

# Physical persons That are Ineligible to Acquire Membership in Business Organizations: A Descriptive Analysis of Ethiopian Legal Framework

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## Introduction

A business organization is an anthropomorphic person that plays a pivotal role in the socio-economic development of a country. Although it is an autonomous entity capable of shouldering and exercising rights and obligations, its initial establishment and perpetual existence; however, is contingent upon the capacity of its members. It can be established only among persons who are capable,<sup>1</sup> and it would be dissolved if a member becomes incapable after its formation.<sup>2</sup> Consequently, it is essential that members of a particular business organization (Hereinafter BO) are legally capable of acquiring membership.

Book II of the Commercial Code of Ethiopia, which recognizes and governs the constitution and operation of six forms of BOs, does not lay down express rules that govern capacity of persons to acquire and maintain membership in the BOs.<sup>3</sup> As a result, one has to synthesize membership capacity through a harmonious reading of Ethiopian private laws. In this regard, the CCE declares that physical persons are presumed to be capable of performing juridical acts unless

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<sup>1</sup>All business organizations arise out of a partnership contract that needs to be concluded among persons who are capable under the Civil Code of Ethiopia. *See* Civil Code of the Empire of Ethiopia, Gazette Extraordinary Proclamation No. 165 of 1960, Negarit Gazette, 19th Year, No. 2, Addis Ababa, 5<sup>th</sup> May 1960 (Hereinafter CCE), Art. 1678 (a); Commercial Code of the Empire of Ethiopia, Gazette Extraordinary Proclamation No. 166 of 1960, NEGARIT GAZZETE, 19<sup>th</sup> Year No. 3, Addis Ababa, 12 May 1960 (Hereinafter ComCE), Arts. 210 & 211.

<sup>2</sup>Incapacity of a member is a ground for dissolution of General Partnership, Limited Partnership, Joint Venture and Ordinary Partnership forms of business organizations. ComCE, Arts. 218(2), 278 & 206(1) cum 265 & 303. Share Companies and Private Limited Companies could also be dissolved if the composition of its members fell below the legally apposite number of members due to incapacity of a member, and replacement is not made within a reasonable period of time, six months in the case of Share Companies. ComCE, Arts. 311 & 511.

Besides, incapacity of a member has also a bearing on the capacity of a BO in which the person has become a member of. For example, foreign nationals are rendered incapable of acquiring membership in a BO engaged in economic activities reserved for domestic investors per article 12 of the 2012 Investment Proclamation. If a foreigner happened to have acquired membership in such BO, the BO itself would be barred from carrying out the activity reserved for domestic investors pursuant to article 26 of the ComCE. As such, the incapacity of the person may have effect on the capacity of the BO. ComCE, Art. 26; Investment Proclamation, Proclamation No. 769/2012, FED. NEGARIT GAZZETA 18<sup>th</sup> Year No. 63, Addis Ababa, 17 September 2012 (Hereinafter 'Investment Proclamation'), Art. 12.

<sup>3</sup> *See* ComCE, Arts. 210-560.

otherwise declared by an express proscriptive law which puts the person under general or special disability.<sup>4</sup> This presumption also works for physical persons' capacity to acquire membership in BOs by virtue of a cross-reference made by article 1 of the ComCE.<sup>5</sup> Therefore, a physical person is presumed to be legally capable of acquiring and maintaining membership in BOs unless declared otherwise by law pursuant to a cumulative reading of article 1 of the ComCE and article 192 of the CCE.

Incapacity to acquire membership, on the other hand, is not presumed and needs to be determined through a holistic examination of Ethiopian laws. Given that capacity is presumed, the primary concern of this article is to make a critical analysis of scenarios whereby physical persons could be rendered incapable of acquiring membership in Ethiopian BOs.<sup>6</sup> *Particularly, can minors, interdicted persons, and persons under non-competent duty acquire membership in Ethiopian BOs? If they cannot, what circumstances could trigger their incapacity? Does their incapacity bar them from acquiring membership in all forms of BOs? Can minors and judicially interdicted persons acquire membership through the instrumentality of their parents and tutors?* Despite its practical adverse effect, these and other issues in relation to membership incapacity have not been a subject of adequate scholarly scrutiny.<sup>7</sup> The purpose of this article is, therefore, to investigate Ethiopian legal proscriptions on membership capacity of minors, interdicted persons, foreigners and persons under non-competent duty, which are heretofore unexamined by past scholarly works.

This article is structured into five sections. Assuming that membership incapacity of physical persons can primarily be analyzed in terms of *mode of membership acquisition* and the ensuing *membership status*, the first section distinguishes between two modes of acquisition, viz., original and derivative acquisition, and two types of membership status, viz., a trader and a non-

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<sup>4</sup> CCE, Art. 192.

<sup>5</sup> Article 1 of the ComCE states that “[u]nless otherwise provided in [the ComCE], the provisions of the [CCE] shall apply to the status and activities of persons and [BOs] carrying on a trade.”

<sup>6</sup> This article is limited to a doctrinal analysis of Ethiopian laws on capacity of physical persons to acquire membership in BOs that are established pursuant to Book II of ComCE.

<sup>7</sup> Only Goldberg has slightly touched upon the issue. In his attempt to provide for the skeleton of Ethiopian law of BOs, he briefly addressed membership capacity of minors, judicially interdicted persons and married persons in an introductory manner. As stated in his conclusion his analysis was not meant to be exhaustive. Besides, much water has run under the bridge since the publication of his article in 1972. For example, his analysis regarding capacity of minors and judicially interdicted persons are based on Civil Code provisions that are now replaced by Federal and State Family Codes. Everett F. Goldberg, *An Introduction to the Law of Business Organizations*, 8 J. Eth. L 495, 519 (1972)

trader membership. The second section examines membership capacity of minors, judicially interdicted persons and legally interdicted persons in light of the conceptual framework set under the first section. Then, the nature and scope of potential restrictions on membership capacity of persons under non-compete duty and foreigners are respectively discussed under the third and fourth sections. Finally, the last section makes concluding remarks and recommendations.

**KEYWORDS:** Business Organizations, Membership, Capacity, Physical Persons, Ethiopia

## 1. “MODES OF ACQUIRING MEMBERSHIP” AND “MEMBERSHIP STATUS” AS TOOLS FOR ASSESSING INCAPACITY

ComCE recognizes six types of BOs viz., Ordinary Partnership (Hereinafter OP), General Partnership (Hereinafter GP), Limited Partnership (Hereinafter LP), Joint Venture (Hereinafter JV), Share Company (Hereinafter SC) and Private Limited Company (Hereinafter PLC).<sup>8</sup> Although each of these forms of BOs has its own distinctive features, all of them exhibit some common features. First, their formation and continued existence is guided by plurality of membership.<sup>9</sup> Second, they all arise out of a special type of contract known as ‘partnership agreement’.<sup>10</sup> Third, they all are anthropomorphic creations with a juridical personality acquired through a process of incorporation, except for JVs.<sup>11</sup> Fourth, all members of BOs are required to make contributions and can participate in the profits and losses.<sup>12</sup> Fifth, membership shares in BOs are transferrable to third parties. Sixth, BOs are characterized by a delegated management.<sup>13</sup>

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<sup>8</sup> ComCE, Art. 212(1).

<sup>9</sup> See ComCE, Arts. 210 cum 211, 307(1) & 510(2). However, there may be variations to plurality of membership in the case of government owned provisional one man SC. Ethiopian law recognizes a one man SC as an interim form of BO for handling privatization process of public enterprises. A public enterprise under privatization will be converted to an SC and the government will temporarily be the sole member of the SC until shares get transferred to private investors. See Privatization of Public Enterprises Proclamation, Proclamation No. 146/1998, FED. NEGARIT GAZZETA, 5<sup>th</sup> Year No. 26, Addis Ababa, 29 December 1998, Art. 5(1-3). Besides, the Draft Commercial Code of Ethiopia recognizes one man company. One may, therefore, anticipate that there could be variation to plurality of membership based on future amendment or revision of the ComCE. See Draft Commercial Code of Ethiopia, FDRE Attorney General, June 2017 (Hereinafter Draft ComCE), Arts. 210 & 505(2).

<sup>10</sup> ComCE, Arts. 210 & 211.

<sup>11</sup> ComCE Code, Arts. 210(2); Also See Commercial Registration and Business Licensing Proclamation, Proclamation No. 980/2016, FED. NEGARIT GAZZETA, 22<sup>nd</sup> Year No. 101, Addis Ababa, 5 August 2016, Art. 7.

<sup>12</sup> ComCE, Arts. 211 & 215, 229-232 cum 295 & 303.

<sup>13</sup> All BOs transact with third parties or act in legal proceedings through their agents. Therefore, the provisions of the CCE (arts 2179–2265) dealing with agency are applicable. See ComCE, Art 216.

Finally, all BOs are dissolved where the purpose for which they were established is achieved or cannot be achieved; where the period for which they were established lapses (when the BO is set up for a defined or fixed period); where the partners agree to dissolve the BO; and where a court pronounces judicial dissolution because of good cause.<sup>14</sup>

In addition to the above common features of BOs, the fact that no incapable person may become a member of BOs is an important common attribute of BOs that could be analyzed by reference to mode of acquisition of membership and the membership status thereby acquired.

### **1.1. Modes of Acquiring Membership and the Relevant Law for Assessing Incapacity**

The mode of acquiring membership is relevant for identifying the law applicable to determine membership incapacity. A person may acquire membership in various ways. She may acquire membership by signing a partnership contract, through inheritance or donation *inter vivos* or *mortis causa* or as a result of execution levied by court. These various modes of acquisition can be generally classified into ‘*original acquisition*’ and ‘*derivative acquisition*’ for the purpose of analyzing membership capacity of physical persons. Original acquisition of membership happens when a person, by participating in the negotiation and signing of the partnership agreement out of which a BO arises, makes a contribution that would make her a member in a newly established BO. Derivative acquisition, on the other hand, refers to acquisition of existing membership shares through a transfer from a member of an already established BO.<sup>15</sup>

In relation to original acquisition of membership, the relevant laws applicable to assess membership incapacity are the laws that govern a person’s capacity to conclude a contract. This is because original acquisition involves the signing of a partnership contract required for the establishment of all types of BOs,<sup>16</sup> and persons who are allowed to conclude this contract are required to be capable under the law.<sup>17</sup> Accordingly, a conclusion one can draw with a reasonable certainty is that a person who is not capable of concluding a contract is also not

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<sup>14</sup> ComCE, Arts. 217 & 218; *See also Yared Sisay v. Algreen Agro Industry PLC*, FDRE Supreme Court Cassation Division Case Book, Vol. 13, File No. 71134, p. 399, (Decision of 04 Sene 2004 E.C.). (*Ruling that a PLC may not be judicially dissolved without showing a good cause*)

<sup>15</sup> In this work, a person who acquires membership through original acquisition is referred to as ‘*an original member*,’ while a person who derivatively acquires membership is referred to as ‘*a derivative member*’.

<sup>16</sup> *See* ComCE, Arts. 210 & 211.

<sup>17</sup> The contract will also be voidable where it is concluded by an incapable person and the contracting parties will be reinstated to a position they were before the conclusion of the contract. CCE, Art. 1678(a), 1808(1) & 1815-1817.

capable of acquiring original membership in a BO; and also that membership incapacity is determined on the basis of rules of capacity to conclude a contract.

The law applicable to assess membership capacity in the case of derivative acquisition; however, is not necessarily based on the rules regarding a person's capacity to conclude a contract. It rather involves identifying the law that governs the transfer of membership share from an existing member of a particular BO to a transferee whose capacity is under inquiry. Where a person inherits membership share through intestate or testate succession, law of successions and family law would be relevant to assess her capacity to inherit and maintain membership; where she buys membership share, the rules on capacity to contract and other rules relevant to sale of membership share would be relevant; and where she acquires membership via donation, the rules governing donation of membership share would be applicable to assess incapacity.<sup>18</sup> Due to such variations in the sources of derivative acquisition, capacity to become a derivative member of a BO has to be analyzed in juxtaposition with the laws that govern the transfer.

## **1.2. Membership Status and Assessment of Incapacity**

While distinguishing between the two modes of acquisition of membership is useful to determine the law applicable for assessing capacity, membership status is a tool that can be used to identify the type of membership a person may not be allowed to acquire. Article 11(1) of the ComCE proclaims that persons who are incapable under the civil law may not carry on any trade. It means that they are incapable of becoming a trader. However, membership in BOs does not necessarily entail a trader status. Consequently, we need to classify membership into membership with a trader status and without a trader status in order to make a proper analysis of membership incapacity.

The ComCE explicitly provides for membership with a trader status by labeling a partner in a commercial GP,<sup>19</sup> a general partner in a commercial LP,<sup>20</sup> and a partner in a commercial JV<sup>21</sup> as

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<sup>18</sup> In fact, the ComCE rules governing transfer of membership share is also relevant. The ComCE sets rules addressing the nature of approval and requirements for transferring membership share in each type of BO. However, most of these rules are mainly concerned with the capacity of the transferor – not the transferee. *Generally see* ComCE, Arts. 210-560.

<sup>19</sup> ComCE, Art. 280(2).

<sup>20</sup> ComCE, Art. 300 cum Art. 280(2).

<sup>21</sup> ComCE, Art. 271 cum Art. 280(2).

traders. Accordingly, persons that are incapable of becoming a trader are also incapable of becoming such members in these three BOs.

On the other hand, members in non-commercial BOs<sup>22</sup> acquire a membership without a trader status. Members in such BOs cannot be regarded as traders since the BOs themselves are not labeled as traders.<sup>23</sup> Hence, members in a non-commercial GP, a non-commercial LP, and a non-commercial JV acquire membership with a non-trader status. Besides, members of commercial BOs that enjoy limited liability coupled with a generally limited participation in management could be regarded as members without a trader status.<sup>24</sup> Accordingly, shareholders of a PLC and an SC and a limited partner in an LP are members without a trader status, and an incapacity to become a trader per article 11(1) of ComCE would not bar a person from acquiring membership in such scenario.

## **2. MEMBERSHIP CAPACITY OF MINORS, JUDICIALLY INTERDICTED PERSONS AND LEGALLY INTERDICTED PERSONS**

### **2.1. Minors**

Minors are persons who are under the age of 18 and who, until they attain majority or get emancipated, are rendered incapable of personally performing juridical acts that could make them a member of BOs.<sup>25</sup> Even when they get emancipated, minors are rendered incapable to

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<sup>22</sup> These BOs are further classified into commercial BOs (*sociétés commerciales*) and non-commercial BOs (*sociétés civiles*).<sup>22</sup> Commercial BOs are trading entities that are engaged in *fonds de commerce* (business) with *un but lucrative* (profit-making objective), and BOs pigeonholed under this category are Commercial GP, Commercial LP, Commercial JV, SC and PLC. On the other hand, non-commercial BOs are civil entities that do not engage in trade, and BOs falling under this category are OP, Non-commercial GP, Non-Commercial LP and Non-Commercial JV. See ComCE, Arts. 10 & 213.

<sup>23</sup> A BO itself becomes a trader where it, professionally and for gain, undertakes one or more commercial activities listed under article 5 of the ComCE and subsequent legislations. While article 5 of the Code lists 21 commercial activities, this list is not exhaustive since subsequent legislations have expanded this list. For example, some of the 1352 commercial activities listed under Ethiopian Standard Industrial Classification do not fall within the ambit the list under article 5 of the ComCE. However, a non-commercial BO is not a trader since it cannot lawfully engage in commercial activities. See ComCE, Art. 5 cum Art. 10; and FDRE Ministry of Trade, Ethiopian Standard Industrial Classification (Rev. 1, 2015).

<sup>24</sup> Although the ComCE does not expressly address scenarios whereby membership could be acquired without a trader status, this conclusion can be warranted from the rule regarding membership status in commercial LP. Only a general partner is regarded as a trader since her rights and obligations similar with that of a partner in a commercial GP, who is regarded as a trader. This partner has unlimited liability and has a managerial role in the LP. On the other hand, a limited partner in the LP does not participate in management and her liability is limited. As a result, she is not regarded as a trader. The liability and participation of a limited partner resembles that of shareholders in an SC and a PLC. See ComCE, Arts. 280, 296, 300, 301, 304(1), 347-428, 510(1) & 525-538.

<sup>25</sup> For example, unless they are represented by their tutors, minors are incapable of personally concluding partnership contracts. See ComCE, Arts. 210 & 211; CCE, Arts. 193, 199 & 1675 & 1678(a); The Revised Family Code, Proclamation No. 213/2000, FEDERAL NEGARIT GAZZETE EXTRA ORDINARY ISSUE, 6<sup>th</sup> Year No. 1, Addis Ababa, 4 July 2000 (Hereinafter FDRE Revised Family Code), Arts. 215 & 216.

carry on a trade.<sup>26</sup> However, their tutors are allowed to undertake juridical acts on behalf of the minors with regard to the minors' pecuniary interests and property administration. *Can minors, therefore, acquire original or derivative membership with or without a trader status through the instrumentality of their tutors?* Article 12 of the ComCE specifically provides that "tutors may not carry on a trade in the name and on behalf of a minor except in the cases provided in article 288 of the CCE." *Do these restrictions also render minors incapable of acquiring membership in BOs?* This work argues that the restrictions that can be imposed on a minor's membership capacity are partial; and that minors can derivatively or originally acquire membership with or without a trader status under the following three circumstances.

First, a minor is capable of acquiring membership with a non-trader status irrespective of the mode of acquisition. There is no rule that prohibit a minor, who is represented by a lawfully acting tutor, from derivatively or originally acquiring membership with a non-trader status. A tutor is authorized to acquire, keep and alienate membership share on behalf of a minor.<sup>27</sup> A tutor; however, can invest the capital of a minor and make the minor a member in BOs that do not make the minor a trader due to a clear restriction under article 12 of the ComCE.<sup>28</sup> Accordingly, a minor represented by a tutor is capable of acquiring membership without a trader status. Therefore, a minor who is represented by a tutor can become a derivative or original member of a BO in non-commercial BOs; a limited partner in a commercial LP; and a shareholder in a PLC and an SC.

Second, a minor should be capable of derivatively acquiring membership with a trader-status provided that the minor inherited membership share through the operation of intestate succession. Article 12 of the ComCE allows a minor to acquire membership with a trader status

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<sup>26</sup> ComCE, Art. 13; *But see* Draft ComCE, Arts. 17.

<sup>27</sup> A tutor is required to invest monies belonging to the minor within three months from the time they are at her disposal where such monies exceed five hundred Ethiopian Birr. This obligation of the tutor is further stressed by the imposition of a liability to pay legal interest where the tutor has failed to invest the capital which exceeded Birr 500. Where appropriate, the tutor may also be condemned to pay damages for a failure to invest.<sup>27</sup> This shows that a minor, represented by a tutor, may become an original or derivative member of a BO. FDRE Revised Family Code, Arts. 280(1), 281(1) & 282.

Besides, a tutor is required, per article 273 of the Revised FDRE Family Code, to safely deposit securities belonging to a minor. This presupposes that a minor can become a member of an SC by keeping equity security. Moreover, article 278 impliedly authorizes a tutor, who is a father or a mother of a minor, to keep registered and bearer securities on behalf of the minor while it requires other tutors either to alienate or convert bearer securities owned by the minor to registered securities. When read jointly, these provisions lead to a valid conclusion that a minor, who is represented by a tutor, may become a member in a BO without a trader status.

<sup>28</sup> Article 12, only prohibits a minor from becoming a trader – it does not prohibit the minor's participation in a BO as a member where the membership does not lead to acquisition of the status of a trader.

where the requirements of article 288 of the CCE are complied with.<sup>29</sup> According to article 276 of the Revised FDRE Family Code, which replaced article 288 of the CCE, a minor can acquire a derivative membership in a BO. The provision allows a tutor to trade in the name and on behalf of a minor where the minor inherits a commercial, industrial or other form of enterprise where: (1) the tutor is a father or a mother of the minor and she decides to keep the enterprise going; or (2) a court has instructed the tutor to keep the enterprise.<sup>30</sup> In such situations, article 276 of the Revised Family Code can be analogically applied to render a minor capable of derivatively acquiring membership shares which form part of her inheritance.<sup>31</sup> This leads us to assume that if a minor is authorized to inherit and keep the whole of a particular business enterprise, she should, for a stronger reason, also be allowed to inherit and keep membership in that enterprise.<sup>32</sup> Therefore, a minor should be able to derivatively acquire a trader membership in a BO provided that a decision to keep the inherited membership is made in accordance with article 276 of the Revised Family Code.

Finally, a minor should also be able to acquire derivative membership in a BO even where her membership could make her a trader provided that she acquires the membership share through *inter vivos* or *mortis causa* donation<sup>33</sup> by a person who made an instruction that the tutor of the minor shall keep the membership on behalf of the minor unless a court makes a variation upon

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<sup>29</sup> However, article 288 of the CCE is now repealed and replaced by Federal and Regional Family Codes. *For example see* FDRE Revised Family Code, Art. 276; Oromia Family Code, Proclamation No. 69/1995, MEGELATA OROMIA, Finfine, 1995 (Hereinafter Oromia Family Code), Art. 293; Amhara Family Code, Proclamation No. 79/2003, ZIKIRA HIG, 8<sup>th</sup> Year No. 3, Bahir Dar, 25 June 2003 (Hereinafter Amhara Family Code), Art. 287.

<sup>30</sup> ComCE, Art. 12; FDRE Revised Family Code, Art. 276. Where the tutor is not a father or a mother of the minor, the tutor is required to seek authorization of the court. Application for authorization can be made by one of the ascendants or brothers or sisters of the child who has attained majority. Before pronouncing the authorization the court is required to make the decision by taking the longevity of the tutorship and the abilities of the tutor as well as the interests of the minor into account.

<sup>31</sup> It has to be noted that article 276 of the Revised Family Code does not expressly deal with a transfer of membership share through inheritance. It is express about a minor who inherits an enterprise itself – not just a membership share in the enterprise.

<sup>32</sup> There are compelling reasons for suggesting analogical application. First, it is a matter of common sense and elementary logic that if you are allowed to acquire and keep a whole of something, you may as well be allowed to acquire and keep a part in the whole of the thing. Second, a minor who inherits a business enterprise will be a trader as a sole proprietor, and article 276 of the Family Code even authorizes the minor to become a trader. Thus, a minor who inherits a membership right in a BO should also be able to acquire a membership share with a trader status as in the case of a partner in a GP and LP. Finally, analogical application would be in line with the rationale behind incapacity of a minor, which is protection of the minor against herself. A minor is more protected in acquiring membership in a BO than acquiring an enterprise as a sole proprietor since one of the advantages of a BO is that it creates more risk sharing mechanisms than a sole proprietorship would.

<sup>33</sup> Pursuant to article 2427 of the CCE donation is defined as “a contract whereby a person, the donor, gives some of her property or assumes an obligation with the intention of gratifying another person, the donee.” An *inter vivos* membership share donation is a donation which becomes effective during the life time of the donor and which is regulated by Book V Title XV Chapter 3 (Arts. 2427-2470) of the CCE while a *mortis causa* membership share donation is a donation which becomes effective after the death of the donor and the rules regarding wills (Book II Title V Chapter 1 Section 3 Arts. 857-941) are applicable to its transfer. *See* CCE, Arts. 2427-2470, 2428 & 857-941



the application of the tutor. Although not explicit enough, article 275 of the Revised FDRE Family Code has authorized a transferor to enable a minor to acquire membership shares (which is an object of property or a *res*) with a trader status.<sup>34</sup> One may wonder about whether the tutor should dispose a membership share transferred to a minor in the absence of an implied or express instruction to keep the membership share. Once again the author contends that article 276 of the Revised Family Code, which applies to inheritance of membership, should be analogically applied since acquisition through inheritance and donation are similar in nature.<sup>35</sup> Besides, the best interest of the minor may also demand the application of Article 276.<sup>36</sup> Due to such fundamental similarity, a minor who derivatively acquires a membership in a BO from a donor who has not made an instruction to keep the membership right should be allowed to keep her membership provided that the conditions laid down under Article 276 are complied with.

In conclusion, a minor, even where she is represented by a tutor, is incapable of acquiring original membership with a trader status. She is not also allowed to acquire derivative membership with a trader-status except where the membership is inherited or is donated to her. However, a minor is capable of derivatively or originally acquiring membership without a trader status.

## 2.2. Judicially Interdicted Persons

Notoriously insane persons<sup>37</sup> and persons with apparent infirmity<sup>38</sup> are persons for whom an organ of protection such a tutor or a guardian is not appointed under the law. However, a

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<sup>34</sup> Article 275 of the Revised FDRE Family Code provides as follows:

*Article 275. - Property Transferred to the Minor by Donation or Succession.*

*1) A person, who donates property to a minor or from whose succession a minor inherits property, may order that the tutor shall follow certain appropriate rules in the administration of such property.*

*2) Where it subsequently appears that the observance of such rules is impossible or prejudicial to the interests of the minor, the tutor may apply to the court to vary them.*

<sup>35</sup> Like inheritance of membership, a minor who acquires membership through donation is a beneficiary who does not need to pay for the membership share she acquires. The difference between the two is that in the case of inheritance, transfer is a result of the operation of the law, while in the case of donation, transfer is a result of a generous juridical act by the donor.

<sup>36</sup> See FDRE Constitution, Art. 36(2).

<sup>37</sup> A notoriously insane person is a person who does not appreciate the importance of her actions and third parties know or should know this condition of the person. The CCE defines an insane person as a person who does not understand the importance of her actions due to insufficient mental development, mental disease or senility. It also provides that feeble-minded persons, drunkards and prodigals may be assimilated to insane persons in appropriate cases. And insanity is regarded as notorious where: (1) the insane person is an inmate of a hospital, mental institution or nursing home due to her mental condition; or (2) in a rural community of less than 2,000 habitants, the insane person's liberty of movement is restricted and she is kept under the watch of her family or a person living with her. See CCE, Arts. 339,341 & 342.

juridical act performed by a notoriously insane person, such as acquisition of membership in a BO, can be invalidated upon the application of the person, her representatives or her heirs.<sup>39</sup> Besides, persons with apparent infirmity who are in a situation where they cannot protect their interests may also voluntarily, but not through the operation of the law, demand to be regarded as incapable with a view to seek invalidations that a notoriously insane person would be able to invoke.<sup>40</sup> That said, an insane and infirm person would become a judicially interdicted person<sup>41</sup> after so is pronounced by court. Once interdicted, they are generally regarded as incapable and an organ of protection such a tutor and a guardian is appointed to look after their pecuniary and personal interests respectively.

Like the case of a minor, a judicially interdicted person is generally prohibited from becoming a trader and her tutor is also prohibited from trading in the name and on behalf of the interdicted person.<sup>42</sup> Once again, this work avers that the interpretation of this prohibition under the ComCE and the incapacity of judicially interdicted persons under the CCE does not entail an absolute restriction on their membership capacity, and that judicially interdicted persons should be capable of acquiring membership under the following four circumstances.

First, a judicially interdicted person should be able to acquire original and derivative membership with a non-trader status since she is only prohibited from becoming a trader – not from becoming a member in BOs with a non-trader status.<sup>43</sup> Accordingly, the above analysis with regard to minors is analogically applicable and a judicially interdicted person, represented by a lawfully

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<sup>38</sup> An infirm person is a feeble-minded, visually disabled person or a person with other permanent infirmity that inhibits her from taking care of herself or from administering her property. CCE, Art. 340. Although the issue of apparent infirmity is mentioned under article 343(2) of the CCE, what makes infirmity “apparent” is not provided under the CCE. A reference to a lexical dictionary for defining the adjective word “apparent” could, however, provide that ‘something is apparent if it is clearly visible or understood.’ Accordingly, one may logically argue that infirmity is apparent where third party can clearly know the infirmity of the person.

<sup>39</sup> CCE, Art. 343 (1). Where the insanity is not notorious, a juridical act performed by the person cannot be invalidated on the ground of her insanity. It can be invalidated only when she shows that; like a sane person, her consent was not free and non-defective. Heirs and creditors of the person can also seek invalidation only if: (1) the insanity was caused by contents of the juridical act, or (2) an application demanding judicial interdiction of the person is submitted and interdiction was pronounced before the death of the person. *See* CCE, Arts. 347 & 348

<sup>40</sup> CCE, Arts. 340 & 343(2).

<sup>41</sup> A judicially interdicted person is an insane or infirm person who is declared incapable by a court because it was proved to be necessary action to protect the interests of the person or her presumptive heirs. It is based on the application of the person, her spouse, her relatives or by the application of a public prosecutor; and the decision pronouncing her interdiction is effective as of a fixed date, and is publicized and registered in a public record. *See* CCE, Arts. 351-354 & 356.

<sup>42</sup> ComCE, Arts. 11(1) & 12

<sup>43</sup> ComCE, Art. 12.

acting tutor, can acquire derivative and original membership in a PLC and an SC, and, as a limited partner, in an LP.<sup>44</sup>

Second, a judicially interdicted person, being represented by a tutor, should be able to acquire derivative membership with a trader status pursuant to article 12 of the ComCE, which makes a reference to a mutatis-mutandis application of article 288 of the CCE. However, the application of this provision to membership capacity of interdicted persons is highly questionable. As mentioned in the above section, article 288 of the CCE, which deals with capacity of minors to inherit and sustain business enterprises with the support of a tutor, is repealed and replaced by FDRE and Regional States' subsequently enacted Family Codes. This reference made by article 11(1) and 12 of the ComCE for the application of the provisions on capacity of persons, in general, and of article 288 of the CCE, in particular, to determine capacity of a person to engage in commercial activities may not coalesce with other laws of the country introduced with the advent of the present federal government structure. Currently, the power to legislate commercial code falls within the mandate of FDRE House of Peoples Representatives while the power to enact civil laws, which includes the laws on capacity of members, is within the mandate of the Regional State councils.<sup>45</sup> This means, states can have separate and, perhaps, contradictory rules of capacity. For example, rules of capacity of minors and their protections are now governed by FDRE and Regional Family Codes, and the rules of minor's capacity found under "Law of Persons" provisions of the CCE are, thus, replaced by these Family Codes.<sup>46</sup> Instead of solving this issue, the Draft ComCE made it worse by removing the reference to Article 288 and replacing it with a rule that authorizes reference to regional laws. Accordingly, the reference made by both the ComCE and the Draft should be abolished and the House of Peoples Representatives should enact rules regarding a person's capacity to become a trader and become

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<sup>44</sup> She may also become a member in a JV provided that an arrangement that limits her liability to her contribution is made by the joint venture agreement and the agreement is executed by the tutor in accordance with the law applicable to JVs. In fact, the tutor would be liable if she executed the agreement in a manner that would create unlimited liability on the interdicted person. This applies both in the case of membership of a minor and a judicially interdicted person in a JV. *Generally see* ComCE, Arts. 271-279

<sup>45</sup> FDRE Constitution, Arts. 55 (4 & 6) cum 52(1).

<sup>46</sup> *For example see* FDRE Revised Family Code, Art. 319(1a); Oromia Family Code, Art. 336(1a); Amhara Family Code, Art. 33(1a), SNNPR Family Code, Proclamation No. 75/1996, SNNPR NEGARIT GAZZETA, 6<sup>th</sup> Year No. 1, Hawassa, 1996, Art. 334; and Tigray Family Code, Proclamation No. 116/1999, TIGRAY NEGARIT GAZZETA, 15<sup>th</sup> Year No. 1, Mekelle, 1999, Art. 246(1).

a member of BOs as part of the ComCE because this is part of its mandate and also because it is necessary for creating a single economic community envisaged by the FDRE constitution.

That said, until a legislative solution is provided to resolve the matter, one has to find a functional solution for enabling derivative membership of a judicially interdicted person in commercial BOs. One way of doing that is resorting to the legislative intent of the time and applying article 288 of the CCE as it is. Accordingly, a judicially interdicted person can acquire derivative membership in a BO with a trader status where she inherits a share in that BO and a tutor is instructed/authorized by court or family council to keep the membership on behalf of the interdicted person.<sup>47</sup> Another way of resolving the issue could be by interpreting the corresponding provisions of the family codes that replaced article 288 of the CCE in a manner that would allow the interdicted person to inherit and keep derivative membership upon a court or family council authorization since this too would maintain the legislative intent.

Third, a judicially interdicted person is capable of acquiring derivative membership with a trader status where she acquired the share from a donor who made an instruction that the tutor shall keep the membership on behalf of the interdicted person and no variation to the instruction is made by court.<sup>48</sup>

Finally, a judicially interdicted person should be able to acquire both derivative and original membership with a trader status if the effect of her interdiction does not include a prohibition from becoming a trader. In this regard, article 371 of the CCE proclaims that “*the court may, in pronouncing the interdiction or after such decision, limit the effects of the interdiction*” or “*it may authorize the interdicted person to do certain acts [herself]*.”<sup>49</sup> Hence, the interdicted person may acquire original and derivative membership of any kind if the effect of the interdiction does not include such prohibition or an express authorization that could be interpreted to authorize acquisition of membership is given by the court. In this situation, the

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<sup>47</sup> Like a minor, a judicially interdicted person is represented by a tutor with regard to the administration of her pecuniary rights. The tutor of the interdicted person, who is necessarily appointed by court, has the same powers and duties as a minor’s tutor with the exception of minor deviations provided under article 359-379 of the CCE. As part of the exception, the tutor, whether she is the father or mother of the interdicted person, is required to seek the instruction and authorization of a membership share inherited by the interdicted person. *See* CCE, Arts. 288, 359(1) cum 358 & 365.

<sup>48</sup>*See* CCE, Art. 358. For further discussion see the above analysis on membership capacity of minors.

<sup>49</sup> CCE, Art. 371.

interdicted person is rendered to be capable of acquiring, not only original membership, but also derivative membership.

### 2.3. Legally Interdicted Persons

A legally interdicted person is a person from whom the law withdraws her capacity to administer her property due to a criminal sentence passed upon her in accordance with criminal law.<sup>50</sup> Hence, such person should be barred from becoming a member in BOs only where there is an express criminal law provision authorizing the interdiction. In this regard, article 123(C) of FDRE Criminal Code provides that a person found guilty of a crime may be deprived of “[her] right to exercise a profession, art, trade or to carry on any industry or commerce for which a license or authority is required”.<sup>51</sup> This deprivation is authorized “where the nature of the crime and the circumstances under which the crime was committed justify such an order, and the criminal has, by [her] unlawful act or omission, shown [herself] unworthy” of exercising these rights.<sup>52</sup> While a sentence of death or of rigorous imprisonment carries with it an automatic deprivation of all civil rights under article 124(1) of the FDRE Criminal Code, the author argues that the phrase “civil rights” in the provision shall not be interpreted to include deprivation of a right to trade or to carry on any industry or commerce as a sole proprietor or as a member of BOs. This is because, on the one hand, article 123 has created a substantive distinction between “civil rights”, “family rights” and “right to carry on trade” and; on the other hand, civil life and commercial life of individuals are governed by separate laws – the CCE and the ComCE respectively.<sup>53</sup>

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<sup>50</sup> See CCE, Arts. 380, 383(1) & 387.

<sup>51</sup>The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414 of 2004, Addis Ababa, 9th May 2005 ( hereinafter FDRE Criminal Code), Art. 123(c)

<sup>52</sup> The court is also required to determine the duration of the deprivation by taking into account the gravity of the crime, the antecedents and character of the criminal, the danger of a relapse into crime, the need for, and utility of the deprivation or the probable effect of the punishment and the interests of society. FDRE Criminal Code, Arts. 123 & 124(1). Besides, this interdiction may be a temporary deprivation ranging from five months to five years or, unless it becomes a subject of pardon, amnesty or reinstatement, a permanent deprivation in the case of death sentence and rigorous imprisonment for life. FDRE Criminal Code, Arts. 124, 229, 230, & 232-237.

<sup>53</sup> Generally see article 123 of the FDRE Criminal Code which reads as follows:

*Article 123. - Deprivation of Rights.*

*Where the nature of the crime and the circumstances under which the crime was committed justify such an order, and the criminal has, by [her] unlawful act or omission, shown [herself] unworthy of the exercise of any of the following rights, the Court may make an order depriving the criminal of:*

- a) *[her] civil rights, particularly the right to vote, to take part in any election or to be elected to a public office or office of honour, to be a witness to or a surety in any deed or document, to be an expert witness or to serve as assessor; or*

By taking the above analysis and the relevant provisions of the CCE into account, it is plausible to argue that an interdicted person may be able to acquire derivative and original membership in BOs if her interdiction does not include the prohibitions under article 123(C) of the Criminal Code. It means she can acquire membership with or without a trader status as though she were fully capable. That being said, even where the person's interdiction falls within the ambit of article 123(C), it, in and of itself, does not lead to an absolute prohibition from acquiring membership. What is prohibited is trading and engaging in commercial and industrial activities for which a license or authorization must be sought. Since acquisition of membership in BOs with a non-trader status does not require a license or authorization, even a person whose interdiction falls within the scope of article 123(C) of the FDRE Criminal Code can lawfully acquire derivative and original membership in a PLC and SC, and a membership in a LP as a limited partner.

Finally, an interdicted person may also acquire derivative membership where she inherits membership in BOs and her tutor is authorized to keep the membership on behalf of the interdicted person. This is similar with that of a minor, and judicially interdicted persons except the fact that authorization to the tutor in this case is given only by court.<sup>54</sup>

### 3. NON-COMPETE DUTY BASED INCAPACITY

Although Ethiopian competition law aims at promoting a healthy competition among business competitors,<sup>55</sup> a non-compete duty may be imposed with a view to deter unfair competition. This non-compete duty does not pose a general incapacity to become a member of a BO. It may; however, trigger incapacity in specific situations. The following paragraphs examine the scope and nature of certain persons' membership incapacity due to a non-compete duty imposed upon them by contract or law. In particular it analyzes non-compete duties and scope of incapacity of *commercial employees, partners in a GP and an LP, Directors and sellers of a business.*

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- b) of [her] family rights, particularly those conferring the rights of parental authority, of tutorship or of guardianship; or
  - c) [her] rights to exercise a profession, art, trade or to carry on any industry or commerce for which a license or authority is required.

<sup>54</sup> ComCE, Art. 12 cumulatively with CCE, Arts. 288 cum 381 & 385.

<sup>55</sup> Trade Competition and Consumer Protection Proclamation, Proclamation No. 813/2013, FED. NEGARIT GAZZETA, 20<sup>th</sup> Year No. 28, Addis Ababa, 21 March 2014, Art. 3

### 3.1. Commercial Employees

A commercial employee<sup>56</sup> is under a legal obligation not to compete with her employer during the time of her employment, and may be put under a contractual non-compete duty to be effective after expiry of her employment. Pursuant to article 30 of the ComCE, a commercial employee cannot be a member in a BO that is engaged in a business similar to the business of her employer.<sup>57</sup> Her incapacity; however, is limited to membership with a trader-status. This incapacity is in force during the time of her employment. This non-compete duty based incapacity – which is not created by contract but imposed by the law itself – is flawed in that the restriction is not limited by space. It would be rational if the employee is restricted from competing with her employer only in places where the employer operates. Where the employee operates at a different place from the place of business of the employer, competition does not exist between them; and the restriction should not have covered all similar businesses irrespective of where the employee might operate.

The non-compete duty continues after termination of employment if a valid contractually imposed non-compete duty exists. Article 2589 (1) of the CCE states that *‘where the work given to the employee enables [her] to meet the clients of the employer or enter into the secrets of [her] business, the parties may provide that the employee shall not, after the termination of the contract, enter into competitive business with [her] employer or engage in any way whatsoever in an undertaking which would compete with the employer.’*<sup>58</sup> Based on this provision and articles 2590 and 2592 of the CCE, an employee under a contractually imposed non-compete duty enjoys a lesser restriction when compared with the legally imposed non-compete duty discussed in the

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<sup>56</sup> Commercial employees, as defined by the ComCE, *‘are persons who are bound to a trader by a contract of employment and who assist the trader by doing work of a non-manual nature as a sales man, secretary, accountant, guardian, inspector or director.’* ComCE, Art. 28 (1)

<sup>57</sup> Article 30 of the ComCE states as follows:

*Art. 30. - Prohibition from carrying on private trade.*

- 1) *A commercial employee may not carry on, on [her] own behalf or on behalf of a third party, a trade similar to the trade carried on by [her] employer. Where an employee infringes this prohibition, [her] employer may claim damages and may cancel or refuse to renew the contract of employment in accordance with Art. 2591 of the Civil Code.*
- 2) *A contract of employment may only contain a prohibition from carrying on private trade upon the expiry of the contract of employment on the conditions specified in Art. 2589, 2590 and 2592 of the Civil Code*

<sup>58</sup> CCE, Art. 2589(1). Although many of the CCE laws on employment relations are replaced by the Labor Proclamation. Article 2589, 2590 and 2592 of the CCE are not replaced by the Labor Proclamation which only repealed laws that are not consistent with the proclamation. Hence, these provisions are still in force pursuant to article 190(2) of the Labor Proclamation. Labor Proclamation, Proclamation No. 377/2003, FED. NEGARIT GAZZETA, 10<sup>th</sup> Year No. 12, Addis Ababa, 26 February 2004, Art. 190(2).

preceding paragraph.<sup>59</sup> In conclusion, a commercial employee under a contractual non-compete duty is also capable of derivative and original membership with a non-trader status even where the BO in which she becomes a member of is engaged in a similar business with her employer.

### 3.2. Partners in GP and General Partners in LP

Like that of commercial employees, certain restrictions are also imposed on membership capacity of partners in a GP and general partners in an LP due to a non-compete duty imposed upon them by the law. In this regard, article 292 of the ComCE states as follows:<sup>60</sup>

*Art. 292. -Restrictions on private trade.*

- 1) *Unless otherwise agreed, no partner may carry out transactions on behalf of a third party or on [her] own behalf which relate to business carried on by [her] firm, nor may [she] be a partner with joint and several liability in the management of a firm carrying on a similar business.*
- 2) *An unlimited agreement under sub-article (1) shall be valid for one year only.*

A major restriction that can be fathomed out of the above provision is that partners in GP and general partners in LP cannot be members with joint and several liability in the management of a firm carrying on a similar business.<sup>61</sup> This restricts a partner from derivatively or originally acquiring membership in another BO where: (1) the other BO is engaged in a similar business with the partnership in which the partner is already a member; (2) the partner assumes joint and several liability if she were to become a member of the other BO; and (3) the partner participates in the management of the other BO. Accordingly, where these three cumulative conditions are fulfilled and where there is no valid contract<sup>62</sup> that could render the non-compete-duty

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<sup>59</sup> The CCE provides that such duty will be valid only when it is made in writing; that imposition of the duty must be necessary for the protection of the legitimate interests of the employer and does not unfairly impede the economic future of the employee; and that it must expressly stipulate the forbidden business and the restriction has to be limited as to time and place. This non-compete duty will lapse if: (1) it is proven that the employer has no material interest in its maintenance; (2) the employer terminated the contract of employment without a good cause; and (3) the employee terminated the contract of employment with a good cause. CCE, Arts. 2589(2), 2590 & 2592.

<sup>60</sup> ComCE, Art. 292. This provision is organizationally put under rules governing GP. However, it is also applicable to general partners in an LP by virtue of a mutatis-mutandis application called for under article 300 of the ComCE.

<sup>61</sup> This prohibition, like the prohibition on commercial employees, is aimed at protecting the partnership against unfair competition.

Another restriction imposed on partners is a prohibition from carrying out, on behalf of themselves or others, transactions that relate to the partnership's business.

<sup>62</sup> A contract concluded by partners of a partnership may suspend the non-compete duty for a fixed time. For example, they may, by the contract, suspend the non-compete duty for 3, 5 or 6 years. The contract remains valid as long as it fulfills requirements for validity of contract under Book V of the CCE and fixes the duration for which the suspension lasts. If the suspension is indefinite, the contract will be valid only for one year and the non-compete duty resumes to be effective. ComCE, Art. 292(2).



ineffective for a fixed period of time, partners in GP and general partners in LP are not capable of becoming members in another GP and general partner in another LP. In another word, they can acquire original and derivative membership with or without a trader-status in all BOs as long as they are not engaged in a similar business with their partnerships. Accordingly, even where the BO is engaged in a similar business, they can be members of a LP with a limited partner status since such partner's liability is limited and the partner is barred from engaging in management. Besides, they can be members of SCs, for their liability is limited as long as they are not elected to a director position since directors participate in management and are jointly and severally to the company and third parties for a breach of their duties. They are also capable of becoming members of PLCs, since their liabilities are limited as long as they do not also work as the manager of the PLC.<sup>63</sup>

### 3.3. Directors

Directors<sup>64</sup> are also under a non-compete duty pursuant to article 355 of the ComCE.<sup>65</sup> The non-compete duty of a director, as stated under Article 355, is similar with the non-compete duty of partners in GP and LP except that the language used here is better in terms of limiting the scope of the restriction. The non-compete duty under Article 355 prohibits the director from becoming a member in 'rival' BO, whereas the non-compete duty of a partner under Article 292(1) is unnecessarily and unreasonably broadened to prohibit a partner from becoming a member in a BO engaged in 'a similar business' with the partnership in which the partner is a member of, irrespective of whether they are rivals or not.<sup>66</sup> Other than this, the incapacity of a director to

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<sup>63</sup> ComCE, Arts. 364, 366 & 530.

<sup>64</sup> An SC is supervised and managed by a board of directors composed of three to twelve directors. Directors are shareholders of an SC who are appointed by ordinary general meeting the SC with a responsibility of directing and ensuring financial solidity of the SC. They are held jointly and severally liable to the SC and third parties where they breach their duties under the law, company statutes and company resolutions. See ComCE, Arts. 347, 350(2), 362–364 & 366.

<sup>65</sup> Article 355 of the ComCE proclaims as follows:

*Art. 355.-Restrictions on private trade.*

*Unless authorized by a general meeting, directors may not be partners with joint and several liability in rival companies nor compete against the company either on their own behalf or on behalf of third parties.*

<sup>66</sup> The phrase 'similar business/similar trade' used in article 30(1), in relation to non-compete duty of commercial employees, and article 292(1) of the ComCE, regarding partners in GP and LP, is unreasonably broad. When construed broadly, the phrase could mean any trading of similar or interchangeable goods and services that are geographically located in different towns, cities or even countries. According to this interpretation a person may not become a member in another BO where the BO is engaged in a similar business but it is not in a competition with the enterprise that receives the protection of non-compete duty. When construed narrowly, the phrase could mean similar trade by rival business enterprises reaching out to customers in the same geographical market. Under this interpretation, a person is incapable of becoming a member of a BO only if there is a competition between the BO and the beneficiary of the non-compete duty. The author argues that the phrase needs to be

become a member of another BO is limited to the same situations as that of partners discussed in the above heading.

### 3.4. Seller of a Business

A business, *fonds de commerce*, is an incorporeal movable consisting of all movable property brought together and organized for the purpose of carrying out commercial activities.<sup>67</sup> It mainly consists of good will and may also consist of incorporeal elements such as trade name, special designation under which the trade is carried on, the right to lease the premises in which the trade is carried on; patents or copyright, and such special rights as attach to the business itself and not to the trader.<sup>68</sup> A business is regarded as an object of property, a *res*, and, as such, it can be sold, leased and mortgaged.

Where an owner of a business sells her business she is under a legal obligation not to compete with the buyer. Article 158 of the ComCE, which governs non-compete duty of sellers of a business, creates ambiguity due to its failure to expressly address a seller's duty to acquire membership in BOs that compete with the business sold by the seller, a rule of membership capacity may be derived through interpretation of the provision.<sup>69</sup> Like article 30 of the ComCE, which governs non-compete duty of commercial employees, Article 58 bars a seller of a business from competing with the buyer as a trader. It does not expressly govern situations whereby the seller acquires membership in a BO that is engaged in a similar business with the sold business. Yazachew Belew and Dominique Ponsot were right in proposing that article 158 of the Code *“should extend to cases of trading through a straw man or a legal entity owned or controlled by*

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construed narrowly in order to mitigate the spillover effect of non-compete duties that impede a person's constitutional right of carrying on trade as a sole proprietor and as a member of BOs. It is also necessary to construe it narrowly so that its effect is limited to providing protection to the beneficiary of the non-compete duty. In fact, a narrow construction of a non-compete duty is applied to determine the scope of a non-compete duty under article 355 of the ComCE. As such, this work suggests that 'similar business/similar trade' should be determined by an assessment of a juxtaposition of both 'product market' and 'geographical market' – an assessment adopted by Ethiopian competition law in order to determine existence of a firm's dominant position. *See Trade Competition and Consumer Protection Proclamation, supra note 55, Art. 6 (3 & 4).*

<sup>67</sup> ComCE, Art. 124

<sup>68</sup> ComCE, Art. 127; For a thorough discussion on the concept of business under Ethiopian law, see Yazachew Belew, *The Sale of Business as a Going Concern under the Ethiopian Commercial Code: A Commentary*, 24 J. Eth. L 2, 90, 90-138 (2010)

<sup>69</sup> Article 158 of the ComCE states as follows:

*Art. 158. -Seller prohibited from competing.*

- 1) *During five years from the sale, the seller shall refrain from doing any act of competition likely to injure the buyer. [She] may not carry on, in the vicinity of the business [she] sold, a trade similar to the trade carried on by the buyer.*
- 2) *The contract of sale may specify the extent of such prohibition which shall in no case exceed five years.*

*the seller.*”<sup>70</sup>That said, the author contends that Article 158 did not completely fail to address the seller’s participation in rival BOs. The seller is prohibited from carrying on a similar trade. That is, she cannot be a trader who engages in a business similar to the one she sold. This also means that she cannot be a member of a rival BO with a trader status. Accordingly, a rule of capacity that prohibits the seller from derivatively or originally acquiring a membership share with a trader status, as in GP and LP, can be drawn from article 158 of the Code; and, hence, the seller is capable of acquiring membership in a rival BO with a non-trader status as the acquisition does not amount to be an act of competition that could injure the buyer of the business.<sup>71</sup>

The restriction under Article 158 of the ComCE is narrow. In terms of geographical scope, the non-compete duty is only effective in the vicinity of the business sold – which means the seller is not under incapacity to acquire membership shares in BOs engaged in a similar business but geographically located in a different place from the business sold by the seller. In terms of duration the duty is effective only for five years from the date of sale, unless the contract of sale of the business stipulates a lesser duration. Consequently, the seller is also capable of acquiring derivative and original membership in a BO, with or without a trader status, where: (1) the BO is not located in the vicinity of the business sold by the seller, (2) the BO does not engage in a similar business with the sold one, or (3) the seller’s non-compete duty has lapsed.

#### **4. MEMBERSHIP CAPACITY OF FOREIGNERS**

Article 389(1) of the CCE proclaims that foreigners are fully assimilated to Ethiopian nationals regarding the enjoyment and exercise of civil rights.<sup>72</sup> With regard to the meaning of the phrase “civil rights,” in this context, article 389(2) of the CCE proclaims that *‘all rights the exercise of which does not imply any participation in the government or administration of the country shall be considered to be civil rights.’*<sup>73</sup> Thus, foreigners are generally capable of acquiring derivative

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<sup>70</sup>Yazachew Belew, *Supranote 68*.

<sup>71</sup> For e.g., The seller is prohibited from acquiring original membership in rival BOs with a non-trader status since participation in setting up of a BO that engages in a similar business with the sold business may amount to be an act of competition prohibited under article 158(1) of the ComCE.

<sup>72</sup> CCE, Art. 389(1).

<sup>73</sup> CCE, Art. 389(2).

and original membership just like Ethiopian nationals since this act amounts to a civil act under the CCE<sup>74</sup> and there are no express proscriptions under the CCE<sup>75</sup> and the ComCE.<sup>76</sup>

However, a restriction is imposed by Ethiopia's Investment Proclamation<sup>77</sup> and Council of Ministers Regulation.<sup>78</sup> Under article 12(3) of Ethiopia's Investment Proclamation, a foreign investor<sup>79</sup> who intends to acquire membership share through purchase is required to apply for a prior authorization from FDRE Ministry of Trade.<sup>80</sup> The Ministry will approve the transfer and the foreigner would be allowed to acquire membership only if: (1) the BO in which membership is sought for is engaged in economic activities that are allowed for foreign investors; (2) the membership share the foreigner intends to acquire complies with minimum capital requirement

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<sup>74</sup> Participation in BOs by becoming a member the BOs is a right which does not imply a participation in Ethiopian government, nor does it imply participation in the administration of the country. Indeed, BOs are established between two or more persons acting in a private capacity. Their objective is to carry out activities of economic nature, not administrative nature. And their function is to produce commercial goods and services with a view to make profit for themselves. Hence, their objectives and the nature of their activities does not involve participation in the government nor does it relate to administration of the country. Membership in BOs is, therefore, regarded as a civil right which foreigners capable of exercising pursuant to article 389(2) of the CCE.

<sup>75</sup> The only civil act the CCE, renders foreigners incapable of is the act of acquisition of ownership or acquisition of rights assimilated to ownership of immovable things situated in Ethiopia. *See generally* CCE, Arts. 390-393.

<sup>76</sup> Although article 389(3) of the CCE anticipates that the capacity of foreigners to become members in BO may be subjected to a restriction imposed by a special law, such restriction is not imposed by the ComCE. Article 100(1) of the ComCE proclaims that '*any Ethiopian or foreign person or business organization carrying out commercial activities within the Empire of Ethiopia shall be registered.*' What transpires from this provisions is that foreigners are capable of becoming traders as an individual and they are also capable of becoming members in BOs with or without a trader-status. The issue is indirectly addressed by article 330(f) of the ComCE, which is applicable to SCs only. The provision declares that '*every share ... shall show a statement showing whether a share may be transferred to a foreigner.*' This could be interpreted to mean that they can be members in SCs; that their capacity to acquire derivative membership is not restricted by the ComCE; and that derivative membership my, however, be restricted by the memorandum of association of the SC. Even in this scenario, foreigners are generally capable of acquiring original and derivative membership with or without a trader-status under mandatory provisions of the *See* ComCE. CCE, Art. 389(3); Commercial Code, Arts. 100(1) & 330(f).

<sup>77</sup> Investment Proclamation. Article 40(1) of the proclamation has repealed the previous Investment Proclamation No. 280/2002 along with amendments made thereto.

<sup>78</sup> Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation, Regulation No. 270/2012, FED. NEGARIT GAZZETA, 19<sup>th</sup> Year No. 4, Addis Ababa, 29 November 2012.

<sup>79</sup> Article 2(4) of the investment proclamation classifies investors into a foreign investor and a domestic investor. Persons who are labeled as foreign investors under the proclamation are: (1) a physical person, who is a foreign national and who has invested a foreign capital in Ethiopia; (2) a business enterprise, whether incorporated in or outside of Ethiopia, wholly owned by foreign nationals and has invested a foreign capital in Ethiopia; (3) a business enterprise, whether incorporated in or outside of Ethiopia, owned by foreign nationals jointly investing with a domestic investor; and (4) an Ethiopian national permanently residing abroad and preferring treatment as a foreign investor. And a "foreign capital" is defined under article 2(7) of the proclamations as '*a capital obtained from foreign sources, and includes the reinvested profits and dividends of a foreign investor.*' *See* Investment Proclamation, Arts. 2(6) & 2(7).

<sup>80</sup> It proclaims that '*... a foreign investor intending to buy an existing enterprise in order to operate it as it stands or to buy shares of an existing enterprise shall obtain prior approval from the Ministry of Trade.*' Investment Proclamation, Art. 12(3)

set under the proclamation;<sup>81</sup> and (3) the acquisition of the share is done in accordance with the Commercial Registration and Business Licensing Proclamation.<sup>82</sup>

With the exception of the third condition, the process of acquisition of membership share by a foreign investor through a purchase is different from that of a domestic investor. The process is made restrictive and onerous by the first and second requirements for approval. Besides, unlike article 12(2) of its predecessor (the repealed Investment Proclamation No. 280/2002), which provides that a decision of approval or rejection must be made within ten days of a complete application by the foreign investor, the Proclamation has not set a reasonable time within which a decision of approval must be made. Accordingly, foreigners' capacity to derivatively acquire membership share through purchase is considerably reduced by the onerous capital requirement and undefined period of approval set under the regulation.

In addition to the above restriction on a derivative acquisition, a foreign national is prohibited from acquiring a membership share in BOs whose business object is carrying out economic activities listed under article 3 of Council of Ministers Regulation No. 270/2012.<sup>83</sup>

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<sup>81</sup>In relation to the minimum capital, a foreign investor is required to acquire membership share that represents at least \$ 200,000 in the capital of a BO she intends to be a member of. This requirement is applicable where all the other members of the BO are also foreigners. However, where the BO also has domestic investors as members, the requirement is reduced to \$ 150,000. The requirement is further reduced to \$ 50,000, where there are members who are domestic investors and the BO is engaged in architectural or engineering works or related technical consultancy services, technical testing and analysis or in publishing work. That said, a foreign investor who reinvests her profits or dividends generated from her existing enterprise in Ethiopia is exempted from allocating a minimum capital. Investment Proclamation, Art. 11 (1, 2, 3b &4).

<sup>82</sup>Investment Proclamation, Art. 12 (3). The list provided under article 12(3) of the proclamation, which provides for a list of cumulative factors that should be considered in making a decision of approval or rejection of a foreigner's application to buy a share, can be regarded as an improvement to article 12 (2) of the repealed investment proclamation no. 280/2002, which gives unreasonably wide discretion by totally failing to list factors that need to be considered. That said, article 12(3) of the proclamation is still dotted by flaws because, as it stands, it creates another layer of unreasonable discretion by failing to prescribe that the three cumulative lists are the only conditions that would be considered by the Ministry in the decision making. See Investment Proclamation (As Amended), Proclamation No. 280/2002, FED. NEGARIT GAZZETA 8<sup>th</sup> Year No. 27, Addis Ababa, 2 July 2002, Art. 12(2)

<sup>83</sup>Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation, Regulation No. 270/2012, FED. NEGARIT GAZZETA, 19<sup>th</sup> Year No. 4, Addis Ababa, 29 November 2012, Art. 3. Article 3 of the regulation reads as follows:

*Article 3:- Investment Areas Reserved for Domestic Investors*

*1. The following areas of investment are exclusively reserved for Ethiopian nationals:*

- a) Banking, insurance, micro-credit and saving services;*
- b) Packaging, forwarding and shipping agency services;*
- c) Broadcasting service;*
- d) Mass media service;*
- e) Attorney and legal consultancy services;*
- f) Preparation of indigenous traditional medicines;*
- g) Advertisement, promotion and translation works; and*
- h) Air transport services using aircraft with a seating capacity up to 50 passengers.*

In accordance with this provision, a BO may engage in the listed activities only if all of its capital is owned by Ethiopian nationals. Even a BO incorporated in Ethiopia with the object of carrying out activities listed under article 3 of the regulation will not have Ethiopian nationality unless all its members are Ethiopian nationals.<sup>84</sup> And if the BO is not Ethiopian, then it cannot carry out the listed activities. Accordingly, foreigners are incapable of acquiring derivative and original membership in BOs that are engaged in activities listed under article 3 of the Regulation.

That said, the restriction imposed by article 3 of the Regulation does not apply to a foreign national of Ethiopian origin who hold an identification card issued in accordance with Proclamation No. 270/2002.<sup>85</sup> They have a right to be considered as a domestic investor and restrictions imposed on foreign nationals regarding the utilization of economic, social, and administrative services are not applicable to them.<sup>86</sup> However, their membership capacity in financial BOs is restricted by a directive recently issued by National Bank of Ethiopia.<sup>87</sup> The directive prohibited foreigners of Ethiopian origin from acquiring or maintaining membership share in banks, insurance companies and other financial institutions.<sup>88</sup> To sum up, foreign nationals of Ethiopian origin having the identification card are capable of becoming a member in

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2. *For the purpose of sub-article (1) of this Article, a business organization may have Ethiopian nationality, provided that its total capital is owned by Ethiopian nationals*

<sup>84</sup> The way Article 3(2) defines Ethiopian BOs for the purpose of article 3(1) of the regulation begs more questions than it answers. For one thing, the provision creates a confusion regarding how nationality of BOs is established, which contributes uncertainties that already exists due to absence of Ethiopian Private International Law. If the rule is aimed at excluding foreigners from becoming a member in Ethiopian BOs, it could state that “BOs are allowed to engage in the listed activities only if their capital is fully owned by Ethiopian nationals.” The other is that BOs should be regarded as of Ethiopian nationality if the majority of their capital is held by Ethiopians. While this work is destined to establishing capacity of persons, in general, and of foreigners, under this section the issue needs to be addressed by another normative study, the author holds a guiles opinion that BOs should be regarded as Ethiopians if majority of their capital is held by Ethiopians. Besides, although there might be a rational explanation for restricting foreigners from engaging in certain activities, their capacity to be members in BOs that are engaged in listed-activities should not be restricted as long as majority of the BOs capital is not held by foreigners.

<sup>85</sup> *See generally* Providing Foreign Nationals of Ethiopian Origin with Certain Rights to be Exercised in Their Country of Origin Proclamation, Proclamation No. 270/2002, FED. NEGARIT GAZZETA, 8<sup>th</sup> Year No. 17, Addis Ababa, 5 February, 2002.

Under article 2(1) of the Proclamation, a “Foreign National of Ethiopian Origin” means a foreign national other than a person who forfeited Ethiopian nationality and acquired Eritrean nationality, who had been Ethiopian before acquiring a foreign nationality, or at least one of her parents, grandparents or great grandparents was Ethiopian national.

<sup>86</sup> *Ibid*, Art. 5.

<sup>87</sup> National Bank of Ethiopia Manner of Relinquishing Shareholdings of Foreign Nationals of Ethiopian Origin in a Bank or an Insurer Guideline, Guideline No. FIS/01/2016 28 October 2016.

<sup>88</sup> *Ibid*. The author is of the opinion that the prohibition under this guideline, which is issued by the National Bank of Ethiopia, is contrary to the permission given to foreign nationals of Ethiopian origin under article 5 of Proclamation no. 270/2002. Legally speaking, the Proclamation is higher in hierarchy because it was passed by the FDRE House of Peoples Representatives and the National Bank does not have a power to pass a guideline (directive) which contradicts the proclamation. Besides, the directive breaches article 15 of the proclamation which proclaims that ‘*any laws, regulations, directives, decisions or procedural practices shall not be applicable in so far as they are inconsistent with this Proclamation.*’ Economically speaking too, the prohibition imposed by the guideline will damage the country’s development by restricting inflow of foreign currency.

all BO including those BOs that are engaged in activities listed under article 3(1) of the regulation with the exception of those engaged in banking, insurance, micro-credit and saving services.

In conclusion, one may drive a principle that foreigners are capable of acquiring derivative and original membership with or without a trader-status unless there is a special legislation prohibiting the acquisition. Among the restriction imposed by special laws are: prohibition of foreigners, with non-Ethiopian origin, from acquiring any form of membership in BOs that are engaged in activities listed under article 3(1) of Regulation No. 270/2012; prohibition of foreigners of Ethiopian origin from acquiring any form of membership in BOs that are engaged in the finance sector; and the requirement of prior approval for foreign investors who intend to derivatively acquire membership through purchase.

## **5. CONCLUDING REMARKS AND RECOMMENDATIONS**

All physical persons are presumed to be capable of undertaking juridical acts and, hence, are also capable of acquiring membership in BOs recognized under the ComCE. However, this presumption could be rebutted by an express proscriptive law that could prohibit a physical person from acquiring membership. This article, therefore, undertakes a comprehensive analysis of circumstances under which Ethiopian law renders physical persons incapable of acquiring membership under Ethiopian law. In particular, it analyzes and describes potential restrictions on membership capacity of minors, interdicted persons, persons under non-compete duty and foreigners.

It does so, on the basis of modes of acquiring membership and the membership status thereby acquired. It applies two modes of acquisition to identify the law applicable to assess membership capacity: viz., original acquisition and derivative acquisition. Original acquisition happens where membership is acquired at the time of formation of a BO and a person is capable to acquire membership only if she is capable of signing partnership contract. The law applicable to assess membership capacity in such acquisition is, therefore, the law that determines a person's capacity to contract. On the other hand, derivative acquisition refers to a membership acquired through a transfer of share in an existing BO and the law applicable to assess membership capacity in such acquisition is the law applicable to the transfer. Besides, it applies two types of membership status in order to assess membership capacity: viz., membership with and without a

trader status. Membership with a trader status is acquired where a person becomes a partner in a commercial GP and JV and a general partner in commercial LP. Membership without a trader status is acquired when a person becomes a member in non-commercial BOs; a limited partner in commercial LP; and a shareholder in a PLC and an SC.

It concludes that minors, represented by tutors, should be capable of acquiring original and derivative membership with a non-trader status since articles 11 through 13 of the ComCE only bar minors from becoming traders. It argues that these provisions have to be interpreted to allow minors' membership capacity with a non-trader status. Consequently, a tutor, who is required to invest the capital of the minor as foreshadowed under article 280(1) and 281(2) of FDRE Family Code, acting on behalf of a minor can acquire membership in PLCs, SCs and limited partner share in LPs. Besides, a minor should be able to acquire derivative membership with a trader status where the minor inherits or receives a donation of membership share if the requirements of article 275 and 276 of the FDRE Family Code are complied with. In other words, a minor is incapable of acquiring membership with a trader status in other situations.

A judicially interdicted person can be regarded as capable of acquiring derivative or original membership with or without a trader status if her interdiction does not have the effect of restricting her membership capacity pursuant to article 371 of the CCE. However, where her interdiction also bars her from becoming a trader, she is only barred from acquiring membership with a trader status. Accordingly, she, represented by her tutor, can acquire derivative and original membership with a non-trader status per article 12 of the ComCE. Besides, a judicially interdicted person cannot acquire membership with a trader status. However, she should be capable of derivatively acquiring membership share, with a trader status, through inheritance or donation.

A legally interdicted person shall be barred from acquiring a membership in BOs only when a sentencing which prescribes such interdiction is authorized by law. Although article 124(1) of the FDRE Criminal Code automatically suspends *civil rights* of convicted persons under a sentence of death penalty or rigorous imprisonment, the phrase "civil rights" should not be interpreted to restrict the convicted person's right to trade. Even where there is an express restriction authorized by law, it should only bar the interdicted person from becoming a trader – not from becoming a member of a BO with a non-trader status. Accordingly, the interdicted



person should be capable of acquiring derivative and original membership with a non-trader status, for so would not harm the purpose of her punishment as long as she does not acquire a controlling share in the BO she became a member of. In addition, like minors and judicially interdicted persons, she should be able to derivatively acquire membership share with a trader status through inheritance or donation in accordance with a cumulative reading of article 381 and 385 of the CCE.

Physical persons under a contractually or legally imposed non-compete duty may also be rendered incapable of derivatively or originally acquiring a membership share in a BO. In particular, *commercial employees, partners in GP and LP, directors and sellers of a business* are under a non-compete duty and are rendered incapable of acquiring membership in specific BOs under specific circumstances. They are contractually or legally barred from competing with the beneficiary of the non-compete duty. It was argued that they should be barred from acquiring membership in a BO that engages in a similar business with the business of the beneficiary. Besides, the incapacity should be geographically restricted to the place where the business of the beneficiary operates; that it should be time bound; that it should be effective only when acquisition of membership would amount to be an act of competition that would injure the beneficiary; and that restrictions imposed by a non-compete duty must be construed narrowly since they impose a restriction on a person's constitutional right to freely engage in economic activities beneficiary.

Foreigners are generally capable of acquiring derivative or original membership with or without a trader status pursuant to article 389(1) of the CCE. However, they cannot acquire membership in Ethiopian BOs that are engaged in investment areas that are reserved for domestic investors under the Investment Proclamation (No. 769/2012) and Council of Ministers Regulation (No. 270/2012). They cannot also acquire membership in a BO that prohibits membership of foreigners under its memorandum of association. Even where the memorandum of association permits membership of foreigners, foreigners who want to purchase membership share by using foreign capital need to meet a higher capital requirement, ranging from \$50,000 to \$200,000, and secure the authorization of FDRE Ministry of Trade in order to derivatively acquire membership share with or without a trader status. Hence, each BO and each potential shareholder who is regarded as a foreign investor is required to meet these requirements in order to become a

member of Ethiopian BOs. Because of this, it was argued that this process needs to be reconsidered since it is unreasonably restrictive, onerous and susceptible to abuse.

In an attempt to analyze and describe membership capacity of physical persons in Ethiopian BOs, this work also addresses and makes conclusions about the nature and content of Ethiopian law on membership capacity of physical. First and foremost, the law is non-comprehensible even for legal professionals. Second, the law is characterized by gaps. For example, many rules of incapacity emanating from a non-compete duty fail to determine the geographic and product market in which the duty is effective; and the duration within which the FDRE Ministry of Trade has to approve derivative acquisition of membership by a foreigner is not set.

Third, the rules on membership capacity do not strike chord with the current federal government structure because capacity of minors to become both a trader and a member of a BO is now determined by FDRE and Regional Family Codes. For example, article 12 of the ComCE makes a cross reference to article 288 of the CCE with a view to establish trading capacity of minors and judicially interdicted persons. However, this provision is repealed and replaced by FDRE and Regional Family Codes. This does not coalesce with the present federal government structure because the power to legislate commercial Code falls within the mandate of FDRE House of Peoples Representatives while the power to enact civil laws, which includes the family law rules on capacity of minors, is within the mandate of the Regional State councils. As a result, states can have separate and, perhaps, contradictory rules of capacity.

Based on these findings, the author recommends that Book II of the ComCE needs to be amended to include a comprehensive rule on the capacity of persons to become a member of BOs. Apart from filling in the gaps in a comprehensible manner, the amendment could avoid inconsistencies that may happen as a result of potential variations in the rules of capacity under regional laws.