Regulation of Merger under the Ethiopian Competition Law

Hussein Ahmed Tura*

Introduction

Issues in market dominance are of crucial importance to developing countries at their early stages of the implementation of competition policy and law. Merger is one of the transactions that give rise to market dominance. Mergers have both benefits and costs in a market economy. Entities merge for different business and commercial reasons. They may merge to achieve economies of scale and scope, to expand business capacity, to be operative in different markets, to produce at lowest marginal cost and various others.[1] Nonetheless, there could be many reasons why governments, market players, shareholders and individuals might object to mergers.

Governments may object mergers because it may be against the industrial or foreign policy or a transaction which could lead to production of illegal quality or quantity of a particular product. Market players might object to a merger transaction as it could lead to monopoly or could create barriers to entry and similar anti-competitive practices. Shareholders might oppose to mergers which result in reduction of share value or share effectiveness or transaction. Similarly, individuals may oppose to a transaction which might

---

* Lecturer in Law, Ambo University, School of Law; LL.B, LL.M; E-mail: hatura7@gmail.com. I wish to thank the anonymous reviewers and the editors of Journal of Ethiopian Law for very helpful comments on an earlier draft of this Article. Particularly I would like to thank Fekadu Petros for his invaluable comments. Any error is the author's own.

[1] Neeraj Tiwari, 'Merger under the Regime of Competition Law: A Comparative Study of Indian Legal Framework with EC and UK', *Bond Law Review*, Vol. 23 No. 1 (2011), 117-141

result in higher market prices, decrease in quantity or quality of goods and other analogous practices.[2]

Merger regulation is based on the preventive theory and generally operates *ex ante*, i.e., to prevent a transaction adversely affecting competition before it is consummated. In addition, cost of de-merging entities is not an easy operation for competition and other regulatory authorities.

Most countries in the world have enacted competition laws to protect their free market economies and have thereby developed an economic system in which the allocation of resources is determined mainly through the process of demand and supply. In the case of Ethiopia, competition law was introduced in 2003. However, Proclamation No.329/2003 was not only inadequate but also obsolete in certain respects; particularly, in light of merger regulation as it did not contain provisions governing the subject matter. To overcome such limitation, the Ethiopian government has enacted the Competition and Consumers Protection Proclamation in 2010. This enactment follows the country's opening up of its economy, and the removal of controls leading liberalization.

This article examines Ethiopia's Competition and Consumers' Protection law with specific reference to merger regulation in light of international best practices. With a view to drawing lessons from the experiences of countries that already adopted advanced merger regulation regime, the article reviews the relevant laws of the United States of America, the European Union, the United Kingdom and South Africa. In general, the article would be useful to understand the scope of the law in Ethiopia and to identify the strengths and weaknesses of the provisions in the Ethiopian law on regulation of merger.

[2] Ibid.

To this effect, the article identities successful practices in other jurisdictions that could be adapted in the Ethiopian context in accordance with the prevailing circumstances. The article attempts to answer the following specific questions:

- What are the different types of mergers and what are their effects on competition?
- How do relevant laws address issues in merger regulation such as threshold limits and substantive procedures for determining fate of mergers?
- How is joint venture transactions dealt with under competition laws?
- What are the major strengths and weaknesses of Ethiopia's Competition and Consumers' Protection law in addressing the main issues in merger?

Primary legislations such as proclamations (statutes or acts), regulations and guidelines as well as relevant commentaries and observations of jurists and experts have been referred to in the course writing this article.

The article is organized into six sections. The first section reviews the Ethiopian competition law and policy by exploring relevant provisions of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution), and relevant subsidiary laws. The second and third sections respectively explain the meaning and different types of mergers; and elaborate on effects and consequences of various merger transactions. The fourth section attempts to elucidate on significant aspect of threshold limits,

notification of merger, and explains substantive tests used for assessment of mergers and the factors considered by competition authorities before deciding the fate of mergers. The fifth section looks into the much debated aspect of control of joint ventures under merger laws and will examine how different jurisdictions have dealt with the same. Finally, the article offers conclusions which could be considered in improving the Ethiopian competition law with specific reference to merger regulation.

1. Overview of Competition Law and Policy in Ethiopia

This section briefly reviews the Ethiopian competition policies and laws. It first looks at the competition policies starting from the period of Transitional Government (1991) and onwards. It discusses the constitutional basis of competition law and policy in the current legal framework. It then reviews Ethiopian laws governing unfair competition including: the Commercial Code, the Civil Code and the Criminal Code. The section gives special emphasis to the Trade Practice and Consumers Protection Proclamation No.685/2010 and reviews its contents with a view to indicating the existing legal framework with respect to competition law and consumers protection in the country.

1.1 Competition Policy

The Ethiopian government has committed to enforce free market economic policy starting from the transitional period. The Transitional Government defined its economic roles under the transitional economic policy adopted in 1991 and promised to reduce the scope of its economic activities in the interest of free market; and to promote domestic and foreign private

investments.[3] The FDRE Constitution also authorizes the Council of Ministers to formulate the socio-economic policies and obliges the government to formulate policies which ensure that all Ethiopians can benefit from the country's legacy of intellectual and material resources.[4] Accordingly, the ruling party (the Ethiopian People's Revolutionary Democratic Front- EPDRF) elaborated on the economic policy objective of the country in 2000.[5] It focused on the significance of private sector as engine of economic growth and foresaw the market correction and developmental roles of the government.[6] The Federal government launched a strategy of Agricultural Development Led Industrialization by adopting rural development policy and industrial development strategy among others. Through these policies and strategies the government elaborated on a number of economic and social policy objectives including: reducing the direct role of the government in business, encouraging the development of private sector, promoting competition, economic efficiency and growth, correcting market failures, providing goods and services which market may not provide, avoiding price and quality abuses, ensuring consumers protection and integrating the Ethiopian economy with the global economy.[7] Moreover, the government adopted an ambitious 'Growth and Transformation Plan' in 2010, to make Ethiopia a middle income country by 2025 and realize domestic food security by 2015, in which it reiterated its commitment to

---

[3] Transitional Government of Ethiopia, Ethiopia's Economic Policy during the Transitional Period, (Nov 1991), pp.17ff; See also Harka Haroye, 'Competition Policies and Laws: Major Concepts and an Overview of Ethiopian Trade Practice Law', *Mizan Law Review* Vol. 2 No.1, (Jan 2008).

[4] Constitution of the Federal Democratic Republic of Ethiopia Proclamation, 1995, Proc. No. 1, Federal Negarit Gazeta, Year 1, No. 1. (FRDE Constitution), Arts 55(10), 89 (1).

[5] EPDRF, Revolutionary Democracy: Development lines and Strategies, (Mega Publishing Enterprise, August 2000), pp. iv, vi, 3-32 and 123-239.

[6] Ibid.

[7] Solomon Abay, "Designing the Regulatory Roles of Government in Business: The Lessons From Theory, International Practice And Ethiopia's Policy Path", *Journal of Ethiopian Law*, Vol. XXIII No.2 (Dec 2009), p.119.

promote free market economy. In an effort to enforce these policies, the government has also taken a number of practical measures. It has privatized some public enterprises and is continuing to promote investments and private sectors through various incentives. The Ethiopian business community has also responded very positively to these openings, as demonstrated by the number of new Ethiopian entrants into several sectors such as banking, insurance, textiles and floriculture industries. However, it has also been argued that:

> (t)he process of introducing free competition into the economy is far from complete. Despite new entry, important sectors are still overwhelmingly dominated by State-owned enterprises, and the retail sector and financial services are, for the most part, closed to competition from foreign firms. Government monopolies also continue to exist in energy and other sectors.[8]

1.2 Unfair Competition under the Commercial Code

The Commercial Code of Ethiopia contains rules governing unfair competition. Particularly, Article 133 prescribes acts of competition which are considered as unfair:

1. Any act of competition contrary to honest commercial practice shall constitute a fault.
2. The following shall be deemed to be acts of unfair competition:
    a. any act likely to mislead customers regarding the undertaking, products or commercial activities of a competitor;
    b. any false statement made in the course of business with a view to discrediting the undertaking, products or commercial activities of a competitor.

[8] United States Agency For International Development, *Ethiopia Commercial Law & Institutional Reform and Trade Diagnostic*, (January 2007), p. 60.

Where an act of unfair competition has been committed by one trader against another, the Commercial Code affords the victim remedies. Article 134 (1) the Code provides for certain remedies: damages and other orders that are deemed fit to put an end to the unlawful act.[9]

1.3 Unfair Competition under the Civil Code

Unfair trade practices which may affect trade within Ethiopia are also prohibited by the Ethiopian Civil Code. The Code states that "a person commits an offence where, through false publications, or by other means contrary to good faith, he compromises the reputation of a product or the credit of a commercial establishment."[10] Furthermore, "in the case of unfair competition, the court may order the abandonment of the dishonest practices used by the defendant."[11] The orders may in turn take the form either of an order for corrective publicity under Article 2120 of the Civil Code or an injunctive order Article 2122 of the Civil Code. Sub-art (2) of Article 134 of the Commercial Code stipulates:

> The court may in particular:
> a) order the publication, at the costs of the unfair competitor, of notices designed to remove the effect of the misleading acts or statements of the unfair competitor to cease this unlawful acts in accordance with Article 2120 of the Civil Code.
> b) order the unfair competitor to cease this unlawful acts in accordance with Article 2122 of the Civil Code.

While entertaining a claim for damages arising from unfair commercial competition, the courts must stick to the rules and principles of the Civil Code governing extra-contractual liability. In this regard, Everett F. Goldberg

[9] See also Civil Procedure Code of Ethiopia, 1965, Art 155.
[10] Civil Code of Ethiopia, 1960, Art 2057.
[11] Ibid, Art 2122.

also argues that: "[s]ince unfair competition is a species of extra-contractual liability, all the Civil Code provisions on extra-contractual liability dealing with matters not expressly covered in Articles 132-134 are applicable; for example, period of limitation, burden of proof, extent of damages, responsibility of persons or bodies corporate for the acts of others, etc."[12]

1.4 Unfair Competition under the Criminal Code

The Criminal Code defines criminal unfair competition as follows:[13]

> Whoever intentionally commits against another an abuse of economic competition by means of direct or any other process contrary to the rules of good faith in business, in particular:
>
> 1. by discrediting another, his goods or dealings, his activities or business or by making untrue or false statements as to his own goods, dealings, activities or business in order to derive a benefit therefrom against his competitors; or
> 2. by taking measures such as to create confusion with the goods, dealings or products or with the activities or business of another; or
> 3. by using inaccurate or false styles, distinctive signs, marks or professional titles in order to induce a belief as to his particular status or capacity; or
> 4. by granting or offering undue benefits to the servants, agents or assistants of another, in order to induce them to fail in their duties or obligations in their work or to induce them to discover or reveal any secret of manufacture, organization or working; or
> 5. by revealing or taking advantage of such secrets obtained or revealed in any other manner contrary to good faith,

[12] Everett F. Goldberg, "The Protection of Trademarks in Ethiopia", *Journal of Ethiopian Law*, Vol. VIII, No.1, (1972), p. 134.
[13] Criminal Code of Ethiopia, 2004, Art 719.

is punishable, upon complaint, with a fine of not less than one thousand Birr, or simple imprisonment for not less than three months.

1.5 Trade Practice Proclamation No 329/2003

With a view to safeguarding against private and public impediments to free competition taking place, and as part of the move to introduce free market forces into the Ethiopian economy, the Ethiopian Parliament passed the Trade Practices Proclamation No. 329/2003 (TPP). This legislation states that the government is committed to "[establishing] a system that is conducive for the promotion of a competitive environment, by regulating anticompetitive practices in order to maximize economic efficiency and social welfare."[14] It prohibits anticompetitive behavior and unfair or deceptive conduct by one competitor against another; authorizes regulation of prices for basic goods and services in times of shortage; and requires disclosure on labels of basic consumer information such as weights and measures. The law also provides for the creation of two implementing institutions, the Trade Practices Commission and the Trade Practices Secretariat.

The TPP has five parts: (a) definitions, objectives, scope, and exceptions; (b) prohibited trade practices; (c) enforcement bodies and appellate rights; (d) labeling and pricing regulations; and (e) remedies for violation. The substantive provisions of the law prohibit anticompetitive agreements[15] and abuses of dominance[16] as well as unfair competition.[17]

[14] Trade Practice Proclamation, Proclamation No. 329/2003, Fed. Neg. Gaz, 9thYear No. 49, Preamble.
[15] Ibid, Art 6.
[16] Ibid, Art 11.
[17] Ibid, Art 10.

Article 6 of the TPP prohibits price fixing, bid rigging (collusive tendering), market and customer allocations, and refusals to deal. The Ministry may authorize exceptions to these prohibitions when "the advantages to the Nation are greater than the disadvantages".[18] This exception seems to authorize exceptions for national champions and may be used to discriminate against foreign companies, even in those sectors in which foreign firms may participate fully.[19]

For the most part, Article 11 (2) of the TPP prohibits the same kind of monopolistic conduct listed as prohibited in many jurisdictions. It prohibits, for example, price discrimination, tying arrangements, refusals to deal, excessive prices, and predatory pricing. Some of these conducts are not considered illegal in the United States, but are illegal in other developed countries.[20] Prohibiting excessive pricing puts the Commission in the position of being a price regulator of a sort, a position that is antithetical to the notion that the market sets prices and output. However, the class of persons to whom the prohibition applies under Article 11 (1) of the TPP is vague. The language of this Article is not clearly directed at those firms that are likely to achieve dominance. It states that "no person may carry on trade . . . having or being likely to have adverse effects on market development." This is unusually broad in that it is not limited to persons who are dominant or likely to achieve dominance, and the effect is that it focuses instead on "market development." Prohibiting single-firm conduct without regard to the firm's dominance opens wide the possibility that either competitively neutral or, even, pro-competitive conduct will be prohibited.[21] It would be

[18] Ibid, Art 7.
[19] USAID, supra note 8, p.59.
[20] Ibid, p.61.
[21] Ibid, p.60.

reasonable to interpret Article 11 as applying only to those who have dominance because it falls under the general heading of "Abuse of Dominance."

The TPP is incomplete as it does not deal with issues related to concerted action and mergers, takeovers and other forms of conglomerations at domestic, regional and international levels, which could lead to monopoly power in production and services provision. It does not define "market dominance." The Commission lacks the power to issue implementing regulations that may fill some of this gap, while the Council of Ministers or Regional Councils do have the power to do so.[22] In the only two actions that the Commission has brought that have involved, among other issues, alleged abuses of dominance, actions brought against Total and Mobile Oil, apparently no analysis was done to determine if the parties were dominant in their markets.[23]

1.6 Trade Practice and Consumers Protection Proclamation No. 685/2010

1.6.1 Introduction

This law comes into picture as an amendment of the Trade Practice Proclamation of 2003 and covers a number of issues related to competition and consumer protection. It reiterates the Ethiopian government's commitment to build free market economy. The Proclamation provides that "... commercial activities must be undertaken in accordance with appropriate practices based on free market economic policy of the country".[24] The

[22] Proclamation No.329/2003, Art 29.
[23] USAID, supra note 8.
[24] Trade Practice And Consumers' Protection Proclamation, Proclamation No. 685/2010, Fed.Neg.Gaz.,_16th Year No. 49, Preamble.

legislature also intended to protect the business community from anti-competitive and unfair market practices and consumers from misleading market conducts; and to establish a system that is conducive for the promotion of competitive market.[25] The Proclamation also explicitly lists five objectives: protecting consumers' rights and benefits; ensuring the suitableness of the supply of goods and services to human health and safety and installing a system of follow up; ensuring that manufacturers, importers, service dispensers and persons engaged in commercial activities in general carry on their activities in a responsible way; preventing and eliminating trade practices that damage the interests and goodwill of business persons; and accelerating economic development.[26]

The Proclamation has seven parts: general provisions[27], trade practices,[28] consumer protection,[29] Trade Practice and Consumers Protection Authority[30], instituting of actions and conducting investigation[31], the distribution of goods and services[32] and miscellaneous provisions[33] respectively. This law is progressive in a number of ways. It deals with the protection of consumers comprehensively for the first time in the history of Ethiopian legal system despite the scattered provisions concerned with consumers' protection in different legislations like the Civil Code particularly dealing with extra-contractual liability and unjust enrichment; and provisions of the Commercial Code dealing with protection of goodwill of traders and prohibition of unfair

---

[25] Ibid.
[26] Ibid, Art 3.
[27] Ibid, Art 1 to 4.
[28] Ibid, Art 5 to 21.
[29] Ibid, Art 22 to 30.
[30] Ibid, Art 31 to 40.
[31] Ibid, Art 41 to 43.
[32] Ibid, Art 44 to 47.
[33] Ibid, Art 48 to 58.

trade practices. This law also defines what constitutes market dominance, an element which was missed in the Trade Practice Proclamation No. 329/2003. Moreover, it contains relatively detailed provisions concerning with regulation of merger. Above all, it reestablishes the Trade Practice and Consumers Protection Authority with clear responsibilities and tries to ensure its independence. In addition, this legislation contains rules prescribing various categories of penalties for violation of specific prohibitions on different aspects of competition law and consumers' protection.

1.6.2 General Provisions

Part one of Trade Practice and Consumers Protection Proclamation contains general provisions dealing with definitions, objectives and scope of application of the Proclamation. The Proclamation defines "Anti Competitive or Acts Restricting Market Competition" as "acts limiting the competitive capacity of other business persons in commercial activities through acts of putting business persons engaged in selling similar goods and services at loss by reduction of prices or through acts of taking over of businesses and technologies of business persons engaged in similar businesses or through act of restricting the entry of other business persons into market or through acts of restricting the suppliers of goods and services from determining their selling prices or through the tying of the sale of certain goods and services with the sale of other unlike goods and services by limiting the choices of consumers or users or are the acts prohibited under Articles 5, 11, 15 and 21 of this Proclamation and the like".[34] The specific provisions cited in this definition deal with prohibitions of different aspects of anti-competitive acts. Articles 5 prohibits abuse of market dominance as "[n]o business person, either by himself or acting together with others, may carry on commercial

[34] Ibid, Art 2 (18).

activity by openly or dubiously abusing the dominant position he has in the market." Article 11, on the other hand, states that "Agreement or concerted practice or a decision by an association is prohibited if it has the object or effect of preventing, restricting or distorting competition." Furthermore, Article 15(1) stipulates for a principle regarding regulation of merger as "the Authority shall prohibit the act of merger, if it decides that it causes or is likely to cause a significant restriction against competition or eliminates competition." In the same token, article 21 of the Proclamation prohibits unfair competition.

1.6.3 Prohibited Trade Practices

Part two of the Proclamtion governs *Trade Practices* and has three chapters. It addresses abuse of market dominance; agreements, concerted practices and decisions of associations of business persons and regulation of merger and unfair competition respectively. The first chapter deals with abuse of market dominance. As per this Proclamation, "a business person either by himself or acting together with others in a relevant market, is deemed to have a dominant market position, if he has the actual capacity to control prices or other conditions of commercial negotiations or eliminate or utterly restrain competition in the relevant market."[35] Accordingly, this law fills the gap in the Trade Practice Proclamation which failed to define *market dominance*. Furthermore, the Proclamation provides for guidelines on assessment of dominance as:[36]

1) A dominant position in a certain market may be assessed by taking into account the business person's share in the market or his capacity to set barriers against the entry of others into the market or other factors as may be appropriate or a combination of these factors.

[35] Ibid, Art 6.
[36] Ibid, Art 7.

2) The market relevant for the assessment of a dominant position is the market that comprises goods or services that actually compete with each other or fungible goods or services that can be replaced by one another.
3) The geographic area of this market is the area in which the conditions of competition are sufficiently homogeneous and can be distinguished from the conditions of competition in neighboring areas.
4) The Council of Ministers may determine by regulation the numerical expression of the degree of market dominance.

Thus, the main factor that must be considered in the assessment of market dominance is the market share of a business person or its ability to limit others entry into the market that involves goods or services or fungible goods or services. In addition, the geographic area of the market should be assessed subjectively as it can be distinguished from the conditions of competition in other neighboring areas.

Besides, detailed acts of abuse of dominance are stipulated in this latest competition law of the country. The following acts shall, in particular, be considered acts of abuse of market dominance:[37]

1) limiting production, hoarding or diverting or preventing or withholding goods from being sold in regular channels of trade;
2) with the view to restraining or eliminating competition, doing directly or indirectly such harmful acts, aimed at a competitor, as selling at a price below cost of production, causing the escalation of the costs of a competitor, preempt inputs or distribution channels;
3) directly or indirectly imposing unfair selling price or unfair purchase price;

[37] Ibid, Art 8.

4) contrary to the clearly prevalent trade practice refuse to deal with others on terms the dominant business person customarily or possibly could employ as though the terms are not economically feasible to him;
5) without justifiable economic reasons, denying access by a competitor or a potential competitor to an essential facility controlled by the dominant business person;
6) with a view to restraining or eliminating competition, impose discrimination between customers, in prices and other conditions in the supply and purchase of goods and services;
7) without any justifiable cause and with the view to restraining or eliminating competition:
   a) making the supply of particular goods or services dependent on the acceptance of competitive or non competitive goods or services or imposing restrictions on the distribution or manufacture of competing goods or services or making the supply dependent on the purchase of other goods or services having no connection with the goods or services sought by the customer;
   b) in connection with the supply of goods or services, imposing such restrictions as where or to whom or in what conditions or quantities or at what prices the goods or services shall be resold or exported.

Any business person who violates these provisions shall be punished with a fine of 15% (fifteen percent) of his annual income or where it is impossible. to determine the amount of his annual income with fine from birr 500,000

(five hundred thousand birr) to birr 1,000,000 (one million birr) and with rigorous imprisonment from 5 (five) to 15 (fifteen) years.[38]

In the Second Chapter of the Proclamation, "agreement or concerted practice or a decision by an association is prohibited if it has the object or effect of preventing, restricting or distorting competition."[39] Unlike the case of abuse of market dominance, certain agreements or concerted practices are absolutely prohibited under this section:[40]

a) agreements or concerted practices or decisions by associations of business persons in a horizontal relationship[41] and have the object or effect of the following:
    i. directly or indirectly fixing prices;
    ii. collusive tendering;
    iii. allocating customers, or marketing territories or production or sale by quota;
b) agreement between business persons in a vertical relationship that has an object or effect of setting minimum retail price.

Article 49 further provides that:

> Any business person who violates the provisions of Article 13 sub article (1) (a) and (b) of this Proclamation shall be punished with a fine of 20% (twenty percent) of his annual income or where it is impossible to determine the amount of his annual income with fine from birr 1,000,000

[38] Ibid, Art 49 (1).
[39] Ibid, Art 11.
[40] Ibid, Art 13.
[41] Horizontal relationship is deemed to exist between competing business persons in a certain market, whereas vertical relationship is deemed to exist between business persons and its customers or suppliers or both. See Ibid, Art13 (2).

(one million birr) to birr 2,000,000 (two million birr) and with rigorous imprisonment from 5 (five) to 10 (ten) years.[42]

The third chapter of the Proclamation provides for Regulation of Merger[43] and Unfair Competition[44]. The provisions dealing with regulation of merger will be covered under the next section in light of international practices in detail. Unfair competition is dealt with under Article 21 of the Proclamation. Accordingly, "any act or practice carried out in the course of trade, which is dishonest, misleading, or deceptive and harms or is likely to harm the business interest of a competitor shall be deemed to be an act of unfair competition."[45] Specifically, the following acts of unfair competition are prohibited:[46]

- any act that causes or is likely to cause confusion with respect to another business person or its activities, in particular, the goods or services offered by such business person;
- any act of disclosure, possession or use of information, without the consent of the rightful owner of that information, in a manner contrary to honest commercial practice;
- any false or unjustifiable allegation that discredits, or is likely to discredit another business person or its activities, in particular the products or services offered by such business person;
- comparing goods and services falsely or equivocally in the process of commercial advertisement;
- with a view to acquire an unfair advantage, disseminating to consumers or users, false or equivocal information including the

[42] Ibid, Art. 49 (2).
[43] Ibid, Art 15 to 20.
[44] Ibid, Art 2 (12),Unfair Trade Practice is defined as "any act in violation of provisions of trade related Laws".
[45] Ibid, Art 21 (1).
[46] Ibid, Art 21 (2).

source of which is not known, in connection with the prices or nature or system of manufacturing or manufacturing place or content or suitableness for use or quality of goods and services; and

- obtaining or attempting to obtain confidential business information of another business person through his ex-employee or obtaining the information to pirate his customers or to use for purposes that minimize his competitiveness or obtaining the information to pirate his customers or to use for purposes that minimize his competitiveness.

Moreover, it is stipulated that "any business person who violates Article 21 of this Proclamation shall be punished with fine of 10% (ten percent) of his annual income or where it is impossible to determine his annual income with fine from birr 300,000 (three hundred thousand birr) to birr 600,000 (six hundred thousand birr) and with rigorous imprisonment from 3 (three) to 5 (five) years."[47]

1.6.4 Protection of Consumers

The third part of the Proclamation deals with protection of consumers. It covers a range of topics including: the right of consumers[48], display of price of goods and services[49], labels of goods[50], issuing receipts and keeping their pads[51], self disclosing,[52] commercial advertisements,[53], defects found in

---

[47] Ibid, Art 49 (3).
[48] Ibid, Art 22.
[49] Ibid, Art 23.
[50] Ibid, Art 24.
[51] Ibid, Art 25.
[52] Ibid, Art 26.
[53] Ibid, Art 27.

goods and services,[54] prohibition of waiving obligations through contract,[55] and unfair and misleading acts.[56] Any consumer shall have the right to[57]: i) get sufficient and accurate information or explanation on the quality and type of goods and services he purchases; ii) selectively buy goods or services; iii) not to be obliged to buy for the reasons that he looked into quality or options of goods and services or he made price bargain; iv) be received humbly and respectfully by any business person and to be protected from such acts of the business person as insult, threat, frustration and defamation; v) submit his complaints to the Trade Practice and Consumers Protection Authority for adjudication; and vi) be compensated for damages he suffers because of transactions in goods and services.

Furthermore, the following unfair and misleading acts are prohibited from being committed by any person or business person:[58] 1) issuing misleading information on quality or quantity or volume or acceptance or source or nature or component or use of goods and service may have; 2) failing to disclose correctly the newness or model or the decrease in service or the change in or re-fabrication or the recall by the manufacturer or the second hand condition of goods; 3) describing the goods and services of another business person in a misleading way; 4) failing to sell goods and services as advertised or advertising goods or services with intent not to supply in quantity consumers demand, unless the advertisement discloses a limitation of quantity; 5) making false or misleading statements of price reduction; 6) applying or attempting to apply a pyramid scheme of sale by describing that a consumer will get a reward in cash or in kind by purchasing a good or

[54] Ibid, Art 28.
[55] Ibid, Art 29.
[56] Article, Art 30.
[57] Ibid, Art 22.
[58] Ibid, Art 30 (1-18).

service or by making a financial contribution and which describes that the consumer will get additional reward in cash or in kind where other consumers through his salesmanship purchase the good or service or make financial contribution or enter into the sales scheme, based on the number of consumers; 7) failing to meet warranty obligation entered in connection with the sale of goods and services; 8) misrepresenting the need for repair or replacements of parts to be made to goods as though not needed; 9) delivering services of repairing or replacing parts of goods or immovable properties or delivering the service of making or building immovable properties or delivering any other services below the standard recognized in the business or with deficiency; 10) preparing or making available for sale or selling goods or services that are dangerous to human health and safety or those source of which is not known or whose quality is below standards set in advance or are poisoned or have expired or are adulterated; 11) doing any act of cheating or confusing in any transaction of goods and services; 12) refusing to sell goods and services for reasons that are not protecting the rights of the consumer; 13) making available for sale or selling goods or services without standard marks for which the standard mark is needed; 14) selling goods or services at a price above the price affixed to the goods or the price posted in the business premise; 15) describing the country of the making of goods falsely; 16) unduly favoring one consumer over the other; 17) subjecting the consumer to purchase a good or service not desired in order to sell another good or service; 18) cheating in balance or measurements or any other measurement contrary to the lawful ones.

Any business person who violates sub articles (6) and (10) of Article 30 of this Proclamation (regarding unfair and misleading acts) shall be punished with fine from Birr 100,000 (one hundred thousand) to Birr 300,000 (three

hundred thousand) and with rigorous imprisonment from 10 (ten) to 20 (twenty) years.[59] Similarly "any business person who violates the provisions of Article 30 of this Proclamation other than sub articles (6) and (10) ... shall be punished with fine from birr 50,000 (fifty thousand) to birr 100,000 (one hundred thousand) and with rigorous imprisonment from 3 (three) to 7 (seven) years."[60]

1.6.5 Institutional Framework

The Proclamation establishes the *Trade Practice and Consumers Protection Authority* (the TPCP Authority) as an autonomous federal government organ having its own legal personality which is accountable to the Ministry of Trade and Industry.[61] The Proclamation also states that "the Authority shall be free from any interference or direction by any person with regard to the cases it adjudicates."[62] Moreover, the Authority shall have the following powers and duties:[63] 1) takes appropriate measures to increase market transparency; 2) takes appropriate measures to develop public awareness on the provisions of this proclamation and implementation; 3) receives and decides on merger notifications; 4) makes study and research in connection with commercial competition and consumer interests and rights; 5) regularly announces to consumers goods banned by government or internationally from being consumed or sold; 6) organizes various education and training forums and provides education and training in order to enhance the awareness of consumers; 7) ban advertisements of goods and services which are inconsistent with health and safety requirements or with this

[59] Ibid, Art 49 (4).
[60] Ibid, Art 49 (5).
[61] Ibid, Art 31 and 32.
[62] Ibid, Art 33.
[63] Ibid, Art 34.

Proclamation when it is aware of them by itself or when it is reported to it by any person, and order the issuance of announcements of corrections for such advertisements, in the methods the advertisements were made at the expense of the person in whose interest they were made;8) ensure that the interests of consumers have got proper attention; 9) protect consumers from unfair activities of business persons and from unfair prices of goods and services aimed at obtaining unjustifiable profit; 10) take administrative and civil measures against business persons or other persons on violation of this Proclamation; 11) give necessary advice and support to branch offices to be established; 12) establish relationship and cooperation with national, continental and international bodies having similar objectives; 13) own property, enter into contracts, sue and be sued in its own name; 14) perform such other duties as may be defined by law and undertakes other activities necessary for the attainment of its objectives; 15) determine the employment, administration and dismissal of the staff of the authority in accordance with federal civil servants Proclamation; 16) initiate policy issues, participate on policy and strategy drafting undertakings by other organs of government.

The Authority has power and duties to adjudicate, impose administrative and civil sanctions, and get complainants compensated for damages they sustained.[64] The Authority has a Director General to be appointed by the Prime Minister upon the recommendation of the Minister of Trade and the necessary judges and staff. The TPCPP also stipulates that "regional states may, when necessary, establish organs that adjudicate on matters of consumer rights protections as indicated in this Proclamation."[65]

[64] Ibid, Art 35.
[65] Ibid, Art 39.

2. Defining Merger

Merger is ordinarily understood as 'the absorption of one company (especially a company) that ceases to exist into another that retains its own name and identity; and acquires the assets and liabilities of the former'.[66] It involves two separate undertakings merging entirely into a new entity.[67] However, under competition law, the term 'merger' is used in a wider sense to mean and include amalgamation, acquisition of shares, voting rights, assets or acquisition of control over enterprise.[68] In an extensive ambit, merger is a transaction that brings change in control of different business entities enabling one business entity to effectively control a significant part of assets or decision making process of another.[69] An effective control through any form of acquisition mentioned above, amounts to merger as per the European Commission Merger Regulation (ECMR hereinafter) guidelines if there is a 'possibility of exercising decisive influence' by the acquiring firm over the acquired one.[70] In various decisions, the European Commission has determined that the question whether a particular transaction results in a merger (or concentration as used in the ECMR) is to be determined by analyzing if the market in future will function less competitively than it did prior to merger.[71] The Ethiopian Competition law uses the terminology 'causes or likely to cause appreciable adverse effects on competition' to determine the veracity of a transaction.[72] It provides that "merger is deemed to occur when two or more business organizations previously having independent existence amalgamate or when such business

---

[66] Black's Law Dictionary, (7th ed, 1999), p.1002.
[67] Richard Wish, *Competition Law*, (Oxford University Press, 6th ed., 2009), p.798.
[68] Ibid, p. 799; see Vinod Dhall, *Competition Law Today* (Oxford University Press, 1st edition, 2007), p.15.
[69] Dhall, supra note 68, p.93.
[70] Whish, supra note 67, p. 799.
[71] Case M 890 Blokker/Toys 'R' Us, decision of 26th June, 1997, OJ [1998] L 316/1.
[72] Trade Practice and Consumers' Protection Proclamation No.685/2010, Art 15.

organizations pool the whole or part of their resources to carry on a certain business purpose."[73] Merger also occurs by directly or indirectly acquiring shares or securities or assets of a business organization by a person or group of persons jointly or the business of another person through purchase or any other means.[74]

The focus of many competition laws is typically on mergers proper or acquisitions of shares or assets or acquisition of control, etc.; of entities with turnovers (assets) above a certain prescribed threshold limit as such transactions are considered to be more likely to negatively impact competition. Joint ventures, although at times not mentioned explicitly by merger control provisions of competition laws, may also fall within their ambit.[75]

3. Types of Merger

Mergers can be classified on a basis of the position of merging parties in the economic chain prior to the merger, acquisition or the joint venture as the case may be. On this basis, mergers may be classified as horizontal, vertical or conglomerate. Vertical and conglomerate mergers are referred to as non-horizontal mergers. The guidelines issued by various competition authorities for the evaluation of mergers are based on the classification into horizontal and non-horizontal mergers.

This classification may become important when assessing the effects of competition on the proposed transactions as the factors taken into account to assess such impacts may vary with the type of merger.

[73] Ibid, Art 16 (1).
[74] Ibid, Art 16 (2).
[75] Tiwari, supra note 1, p.121.

3.1 Horizontal Merger

The most common type of merger is horizontal merger. It occurs when actual or potential competitors operating on the same level of market of the same product and at same level of production or distribution like soft drinks manufacturers, Coca-Cola and Pepsi Cola, combine.[76]

Horizontal merger is considered as the most blemish to competition than the other type of mergers. This merger has an adverse effect on market concentration and use of market power as it leads to reduction in number of market players; and increases the market share of the merged entity.[77] It may result in the undertakings acquiring or strengthening a position of market power and, consequently, in an increase in the market price of the products or services on the relevant market. A merger between two or more previously independent undertakings which do not lead to the creation of an individual dominant position may, however, lead to a substantial increase in the concentration of a particular industry. This may lead to the creation or strengthening of a collective dominant position on an oligopolistic market and may consequently facilitate collusion, explicit or tacit, between the undertakings operating on the relevant market.[78] Commentators state that:

> [M]ergers may raise two potential competitive concerns. First, by eliminating the competitive constraints which currently exists

---

[76] Whish, supra note 67, p. 799; See Tiwari, supra note 1; See also Pieter T. Elgers and John J. Clark, Merger Types and Shareholder Returns: Additional Evidence, Financial Management, Vol. 9, No. 2 (Summer, 1980), pp. 66-72.

[77] Alan H Goldberg, 'Merger Control' in Vinod Dhall (ed) *Competition Law Today*, (Oxford University Press, 1st ed., 2007), p.93; See also David M. Barton and Roger Sherman, 'The Price and Profit Effects of Horizontal Merger: A Case Study', *The Journal of Industrial Economics*, Vol. 33, No. 2 (Dec., 1984), pp. 165-177; See also Alan A. Fisher et. al., 'Price Effects of Horizontal Mergers', *California Law Review*, Vol. 77, No. 4 (Jul., 1989), pp. 777-827

[78] Nnamdi Dimgba, 'Merger Control under Nigeria's Proposed Competition Law', *Journal of Law and Investment*, vol. 1(2) (2007), Paper presented at the NBA Section on Business Law Conference, Abuja, (April 16, 2009), p.6.

> between the parties, they may weaken to a significant degree the strength of the overall competitive constraints acting on one or both of the two parties. As a result, the prices charged by the merged entity may increase relative to their pre-merger level. A merger which has these characteristics is said to give rise to a situation of single dominance [the unilateral effect of the merger]. Secondly, the merger may lead to a reduction in the effectiveness of competition if the change in market structure creates a competitive environment more favorable to sustainable tacit collusion.[79]

For this reason, many competition authorities adopt a merger policy which seeks to prevent undertakings from merging to create or strengthen a collective dominant position.[80] For instance, the European Commission's Horizontal Merger Guidelines mention two conditions where horizontal merger affect healthy competition in the market.[81] These conditions are creation or strengthening of dominant position of one firm having high market share post-merger.[82] The second being reduction in competition restrains which existed pre-merger.[83]

The International Competition Network Merger Guidelines Workbook ('ICN Workbook') produced by a Subgroup of International Competition Network, states theories of competitive harm through mergers, having coordinated or

---

[79] S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, (Sweet & Maxwell, London, 1999), p.68.

[80] H. Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice,* (West Publishing, 1994), pp. 445 and 447.

[81] John J. Parisi, 'A Simple Guide to the EC Merger Regulation', January 2010, available at http://www.ftc.gov/bc/international/docs/ECMergerRegSimpleGuide.pdf (last visited on 30 April, 2013)

[82] Ibid.

[83] Ibid.

non-coordinated effects.[84] As explained in the European Commission 's Horizontal merger guidelines,[85] and Office of Fair Trading ('OFT') guidance[86] and United Kingdom's Competition Commission Guidelines,[87] anti-competitive effects arising post-merger, but due to non-coordinated action by market players are known as non-coordinated or unilateral effects. The most common non-coordinated effect of a merger arises when post-merger the market players are reduced in number and their market power increases due to which they are vastly empowered to increase profit margins or able to reduce output, quality or variety.[88] For example, if there are three market players viz. 'X', 'Y' and 'Z' and merger occurs between two of them to form 'XY', the number of competitors in the market is reduced and market share of the players increase post-merger. Now, if 'XY' increases profit margin, and customers start preferring 'Z'; 'Z' may also increase its profit margin due to its position in the market post-merger.[89] This situation is referred to as 'non-collusive oligopoly' in paragraph 25 of European Commissión Horizontal Merger Guideline where with little or no coordination the market players are in a position to act in such a way that consumer interest is at detriment.[90] The ICN Workbook, the European

---

[84] International Competition Network: Investigation and Analysis Subgroup, 'ICN Merger Guidelines Workbook' ('ICN Workbook'), (April 2006), p.11

[85] EC, 'Horizontal Merger Guideline', 2004, sec 24

[86] Office of Fair Trading, *Mergers: Substantive Assessment Guidance* ('OFT guidance'), (May 2003), Article 4.7 -4.10.

[87] UK Merger references: 'Competition Commission Guidelines' ('UKCC guidelines'), (June 2003), Article 3.28-3.31.

[88] ICN Workbook, supra note 84 at 39, sec C.4; Other non-coordinated effects can also arise from merger as mentioned in ICN Workbook at 40, sec C.8 'Unilateral effects can also arise in other contexts, including bidding or auction markets, where different firms compete to win orders. The specific model used will vary depending upon the circumstances of the market, but should have a common thread of attempting to assess whether there is any increase in market power as a result of the merger, for example, by combining the two lowest-cost bidders and thus allowing the merged firm to win with a higher bid.'; See also Whish, *supra* note 67 p.808.

[89] Whish, *supra* note 67 p.808.

[90] EC, 'Horizontal Merger Guideline', 2004, article 25.

Commission 's Horizontal Merger Guideline, OFT guidance and UKCC Guidelines explain various factors which may be relevant in determining whether non-coordinated effects might occur due to merger. The list being only illustrative in nature, mention a range of factors such as high market concentration, restricted consumer choice, weak competitive constraints from other market players, buyer power, elimination of potential competitor or new entrant, amongst others.[91]

Coordinated effects arising out of mergers have also been explained by the ICN Workbook, and other state legislations. Coordinated effects arise where competitive constraints amongst the market players are reduced post-merger, thus creating or strengthening the situations whereby the players are able to coordinate their competitive behavior.[92] The Horizontal merger guideline explains that situations may arise where players without entering into an agreement behave in a coordinated way, towards price fixation, levels of production, expansion of capacity, allocation of markets or contracts in bidding markets.[93] Three important factors have been explained by ICN Workbook and various other legislations including the U.S. Horizontal Merger Guidelines, which are relevant to determine whether coordination effects have occurred due to merger are: a) market transparency must make it possible for the coordinating firms to monitor whether the terms of coordination are followed, b) existence of credible deterrents for the firm to maintain the coordinated policy, and c) no retort from competitors or consumers that would imperil the coordinated policy.[94] Apart from these

[91] ICN Workbook, supra note 84 at 42-43; OFT guidance, article 4.26, 4.27; UKCC guidelines, article 3.58; Whish, *supra* note 67 p.859; Parisi, supra note 81, p.13

[92] ICN Workbook, supra note 84 p.45

[93] EC Horizontal Merger Guideline, 2004 at article 40.

[94] ICN Workbook, *supra* note 84 p.42-43; US, Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines ('FTC guidelines'), (August 2010), 25,

factors, other aspects such as past coordination or coordination in similar markets may be considered.[95]

3.2 Vertical Merger

Vertical merger occurs when two entities which operate at different but complimentary levels of production chain.[96] Hence, a merger between a raw material supplier and manufacturer of final product from that raw material is a vertical merger. Vertical merger may have backward integration, as the case of transaction between supplier and manufacturer and can also be forward integration, for example, between the manufacturer and retailer.[97]

Vertical mergers do not pose as much of a danger to competition as horizontal mergers. In fact, they have been found to be beneficial to both firms and consumers including by facilitating long term investment, enhancing the quality of the product, etc.[98] The purpose and effect of vertical integration including through mergers may be cost reduction and where transaction costs of buying and selling between two vertical levels are relatively high, greater efficiency can be achieved by such integration, which can also be resorted to so as to avoid being a price victim of a monopolist or dependence upon an already vertically integrated competitor.

However, they may have certain harmful effects as such transactions may lead to foreclosing rivals from previously independent firms at the vertical

---

sec 7.2; OFT guidance sec 5.5.12-13; UKCC guidelines, article 3.41; Whish, supra note 67 p.860; Parisi, supra note 81, p.13.

[95] EC Horizontal Merger Guideline , 2004, sec 43; Whish, supra note 67, p.861

[96] James L. Hamilton and Soo Bock Lee, 'Vertical Merger, Market Foreclosure, and Economic Welfare', *Southern Economic Journal,* Vol. 52, No. 4 (1986), pp. 948-961.

[97] *Ibid*; See Tiwari, supra note 1, p.122

[98] OECD/World Bank, 'A Framework for the Design and Implementation of Competition Policy and law', (1991), p. 43.

level thereby making entry more difficult which reduces opportunities available to potential new entrants.[99]

3.3 Conglomerate Merger

The third type of merger is conglomerate merger, which generally refers to mergers between entities that are not linked. Conglomerate mergers in economic sense can be classified further as: a) pure conglomerate, where merging entities are not connected in any manner; b) product extension merger, where the product of the acquiring entity is complementary to that of acquired entity; and c) market extension merger, where the merging entities seek to enter into a new market.[100]

Pure conglomerate mergers are said to occur where there is absolutely no functional link between the merging entities. On the other hand, in product line extension mergers, the merging entity/entities seek(s) to add new products to their existing product line. In a product extension merger, the products of the acquiring company are complementary to the products of the acquirer. In market extension mergers, entities enter into newer markets through the merger, amalgamation, or acquisition as the case may be rather than doing so by internal growth.

These mergers can also pose certain threats to competition including in the case of market extension mergers, which have been noted to have an affinity with horizontal mergers. Other impacts include increase in opportunities for reciprocal dealing, increases in overall industrial concentration and a danger of dilution of functioning of capital markets. Conglomerate mergers may enhance the likelihood of mutual forbearance, the development of a 'live and let live policy' that is comfortable for firms but harms consumers.

---

[99] Tiwari, supra note 1, p.120.
[100] Ibid.

The European Commission has issued Non-Horizontal merger guidelines in 2007, which also recognize that non-horizontal mergers are less likely to significantly impede competition.[101] The UK's OFT guidelines also mention the progressive effects to non-horizontal mergers.[102] However, these guidelines also state that there can be circumstances where non-horizontal mergers cause anti-competitive effects. Examining vertical mergers, one may identify two possible anti-competitive effects that could arise: a) non-coordinated effects likely to cause foreclosure of other market players,[103] and b) coordinated effects carried out by the merged entity.[104] Non-coordinated effects are chiefly classified as input foreclosure and customer foreclosure. Input foreclosure occurs when the merged entity is likely to restrict products or services in the downstream market for other market players, thereby increasing their cost of production, leading to higher costs for consumers.[105] Customer foreclosure occurs when the supplier integrates with a customer base in the market, thereby depriving other players' access to customers.[106] Coordinated effects may occur in non-horizontal mergers. However, the factors to determine whether coordinated effects have occurred are similar to that present in horizontal mergers.[107] Conglomerate mergers also have minimal anti-competitive effects although three concerns arising out of these kinds of mergers have been detailed by the OFT guidance.[108] Firstly, conglomerate mergers may lead to market domination over various portfolios

---

[101] EC, 'Non-Horizontal Merger Guidelines', 2007, Article 12, 20 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:01:EN:HTML (Accessed on 3 May, 2013).

[102] OFT guidance, supra note 86, Article 5.3, 5.4.

[103] EC, 'Non-Horizontal Merger Guidelines', 2007, Article 18; OFT guidance, Article 5.4.

[104] Ibid, Article 19; OFT guidance, supra note 86, Article 5.5; See Whish, supra note 67, p.808.

[105] Ibid, Art 34.

[106] Ibid, Art 58.

[107] Whish, supra note 67, p. 867; EC, 'Non-Horizontal Merger Guidelines', 2007, Article 79-90

[108] OFT guidance, supra note 86, Art 6.1.

of products in a market. Secondly, such merger may lead to anti-competitive practices such as predation;[109] and thirdly, it may lead to coordinated behavior in the market.[110]

4. Merger Regulation in Ethiopia: Comparison with International Experience

Part three of the Ethiopian Trade Practice and Consumers Protection Proclamation deals with regulation of merger. Pursuant to this legislation "[M]erger ... is deemed to have occurred when two or more business organizations previously having independent existence amalgamate or when such business organizations pool the whole or part of their resources to carry on a certain business purpose."[111] It also occurs by directly or indirectly acquiring shares or securities or assets of a business organization by a person or group of persons jointly or the business of another person through purchase or any other means;[112] and "a person or a group of persons shall be deemed to have acquired or to have taken control of a business organization or a business where such person or group of persons could influence the decision making in the affairs or in the administrative activities of a business organization or a business."[113] The main aim of this section is to analyze the regulation of merger under Ethiopian competition and consumers' protection law in light of international best practices with a view to indicating strengths and weaknesses, if any, of the Ethiopian law.

---

[109] Ibid, Arts 6.2 and 6.3.
[110] Ibid, Arts 6.4 and 6.5
[111] Trade Practice and Consumers Proclamation No. 685/2010, Art 16 (1).
[112] Ibid, Art 16(2).
[113] Ibid, Art 16 (3).

4.1 Threshold Limits

Threshold limits are important aspect of all competition laws and policies as these limits determine which transaction is to be notified to or which needs to be reviewed by the competition authorities. The ICN Recommended Practices on Merger Notification Procedures state that threshold limits should be clear, understandable and determined on objectively quantifiable criterion and information.[114] The laying down of threshold limit also eases the pressure of competition authorities of inspecting all mergers, as is done in mandatory notifying systems and allows the authorities to focus only on most likely mergers to affect transactions.[115] It is important to note that threshold limits are used in order to provide a straightforward mechanism in determining the jurisdiction of competition authorities over a transaction and should not be considered as means of substantive assessment over the transaction.[116]

Different jurisdictions have set out different threshold limits in the terms of assets, sale, turnover etc., of the undertakings involved. In spite of there being difference in criteria, the ICN practices suggest that sufficient assets or sales of the undertakings involved in the transactions should be within the territorial limits of a country where authority is exercising jurisdiction.[117] This is also known as the local nexus provision.

In United States, the Hart-Scott-Rodino Antitrust Improvements Act, 1976 (HSR Act has set out three ways of determining jurisdictional thresholds. The

---

[114] International Competition Network, 'Recommended Practices for Merger Notification Procedures', pp. 3-4

[115] Alan H Goldberg, 'Merger Contı ol' in Vinod Dhall (ed) *Competition Law Today*, (Oxford University Press, 1st ed., 2007), p.96.

[116] Whish, supra note 67, p. 828

[117] International Competition Network, 'Recommended Practices for Merger Notification Procedures', p.1

first is 'the commerce test', which states that if the undertakings involved in the transaction i.e. either the acquiring or the acquired party are engaged in the US commerce or any activity affecting US commerce, then the authorities have power to inspect.[118] The second is the 'size of transaction test' which states to look into the voting securities or assets that will be held by acquiring party through the proposed transaction.[119] This test has been simplified by the 2001 amendment of HSR Act, which now states that the competition authorities will intervene only if the aggregate value of voting securities or assets held by the acquiring party exceeds US$ 50 million.[120] The third and important method of determining jurisdictional threshold is the 'size of parties' test. This test looks at size of the parties involved in the transaction and is satisfied if one party has worldwide sales or assets of US$10 million or more and the other has worldwide sales or assets of US$100 million or more.[121] It is important to note that the terms of acquired party and acquiring party have been given, very wide understanding in the law and include entire corporate family of the parties involved.

In contrast to the US law, the EU law only looks at turnover as an important aspect for determining jurisdictional threshold. The ECMR for large-scale transactions provides that authorities will have jurisdiction if the aggregate worldwide turnover of the parties exceeds €5 billion and the Community wide turnover of each of at least two parities, exceeds €250 million unless each of the parties achieves more than two-third of its aggregate Community

---

[118] HSR Act, 1976, sec 7A(a)(1).

[119] Jeffrey I. Shinder, 'Merger Review in the United States and the European Union', available at http://www.constantinecannon.com/pdf_etc/Pres_USEC_merger.pdf (Accessed on 3 May, 2013).

[120] HSR Act, 1976, sec 7A(a)(2).

[121] Ibid; See also FTC Premerger Notification Office. 'To File or Not to File: Introductory Guide',(September 2008),3

wide turnover in one and the same member state.[122] Similarly, for small scale transactions the ECMR will intervene if the aggregate worldwide turnover of the parties exceeds €2.5 billion and the Community wide turnover of each of at least two parities exceeds €100 million and in each of at least three member states, the aggregate turnover of all the parties exceeds €100 million and in these three member states, the turnover of each of at least two parties exceeds €25 million unless each of the parties achieves more than two-third of its aggregate Community wide turnover in one and the same member state.[123] The term turnover is understood as amount derived from the sale of products or provision of services in the preceding financial year.[124]

The UK law is similar to the EU one. However, the jurisdictional tests laid in the Enterprise Act of 2002 are much simpler. The UK law also mainly follows the turnover test, where a relevant merger situation is created and authorities can inspect, if the value of turnover of the enterprise being acquired exceeds £70 million.[125] The turnover is determined by aggregating the total value of the turnover in UK of the enterprises which are ceasing to be distinct and deducting: the turnover in UK of any enterprise, which continues to be carried on under the same ownership or control or if no enterprise continues to be carried on under the same ownership and control, the turnover in UK which of all turnovers concerned, is the turnover of the highest value. The Act also provides for 'share of supply' test, whereby it states that authorities will intervene if the merger creates or enhances 25%

[122] EC, 'Merger Regulations', 2004, art 46(2)
[123] Ibid at Art 46(3)'
[124] Tiwari, supra note 1.
[125] UK, Enterprise Act, 2002, sec 23(1).

(one-quarter of the goods or services) share of supply or purchases in UK or in substantial part of it.[126]

The South African law, though largely based on the EU and the UK laws, talks about both turnover and assets. The South African law also differentiates small, intermediate and large mergers, which is not seen in any of the developed jurisdictions worldwide. Intermediate merger is one where if the value of the proposed merger equals or exceeds R560 million (calculated by either combining the annual turnover of both firms or their assets), and the annual turnover or asset value of the acquired party is at least R80 million.[127] Similarly, if the combined annual turnover or assets of both the acquiring and acquired party are valued at or above R6.6 billion, and the annual turnover or asset value of acquired party is at least R190 million, it qualifies as large merger and the Commission has power to intervene.[128]

The Ethiopia's Trade Practice and Consumers Protection law is silent on the issue of threshold limits. The Authority is empowered to prohibit the act of merger if it decides that it causes or is likely to cause a significant restriction against competition or eliminates competition.[129] There is no objective quantitative requirement in the law to determine a threshold above which a merger transaction could be prohibited.

4.2 Pre-merger Notification

Many merger control regimes impose mandatory pre-merger notification for mergers of a certain size. Insofar as the ECMR is concerned, it is concentrations and combinations that are to be notified to the respective

---

[126] Ibid at sec 23(3) and 23(4.)

[127] South Africa, 'Merger Thresholds', April 2009 available at http://www.compcom.co.za/merger-thresholds/ (Accessed on 3 May, 2013).

[128] Ibid.

[129] Trade Practice and Consumers' Protection Proclamation No. 685/2010, Art 15.

competition authorities and which may be substantively reviewed irrespective of notification provisions. The ECMR does not provide for separate avenues by which merging parties can specifically seek clearance of a merger (on the basis that it is not of a type specifically prohibited by legislation because of its anti-competitive effects) or authorization (on the grounds of the benefits likely to result from the merger).[130]

On the other hand, the UK merger control regime does not impose the mandatory notification requirements for any type of merger. Instead, merging parties may voluntarily opt to notify competition authorities. The availability of merger clearance, which gives merging parties' certainty that the competition authority will not seek to prevent the merger if it proceeds, can make voluntary pre-merger notification attractive option despite the various costs involved.[131]

The existing competition law of Ethiopia (Proclamation No. 685/2010) provides for mandatory pre-merger notification. It states that "a government office, which conducts commercial registration, shall inform the Authority, the merger of business organizations or the transfer of shares or securities or assets which shall be entered in the commercial register before registering the

[130] Tiwari, supra note 1, p.123.

[131] Goldberg favours the 'mandatory notification for mergers valued above certain monetary thresholds' as such criteria for notification lessens the administrative burden for competition authorities, compared with mandatory notification of all mergers. It also enables competition authorities to identify and focus upon the mergers which are most likely to be of concern. See supra note 4 at 96. But some commentators argue that merger pre-notification thresholds do not have to limit the competition authority's jurisdiction to review any combination that it feels might harm competition markets competition can be harmed by the combination of even relatively smaller firms. See Subhadip Ghosh and Thomas Ross, 'The Competition Amendment Bill, 2007: A Review and Critique', *EPW*43:51, 35, ((2008), p. 39.

same."[132] It further provides that "any person, who is concerned with an agreement or arrangement that has the purpose of merger, shall inform the Authority of the conclusion of an arrangement agreement with the purpose of merger or an attempt to conclude the same"[133]; and that "(N)o merger arrangement shall be implemented before the Authority grants permission."[134]

Mandatory pre-merger notification is helpful in screening out harmful mergers before they are consummated. It can also reduce a long and cumbersome publication of notice process involving a number of government departments which demand much resource and time. The bureaucratic delays in publishing such notices would also lead to many potentially harmful mergers escaping the Authority's net. Thus, mandatory pre-merger notification requirement under the existing law is significant to ease the regulation of abuse of dominance that could be caused as a result of consummation of harmful mergers. However, the Proclamation does not provide for minimum threshold limits for merger notification.

4.3 Substantive Assessment of Mergers

Every merger transaction would most likely have certain pro-competitive as well as anti-competitive effects. It is the duty of the competition authorities to balance out these effects through substantive tests and procedures and determine whether the proposed transaction meets the requirements to be blocked.[135] It has been determined through series of cases by the European courts that the burden of proof is on the competition authorities to produce

---

[132] Trade Practice and Consumers' Protection Proclamation No.685/2010, Article 17 (1)
[133] Ibid, Art.17 (2).
[134] Ibid, Art17(3).
[135] Whish, supra note 67, p.849.

convincing evidence that the transaction is anti-competitive in nature.[136] There is no presumption for or against any transaction.[137]

In United States, the Clayton Act prohibits transactions that may 'substantially lessen competition or tend to create a monopoly'.[138] Subsequently, various guidelines have laid down 'test of efficiency', which states that a merger transaction should not be blocked if it increases substantial efficiency in the market.[139] These guidelines also state that a merger should not be permitted to proceed if it will create or enhance market power or will facilitate its exercise. Merger transactions in US are usually analyzed through the following steps: i) identification of the relevant product and geographic markets which are likely to be affected by the transaction; ii) assessment of the market shares of the players involved in transaction and the degree of concentration in the market; iii) identification of possible anti-competitive activities to be carried out by the resultant entity of the transaction such as predation, barrier to entry, refusal to deal etc, and iv) acknowledging possible pro-competitive effects and efficiency created through the transaction such as reduction in market prices, consumer welfare etc.[140]

Similarly, the European Commission's guidelines on merger regulation prohibit any merger transaction which would "significantly impede effective competition in common market or in substantial part of it."[141] The ECMR guidelines lay special importance to check creation or strengthening of

---

[136] Shinder, supra note 119.
[137] Ibid.
[138] US, Clayton Act, 1914,sec 7.
[139] US, FTC guidelines, p. 29, Art 10.
[140] Organization for Economic Co-operation and Development, Substantive Criteria used for Merger Assessment, October 2002, 293 available at http://www.oecd.org/dataoecd/54/3/2500227.pdf (last visited on 4 May, 2013).
[141] EC, 'Merger Regulations', 2004, Art 2(1).

dominant position by the resultant entity of the proposed transaction.[142] The ECMR guidelines also provide for analysis of the relevant market to be affected by the said transaction and the market shares of players involved in the transaction. As per the Merger Regulation of 1989, the authorities relied on test whether the merger would create or strengthen a dominant position, which would 'substantially lessen competition' (the 'SLC Test'). Hence, creation of a dominant position was a necessity to block a merger transaction. However, it was very critically fricasseed that there would certain situations in which, in spite of not being in dominant position, a merged entity could cause significant harm to competition and such harmful mergers could not be challenged under ECMR.[143] The 2004 amendment to the regulations removed market dominance as the exclusive test and empowered the authorities to block any merger which would 'significantly impede effective competition' (the SIEC Test'). The guidelines also provide for 'appraisal criteria', whereby the authorities also look into a checklist of factors that should guide the Commission, few of them being: interest of consumers, development of technical and economic progress, alternative players and products in the market etc.[144]

The United Kingdom also follows similar approach in inspecting mergers and uses the SLC test in analyzing the pro-competitive and anti-competitive effects of a merger transaction.[145] The antitrust authorities have laid down various procedures for analyzing merger transaction. The OFT has laid down procedures in the 'Mergers: Substantive Assessment Guidance'[146] and the Commission has in 'Merger References: Competition Commission

[142] Ibid , Art 2(1) and 2(3)
[143] Whish, supra note 167, p. 852
[144] EC, 'Merger Regulations', 2004, Arts 2(1)(a),2(1)(b).
[145] UK, Enterprise Act, sec 35, 36.
[146] OFT guidance, supra note 86.

Guidelines'.[147] The guidelines provide for methods for defining market and market infiltration.[148] Guidelines also provide for inspection into the coordinated or non coordinated effects likely to be caused by the merger, which could lead to SLC and importantly also provide for relevance of efficiencies.[149] The efficiency test has also been laid down in the Enterprise Act which provides for decision making authorities to consider 'relevant customer benefits' from the merger transaction.[150] A merger may be permitted, in spite of causing SLC, if parties are able to prove efficiencies which are demonstrable, merger-specific and likely to benefit consumers.[151] Benefit to customers would denote lessening of prices, increase of choices, betterment of quality and other analogous benefits.[152] The OFT guidance and UKCC guidelines also in certain cases recognize the 'failing-firm defense' where three conditions are importantly analyzed: first, the firm would have to exit the market if merger transaction does not take place; second, the firm is not in a position to stabilize its operations; and third, there is no other less anti-competitive approach than the merger.[153]

The South African legislation relying on like method lays down certain factors which the authorities should consider before clearance of merger. Few of these are: the actual and potential level of import competition in the market, the ease of entry into the market, the level and trends of concentration, history of collusion and the degree of countervailing power in

---

[147] UKCC guidelines, supra note 87.
[148] OFT guidance Art 3.12; UKCC guidelines, Art 2.7.
[149] Ibid, Art 4.39- 4.35; UKCC guidelines, supra note 87, Arts 3.26, 3.27, 4.34-4.45.
[150] UK, Enterprise Act, sec 30,sec 22(b).
[151] OFT guidance, supra note 86, Art 4.34.
[152] UK, Enterprise Act, sec 30(1)(a).
[153] OFT guidance, supra note 86, article 4.37; CC guidance 3.61-3.63; See also Morven Hadden, 'EC Merger Control Regime' in Gary Eaborn, *Takeovers: Law and Practice*, (Lexis Nexis Butterworth, 2005), p.714.

the market.[154] Considering the socio-economic condition in the country, the South African legislation very significantly lays down consideration for public interest and importance to aspects such as employment, the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive and the ability of national industries to compete in international markets. [155]

The Ethiopian Trade Practice and Consumers Protection Proclamation, which has largely followed the European and UK laws, prohibits any merger which causes or is likely to cause a significant restriction on competition or that eliminate competition.[156] Article 18 stipulates that:

1. The Authority shall prohibit the acts of merger that cause or are likely to cause a significant restriction on competition or that eliminate competition.

2. The Authority, when a notification of merger is submitted to it, shall immediately communicate to the applicant in writing of its decision either to grant or deny its permission.

3. If the Authority needs additional information or documents, it shall communicate its decision to the applicant within a short period of time in order that the information and documents be submitted.

4. Where the Authority deems necessary, it may notify the applicant how he shall amend the merger and that it gives the permission on condition of the submission of the amendment.

5. The Council of Ministers may specify by regulation those acts of mergers that are subject to supervision.

---

[154] South Africa, Competition Act, 1998, sec 16(2).
[155] Ibid at sec 16 (3).
[156] Proclamation No.685/2010, Art18 (1).

However, the law does not mention various factors to be considered by the competition authorities while analyzing a merger like that of South African law which provides for consideration of actual and potential level of competition through imports, extent of barriers to entry, the degree of countervailing power in the market, likelihood of increase in market prices by the merged entities and possibility of failing business.

The Proclamation also provides for certain exceptional cases in which the Authority may grant a permission to implement a merger although it may have anticompetitive effects where an applicant can justify the merger by proving that gains in this respect cannot be obtained without restricting competition; and technology, efficiency and precompetitive gains resulting from the merger outweigh its anticompetitive effects.[157] This provides a space for the Authority to consider economic benefits of merger and balance it in terms of the prospective costs and benefits. Regulation of merger in Ethiopia should, like that of South African law, consider the reality in the country while granting or prohibiting mergers. Multiple objectives of promoting domestic and international market competition, efficiency and protection of consumers could be considered together. In addition, dominance *per se* is not harmful and merger should be regulated on the basis of *rule of reason*.[158] Thus, this exceptional provision in the law is vital to

[157] Ibid, Art 19.

[158] 'Rule of reason' is a standard that courts use in testing the legality of business conduct under section 1 of the Sherman Antitrust Act (1890), which prohibits "every contract, combination... or conspiracy in restraint of trade." At first, the Supreme Court read the act as condemning every restraint of trade. The Court then began moving away from literalness, and in 1911 Chief Justice Edward D. White, writing for the majority, in Standard Oil Co. of New Jersey v. United States and United States v. American Tobacco, explained that the Act condemned only those.practices "which operated to the prejudice of the public interests" by unduly restraining trade. He states that Congress intended that the courts apply the standard of reason in determining whether the act had been violated. Although the Court ordered the oil trust to be dissolved, the rule of reason's factual evaluation of business practices on

balance the costs and benefits of merger in one hand and to build a market for further competition on the other.

Furthermore, the Proclamation provides for exemptions. It states that "the Council of Ministers may specify by regulation those trade activities it deems are vital in facilitating economic development to be exempted from the application of the provisions chapter three (i.e., regulation of merger)."[159]

---

a case-by-case basis was widely viewed as "pro-trust." In Chicago Board of Trade v. United States (1918), Justice Louis D. Brandeis listed some factors to be considered in applying rule of reason: "the facts peculiar to the business to which the restraint is applied, its condition before and after restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." The rule of reason was the dominant approach in antitrust cases for about two decades. After 1937, as the power of the national government expanded, the Court increasingly declared that various business agreements or practices were conclusively presumed to be unreasonable without elaborate inquiry about the harm caused or the business justification. These activities were *per se* illegal "because of their pernicious effect on competition and lack of any redeeming virtue" (Northern Pacific Railway Co. v. United States 1958, p.5). The per se approach dominated antitrust litigation from 1940s through the 1960s. Per se rule proscribed a range of restrictive agreements that included price fixing and market allocation. With an increasing emphasis on deregulation and a free market in the 1970s and 1980s, the court began to abolish or modify per se rules, returning to the rule of reason as the prevailing standard to test many business practices. Per se rule retain some validity, however, particularly when applies to restraints among competitors. In 1978 the Court declared in the National Society of Engineers Vs. United States that "the inquiry mandated by the rule of reason is whether the challenged agreement is one that promotes competition or one that suppresses competition. ... Although the rule of reason and the per se illegality rule are sometimes viewed as dichotomous, they can also be viewed as complementary categories and converging methods of antitrust analysis. Several court cases in the 1980s reflect a methodological overlap between the two standards, with some justices advocating a quick threshold examination of a business practice for competitive impact on before applying a per se or rule of reason approach. Debate over the rule of reason remains lively. Some commentators view the Court's renewed emphasis on the rule of reason as part of free market, pro-business, antigovernment philosophy and as fostering increased economic concentration. Others welcome the diminishing influence of per se rules they consider to base on unsound economic theory. Several commentators criticize the rule of reason as lacking substantive content, asserting that it focuses on a lengthy list factors, allowing an unlimited, freewheeling, high cost judicial inquiry without providing sufficient guidance to trial courts or businesses. See Whish supra note 67.

[159] Ibid, Art 20.

This means, irrespective of the nature of the merger, the Council of Ministers may exempt trade activities as long as they are important for economic development of the country. However, since the law gives the Regulator a very wide discretionary power without specific guidelines, it might erode the purpose of the Proclamation itself. To maintain the purpose of the law, such broad discretion of the regulator should be accompanied by certain specific guidelines.

Generally, competition bodies over the world are reluctant in making mergers unlawful per se, unlike price-fixing, market division and other cartel agreements and abuses of dominant positions, or even coming anywhere near such a rule because of beneficial effects of a merger. Furthermore, most competition authorities work with the guiding principle that mergers are good things.[160] Accordingly, the duty of the competition authorities is to identify and prohibit those mergers which have such an adverse impact on competition or society that any benefits resulting from them are outweighed or should be ignored. By and large, this involves a careful balancing act on the part of the authorities on the basis of rule of reason.

5. Joint Ventures

Another important aspect under merger regulations, which has been highly debated worldwide, is that of intrusion of joint ventures into these regulations. Whether joint ventures are covered under merger regulations is not a settled position of law and different jurisdictions have taken different stands in this regard. At the outset, joint venture may be defined as "any arrangement whereby two or more parties co-operate in order to run a

[160] S Wilks, *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission* (MUP, 1999), p. 205.

business or to achieve a commercial objective."[161] The European Community law earlier provided for concentrative and co-operative joint ventures whereby concentrative joint ventures, which would meet threshold requirements should be notified to the competition authorities.[162] However, since the 2004 amendment, ECMR provides for 'full function joint ventures' whereby only fully functional joint ventures, which meet threshold criterion should be notified to the competition authorities. Article 3(4) of the ECMR stipulates three conditions to determine the existence of 'fully functional joint ventures': a) existence of joint control, b) sufficient resources, assets and financial resources to operate its business autonomously, and c) existence for sufficiently long duration as to bring about a lasting change in the structure of the market concerned.[163]

A joint venture which does not fulfill the above criteria is inspected to check if it goes/falls under any other competitive principle.[164] The United States FTC defines Joint Ventures as "a set of one or more agreements, other than merger agreements, between or among competitor agencies to engage in economic activities and the economic activity resulting there from."[165] Joint venture involving acquisition of assets or voting securities for the formation of a for-profit venture are subject to the HSR Act.

The Ethiopian Trade Practice and Consumers Protection does not deal with joint ventures. A certainty over the status of joint venture needs to be

[161] Nishith Desai Associates, 'Joint Ventures in India', April 2011, available at http://www.nishithdesai.com/Research2011/Paper/Joint%20Ventures%20in%20India.pdf (Accessed on 4 May, 2013).

[162] Kiran S. Desai, et. al., *Joint Ventures Under India's Competition Act*, Mayer Brown and Khaitan & Co., available at http://www.mayerbrown.com/publications/article.asp?id=10438 (Accessed on 3 May, 2013)

[163] EC, 'Merger Regulations', 2004, Art 2(4).

[164] Whish, supra note 67.

[165] US, Department of Justice and Federal Trade Commission, Antitrust Guidelines.

elucidated by the law. If the joint ventures are treated as acquisitions, as done under the American law, where if two or more parties contribute to form a new company, and as a result receive voting securities of this new company, the contributing parties are treated as acquiring party and the new company is treated as acquired party if the relevant turnover thresholds are satisfied. It is also to be noted that treating such transaction within the ambit of merger regulation would increase the burden on the Competition Authority as the possibility of complaints arising is much higher.

6. Conclusion

Ethiopia has taken a number of measures to promote free market economy since 1991. The Transitional Government defined its economic roles under the transitional economic policy adopted in 1991 whereby it promised to reduce the scope of its intervention into the economy in the interest of free market, and to promote domestic and foreign private investments.[166] The FDRE Constitution also authorizes the government to formulate policies that ensure all Ethiopians benefit from the country's intellectual and material resources.[167] Thus, the ruling party (EPDRF) elaborated on the economic policy objectives of the country in 2000, which focused on the importance of free market as an engine of economic growth.[168] The country also enforces substantive provisions prohibiting unfair competition under its Commercial Code, Civil Code and Criminal Code.

The first formal competition law was introduced in 2003 by enactment of the Trade Practice Proclamation No. 329/2003. Although this legislation contained legal and institutional frameworks targeting at promotion of

[166] Transitional Government of Ethiopia, Ethiopia's Economic Policy during the Transitional Period, supra note 3.
[167] FRDE Constitution, Art 89 (1).
[168] EPDRF, Revolutionary Democracy: Development Lines and Strategies, supra note 5.

market economy and protection of consumers, it lacked clarity and comprehensiveness to address important issues related to abuse of dominance, regulation of merger, protection of consumers and independence of implementing institutions. To fill the gaps in this legislation and to further strengthen the free market economy and protection of consumers, the Federal Parliament (the House of Peoples Representatives) introduced the Trade Practice and Consumers Protection Proclamation No. 685/2010.

The preceding sections of this article reviewed the competition laws and policies of Ethiopia and made specific reference to provisions pertinent to regulation of merger and critically examined them in light of international best practices regarding issues like setting of threshold limits, pre-merger notification and substantive assessment of mergers. It is found that the Ethiopian Trade Practice and Consumers Protection Proclamation has its basis on the developed jurisdictions such as the EU and US. Nevertheless, the law lacks in provisions regarding definite threshold limits.

The Ethiopian Trade Practice and Consumers Protection should, therefore, provide for threshold limits and consider the fact that setting monetary thresholds needs timely restructuring as the economic and commercial factors keep shifting rapidly. The developed jurisdictions have clutched the intricacies of changing economies and market structures which is yet to be confronted by Ethiopia. Moreover, setting out threshold limits could avoid a situation where mergers, which do not meet the monetary requirements to be inspected by the Authority, come into operation with a possibility of having adverse effects on competition. Furthermore, there is a need for clear and cogent guidelines or principles on types of mergers and their effects. The Ethiopian law should provide for guidelines similar to those of the EU or US

guidelines of horizontal and non-horizontal mergers, which prescribe for coordinated and non-coordinated effects caused by mergers.

The fate of joint ventures should also be clarified under Ethiopian competition law. Particularly, whether joint ventures are treated as merger transactions or as anti-competitive agreements needs to be described. Since both possibilities have their own pros and cons, this concern needs appropriate consideration. Moreover, like the laws of South Africa and other jurisdictions discussed above, the Ethiopian Competition law should ascertain crucial concerns of employment, benefits to previously deprived and abandoned entities and, very importantly, ability of national entities to compete in the international markets. Due consideration of these factors in the regulation of merger plays a vital role in facilitating economic development as well as acceptance amongst the market players and consumers.