

The Notion of ‘Business’: An activity? A responsibility? An entity? Or A property? (Reflection on Issues for Consideration)

Lanteran Nadew*

I. Perplexities Involving Use of the Term ‘Business’

We often use the term ‘business’ in our daily interactions in various contexts. It is not uncommon to notice one saying: “It is none of my business,” or “My family business is doing good,” “Sale of garage business,” or “Let’s do business,” and so forth. Ordinarily, it is common to use the term business in the sense of activity, responsibility, or entity. When one says, “it is none of my business,” we imagine absence of responsibility or when one says, “it is a profitable business, or the business is not good,” it implies a transaction or venture. In the expression ‘business organization,’ the term business denotes entity. In the sense of Comm. Code (Both in 1960 and 2021), the notion of ‘business’ applied in the sense alien to the popular use of the term. As defined in the Comm. Code, the notion of business is neither a responsibility nor an activity, or transaction. In a day-to-day usage, the notion of business is very familiar, but understood in different contexts. The legislative definition as expressed in the Comm. Code of 2021 is not simple enough to capture.¹ It is, therefore, fair to question what business is and how it works in real life.

This short note aims to shed light on the nature and constituent elements of the notion of “business.” The reflection is believed to provoke professionals in the field for further illumination of the notion of business and its legal effects. Varied usage of the term business is also reflected in formal use of the term in non-business legislations, which define the term business as an activity.² This view aligns with the dictionary meaning of the term. The professional law

*LL.B., LL.M., SJD, Assistant Professor, School of Law and Federalism, ECSU. The reflection is a modified version of a draft version of the book on Ethiopian Law of Traders and Business Organizations.

¹ The Comm. Code defines the term business technically which is different from the popular sense of the term.

² See for instance, Art. 2(2) (a) of the Federal Income Tax Proclamation, defines the term business as, “any industrial, commercial, professional, or vocational activity conducted for profit and whether conducted

dictionary illustrates the notion of “business” as, “Employment, occupation, profession, or commercial activity engaged in for gain or livelihood.”³ The legislative definition of the term as envisaged both in the Commercial Code of 1960 and the revised version (Commercial Code of 2021) business may ridicule non-lawyers or even puzzle beginners of law. The Commercial Code of 2021 defines the term business as an incorporeal chattel.⁴ This further fuels the complexity. At first confrontation with Art. 124 of the Comm. Code of 1960, or Art. 106 of the Commercial Code of 2021, it may not surprise if a reader screams “what!” The definitional provision necessarily appears calling for a definition. Use of the terms like ‘incorporeal chattel,’ ‘intangible movable,’ ‘property brought together and organized for the purpose of carrying commercial activity’ is an uphill battle to master. What is incorporeal chattel? How business an intangible property moves? What is the relationship between business as an intangible property and tangible properties that are brought together and organized? A brief analysis of the nature of business in sense of the Comm. Code will answer these issues.

In the words of the Code, the term business is, “[...] an incorporeal movable consisting of all movable properties brought together and organized for the purposes of carrying out any of the commercial activities specified in Article 5 of this Code.”⁵ In legislative perspectives therefore the term “business” is defined as a property – an invisible property – a property one cannot see but can enjoy its pecuniary effects. In the property sense of the term, “business” is akin to other tangible properties, can be sold, donated or bequeathed, or can be transferred from one person to the other.⁶ The Code’s definition of the term business as an intangible property is far away from the popular sense of the term.⁷ Is business really a property? Further, no wonder even one questions the property nature of an intangible movable. Though the property nature of invisible

continuously or short-term, but does not include the rendering of service as an employee or the rental of buildings.” Federal Income Tax Proclamation, Proc. No. 979/2016, *Neg. Gaz.* 22nd year 104, Art. 2(2)(a).

³ Black’s Law Dictionary Six Edition

⁴ Comm. Code of Ethiopia, Proc. No. 166, 1960 NEG. GAZ. 19th Year No. 3 A.A. (Herein after Comm. Code of 1960) Art. 124. Almost the same wordings used in Art. 106 of the Comm. Code of 2021, which avoided the term “chattel” to movable. This change avoids confusion of non-lawyers. Ordinary use of a term is preferred to technical meaning.

⁵ Comm. Code of Ethiopia, Proc. No. 1243/2021, Fed. NEG. GAZ. Extra Ord. Issue Year 27 No. 23 A.A. April 2021 (herein after Comm. Code of 2021). Art. 106; Comm. Code of 1960. Art. 124.

⁶ JOHN G. SPRINKLING *ET AL*, GLOBAL ISSUES IN PROPERTY LAW, 1(Thomson West, 2006)

⁷ Comm. Code of 2021. Art. 106.

property is hard to understand to some, the law considers an intangible property as a property and bestows legal protection.

A critical look at the elements of the legislative definition of the term business ignites further issues. The extent of corporeal chattel that the notion of business includes, the modalities of transacting business, how ownership of business may be proved, who may own a business, and so forth. Could non-traders or non-commercial business own a business? Both provisions (Art. 106 of the Comm. Code of 2021 and its predecessor, Art. 124 of the Comm. Code of 1960) define the notion of business, as a property that emerges out of *commercial activity* (any one or more the activities enumerated in Art. 5 of the Comm. Code). Literal understanding of Art. 106 reveals that only traders and commercial business organizations can operate business. A trader, in the sense of the Commercial Code, is a person who carries out anyone or more of the activities enumerated in Art. 5 professionally and for gain.⁸ By implication therefore non-traders⁹ do not operate business.

Similarly, in old days, the same rule applied to non-commercial business organizations.¹⁰ In accordance with Art. 10 of the Comm. Code of 1960, business organizations, depending upon the activity they carried on, are categorized into commercial or non-commercial business organization. Before the coming into force of the Comm. Code of 2021, if a business organization carried out anyone or more of the activities enumerated in Art. 5 of the Comm. Code, it was classified as commercial business organization. However, companies (share company and private limited company),¹¹ irrespective of the activity they operate, were considered as commercial. There was

⁸ Comm. Code of 2021. Art. 5.

⁹ Non-trader does not always mean persons operating non-profit activity. It includes all persons who are not engaged in any one or more activities enumerated in Art. 5 of the Comm. Code. Art. 5 of the Comm. Code enumerated almost all activities that make persons engaged in traders. Small scale workers and handicraftsmen, even if they operate anyone of the activities stated in Art. 5 of the Comm. Code. Generally, non-trader status includes any activity other than those enumerated in Art. 5. Thus, person that can possibly own business are limited; see also Art. 107(10) of the Comm. Code of 2021 which states, "Every trader operates a business." By implication non-traders cannot operate business.

¹⁰ The Comm. Code of 2021 has no provision analogues to Art. 10 of the Comm. Code of 1960. Therefore, in silence of the Code, and other legislations that do not make any distinction between commercial and non-commercial business organizations, it is doubtful to assume classing business organizations as commercial and non-commercial still works. The policy rationale behind classing as commercial or non-commercial was to distinguish organization that may be relieved from certain defined obligations. But now all business organizations are required to discharge those obligations. Currently, all business organizations have the obligation to be registered, keep books and accounts, and should get business license. Therefore, in effect, there is no difference between commercial and non-commercial business organizations.

¹¹ The Comm. Code of 1960 recognized only two forms of companies.

no non-commercial company. Other business organizations (other than ordinary partnership),¹² depending upon the activity they carried out, were classed as commercial or non-commercial.¹³

In accordance with Art. 10 of the Comm. Code of 1960, a business organization may be branded as commercial either if it carried out any one or more of the activities enumerated in Art. 5 or based on the nature of business organization. Companies, irrespective of the activity they carry on, were always regarded as commercial business organization. Other business organizations (partnership and joint venture) can only be viewed as commercial business organizations if and only if they carry out commercial activities as enumerated in Art. 5.¹⁴ There is no analogous provision in the Comm. Code of 2021. Does it mean there is no classification as commercial and non-commercial business organizations in the Comm. Code of 2021? Doubtful. The silence of the Comm. Code of 2021 has further complicated setting boundary of business organizations that may operate business. If the Commercial Code of 2021 has avoided commercial or non-commercial classification of business organizations then why it uses the old technical terms like: ‘commercial activities, trade’ etc? If the silence and other legislations have changed the rule by making categorization of business organizations as commercial and non-commercial in effect meaningless, then one can conclude that all business organizations can own and operate business. It also appears possible to pose the same argument in respect to non-trader businesspersons. Leaving the issue of persons or organizations that may own business, unresolved, let’s deal the issue of actual meaning of business and its elements as defined in the Comm Code.

II. What is Business Actually?

In the sense expressed in the Commercial Code of 2021, the term “business” is mainly an incorporeal chattel. It is an intangible property that emerges out when one (a businessperson) operates a commercial (business) activity. It is a value that can be created by the operation of commercial activity. If the operator carries the business skillfully and attracts more customers, the

¹² The Comm. Code of 2021 has scrapped the ordinary partnership from Ethiopian business organization. Now on wards, in Ethiopia there no partnership captioned as ordinary partnership can be set up.

¹³ Art. 10 cum 213 of the Comm. Code of 1960.

¹⁴ Commercial activities are list in Art. 5 of both the Comm. Code of 1960 and Comm. Code of 2021. The enumeration of Art. 5 of the Comm. Code of 2021 is very extensive while the listing of Art. 5 of the Comm. Code of 1960 is fairly short.

value of the business increases. Conversely, if the operator is not doing well, the business would attract less number of customers. In this case, the money value of business would be very small. Despite variation of value, all traders and business organizations have business of some sort. By implication thus total absence of business means the person or organization has stopped the business activity. If no customer shows up or no one wishes to transact with a given trader or business organization, then it is assumed that the trader or business organization will be forced to close and stop what he/she has been attempting to do. This is not a scenario likely to happen in cases and circumstances. Though a trader or business organization may experience slow traffic of customers, some may wish to transact with a businessperson. There may be price negotiation or quality specification that may not be profitable to the expected level, but possibly, some limited number of customers would be willing to maintain business relationship. In this case therefore the businessperson has business of some value.

Though the money value of businesses of all traders or business organization is not identical, all businesses have a certain value, which depends upon the quality of service rendered or the significance of items produced or offered for sale. A trader or business organization may be wealthy if the services or products are highly demanded or more customers are willing to deal or maintain business relationship with the trader or business organization. With a view to win market competition and attract more clients a trader or business organization may endeavor, by investing more resources and labour, to hire competent personnel that can offer good customer care. The value of business that may emerge from a huge investment will be higher as long as it is the right kind of investment. Being a product of labour and investment, like any tangible asset, business is a property that can be transacted. It can be sold,¹⁵ leased,¹⁶ mortgaged,¹⁷ or contributed to business organizations.¹⁸

However, in traditional societies, it may be hard to cognize the property nature of an inviable asset. How can one value a property that cannot be seen or touched? Ordinarily, it is a challenge to perceive and value a property ‘without a body or substance.’ Even the owner of a business may

¹⁵ Comm. Code of 2021. Art. 122

¹⁶ *Id.* Art. 116

¹⁷ *Id.* Art. 143

¹⁸ *Id.* Art. 168.

not understand the level of his/her intangible wealth. Intangible property is a property “[w]ithout body or substance; in a material nature ...” and incorporeal movable (chattel) is “a class of incorporeal rights growing out of or incident to things personal, such as: patent-rights and copyrights.”¹⁹

The notion of “business” is substantially an incorporeal chattel, but it also holds some corporeal chattels that the trader or business organization uses when running the activity. The Commercial Code of 2021 points out the possibility of inclusion of movable properties under business stating that “a business may consist of corporeal elements such as equipment or goods.”²⁰ This is a restatement of what is already provided in the definitional provision.²¹ A tangible property to be considered as a component of business should be destined to operate the business activity. A businessperson or business organization may use variety of movable properties in business operation. Movable properties like vehicles, machines, computers, printers, scanners, phones, furniture and fixtures, or other office equipment that the trader uses while operating his/her venture are parts of business. The inclusion of corporeal chattel in business is not a necessary requirement. In some very limited circumstances, a person may carry out trade without using one or more movable properties. A broker, for instance, may not have an office or a vehicle destined to operate a business, but, if considered as a trader, he/she owns a business of some value. In this highly digitalized economy, it is not surprising if one works simply using his/her cellphone at his/her living room, or his/her own or even family car in getting contact with customers. A locksmith, for instance, can put all his locksmithing stuff in the trunk of his family car waiting for call. Whenever called he/she may move using his personal car. He/she doesn’t need to have a permanent business place, or even he/she may not use the same car permanently.²² As personal property does not makeup business or a living room sofa set is not business property that can constitute business. However, in normal course of things, one cannot imagine a business activity or a trade of some sort without being assisted by a property.

As it is clearly provided in Article 106 of the Commercial Code of 2021, only movable properties

¹⁹ *Id.*

²⁰ Comm. Code of 2021, Art. 110.

²¹ Art. 106 of the Comm. Code of 2021.

²² Such small-scale workers however not captioned as traders. Therefore, it is possible to argue that such small-scale workers and handicraftsmen/women do not have business to build or sell.

used for commercial activity can make up business. The expression, “[...] consisting of all movable property brought together and organized for the purpose of carrying out any of the commercial activities [...]”²³ proves the fact that immovable property does not constitute business. The express statement stating that only movable properties can make up business avoids confusions, but even in absence of this expression, the nature of the term business itself indicates that only movable properties can be part of business. A business is a movable property; hence, it is awkward to talk about a movable property consisting of an immobile property. Thus, a building that a trader or a business organization carries out a commercial activity does not constitute business.

The other possible confusion is the use of the term business in Amharic. The Amharic version of the Commercial Code of 2021, as well as its predecessor, the Commercial Code of 1960, use the expressions “የንግድ መደብር” to mean “business.” It sounds like a place where a trader carries out his/her commercial activity. Is a store or shop where a trader carries out commercial activity an intangible property? What if a trader does not have a settled place of business? Certain traders, depending upon the nature of the activity, may not necessarily settle at a given place. During registration of the business the trader may simply provide his residential location and run business moving here and there or whenever called by his/her truck that carries all stuff needed for the business activity. Can we designate the trader’s residential location as a business? It is true the truck, being a corporeal chattel, is a component of business. Hence, a trader on account of the nature of trade carried out, may not have a definite business place but can provide his/her residential address in the commercial register. Can we say such “traders” do not have business? The answer is quite clear; No! Is connoting the expression, “የንግድ መደብር” as business proper use of the term? If not what is the possible counterpart of the term “business?” Or else can we consider the terms, “የንግድ መደብር” as a technical Amharic counterpart of the term “business?”²⁴

²³ Comm. Code of 2021. Art. 106.

²⁴ Assessing legislative meaning, or legal jargons is not the theme of this work but understanding of the true nature of legal expressions will facilitate our perception and application of the law.

III. Business is Mainly Goodwill

In addition to the corporeal chattel that the notion of business may comprise, the Comm. Code of 2021,²⁵ specifically enumerates some of the incorporeal chattels that constitute business.²⁶ As provided in Art. 109(1) of the Comm. Code of 2021, the main constituent element of business is goodwill. Goodwill is an important element of business. It is, therefore, crucial to explore the meaning and nature of ‘business.’ But comprehension of an exact nature of the term, “goodwill” is also an uphill journey. What actually “goodwill” is and how can we perceive its property nature or gauge its economic value? We often hear about “goodwill” and have our own sense of understating of the term, but it may be a painstaking attempt to define the expression goodwill precisely or explain its exact nature. Article 112 of the Commercial Code of 2021 defines the term “goodwill” on the basis of its source and its pecuniary effects. It illustrates “goodwill” in terms of its creation as follows:

The goodwill results from the creation and operation of a business and is of a value which may vary according to the probable or possible relations between a trader and third parties who may require from him goods or services.²⁷

The Commercial Code of 2021 is substantially identical with its predecessor, the Commercial Code of 1960, but it goes beyond a sheer source of goodwill. In accordance with the Commercial Code of 2021, “goodwill” is a value created by (resulted from) commercial activity, and its value advances as a result of the attitude of customers toward goods and services offered by the trader.²⁸

The Commercial Code of 2021 does not plausibly define the term “goodwill,” but it apparently illustrates how goodwill emerges out in commercial activities. The apparent definition is cloudy that demand explanatory work. The Code describes goodwill in terms of value, and the value created by the attitude of customers toward commercial activity of trader. How can we measure

²⁵ *Id.*, Art. 109.

²⁶ *Id.*

²⁷ Comm. Code of 2021. Art. 112.

²⁸ As the English version of the Code is not publicly available, this is author’s translation from the Amharic version of the Comm. Code of 2021.

the attitude of customers in terms of money? Is it possible to gauge the money value of attitude?

As briefly highlighted above, whenever a trader operates any one or more of the activities stated in Article 5 of the Commercial Code,²⁹ a property known as “business” emerges thereby yielding an intangible property called ‘goodwill’. Therefore, every trader or business organization operates business, which can be expressed in terms of goodwill. To ‘produce’ goodwill the creation of business organization or registration of a trader in the commercial register or getting a business license is not sufficient: in order for a venture to generate goodwill, the business activity should be operational. The pecuniary value of goodwill depends upon the quality of operation of business activity. If the trader or business organization offers quality products or services that best satisfy the interest of customers, more customers would stay in hold with the trader or business organization. A satisfied customer will obviously decide to keep business relationship with the trader. That is why the Commercial Code tries to define the expression “goodwill” in terms of customers’ behavior.³⁰ The attitude of customers may vary depending upon the level of satisfaction, quality of goods and services offered. Accordingly, Comm. Codes (both 1960 and 2021) gauge the value of goodwill in terms of probable and possible relationship between the trader and customers.³¹ If the business of the trader attracts more customers who have decided to continue commercial relationship with the trader, the value of goodwill is expected to be high. On the contrary, if the quality of goods and services offered by the trader is poor, the trader still has business and goodwill but the economic value of business and its fruit – goodwill – is very minimal. It will eventually grow up should the trader makes effort to boost up the quality of business activity by rendering attractive services, customer care, and applies market tools including advertisement.

The Amharic counterpart of the term ‘goodwill’ as provided in the Comm. Code of 1960 was very intriguing. It captioned the expression “goodwill” as, ‘ደንበኛ ገበያተኛ’.³² At first glance one may be ridiculed. Why the legislature of 1960 opted to mean goodwill ‘ደንበኛ ገበያተኛ’? No legislative explanation was provided, and no rationale is available. The only possible remedy to cognize

²⁹ Art. 5 of Comm. Code of 2021 defines the term “trader.”

³⁰ Comm. Code of 2021, Art. 112.

³¹ *Id.*

³² Comm. Code of 1960. Art. 130.

goodwill was to resort to the English term and experiences of other jurisdictions. Literally the term ‘ደንበኛ’ may be understood in two contexts. The most relevant context is customer. First, the most common context relevant to ‘goodwill’ is customer, and the term ‘ገበያተኛ’ literally means marketer. Both Amharic terms ‘ደንበኛ ገበያተኛ’ literally mean a real or true marketer. This meaning has nothing to do with the meaning of the term ‘goodwill’. The Comm. Code of 2021 has changed this expression by coming with the expression, ‘መልካም ስም’.³³ But the Codes does not reveal how “መልካም ስም” (goodwill) may be valued.

The perplexity of defining the term business extends to its main constituent element -- “goodwill.” Supposedly, the elusiveness of the term had forced the legislature of the Comm. Code of 1960 simply to illustrate how goodwill emerges out rather than what goodwill actually was. To illustrate the notion of “goodwill” means indicating how *business* emerges out. The Amharic term, ‘መልካም ስም’, appears relatively better, but still blurry. The terms, ‘መልካም ስም’ is equivalent to the word ‘reputation,’ or ‘good name’. Is the notion of ‘goodwill’ really equivalent to reputation or good name? Doubtful. It is apparently true that ‘good name’ or ‘reputation’ is weighed in terms attitude of customers. Customers would like to continue business relationship with the trader or business organization if the products or services rendered is satisfactory. The satisfaction obviously generates “good name” or “good reputation,” to the trader or business organization. In this regard, the expression, “መልካም ስም” is more expressive, and mitigates the potential confusion. It would be more effective if the Comm. Code delineates the contours of the term goodwill clearly.

The problem of defining goodwill is not peculiar to Ethiopia. It is a global hassle. Jurists have been battling to find out a working meaning of the notion of goodwill. English judges took forefront in the battle of the defining the term goodwill. Lord Eldon describes goodwill as, “... nothing more than the probability that the old customer will resort to old place.”³⁴ Thus, if an old customer craves to maintain unbreakable business bondage with a given trader or business organization, judges suppose the tendency of the customers as the expression of goodwill. The monetary value of goodwill is so great if customers of a trader decide to keep everlasting business relationship with

³³ Comm. Code of 2021. Art. 112.

³⁴ Lord Eldon defined the goodwill when disposing an English case *cruel well v Lye*. The case was reported in (*Cruel well v Lye* 17 vest 335).

the trader. On the contrary, if old customers look for alternative option for the same service or goods, the value of the goodwill is minimal. In this regard, the notion of goodwill may be described in terms of customers' behavior. According to Lord Machaghten, goodwill is:

...the very sap and life of the business, without which the business would, yield little or no profit. It is the whole advantage whatever it may be of the reputation and connection of firm, which may have been built up by years of honest work or gained by lavish expenditure of money.³⁵

Hence, the terms “business” and “goodwill” are highly intertwined. Therefore, if there is no goodwill, one cannot expect the existence of business or commercial activity. In other words, if no one dares to transact with the trader, there will be no goodwill. This in turn means there is no business and the trader would abandon the commercial activity. However, if few people or very few customers are willing to transact with a given trader, there is still goodwill and business, but its economic value is minimal. Unless the trader does some improvement or takes a corrective action to boost up the quality of service or products, the value of the goodwill will diminish eventually. Lord Machaghten was right in gauging goodwill in terms of the whole advantage that a trader enjoys as a result of his/her commercial activity.³⁶

In addition to goodwill, the notion of business holds other constitutive elements that the law confers on traders. Article 109 of the Commercial Code of 2021 enumerates additional invisible rights that a trader may own as a result of the business activity he/she runs.³⁷ Additional constituent elements of business includes: trade name, trademark, the right to lease premises, patent, or copyright.³⁸ These expressions are self-explanatory and do not call for further analyses in this short commentary.

³⁵ Lord Machaghten in the case, *Trego v Hunt* (*Trego v Hunt* (1896) AC 7, 16)

³⁶ *Id.*

³⁷ Art. 109 of the Comm. Code of 2021 enumerates additional elements that make up business.

³⁸ The Comm. Code of 2021 has referred trade name, trademark, and patent to specific laws that set forth rules governing each of them. Comm. Code of 2021, Art. 115.

IV. Conclusion

This short reflection aimed to expose possible issues that may arise from the notion of business as expressed in the Ethiopian Commercial Code. The work is not deep enough but believed to provoke professionals in the field to make further research. Until a detailed research and analysis is made, the short expository work can help law students, the academia and the judiciary solve possible issues that may arise in cognizing the terms, especially in issues involving goodwill and unfair competition.

The term ‘business’ is very important in commercial activity, but it is presented in the Commercial Code in very technical and vague terms. Business is a very critical invisible property that emerges out from commercial activity. The notion of business may appear to goodwill, but the two expressions are not exactly same. The term ‘business’ holds additional elements, like corporeal chattel used by trader or by business organization while operating business activity. Business also includes other intangible properties like copyright, trademark, tradename, patent, and the right to lease premises. Business, though an invisible property, it is a property that can be transacted like any other asset. Business may be sold, leased, mortgaged, or subjected to usufruct.

Additionally, it is better if proper nomenclature of the new Commercial Code is used when cited for the first time, i.e., Commercial Code of Ethiopia Proclamation No. 1243/2021. It is okay if you use "Commercial Code of 2021" after first using the proper nomenclature.