(1), (herein after German Commercial Code).

[53] The definition of merchants based on the means employed often comes into picture not to define merchants; rather, it helps certain category of persons undertaking commercial activities and thereby would qualify as a merchant to be exempted from certain rigidities of commercial law. They are often referred to as artisans or hand crafts men. See German Commercial Code), Ibid., p.14,35. To qualify for this exemption, it is usually required that the person needs to be one who works at manual job and employs his own and his family's labor.

[54] Determining what constitutes the class "commercial activities" is found to be difficult. A fair detail is given below (see section).

[55] German Commercial Code, *supra* note 52.

> *This law (Commercial Companies Act) shall apply to commercial companies. Commercial companies are those whose purpose is to exercise commercial activities and which take the legal form of partnerships, private limited companies, public companies, limited partnerships or limited partnerships with share capital. Companies having as their purpose the exercise of commercial activities must take one of the forms referred to above. Companies having the sole purpose of practising non-commercial activities may take one of the forms referred to in paragraph 2 (second sentence), in which case they shall be subject to this law.*[56]

Similarly, the French Commercial Code declares that "[t]he commercial nature of a company shall be determined by its form or by its objects. General partnerships, limited partnerships, limited liability companies and joint-stock companies are trading companies by virtue of their form, irrespective of their objects."[57] Other legal systems as well adopt similar criteria.[58] Thus a business organization is considered commercial if its purposes are the performance of commercial activities while a business organization is considered civil/non-commercial if its profits are to be made in the performance of civil acts/non commercial activities. Moreover, perhaps due to some difficulties encountered as to the civil or commercial nature of the activities,[59] additional criterion based on form of organization is adopted to

[56] Commercial Company Act of Portuguese, *supra* note 11, Art.1.

[57] French Commercial Code, , Updated 03/20/2006, (herein after French Commercial Code), at http://ox.libguides.com/content.php?pid=108878&sid=819232> (consulted 6November , 2014), Art. L210-1.

[58] The latin-American civil law countries do have similar classification criterion. See Cueto-Rua, *supra* not 38, P.42.

[59] Ibid.

define status of legal entities as merchant. A business organization performing activities other than commercial activities and did not adopt any one of the types specified for commercial business organizations shall be considered civil/non-commercial concern (non-merchant).

It is this attempt to determine to whom the commercial law applies that led to the distinction of business organizations into commercial and civil. Civil business organizations are subject to the rules of civil code and commercial business organization subject to commercial code. This holds true at least for most dualist countries;[60] however, the scenario in Ethiopia is different as both are regulated by the commercial code.

3.2 The Classification under Ethiopian Law

As noted above, legal systems distinguish between commercial and civil business organizations usually based on either of two grounds: the purposes of the business organization or its form. In this regard, the Ethiopian Commercial Code pursues same trend. The relevant provisions stipulate that:

> *Art.- 10 Business organizations*[61]
>
> *(1) Business organizations shall be deemed to be of a commercial nature where their objects under the memorandum of association or in fact are to carry on any of the (commercial) activities specified in Art. 5 of this (Commercial) Code.*

[60] See *infra* footnotes 94-96.

[61] Commercial Code, *supra* note 6, Art.10.

> *(2) Share companies and private limited companies shall always be deemed to be of a commercial nature whatever their objects.*
>
> *Art. 231-Commercial business organisations.*[62]
>
> *(1) Any business organisation other than an ordinary partnership may be a commercial business organisation within the meaning of Art. 10 (1) of this Code.*
>
> *(2) Where a commercial business organisation is created in the form of an ordinary partnership or where the form of the organization is not specified, the commercial business organisation shall be deemed to be a general partnership.*

These provisions speak of commercial business organizations and the criteria thereof implying that there are also civil business organizations.[63] As described above, a business organization, either civil or commercial, presupposes cooperation among two or more persons for sharing profits and losses. Based on the twofold criteria i.e., form of organization and object, the Ethiopian Commercial Code categorizes the six types of business organizations into commercial and civil. With respect to the form of business organizations, the two types of companies (share company and private limited company) are always commercial irrespective of their object of economic engagement. On the contrary, an ordinary partnership can only be civil.

[62] Ibid., Art.213.

[63] The terms civil and non-commercial are used alternatively in different literatures. E.g. see Antunes, *supra* note, 16, p. 9. He used the term "civil" to refer to Art 1845 of the French Civil Code that uses the term "non-commercial" to refer to similar entities. For our consumption the term civil might be preferable to the term non-commercial as the latter might be misleading giving the impression that these business organizations are non-profit making/civil society/organizations.

Whenever a business organization purports to be an ordinary partnership it must also ensure that its economic activity falls out of the class of commercial activities listed in Article 5 Commercial Code. Other business organizations i.e., the three partnerships (joint ventures, general partnership, and limited partnership) could fit into either commercial or civil business organizations depending on the object of their economic activity. They shall be commercial where their object falls within the list of commercial activities in Article 5 otherwise they shall be civil.

Notable from this discussion is that while most civil law countries including Germany, France and Portugal extend the default category of commercial business organizations into partnerships as well, Ethiopian law has limited that to companies only. Therefore, it follows that the notion of civil business organizations in Ethiopia has to be reduced to partnerships as there is no possibility for companies to be civil. All partnerships other than ordinary partnership could be either commercial or non commercial depending on their object. The default categorization in the above mentioned countries reveals a general tendency to prefer commercial forms and to reserve few alternatives for civil form of organizations. This propensity is reflected to some extent in Ethiopian law. This can be inferred from the 'catch the rest' clause that categorizes business entities engaged in commercial acts with unspecified form into commercial business organizations.[64]

[64] See Commercial Code, *supra* note 6, Art 213 (2).

3.3. Distinguishing commercial activities from non-commercial activities

All that said, why are certain business organizational forms commercial by default while some others may be civil or commercial depending on whether their object is commercial activity or not? In other words, what is the typical feature of "commercial activities" that renders business organizations engaged in these economic activities commercial and while engagement in other economic activities makes business organizations civil?

As discussed above, the very purpose of distinguishing commercial activities from non-commercial activities goes to the question of demarcating the subject matter of commercial law and civil law in the dualist system. As noted above, the general approach in doing that is is relying on either objective test or subjective test or by combining both tests. Since the classification of merchants based on commercial activities is the feature of the subjective approach, characterization of commercial activities is to be sought in countries relying on subjective approach. However, the subjective resolution of the subject matters of commercial law, emphasis is placed on defining merchants rather than defining commercial activities. Of course, merchants are defined in relation to commercial activities but in most cases that is done by mere enumeration of the commercial activities. For instance, the French Commercial Code,[65] which is said to be based on the mixed approach,

[65]See French Commercial Code, *supra* note 57, Article L110-1& Article L110-2 that stipulates:

Article L110-1.The law provides that commercial instruments are:

provides what appears to be a complete list of commercial activities, though practically courts are said to have enlarged the scope by way of interpretation[66]. German Commercial Code, which is based on subjective test,

---

All purchases of chattels in order to resell this, either in kind or after having worked and developed this;

All purchases of real property in order to resell this, unless the purchaser has acted in order to construct one or more buildings and to sell these en bloc or site-by-site;

All intermediate operations for the purchase, subscription or sale of buildings, business or shares of property companies;

All chattels rental undertakings;

All manufacturing, commission and land or water transport undertakings;

All supply, agency, business office, auction house and public entertainment undertakings;

All exchange, banking or brokerage operations;

All public banking operations;

All obligations between dealers, merchants and bankers;

Bills of exchange between all persons.

Article L110-2: The law also deems commercial instruments to be:

All construction undertakings and all purchases, sales and resales of ships for inland and foreign-going navigation;

All sea shipments;

All purchases and sales of ship's tackle, apparatus and foodstuffs;

All chartering or chartering and bottomry loans;

All insurances and other contracts relating to maritime trade;

All agreements and conventions on crew wages and rents;

All engagements of seamen for the service of commercial ships.

[66]Tallon, *supra* note 1, p.32.

supplies an illustrative list[67] of commercial business activities used as a defining element of merchants. In defining the of 'commerciality' of economic activities, the German Commercial code holds that all business activities except those that do not require "commercial business operation" are commercial activities. "Commercial business operation" in turn is described as indicative of scale of operation as measured by turn over, employees, acting via agent, bank finance, etc.[68] This parameter does not disclose the essence of commercial activities that distinguish them from non-commercial ones, as it simply relies on scale of operation rather than inherent essence the activities. Hence, in the subjective system as well, little effort is devoted to explicate the very essence of commercial activities beyond listing of activities. Simple enumeration of activities without defining the nature of activities would be a challenge for courts in countries that adopt illustrative list of activities.

Nevertheless, the traditional specification of commercial activities in commercial laws commonly exempts certain economic activities including "liberal professions"[69] and primary production (agriculture, fishing, etc)[70]

---

[67] German Commercial Code, *supra* note 52. Art. 1(2) provides that an undertaking carried on for purposes of trade in a manner and on a scale which requires a mercantile business organisation, even when it does not fall under any of the heads mentioned in the last section(a list of 9 mercantile trades/commercial activities), is for the purposes of this Code a mercantile trade, provided the undertaker's trade name is entered in the Mercantile Register.

[68] Zekoll, Joachim, Introduction to German Law, Kluwer Law International, , 2005, p.31.

[69] See European Economic and Social Committee, (A study on) The State of Liberal Professions Concerning Their Functions and Relevance to European Civil Society, 5/2013, P.13-14, (herein after European Economic and Social Committee), at (www.eesc.europa.eu)> (consulted 5 November, 2014), p.13.

from the scope commercial activities thereby letting them to fall into the class of civil activities. The commercial laws of Germany[71], France[72] and Ethiopian[73] are notable examples. Yet we need to enquire as to what characteristics justify their exemption. There is no universal definition for the term "liberal profession" but an example here is what the German law has to say on the concept. German law defines a liberal professional service as "a high value service provided in general on the basis of special professional qualification or creative talent, personally, in a professionally independent manner, in the interests of the client and the general public," [74] and provides a long list[75] of these professions.

---

[70] Civil-Law Corporations (German: GbR / BGB-Gesellschaft), at

http://www.frankfurt-main.ihk.de/english/business/legal_forms/gbr/, >(consulted 6 November, 2014).

[71] Zekoll, supra note 68. Members of the learned professions such as doctors, lawyer, accountants, and architects are excluded from the class of merchants on the claim that they are not business people and "only business people can be merchants". Yet the meaning of business people is not clear.

[72] Talon, *supra* note 1, p.33

[73] See Commercial Code, *supra* note 6, Art.5. It is exhaustive list and does not include such activities; See also section 3.4 below.

[74] European Economic and Social Committee, *supra* note 69.

[75] It enumerates the independent professional activities of medical doctors, dentists, veterinarians, medical practitioners, physiotherapists, midwives, massage therapists, psychologists, members of lawyers' chambers, patent attorneys, accountants, tax advisors, economics and business consultants, accountants (chartered accountants), tax agents, engineers, architects, commercial chemists, pilots, full-time court appointed experts, journalists, photo reporters, interpreters, translators, and similar professions as well as scientists, artists, writers, teachers and educators are explicitly mentioned. See Ibid.

European Union Member States recognize several characteristics of liberal professions that include the public interest aspect of the service; the professionally and economically independent performance of tasks; the independent and personal execution of services; the existence of a special relationship of trust between client and contractor; and *the restraint of the profit-maximization motive* (emphasis added). [76]

The liberal professions are 'intellectual' activities that are often subject to strict public supervision to meet public interest. In the exercise of liberal professions there is restraint of the profit-maximization motive since public service aspect is deemed to be their component. In relation to agriculture, the traditional exclusion criterion seems to assume that agriculture is an economic sector for mere subsistence rather than accumulation of profit and wealth.[77] Thus it appears that other economic activities traditionally conceived as civil economic activities are backed by these and similar justifications.

On the other hand, commercial activities such as those listed in Art. 5 of the Ethiopian Commercial Code are economic activities that are operated in competitive and totally profit driven motive. Yet the demarcation between civil and commercial activities remains slippery in that in most commercial codes activities that are considered non-commercial may be considered commercial activities where the scale[78] of operation is significant or the form

[76] .Ibid., p.14.

[77] Talon, *supra* note, p.96-see the topic "enterprise and company".

[78] See footnote 67.

of organization of business organization justifies categorization of the operators as merchants.[79]

The formality test tends to to tell us that some business organizations are more commercial (more profit oriented) than others. An activity which could as well have been civil act becomes commercial when undertaken by a more organized business organization. The more formalized the business organization is, the stronger signal it sends as to its impetus for commerce (profit).[80] In conclusion, both civil and commercial business organizations seek to earn profit but the commercial ones are more profit oriented than the civil ones. The degree of commercialization (level motivation for profit) can be inferred either from the economic activities they engage in or the degree of formalization/organization/. In Ethiopian case, partnerships could be civil or commercial depending on whether their economic activity is civil or commercial respectively. Companies are always commercial because they manifest a high degree of organization as indication of commercialization.

3.4. Commercial Activities in Ethiopian Law

Article 5 of the Ethiopian Commercial Code has come up with a list of 21 commercial activities.[81] Article 5 simply defines 'traders' as persons who

[79] See the paragraphs indicated by footnotes 56, 57&61.

[80] Talon, supra note 1, p. 96.

[81]Commercial Code, supra note 6, Art. 5., - Persons to be regarded as traders.

Persons who professionally and for gain carry on any of the following activities shall be deemed to be traders:

(1) Purchase of movables or immovables with a view to reselling them either as they are or after alteration or adaptation;

(2) Purchase of movables with a view to letting them for hire;

(3) Warehousing activities as defined in Art. 2806 of the civil Code:

(4) Exploitation of mines, including prospecting for and working of mineral oils;

(5) Exploitation of quarries not by handcrafts men;

(6) Exploitation of salt pans;

(7) Conversion and adaptation of chattels such as foodstuffs, raw materials or semi-finished products not by handicraftsmen;

(8) Building, repairing, maintaining, cleaning, painting or dyeing movables not by handicraftsmen;

(9) Embanking, leveling, trenching or draining carried out for a third party not by handicraftsmen;

(10) Carriage of goods or persons not by handicraftsmen;

(11) Printing and engraving and works connected with photography or cinematography not by handicraftsmen;

(12) Capturing, distributing and supplying water;

(13) Producing, distributing and supplying electricity, gas, compressed air including heating and cooling;

(14) Operating places of entertainment or radio or television stations;

(15) Operating hotels, restaurants, bars, cafes, inns, hairdressing establishments not operated by handicraftsmen and public baths;

'(16) Publishing in whatever form, and in particular by means of printing, engraving, photography or recording;

(17) Operating news and information services;

(18) Operating travel and publicity agencies;

(19) Operating business as an agent, broker, stock broker or commercial agent;

(20)Operating a banking and money changing business;

professionally and for gain carry on any of the 21 activities in the list. In other words, it defines traders in terms of commercial activities as persons who regularly perform commercial activities to earn their livelihood. This is not an attempt to characterize acts of commerce; rather, it is an effort to define traders. This closely approaches the subjective determination of the domain of commercial law,[82]and this provision is of little relevance in characterizing the essence of commercial activities due to the mere listing of commercial activities.

Classification of individuals into trader/non-trader, and business organizations into commercial/civil depends on the commercial activities depicted in this article. Hence, whether the list in Article 5 is exhaustive or illustrative is what matters most in this regard. If the list in Ethiopian Commercial Code were illustrative, critical investigation and characterization of the essence of the commercial activities would have been indispensable so as determine whether an economic activity not found in the inventory is commercial or civil one. Fortunately, from the perspective of legal simplicity, the inventory of activities in the said provision is a closed one. On this issue, Alfred Jauffret, the drafter of the Commercial Code noted:

> *The list in Article 5 is very long, and one might even think it too long. One could, in effect, summarize commercial activities in a shorter formula, as has been done in the Italian Civil Code. But the danger of*

(21) Operating an insurance business.

[82] For similar explanation, see Cueto-Rua, supra not 38, P.27.

> *these general formulae is that they raise difficulties of interpretation. At the risk of having a rather long list, I thought it better to prevent difficulties of interpretation and to guide the judge in detail. Of course, each activity enumerated has been carefully weighed to include all the activities which I thought should be subject to commercial law. Because the list is as complete as possible, I have decided that the enumeration should be limitative.*[83]

Jauffret enumerated a long list of commercial activities that he believed to be comprehensive of all possible typical acts of commerce and unequivocally tells us that it was meant to be exhaustive.

Nonetheless, some scholars hold that Article 5 is amended by subsequent laws and claim that the list is enlarged. They remarked:

> *The list in Article 5 was meant to be exhaustive. However, it has been broadened by subsequent legislation. Cases in point are the Commercial Registration and Business Licensing Proclamation No. 67/97, as amended, (now replaced by Proclamation 686/2010)*[84]*, the Re-enactment of the Investment Proclamation No. 280/2002, as amended, (repealed by Proclamation No.769/2012 which in turn is*

[83] Jauffret, Alfred, General Report: Book I (1 March 1958) (Excerpt), in Peter Winship (trans.), Background Documents to the Ethiopian Commercial Code of 1960, Artistic Printers, Addis Ababa: 1974). He also added that "I have also decided to exclude from commercial law the farmer and the handicraftsman two very delicate points. Articles 6 and 7 deal with agriculture; article 8 assimilates to farmers fishermen and persons who breed fish. Article 9 deals with handicraftsmen, already excluded by sub – articles (5), (7), (8), (9), (10) and (11) of Article 5, which declare that certain activities are not commercial if carried on by handicraftsmen. I have kept the maximum number of employees and apprentices allowed at the number three, which is the number that the codification commission gave me in April 1957."

[84] Proclamation No. 686/2010, *supra* note 15.

amended by proclamation No.849/2014)[85] *and the Trade Practice Proclamation No. 329/2003 (repealed by Proclamation No.685/2010 which in turn is repealed by Proclamation No.813/2013*[86]*). The said laws redefined the scope of the enumeration of commercial activities under Article 5 of the Commercial Code. … all of the above terms ('trader', 'businessperson' and 'sole businessperson') refer to one and the same legal concept, viz., and the concept of trader."* [87]

[85] See Investment Proclamation, 2012, Proclamation No. 769/2012, Fed. Neg. Gaz., Year18, No.63; and Investment (amendment) Proclamation, 2014, Proclamation No. 849/2014, Fed. Neg. Gaz., Year 20, No.52.

[86] Trade Competition and Consumer Protection Proclamation, 2013, Proclamation No.813/2013, Fed.Neg.Gaz., Year, No.28.

[87]Alemayehu Fentaw and Kefene Gurmu, Law of Traders and Business Organizations: A Course Material, (sponsored by Justice and Legal Systems Research Institute, Unpublished, Addis Ababa, Ethiopia, January 2008), p.16. They continue to explain the issue as follows:"For instance, such activities as higher education, health, and construction are included. In addition to studying the list of activities that are being opened for traders, it is also important to examine the definition of trader in these laws. In this regard, note that Article 2(2) of Proc. No.67/97 replaces the word 'trader', which is a legal term of art used by the Commercial Code, by 'businessperson'. The definition of the newly introduced term 'businessperson' as found in Art.2(2) of Proclamation No.67/97 is broader than the definition of the hitherto existing terminology "trader". Art.2(2) defines a businessperson as "any person who professionally and for gain carries on any of those activities specified in Article 5 of the Commercial Code, or who dispenses services, or who carries on those commercial activities designated as such by Regulations issued by the Government." Amazingly, Article 2(10) of the Trade Practice Proclamation No.329/2003 uses the term 'trader' with the same definition given for the term 'businessperson' by Proc. No.67/97. Still, the terminological question does not seem to have been settled once and for all. For instance, the Commercial Registration and Business Licensing Proclamation (Amendment) No. 376/2003 introduces a new term 'sole businessperson'. Anyway, you should keep in mind that all of the above terms refer to one and the same legal concept, viz., and the concept of trader."

In support of their assertion, these authors relied on the broader definitions given to the terms "business person"[88], "commercial activity"[89] and "trader"[90] in the subsequent laws.

I argue, however, that the assertion that these laws have amended the meaning of the term "trader" is unfounded. Admittedly, the meaning ascribed to these terms in the subsequent laws is broader than the definition of the hitherto existing terminology "trader" in the Commercial Code. Yet it must be noted that the cited laws provide only purposive definitions limited to their own scope of application; they are not meant to amend the definition of trader in the Commercial Code. For instance, the scope of Proclamation No. 686/2010 is limited to licensing and registration.[91] Trade Competition and Consumer

[88] Proclamation No. 686/2010, *supra* note 15, Art.2 (2). "Business Person" means any person who professionally and for gain carries on any of the activities specified under Article 5 of the Commercial Code, or who dispenses services, or who carries on those commercial activities designated as such by law. The definition here is note different from the repealed legislation. Cf. Commercial Registration and Business Licensing Proclamation, 1997, Proc.No.67/1997,Fed. Neg. Gaz., Art.2 (2).

[89] Proclamation No. 686/2010, *supra* note 15, Art.2(3): "commercial activity" means any activity carried on by a business person as defined under sub - Article (2) of this Article; see also Proclamation No.813/2013, Art 2 (6): "Commercial Activity ' means any activity Carried on by a business person as defined under Sub-Article (5) of this Article.

[90]Trade Practice Proclamation No. 329/2003' Art 2 (10): "Trader" means any person who professionally and for gain carries on any of those activities specified under Article 5 of the Commercial Code, or who dispenses services, or who carries on those commercial activities designated as such by laws issued by the government. Proclamation No.813/2013 replaced the term 'trader' by the term 'business person' but provided identical definition. See Proclamation No.813/2013, Art.2 (5).

[91] Proclamation No. 686/2010, Art. 2. Definitions. It goes on like this: "[u]nless the context otherwise requires. in this Proclamation: …"business person" means… "commercial activity" …means. Also Article 4. Scope of Application holds that "[t]he provisions of this

Protection Proclamation No.813/2013' also defines "business person" for the sake of regulated issues covered in that proclamation alone as can be inferred from the introductory clause " [i]n this Proclamation unless the context otherwise requires …"[b]usiness personr" means… "[c]ommercial activity" means and the scope determining provision holds that "[t]his Proclamation shall apply to any commercial activity…".[92]

Therefore, the wider definitions of the said terms were not meant to amend the meaning of "traders" in Art. 5 of the Commercial Code in all respects. Rather, it indicates that not only traders as defined in the Code but also others engaged regularly and for gain in economic activities outside of Art.5 owe the duty to obtain license and get registered. The other proclamations as well define their subjects broadly than traders not to amend art.5 but only as it fits their purpose only. For instance, not all "business persons" (as defined in art. 2(2) of proclamation 686/2010) nor do all "traders" as defined in the Trade practice proclamation 329/ 2003 are subject to bankruptcy proceeding by virtue of Art. 968 of the Commercial Code but only the narrow class of "traders" as defined in Art. 5 of the Commercial Code.

Therefore, for the sake of classification of business organizations into commercial or civil and demarcation of traders from non-traders, we have to

---

Proclamation relating to business license shall apply to any person engaged in any commercial activity …"

[92]Proclamation No.813/2013, Arts. 2(5), 2(6) &4. The definitions in Trade Practice Proclamation No . 329/2003 were similar.' See Art 2 (10) and Art.4 of Proclamation No . 329/2003.

stick to the limitative inventory in Art.5. Given the long list of commercial activities in Art.5, the question what possible economic activities are likely to remain outside the inventory is in order. In other words, though the inventory of activities in Article 5 is long, would Jauffret's more than half a century old position be justifiable in light of the present state of commercial life in Ethiopia? New market demands evolve continuously and sociological development and social realities may call for expansion of the domain of commercial law beyond its traditional frontiers. The necessity to enlarge Art. 5 is apparent in the new draft of Commercial Code. Article 5 of the Draft defines "Trader" as "[a]ny person who as his regular profession and for gain, carry on any production and service activities," [93] and a list of 17 commercial activities including "operating health, education and kindergarten activities, and any consultancy service", which are not in list of commercial activities in Article 5 of the existing Commercial Code, are provided. The draft also tells us illustrative nature of the list as inferred from the phrase "in particular" that preceded the list.

But until enactment of this draft, "trader" would remain to mean what it was in the 1960s pursuant to Art.5 while those individuals who fail to meet the parameters there will stay non-traders. Similarly, business organizations that are engaged in civil acts (not in the list of Article 5), however enterprising they may be, will continue with the status of civil business organizations unless, of course, they prefer some forms of organizations that are solely

[93] The Draft Revised Commercial Code Prepared by the Ministry of Justice, as cite in Alemayehu Fentaw and Kefene Gurmu, *supra* note 87, p.18.

reserved for commercial ones (company forms in Ethiopia). On the contrary, those that engage in the activities within the list of Article 5 will remain commercial business organizations. All this said, what is the legal significance of this classification?

4. The Legal Significance of the Dichotomy under Ethiopian Law

The classification is not without purpose; it presupposes the necessity and existence of distinct rules governing commerce as opposed to civil engagements. Persons engaged in civil acts are subject to civil law (usually codified/civil code) while persons who opt for acts of commerce as their profession for livelihood are supposed to be subject to commercial law; though commercial law is not often full-fledged and its deficiency is supplemented by civil law. Based on this logic, non-traders and civil business organizations are governed by the civil law while those individuals who qualify as traders and commercial business organizations are subject to the commercial law allegedly leading to different consequences of legal regulation.

Currently, due to increasing commercialization of civil law, the legal significance of demarcating business organizations into civil and commercial does not carry the weight that it used to have in the earlier times. Yet the distinction may be more pertinent in some countries whereby the civil business organization (partnership) is found and regulated in their respective

civil codes rather than the commercial code. This is true in France,[94] Germany[95] and Portugal[96]. Hence, for all purposes, the civil partnership is subject to rules in civil code while the commercial ones found in commercial code are regulated by same though cross reference between the codes exists. Even in these countries the importance of the distinction is diminishing from time to time through new legislation and judicial interpretations.[97]

In the Ethiopian context, the implication of the distinction is likely to be even

[94]See French Civil Code, Art.1832-1873, Georges Rouhette(trans.), English translation , Updated 04/04/2006, (herein after French Civil Code),at http://ox.libguides.com/content.php?pid=108878&sid=819232, >(consulted on November 7, 2014).

[95] German Civil Code/BGB/, Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), last amended by Article 1 of the statute of 27 July 2011 (Federal Law Gazette I page 1600), ss. 21 – 79, (Translation provided by the Langenscheidt Translation Service.), (herein after German Civil Code), at www.juris.de >(consulted August 2014), Section 705-740.

[96] Portoguese Civil Code, Art.980 as cited in Antunes, supra note 16, p.9.

[97] Patrick C. Leyens , German Company Law: Recent Developments and Future Challenges, in German Law Journal, Vol. 06, No. 10, 2005, p.1. The author stated that "[t]he most basic form for any type of co-operation is the Gesellschaft bürgerlichen Rechts (GbR) (civil partnership) that is subject to the more than one hundred year old provisions of the Bürgerliches Gesetzbuch (BGB) of 1896 (German Civil Code). The BGB applies to non-commercial partnerships but also lays the fundament for the law on commercial partnerships according to the Handelsgesetzbuch (HGB) of 1897 (Commercial Code). The breaking change in the legal understanding of the civil partnership came recently in 2002 when the Bundesgerichtshof (BGH) (Federal Civil Court of Justice) held that a GbR has its own legal personality. The consequence is a largely parallel liability regime for civil and commercial partnerships. According to the BGH, new partners are liable for debts that stood before they joined the partnership. From the viewpoint of a creditor the advantage of this change in doctrine is a considerable facilitation of litigation. Today a law suit can be brought against the partnership itself. Formerly the procedural requirement to state the name of each single partner had proved to be a severe obstacle for litigation particularly in regard to law suits against foreign partnerships."

more minimal. Unlike above cited countries, both commercial and civil business organizations are regulated by the Commercial Code from birth to death.[98] At the same time, we cannot dare to say that civil and commercial business organizations are subject to same treatment in the Commercial Code because if that were the case there would not have been such distinction. If so, what unique treatments are they subject to?

Although the substantive divergence points of commercial law from civil[99] remain controversial and are labeled as unscientific, a glance at the commonly cited unique rules of commercial law, to which the commercial ones are subjected to while the civil one are not, is essential for the issue under this topic. The most important distinctly regulated subject matters are requirements on disclosure, keeping books and accounts, rules of evidence,

[98] The formation, organization, management and dissolution of civil and commercial business organizations are regulated by the code in similar fashion except the scanty exclusive reference to commercial ones. See generally Commercial Code, *supra* note 6, Book II.

[99] Some of the the distinction between civil and commercial law are: in civil matters written form may be mandatory whereas the same transaction may be exempted from formal requirement in commercial matters; production of evidence is flexible in commercial matters; no formal demand required where this might be the case in civil matters; the court may not give grace period in commercial matters while this is possible in civil matters; interest rate is due without default notice in commerce while not in civil cases; period of limitation is shorter in commercial matters; also the books and records of traders and commercial companies have special evidentiary value as among themselves even availing once record in his own favor. Non-commercial business organizations are governed by civil code such as in France and they differ in all these respects from commercial ones. Also in the old days many countries used to maintain special courts and summary procedure for commercial ones and traders only. See generally Tallon, *supra* note 1.

liability of partners, rules on "insolvency/bankruptcy proceeding,"[100] jurisdiction of tribunals, and so on. These major departures are briefly discussed herein below.

In the first place, the disclosure rules - inscription in a special register and publication- is the oldest criterion for the distinction between civil and commercial business organizations. Registration (in the register of commerce) and publication as well as keeping books and accounts are used to be the characteristics of traders and commercial business organizations and entail their own legal consequences including a constitutive effect; whereas, at least as a matter of principle, non-traders and civil business organizations should not be required to undergo this.[101] But legal systems differ significantly on this issue. In France, for example, all firms (business organization) other than undisclosed partnership (a sort of joint venture under Ethiopian law) shall have juridical personality from their registration[102] while in Germany the civil

[100] The term "collective insolvency proceeding" is used in French law as generic expression to describe any insolvency proceedings where the debtor is in a payment failure situation. Safeguard proceedings are also categorized under collective insolvency proceedings even though the debtor is not in a payment failure situation. See Tetley, Andrew *et al*, Insolvency Law in France, 2009, p.196.

[101] Becken, Hubert and Bondt, Walter de, Introduction to Belgian Law, Geens, Koen and Carl Clottens, Corporations and Partnerships (in Belgium), Kluwer International, 2006, p. 276. Registration gives information about all facts essential for law which can be important for a merchant's business partner. This includes, for example, the corporate name, the proprietor's name or that of the personally liable partner of a business partnership. The register of Commerce enjoys public belief, i.e. it protects bona fide legal dealings to a certain scope through trust in the correctness of the entries and publications.

[102] French Civil Code, *supra* note 94, Art.1842, and French Commercial Code, *supra* note 57, Art. L-123.

business organization (a partnership), the typical one being *Gesellschaft bürgerlichen Rechts (GbR),* is regulated by the Civil Code and is not required to register[103] in so far as they remain *under conditions that keep them civil*.[104]The trend in Belgium[105] is similar to that of Germany.

[103] See German Civil Code, *supra* note 95, Sections 54, 705… and German Commercial Code, *supra* note 52, Art. 2 and 106. In German civil code that deals with Partnership (civil) there is no requirement of registration but in the commercial code partnership (commercial) are required to register. German Civil Code Section 54: Associations without legal personality. Associations without legal personality are governed by the provisions on partnership (in the Civil Code). When a transaction is entered into with a third party in the name of such an association, the person acting is personally liable; if more than one person acts, they are liable as joint and several debtors. But according to recent case-law the GbR (Civil-Law organization) is considered to be a legal entity and is able to sue and be sued. It is often used for single joint ventures (e.g. construction projects) and comes to an end when the joint project has been completed. On the other hand, German Commercial Code, Section 106 stipulates that :The partnership must apply for registration in the Mercantile Register of the Court in whose district its place of business is situated.

[104] See German Commercial Code, *supra* note 52, Art. 2. An undertaking carried on for purposes of trade in a manner and on a scale which requires a mercantile business organization, even when it does not fall under any of the heads mentioned in the last section (list of commercial acts), is for the purposes of this Code a mercantile trade, provided the undertaker's trade name is entered in the Mercantile Register. Such entry is obligatory upon the undertaker, and must be made in the manner prescribed for the registration of mercantile trade-names. The decisive criteria for the assessment whether a business operation set up in a commercial way are, above all, annual turnover, amount of the capital used, nature and quantity of business processes, use and granting of loans, size and properties of the business premises, number of people employed, nature of accountancy. As a rule, a duty to entry can be assumed in the retail trade with an annual turnover of € 250,000. In the wholesale trade and in production, an annual turnover of € 400,000 to € 500,000 is assumed. If an enterprise does not have itself entered in the Register of Commerce although it is liable to entry as a result of its scope of business, the Local Court can enforce registration - if applicable by imposing penalty payments. If an enterprise does not require a business operation set up in a commercial way with a view to its nature and scope, there is no obligation, but there is the entitlement to apply for entry in the Register of Commerce. If such an enterprise has itself entered in the Register of Commerce voluntarily, the capacity of a merchant is acquired upon

In Ethiopia, these requirements of registration and keeping books of account are due for both civil and commercial business organizations and traders. Both civil and commercial business organizations are subject to compulsory requirement of registration.[106] The Commercial Code and subsequent legislation as well demand all business organizations and traders to keep books and accounts.[107] So in these respects civil business organization could not posses any special legal significance in Ethiopia.

The second point of distinction is with respect to rules of evidence. With respect to claims arising out of contracts subject to commercial law, more flexible rules of evidence are applicable.[108] Also in commercial matters one's

---

entry. A civil-law partnership (GbR) becomes a general partnership (OHG). See http://www.linkedin.com/groups/What-are-differences-between-commercial-4295377.S.96276581 >(consulted 10 November, 2014).

[105] Becken and Bondt, *supra* note 101, p.185.

[106] See Commercial Code, *supra* note 6, Art.100.The requirement of registration is enshrined in Art. 100. Art. 100(1) laid down the principle for both civil and commercial business organizations and proceeds in its sub-article 2 to emphasize the need for registration of traders and commercial business organizations. Again business licensing and registration proclamation 686/2010 demands any business person to register. "Business Person" includes all traders and business organization. see art.2(2).

[107] Commercial Code, *supra* note 6, Art. 63. Although Art.71 - Scope of application of this Chapter(keeping accounts)- that holds "the provisions of this Chapter shall apply to all commercial business organisations and to all persons carrying on trade seems to modify Art. 63 and confine its application to commercial business organization, the Income Tax Proclamation no.286/2002, Art. 48 confirms the position of Art. 63 0f the Commercial Code by demanding all profit earning businesses having annual turnover of more than 100,000 to keep books and accounts.

[108] Becken and Bondt , *supra* note 101, p. 276. Most often the rules of evidence in civil matters are more rigid than in commercial matters. In commercial matters evidences are freely admissible. In civil matters transactions involving beyond certain fixed sum of may demand written contract as formality and disputes in that regard may not be proved other than

own records and books may be used as evidence in his/her own favor where as this is not the case in civil matters. The Ethiopian Commercial Code adopts this flexibility on evidence in commerce for traders and all business organizations and makes no distinction between business organizations.[109]

Third, the relationship of partners in relation to third parties is one important area where the legal significance of civil versus commercial business organizations dichotomy manifests itself. Traditionally, whether co-debtors are presumed jointly and severally liable or individually liable used to be one of the distinguishing marks of commercial law and civil laws. It was in commercial custom that joint and several liability is presumed.[110] The tradition still exists in countries such as France[111] that partners of civil

---

by written evidence. But such specification may be relieved of in commercial matters. Transactions of whatever amount could be concluded without any formality, and proof in relation to that may not require written evidence rather any form of proof. The justification for not requiring written formally and evidence in commercial matters lies in that in its essence commercial law focuses on facilitated transaction and should not be hampered by excessive formality.

[109] Read Commercial Code, *supra* note 6, Arts. 63, 71, together with Art. 3. Art.63 requires all traders and business organizations to keep books and accounts. Art. 71 holds that "[w]here a dispute arises between traders as to their commercial activities, the court may, notwithstanding the provisions of Art. 2016 of the Civil Code, admit as evidence in favour of a party books and accounts which have been kept by such party according to the provisions of the preceding Articles (on keeping accounts). Art.3 extends the applicability of provision meant for physical persons/traders/ to business organizations. Art.63 requires all traders and business organizations to keep books and accounts. Hence, Art. 71 read together with Art. 3 permits admissibility of of own records as evidence in ones own favor.

[110] Tallon, *supra* note 1, p.78.

[111] French Civil Code, *supra* note 94, Art. 1857. It states that "[w]ith regard to third parties, partners are liable indefinitely for debts of the partnership in proportion to their share in the

business organizations are not presumed to be jointly and severally liable in the absence of otherwise agreement while partners of commercial business organizations are mandatorily jointly and severally liable so as to reinforce creditors' confidence in commercial affairs.[112]Thus liability of partners in civil business organizations is more moderate than in commercial ones.

In this regard, Ethiopian Commercial Code displays similar feature. The major features of legal regime of civil business organizations are found in the Commercial Code under the provisions dealing with ordinary partnership which is the typical civil business organization.[113] The relevant provision prescribes that:

Art. 255. - Creditors of the partnership.

---

capital of the partnership on the date when falling due or on the day of cessation of payments. A partner who has contributed only his industry is liable like the one whose contribution in the capital is the smallest." Versus French Commercial Code on General partnerships, Article Article L221-1, that holds "[t]he partners in a partnership shall all be deemed to be merchants and shall have unlimited joint liability for the debts of the partnership. A partnership's creditors may not pursue payment of the debts of the partnership against a partner until after having fruitlessly given the partnership formal notice to pay by extra-judicial means."

[112] French Commercial Code, *supra* note 57, Article L221-1

The partners in a partnership shall all be deemed to be merchants and shall have unlimited joint liability for the debts of the partnership.

[113] Commercial Code, *supra* note 6, Art. 227. - Definition.

A 'partnership is an ordinary partnership within the meaning of this Title where it does not have characteristics which make it a business organization covered by another Title of this Code. Art. 213. - Commercial business organisations. (1) Any business organisation other than an ordinary partnership may be a commercial business organization within the meaning of Art. 10 (1) of this Code (that classifies business organizations based on their object).

> *(1) The creditors of the partnership may claim against partnership assets.*
>
> *(2) They may also claim against the personal property of the partners who shall, unless otherwise agreed, be jointly and severally liable to them for the obligations of the partnership. A partner who issued on his personal property may require, as though he were a guarantor, that the creditor first distrain the property of the partnership.*
>
> *(3) Any provision relieving the partners or some of them of joint and several liability may not be set up against third parties unless it is shown that such parties were aware such provision. Notwithstanding any provision to the contrary, the partners who acted in the name of the partnership shall always be jointly and severally liable.*

Accordingly, Art. 255 of the Code permits an otherwise agreement to limit liability that does not have a counterpart in other partnerships that are principally meant for commercial business organizations.[114] Given the general trend toward that presumption of joint and several liability of co-debtors in civil transactions as well,[115] distinctions based on this criteria tends to to be unwarranted particularly in Ethiopian context.

---

[114] Cf. Ibid., Art. 280. - Nature of general partnership.

(l)A general partnership consists of partners who are personally, jointly, severally and fully liable as between themselves and to the partnership for the partnership firm's undertakings. Any provision to the contrary in the partnership agreement shall be of no effect with regard to third parties.

[115] Tallon, *supra* note 1, p.78; Civil Code, *supra* note 8 , Art.1896

Fourth, particularly in early times, there used to exist special commercial courts that handle only disputes related to commerce between or against traders/commercial business organizations whereas non-traders and civil business organizations were under the jurisdiction of ordinary courts. There was a tendency to consider ordinary private law judge as unsuitable. Special courts with judges equipped with knowledge of the context of commerce used to entertain cases in commercial matters. The tradition is still intact in some countries such as Belgium.[116]The commercial tribunal in Belgium entertains suits between and against commercial firms as well as bankruptcy and reorganization proceedings. In the Ethiopian legal system, the commercial code did not stipulate for this distinct judicial arrangement. Of course this may be more of procedural and it is possible that special courts for commercial disputes or special bench within a court could be established at any time. Indeed, recent pieces of legislation such as the trade practice proclamation have come up with special tribunal. Be that as it may, the silence of the commercial code on special courts and subjecting commercial matters including bankruptcy proceeding to ordinary courts shows its deference from this alleged traditionally distinctive feature of commercial law.

Fifth, the most significant point of divergence between civil and commercial business organizations goes to the existence of special insolvency proceedings for commercial ones while civil ones are subject to the ordinary rules of civil

[116] Bocken and Bondt, *supra* note 101, p. 281.

procedure.[117] Under insolvency proceedings, traders and commercial business organizations that are unable to honor their debts will be declared bankrupt and subjected to compulsory liquidation procedure provided that they cannot be saved/reorganized.[118] To mention few among a host of benefits of insolvency proceeding, for creditors it ensures expedient proceedings as opposed to the ordinary proceeding in civil matters; they will be treated collectively rather than individually, and not on first come first served basis.[119] To the debtor, it offers a chance for survival by applying for reorganization, if the entity can be saved.[120]

The legal significance of the distinction of business organizations in Ethiopia tends to assume special importance in this respect. Book V of the Commercial Code entitled "Bankruptcy[121] and Schemes of Arrangement" [122] (herein after

[117] Ibid., p.277and 281.

[118] Ibid.

[119] Levratto, Nadine, Bankruptcy: from Moral Order to Economic Efficiency, 2007, p.20. The bankruptcy system and the protection it offers were therefore valued by debtors who, owing to the compulsory "class", did not run the risk of finding themselves confronted by isolated creditors seeking to commence proceedings first, for fear of being overtaken by the others.

[120] Ibid.

[121] Bankruptcy as used in the Ethiopian Commercial Code represents liquation oriented proceeding. See generally Commercial Code, *supra* note 6, Arts.974-1118

[122] Schemes of arrangement under Ethiopian law corresponds to "Safeguard proceedings" under French law which is described as a variation on judicial reorganization of which the principal distinguishing feature is that it can be invoked, at the debtor's request, without the debtor being in a payment failure situation. The objective for the debtor, who seeks to take

bankruptcy proceeding is used to refer to both terms) excludes civil business organizations from its sphere of application. Art. 968 of the the Commercial Code on scope of application prescribes that:

> *(1) The provisions of this Book (Book V. Bankruptcy and Schemes of Arrangement) shall apply to any trader within the meaning of Art. 5 of this Code and to any commercial business organization within the meaning of Art. 10 of this Code with the exception of joint ventures.*
>
> *(2) Without prejudice to such provisions as are applicable to physical persons only or to the provisions of Title IV applicable to business organisations only, the provisions of Titles I, II, III and V of this Book shall apply to traders and commercial business organisations.*
>
> *Art. 1155. - Business organisations which may be adjudged bankrupt.*
> *(1) Al1 commercial business organisations, other than a joint venture, may be adjudged bankrupt or be granted a scheme of arrangement.*

Apparently, these provisions of the Code - that are the cornerstone determinants of the scope of Book V- have limited the scope of application of the rules on "bankruptcy and schemes of arrangement" to traders and commercial business organizations thereby exempting civil business organizations. [123] Hence, in Ethiopia, claims concerning insolvent civil business organizations are subject to the ordinary proceeding in the Civil

---

advantage of safeguard proceedings, is to obtain a moratorium on claims during the observation period. See Commercial Code, *supra* note6, Arts.1119…together with Tetley, *supra* note 100, p.197.

[123] In some of the provisions under Book V, the Code uses the term business organizations without the qualifying term 'commercial'. This should not lead to confusion and does not imply the Code lacks consistency since the provisions that determine scope are explicit.

Procedure Code while bankruptcy proceeding applies to traders and commercial business organizations.

Nevertheless, the wisdom of maintaining this distinction to date may be questionable. In its origin, insolvency proceeding and the overall spirit of this law was focused to penalize[124]with civil and criminal sections. The traditional exclusion of non-traders and civil business organization from the application of bankruptcy law tends to be founded on the sympathy to these supposedly unsophisticated groups. Nowadays, insolvency law has shown tremendous transformation from liquidation targeted and creditor focused orientation to saving businesses by giving a chance to survive.[125] In the Ethiopian Commercial Code as well, the "schemes of arrangement"[126] offers moratorium on credit claims and give the debtor the chance reorganize and survive. Moreover, the provision on "composition" proposal-particularly "composition by way of surrender of assets"-[127] bestows the debtor the

[124] For instance, the insolvency provisions of Commercial Code of 1807 of France were said to have focused on punishing the debtor that included incarceration, the sealing and confiscation of the debtor's assets and various civil and professional sanctions. See Tetley, supra note 100, p.224.

[125] For instance, French insolvency law is said to have undergone through three evolution periods: the Commercial Code of 1807 -focused on punishing the debtor; the law of 1967 which sought to provide protection to creditors by assisting the company with its reorganization; and the 3rd period, more recently, the tendency being to use the bankruptcy procedures as a way to protect debtors from their creditors and assist them in reorganizing in order to return to financial health. See MJULI, Legal Consequences of Bankruptcy,

[126] Commercial Code, *supra* note 6, Art.1119….

[127] Ibid., Art.1099 (3).

prospect to start business afresh, closing the file for all previous claims.

Business logic can hardly justify the denial of these benefits to civil business organizations. Other legal systems such as France that used to exclusively apply bankruptcy law to traders and commercial business organizations have extended its application to all those in business-including individuals' undertaking in the liberal profession and all private legal entities.[128]

Sixth, the other consequence of the distinction between civil and commercial business organizations pertains to the applicability of provisions[129] on "businesses". Book I, Title V of the Ethiopian Commercial Code. In defining "business ", Article 124 reads stipulate that " a business is an incorporeal movable consisting of all movable property brought together and organized

[128] It is stated that with the passage of time, more and more entities have been made subject to the law in this area. The scope of application has continuously been widened. Whereas, before 1967 only commercial entities could be made subject to a collective insolvency proceeding, today all types of independent professionals and all types of legal entities are affected. … The most recent development concerns regulated liberal professions or professions whose status is otherwise protected." Bayle, Marcel, Description of French Collective Insolvency Proceedings, in Tetley, *supra* note 100, p.224. see also Levratto, Nadine, Bankruptcy: from Moral Order to Economic Efficiency, 2007, p.25 Levratto, supra note 119. Here it is stated that the evolution of bankruptcy law observed in France testifies to the unification of commercial and civil law which admitted bankruptcy of corporations under non-trading private law (non-commercial partnerships, associations, trade unions, cooperatives), authorised receivership for artisans in 1985 and for farmers in 1988 and allowed the liquidation of companies to be extended to their managers who were still did not have legal trader status. The same phenomenon of unification occurred in other countries in Europe, albeit at very different periods: in England, the Insolvency Act (1986) applied to all debtors, in Germany, the procedure ensuring equal rights to payment on execution among unsecured creditors (1877) was also applied to all insolvent debtors (which explains why this particular system was maintained in the three recovered departments of Alsace-Lorraine), as well as in the Netherlands (see Sgard, 2005).

[129] These provisions cover Arts. 124-209 of Commercial Code, supra note 6.

for the purpose of carrying out *any of the commercial ac1livities specified in Art. 5 of this Code*." Article 125(1) continues to tell us that "every trader operates a business". By virtue of Article 3 that extends[130] applicability of provisions on traders to business organization, commercial business organizations also operate 'business" within the meaning of Articles 124.

On the other side, civil business organizations are not deemed to be operating business since 'business' is defined under Article 124 in relation to commercial activities under Article 5. It from these it follows that the *provisions of the Code on 'business'*[131] do not apply to civil business organizations. To be more specific, that the provisions of the Code on 'constituency of business', protection of 'goodwill', 'trade name' and 'distinguishing mark', the 'right to the lease of premises' in which 'trade' is carried, 'sale of business', 'mortgage of business, 'hire of business', and 'contribution of business' to business organization apply only to commercial business organizations and not to civil business organizations.

On matters similar to those stated above, the Civil Code and other relevant laws apply as far as civil business organizations are concerned. This exclusion of civil business organizations deprives several potential benefits provided in

[130] Article 3 of the Commercial Code –captioned as "persons and business organizations"- states that "the provisions of this Code applicable to persons other than those provisions applicable to physical persons only shall apply to business organizations. Nothing shall affect the special provisions of Book II and Book V Title IV of this Code app1icahle to business organisations only. See Commercial Code, *supra* note 6, Art.3.

[131] Ibid., Arts.127-209.

the Commercial Code by departing from the Civil Code. For instance, the law defining "constituency of business" and recognition of different items as a single whole maximizes the value of business assets since business assets as a whole fetch a better value than assets dismembered.[132] It also enables transaction of all the elements as a single "incorporeal property"[133] in transactions such sale, hire, mortgage and contribution of business. Moreover, simplifies business transactions for those operating business by filling gaps as to what items are considered to be transacted as part of a single whole/business/ but one dealing with civil business organizations has to rely on the rules of the Civil Code on accessories and intrinsic elements if they could be any help.[134] Again, Article 145 of the Commercial Code has guaranteed those operating business unconstrained right to sub-lease premises in which 'trade' while sub-leasing in the Civil Code[135] possible only if lessor agreed.

Other differences in legal consequence may also be discerned from provisions of the Commercial Code here and there. For instance, as per Art. 280 (2) of the Commercial Code, partners in commercial business organizations do have

[132] Levratto, *supra* note 119, p.25.

[133] Commercial Code, *supra* note 6, Art.124

[134]Cf. Arts. 1131-1139 of Civil Code with Arts. 127-129, 155(2) of the Commercial Code. *supra* note 6.

[135] Cf. Civil Code, *supra* note 8, Art. 2959.

the status of trader.[136] The converse is that where a partnership is a civil one the partners are not deemed to be traders. This will have its own implication. Noteworthy in this regard is that to assume the status of a trader one needs special legal capacity. Ethiopian commercial law denies an emancipated minor to acquire the status of trader absent written authorization from family council (now replaced by judicial authorization)[137] while mere emancipation suffices for engagement in civil activities.[138] Hence an emancipated minor needs special capacity (additional requirement of written authorization from family council (now court authorization) to be a partner in commercial partnerships but not in civil ones. Neither could a tutor invest capital of a minor in commercial partnerships but only in civil ones or company form of commercial business organizations since these do not vest the minor the status of a trader.

---

[136] Commercial Code, *supra* note 6, Art. 280 (2). It stipulates that "where the partnership (general partnership) is a commercial partnership, each partner shall have the status of a trader."

[137]The institution of "Family Council" that was one of the organs of protection of the minor in the civil code is no more applicable in the federal jurisdictions and perhaps states that have enacted new family laws. The power of the Council to supervise the guardian and tutor is vested to the court. Cf. Arts.241-260 of the Civil Code of Ethiopia and the Revised Family Law, proclamation no. 213/200, Fed. Neg. Gaz., Year 6, No.1, Arts.224-235, 239, 272 etc.

[138] Commercial Code, Art. 13. - Emancipated Minors.

(1) Notwithstanding the provisions of Art. 333 of the Civil Code, emancipated minors may not carryon a trade unless authorised in writing by the family council.

(2) In default of authorisation under sub-art. (1), emancipated minors shall not be deemed to be of age. Cf: French Commercial Code, Art. Article L121-2 that states "[m]inors, even when declared of full age and capacity, may not be traders."

In the same vein, since being a partner in civil partnership does not entail status of trader, these provisions on objections to trading spouse by the other spouse are arguably applicable in case a spouse is to become a partner in commercial partnership only.[139]

As a last remark, compared to commercial ones, civil business organizations are taken to be less sophisticated: contractual relation between partners is more manifest than institutional character or lacks it; subject to lesser regulation by law and more of contractually dealt by the partners; and that they are designed for small scale and perhaps temporal business opportunities.

In this regard, Cueto-Rua stated that:

> *The Latin-American civil law distinguishes between commercial partnerships and civil partnerships and subjects them to different legal requirements and consequences. For instance, today there is no doubt that commercial partnerships are endowed with juridical personality, while there is a serious question, at least in several Latin-American countries, as to whether civil partnerships (sociedad civil) have or have not a juridical personality.*[140]

Also in Germany, the GbR (civil partnership) is considered to be devoid of legal personality[141] with the consequent implication that it cannot sue or be sued. Also, partners transact in their own name and their actions are not

[139] Commercial Code, *supra* note 6, Arts.16-21.

[140] Cueto-Rua, *supra* note 38, p.39-40.

[141] See footnote 66. But according to recent case-law the GbR (civil partnership) is considered to be a legal entity and is able to sue and be sued.

attributable to the partnership. Hence acts of one partner can bind and affect the other only if there is explicit authorization is given to one partner to act on behalf of the other in accordance with law of agency. Moreover, in practice as well, the GbR is often used for single joint ventures (e.g. construction projects) and comes to an end when the joint project has been completed.[142] Still more, where the scale of operation is significant and began to be sophisticated, the GbR shall become commercial and subject to commercial code.[143] A useful analogy is that while individuals engaged in commercial activities at small scale / handicraftsmen levels are exempted from being strictly subject to rules applicable to traders, business organizations engaged in civil activities but of small scale are exempted from certain rules applicable to commercial business organizations. These small scale civil business organizations are assimilated to petty traders/handcrafts. They will remain petty business organizations till the scale of operations manifests the scope of commercial motive.

In similar vein, Engrácia Antunes described the legal situation of civil business organizations in Portugal as follows:

> *The civil company is ruled in the Civil Code of 1966 as a contract between two or more persons (individuals or legal persons) which contribute with goods (cash or in kind) or services to jointly enter into a profit-making civil economic activity (art. 980º CC). Examples of*

[142] Katy Elmaliah, introduction to German Corporate Law, available at http://www.elmaliah.com/?categoryId=84560, accessed on November 5, 2014.

[143] See footnote 67&104.

> *these civil companies are partnerships of liberal professions such as those involving attorneys, auditors, physicians, artists, engineers, and so on. All partners are also personally and jointly responsible for the company debts, although subsidiarily in front of the company itself: this mean that, while each partner can be directly sued by company's creditors, he may request the previous exhaustion of the company assets.* [144]

Even where civil partnerships manifest institutional character equivalent to commercial partnerships, such as in France[145] and Ethiopia, there appears to be significant demonstration of the contractual character in civil ones than commercial ones. For instance, the Ethiopian Commercial Code allows partners of ordinary partnership to use partnership's property with due caution,[146] diminishing the separate entity character of the partnership to some extent while no comparable provision is found in the case of general partnership.

---

[144] Antunes, *supra* note 16, p.9.

[145]Compare partnership in the French Civil Code, *supra* note 94, (Art.1832...) and partnership in French Commercial Code, *supra* note 57, Art. L 221-1.

[146] Commercial Code, *supra* note 6, Art. 245. - Use of partnership property.

(1) Property, debts and rights brought into or acquired by the partnership shall belong to the partners in common under the terms of the partnership agreement.

(2) Every partner may use partnership property in accordance with usual partnership practice.

(3) No partner may use partnership property against the interests of the partnership or so as to prevent his co-partners from using such property in accordance with their rights.

5. Concluding Remarks

In conclusion, the distinction between civil law and commercial law is too delicate. Due to increasing commercialization of civil law, even the traditionally alleged differences are diminishing. Within the scope of their shrinking differences, they purport to regulate different subjects and/or transactions. The commercial law is meant to govern traders and business organizations in their dealings and/or commercial transactions while the civil law regulates dealings of non-traders and civil business organizations in their dealings and/or civil transactions.

The basis of distinction between civil and commercial business organization is the form of business organization and the business purpose it undertakes. Certain forms are considered commercial without regard to the business purpose while in other cases the object of the entity is determinant .i.e., where the economic activity the entity undertakes belongs to the category of commercial activities, it is commercial and otherwise it will be civil. In this regard, Ethiopian law holds that ordinary partnership is always civil and companies are by default commercial. The remaining ones .i.e., joint venture, general partnership and limited partnership could be either civil or commercial depending on their object. In connection with this classification, it is important to note that the closed list of commercial activities in Article 5 of the Commercial Code has simplified the classification of business organizations.

Due to the declining differences in substance between the two branches of

private law i.e. civil law and commercial law, these days the legal significance of demarcating business organizations into civil and commercial does not seem to carry the credence that it used to have in the earlier times. The legal significance of the distinction is likely to be more minimal in Ethiopia since both the civil and commercial business organization are governed by the Commercial Code unlike countries that maintained separate regulation, at least by and large, of civil business organizations by their civil code and commercial business organizations by commercial code.

In the Ethiopian legal context, the principal legal significance of the distinction between civil and commercial business organizations pertains to liability of partners, and applicability of bankruptcy proceeding and scheme of arrangement, and applicability of rules on "business". At least in the case of ordinary partnership, which is the typical civil business organization under Ethiopian law, the partners can individualize liability but in other partnerships joint and several liability is not only presumed but mandatory. Distinction based on this criterion is unwarranted in Ethiopian context not only because the general trend witness that presumption of joint and several liability has permeated into civil transactions the Ethiopian Code has also endorsed presumption of joint and several liability co-debtors.

Again, under Ethiopian law, applicability of "bankruptcy" and "schemes of arrangement" constitutes the most important legal significance of the distinction; the commercial business organizations are subject to bankruptcy proceeding and scheme of arrangement while the civil ones are not. In relation to the provisions on "business", civil business organizations are

excluded by the very definition of "business" from the application of the Articles 124-209 of the Commercial Code.

Countries such as France, Germany and Portugal rendered most business entities commercial business organizations by virtue of their form, and they permit single or few options for civil business organizations. It tells us that, like petty traders, there could petty business organizations known for their simplicity as a result their exemption from application the rules of commerce. The experience of these countries also tells us that but there be only few petty civil business organizations. Unlike the situation in these countries, under Ethiopian law four of the six business organizations could be civil. This is against the general tendency that subjects organized business entities to the rules of commerce in all respects. The case in Ethiopia is likely to deny creditors the relatively secured bankruptcy proceeding and fair apportionment of claims due to the non-applicability of this special proceeding to civil ones. It also entails that the civil business organizations in financial constraint would lose the opportunity for survival via schemes of arrangement.

Moreover, the provisions of the Commercial Code dealing with "business" endorse the typical advantages of being a merchant (trader and commercial). The exclusion of civil business organizations and individuals operating business in economic sector other than in Art.5 of the Code from the potential benefits in these provisions tends to be unsound. Against this background, this author holds that the distinction between civil and commercial business organization needs revision on account of concerns mentioned in these

concluding remark. Revision could still recognize the very logic of the distinction that was meant to allow more flexibility to civil business organizations by exempting certain rules in commercial law applicable commercial ones. Yet this could be done without denying potential benefits hinted in this research and others. Finally, it must be clear that the author does not pretend to have exhaustively studied the implications of the distinctions. This article simply evaluates some of the apparent distinctions in legal treatment and holds that on account of these appraised points, the classification appears to be outmoded. This article does not call for total abolition of the distinction for such a bold conclusion should be preceded by wider and deeper investigation from different perspectives.