Working Paper

Ethiopian Merger Regulation

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Introduction

Preventing companies from gaining market dominance is crucially important to developing countries when they begin to implement competition law. Mergers can give rise to market dominance: they allow entities to achieve economies of scale, to expand business capacity, to operate in different markets, and to increase efficiency, among other things.[1] Market players might therefore object to a merger because it could make it hard for them to compete. Similarly, consumers may oppose a merger which results in higher prices, or lower quality products.[2] Finally, governments may find mergers controversial because they conflict with industrial or foreign policy, and shareholders may dislike mergers which reduce share value.

Merger regulation therefore aims to prevent a transaction from adversely affecting competition before it is consummated. This is important because it is expensive to undo a harmful merger after it has already taken place. Merger regulation may also involve other considerations, like industrial or foreign policy.

Most countries have enacted competition laws to protect their free market economies. Ethiopia introduced competition laws in 2003, but its first laws, and particularly its merger regulations, were inadequate and obsolete. To correct these problems, and respond to its liberalizing economy, the Ethiopian government enacted the Trade Practice and Consumer Protection Proclamation in 2010.

This article examines Ethiopia's competition and consumer protection laws, and focusses on merger regulation. It compares the merger regulations of the United States of America, European Union, United Kingdom and South Africa, and highlights lessons this comparison has for Ethiopia. The article aims to answer the following questions:

1) What are the different types of mergers and what are their effects on competition?

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[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

[2] Ibid

2) How should merger regulation address threshold limits, pre-merger notification, and substantive tests for reviewing mergers?
3) How does competition law deal with joint ventures?
4) What are Ethiopia's merger regulation's major strengths and weaknesses?
5) What lessons could Ethiopia draw from international experiences to improve its merger regime?

This article is organized into six sections. The first section reviews Ethiopian competition law, and explores the FDRE Constitution, Codes and recent Proclamations. The second and third sections explain different types of mergers, and elaborate on their effects and consequences. The fourth section discusses Ethiopian and international merger regulation, focusing on threshold limits, merger notification, tests used for merger assessment and the factors competition authorities consider when reviewing mergers. The fifth section looks into joint venture control. Finally, the article concludes with suggestions to improve Ethiopian merger regulation.

1. Overview of Ethiopia's Competition Law

This section reviews Ethiopian competition law. It first looks at competition policies from 1991, and discusses competition law's constitutional basis. It then discusses Ethiopia's modern competition law, including the Commercial Code, the Civil Code, and the Criminal Code. The article gives special emphasis to the Trade Practice and Consumer Protection Proclamation.[3]

1.1 Competition Policy

The Ethiopian government committed to enforce free market economic policy from 1991. In 1991, the Transitional Government promised to reduce the scope of its economic activities, to develop a free market, and to promote domestic and foreign private investments.[4] The FDRE Constitution also obliges the government to formulate socio-economic policies which ensure that all Ethiopians can benefit from the country's intellectual and material resources.[5] Accordingly, the ruling party[6] elaborated on the country's economic policy objectives in 2000.[7] It focused on the private sector as the engine of economic growth and mandated that the government's role would be to correct and develop Ethiopia's free market.[8] The federal government translated these

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[3] Proclamation No 685/2010

[4] TGE, *Ethiopia's Economic Policy during the Transitional Period*, (Nov 1991), 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)

[5] FRDE Constitution, 8 Dec, 1995, Articles 55(10), 89(1)

[6] The Ethiopian People's Revolutionary Democratic Front (EPDRF)

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

[8] Ibid

objectives into government policy and modified agricultural and industrial policy accordingly.

When making these modifications, the government elaborated on a number of economic and social policy objectives, including: reducing the government's role in business, encouraging private sector development, promoting competition, economic efficiency, and growth, correcting market failures, providing goods and services which the market may not provide, avoiding price and quality abuses, protecting consumers, and integrating the Ethiopian economy with the global economy.[9] 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. To enforce these policies, the government privatized some public enterprises and is continuing to promote private sector investment through various incentives. The Ethiopian business community has responded very positively, as demonstrated by the number of new Ethiopian entrants into several industries, including banking, insurance, textiles, and floriculture. However:[10]

> The 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.

1.2 Unfair Competition under the Commercial Code

Ethiopia's Commercial Code contains rules governing unfair competition. Article 133 sets out what counts as unfair competition:

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; and
    b) Any false statement made in the course of business with a view to discrediting the undertaking, products, or commercial activities of a competitor.

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[9] 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), 119

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

Article 134(1) provides remedies for acts which infringe competition law, principally damages, and injunctions that stop the unlawful act.[11]

1.3 Unfair Competition under the Civil Code

Unfair trade practices which may affect trade within Ethiopia are also prohibited by the 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.'[12] Courts can order that a defendant rectify these unfair practices with: 1) an order for corrective publicity; 2) an injunction; or 3) a damages award.[13] While awarding damages, courts must stick to the Civil Code's rules governing extra-contractual liability.[14]

1.4 Unfair Competition under the Criminal Code

The Ethiopian legal system also criminally punishes unfair competition. The Criminal Code defines criminal unfair competition as follows:[15]

> 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:
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> 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;
> 2) By taking measures such as to create confusion with the goods, dealings or products or with the activities or business of another;
> 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;
> 4) By granting or offering undue benefits to another's servants, agents or assistants, 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 trade secrets obtained or revealed in any other manner contrary to good faith,
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> is punishable, upon complaint, with a fine of not less than one thousand Birr, or simple imprisonment for not less than three months.

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[11] See also Civil Procedure Code of Ethiopia, 1965, Article 155

[12] Civil Code of Ethiopia, 1960, Article 2057

[13] Commercial Code of Ethiopia, Article 134(2)

[14] Everett F. Goldberg, 'The Protection of Trademarks in Ethiopia' Journal of Ethiopian Law, Vol VIII, No 1, (1972), 134

[15] FDRE Criminal Code, 2004, Article 719

1.5 Trade Practice Proclamation[16]

To prevent private and public impediments to free competition, and to help introduce free market forces into the Ethiopian economy, the Ethiopian Parliament passed the Trade Practices Proclamation (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.'[17] It prohibits anticompetitive behavior and unfair or deceptive conduct; authorizes price regulation for basic goods and services in times of shortage; and requires that product labels disclose basic information which helps consumers compare products. The law also authorizes the creation of the Trade Practices Commission and the Trade Practices Secretariat, to implement competition law.

The practices which the TPP prohibits are fairly typical of those found in competition laws around the world, and mirror Articles 101 and 102 of the Treaty on the Functioning of the European Union. Regarding joint conduct, 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] The government may use this power to promote national champions and discriminate against foreign companies, even in sectors in which foreign firms may participate fully.[19] Regarding unilateral conduct, Article 11(2) of the TPP prohibits, for example, price discrimination, tying, refusal to deal, excessive prices, and predatory pricing.

Prohibiting excessive pricing makes the Trade Practices Commission a price regulator of a sort, which is antithetical to free market ideas. However, the prohibition on excessive prices only applies to a vague class of persons under Article 11(1). Article 11(1) 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. Instead it focusses on 'market development.' Prohibiting single-firm conduct without regard to the firm's dominance allows the Commission to prohibit competitively neutral or, even, procompetitive conduct.[20] Even so, one could interpret Article 11 as applying only to those who have dominance because the Article falls under the general heading of 'Abuse of Dominance.'

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[16] FDRE, Trade Practice Proclamation, Proclamation No 329/2003, <u>Fed Neg Gaz</u>, 9thYear No 49

[17] Ibid, the Preamble

[18] Ibid, Article 7

[19] USAID, n 10, 59

[20] Ibid, 60

The Proclamation was incomplete as it does not deal with 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 also does not define 'market dominance.' The Commission lacks the power to issue implementing regulations that fill these gaps. This power is reserved to the Council of Ministers or Regional Councils.[21] In the only two actions that the Commission brought that involved abuses of dominance, the Commission did not appear to analyze whether the parties were dominant in their markets.[22]

1.6 Trade Practice and Consumer Protection Proclamation[23]

1.6.1 Introduction

In 2010, the Ethiopian government amended the Trade Practice Proclamation of 2003, using the Trade Practice and Consumer Protection Proclamation (TPCPP). The TPCPP reiterates the Ethiopian government's commitment to build a free market economy.[24] The legislature also intended to protect the business community from anticompetitive and unfair market practices, to protect consumers from misleading market conduct, and to establish a system which promotes competitive markets.[25] The Proclamation also lists five other objectives: protecting consumers' rights and benefits, ensuring goods and services protect human health and safety, ensuring that manufacturers, importers, service dispensers and commercial parties act responsibly, preventing and eliminating trade practices that damage business interests and goodwill, and accelerating economic development.[26]

This law deals with consumer protection comprehensively for the first time in Ethiopia's history. Previously consumer protection provisions were scattered across different pieces of legislation. It also defines market dominance, and regulates mergers. In addition, it prescribes various penalties for specific violations of competition and consumer protection law. Most importantly, it reestablishes the Trade Practice and Consumer Protection Authority and tries to ensure its independence.

1.6.2 General Provisions

Part one of the TPCPP contains general provisions dealing with definitions, objectives and the Proclamation's scope of application. The Proclamation defines 'Acts Restricting Market Competition' as:[27]

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[21] FDRE, Proclamation No 329/2003, Article 29

[22] USAID, n 10

[23] FDRE, Trade Practice And Consumer Protection Proclamation, Proclamation No 685/2010, Fed Neg Gaz, 16th Year No 49

[24] Ibid, Preamble

[25] Ibid

[26] Ibid, Article 3

[27] Ibid, Article 2(18)

Acts limiting the competitive capacity of other business persons by forcing them to sell similar products at a loss, or taking over similar businesses, or restricting market entry, or restricting sale prices of goods or services, or tying sales to sales of similar products, or limiting consumer choice, or other acts prohibited under Articles 5, 11, 15 and 21 of this Proclamation and the like.

1.6.3 Prohibited Trade Practices

Part two of the Proclamation governs 'Trade Practices.' It addresses abuses of market dominance in Article 5, agreements, concerted practices and decisions of associations in Article 11, merger regulation in Article 15, and unfair competition in Article 21.

Abuse of Dominance

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.'[28] This fills the gap in the Trade Practice Proclamation which failed to define market dominance. Furthermore, the Proclamation provides for guidelines for assessing dominance:[29]

1) One may assess a business's dominant position in a market by taking into account its market share, capacity to create barriers to entry, and other appropriate factors.
2) A business's dominant position must be in a defined market, consisting of goods or services that actually compete with each other, or can be replaced by one another.
3) The geographic market is the area in which the conditions of competition are sufficiently homogeneous.
4) The Council of Ministers may determine by regulation the numerical criteria used to assess market dominance.

The Proclamation also states that the following acts are abuses of market dominance:[30]

1) Limiting production, hoarding or diverting, preventing or withholding goods from being sold in regular channels of trade;

[28] Ibid, Article 6
[29] Ibid, Article 7
[30] Ibid, Article 8

2) Directly or indirectly selling below production cost, escalating a competitors costs, or preempting inputs or distribution channels, when intended to restrain or eliminate a competitor;
3) Directly or indirectly imposing an unfair selling price or unfair purchase price;
4) Refusing to deal with others on terms the dominant business person customarily or possibly could employ, contrary to prevalent trade practices;
5) Denying competitors access to essential facilities without justifiable economic reasons;
6) Discriminating between customers in prices or other trading conditions, with a view to restraining or eliminating competition; and
7) Unjustifiably, and with a view to restraining or eliminating competition:
   a) Making the supply of particular goods or services dependent on accepting other goods or services, or imposing restrictions on distributing or manufacturing competing goods or services; and
   b) In connection with the supply of goods or services, restricting 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% of his annual income, or where it is impossible to determine his annual income with a fine from birr 500,000 to birr 1,000,000, and with rigorous imprisonment from five to fifteen years.[31]

Agreements and Coordinated Conduct

The second chapter of the Proclamation prohibits an 'agreement or concerted practice or a decision by an association… if it has the object or effect of preventing, restricting or distorting competition.'[32] The following agreements are absolutely prohibited:[33]

1) Agreements or concerted practices or decisions by associations of business persons in a horizontal relationship which have the object or effect of the following:
   a) Directly or indirectly fixing prices;
   b) Collusive tendering; or
   c) Allocating customers, or marketing territories or production or sale by quota.
2) Agreements between business persons in a vertical relationship that have an object or effect of setting a minimum retail price.

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31 Ibid, Article 49(1)
32 Ibid, Article 11
33 Ibid, Article 13

Any person who violates Article 13(1)(a) and (b) of this Proclamation shall be fined 20% of his annual income, or where it is impossible to determine his annual income, he shall be fined between birr 1,000,000 and birr 2,000,000. He shall also receive rigorous imprisonment from five to ten years.[34]

Unfair Competition

The third chapter of the Proclamation regulates mergers[35] and unfair competition.[36] Merger regulation is discussed later in this article. Unfair competition is dealt with under Article 21 of the Proclamation, which states that '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.'[37] Specifically, the following acts constitute unfair competition:[38]

1) Any act that confuses customers about another business, its activities, or the goods and services it offers;
2) Any disclosure, possession, or use of information, without the consent of the rightful owner of that information, in a manner contrary to honest commercial practice;
3) Any false or unjustifiable allegation that discredits, or is likely to discredit another business, its activities, or the products or services it offers;
4) Comparing goods and services falsely or equivocally when advertising;
5) Disseminating false or equivocal information, or information from an unknown source, in connection with the prices, nature, system or place of manufacturing, or content, or suitableness for use, or quality of goods and services, to acquire an unfair advantage; and
6) Obtaining or attempting to obtain another business's confidential information from its former employees, or obtaining confidential information to take its customers or to minimize its competitiveness.

Any business person who violates Article 21 shall be punished with fine of 10% of his annual income, or where it is impossible to determine his annual income, with fine from birr 300,000 to birr 600,000, and with rigorous imprisonment from three to five years.[39]

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[34] Ibid, Article 49(2)
[35] Ibid, Articles 15 to 20
[36] Ibid, Article 2(12). An Unfair Trade Practice is defined as 'any act in violation of provisions of trade related laws.'
[37] Ibid, Article 21(1)
[38] Ibid, Article 21(2)
[39] Ibid, Article 49(3)

1.6.4 Consumer Protection

The third part of the Proclamation deals with consumer protection. It covers a range of topics including consumers' rights,[40] displaying prices of goods and services,[41] labeling goods,[42] issuing receipts and keeping records,[43] self-disclosing,[44] commercial advertisements,[45] defects in goods and services,[46] prohibiting waiving obligations through contract,[47] and unfair and misleading acts.[48] Any consumer shall have the right to:[49]

1) Get sufficient and accurate information on the quality and type of goods and services he purchases;
2) Selectively buy goods or services;
3) Refuse to buy goods and services;
4) Be received humbly and respectfully by any business person and be protected from insults, threats, frustration and defamation;
5) Submit his complaints to the Trade Practice and Consumer Protection Authority for adjudication; and
6) Be compensated for damages he suffers because of transactions in goods and services.

Furthermore, the Proclamation prohibits businessmen from committing a number of specifically enumerated unfair or misleading acts.[50] Anyone who violates these prohibitions shall be fined between Birr 50,000 and Birr 300,000, and shall be imprisoned from three to twenty years.[51]

1.6.5 Institutional Framework (Trade Practice and Consumer Protection Authority)

The Proclamation establishes the Trade Practice and Consumer Protection Authority (the Authority) as an autonomous federal agency which is accountable to the Ministry of Trade and Industry.[52] The Authority is charged with implementing Ethiopia's competition law, and administers Ethiopia's merger regime. It also has extensive public education responsibilities, and promotes consumer protection using Ethiopia's other

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[40] Ibid, Article 22
[41] Ibid, Article 23
[42] Ibid, Article 24
[43] Ibid, Article 25
[44] Ibid, Article 26
[45] Ibid, Article 27
[46] Ibid, Article 28
[47] Ibid, Article 29
[48] Ibid, Article 30
[49] Ibid, Article 22
[50] Ibid, Article 30(1) to (18)
[51] Ibid, Articles 49(4) and (5)
[52] Ibid, Articles 31 and 32

consumer protection laws. Finally, it acts as a policy adviser on consumer welfare issues, and conducts its own socioeconomic research. When pursuing these goals, the Authority can adjudicate cases, impose administrative and civil sanctions, and order wrongdoers compensate victims.[53] 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.'[54]

2. Mergers: a Conceptual Framework

2.1 Merger Definition

Mergers are ordinarily understood as one company acquiring the assets and liabilities of another company, and causing that other company to cease to exist as an independent entity.[55] However, 'merger' is used in a wider sense in competition law, and includes amalgamation, pooling of resources in joint ventures, acquisition of another enterprise's shares, voting rights, assets, or control over that enterprise.[56] Mergers cause a change in control, which enables one business to effectively control another formerly independent business.[57] The European Commission Merger Regulation (ECMR) guidelines define control as the 'possibility of exercising decisive influence' over the acquired firm.[58]

Ethiopian Competition law uses the terminology 'causes or likely to cause appreciable adverse effects on competition' to determine whether to permit a transaction.[59]

Many competition laws focus on mergers between entities with turnovers above a certain prescribed threshold limit, because larger transactions are more likely to negatively impact competition.

2.2. Types of Merger

We can classify mergers based on the position of merging parties prior to the merger. On this basis, mergers can be horizontal, vertical or conglomerate. Vertical and conglomerate mergers are referred to as non-horizontal mergers. This classification may become important when assessing the effects mergers have on competition.

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53 Ibid, Article 35
54 Ibid, Article 39
55 Richard Whish, *Competition Law*, (Oxford University Press, 6th ed, 2009), 798
56 Ibid, 799; See Vinod Dhall, *Competition Law Today*, Oxford University Press, 1st edition, 2007, 15
57 Dhall, Ibid, 93
58 Whish, n 55, 799
59 FDRE, Trade Practice and Consumer Protection Proclamation No 685/2010, Article 15

2.2.1. Horizontal Merger

Horizontal mergers are the most common type of merger, and occur when competitors operating on the same market level for the same product combine.[60] Horizontal mergers generally harm competition more than other types of merger, because they reduce the number of market players, and increase the market share of the merged entity.[61] The merged entity may therefore achieve or strengthen a dominant position.

Even if the merger does not create a dominant position, the merger will still reduce competition, because it will increase market concentration, and may therefore allow for anticompetitive coordinated effects. Coordinated effects arise where the merger reduces competitive constraints, allowing companies to coordinate their competitive behavior.[62] Coordination can involve companies creating a collective dominant position, price fixing, limiting production, expanding capacity, allocating markets, or bid rigging.[63] Parties do not have to have entered into an agreement to engage in coordination: they may be involved in tacit collusion. Coordination is more likely where: 1) markets are transparent; 2) there are credible deterrents to prevent firms from deviating from the coordinated conduct; and 3) competitors and consumers are not expected to destabilize the coordinated policy.[64] Other relevant factors include past coordination or coordination in similar markets.[65] Many competition authorities therefore prevent mergers which allow for coordination.[66]

Finally, horizontal mergers can also allow for non-coordinated anticompetitive harm, which arises in an oligopoly even where no company is dominant.[67] There are fewer market players post-merger, and they have greater market power. They can use this

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[60] Whish, n 55, 799; Tiwari, n 1; Pieter T Elgers and John J Clark 'Merger Types and Shareholder Returns: Additional Evidence' Financial Management, Vol 9, No 2 (Summer, 1980), 66-72

[61] Alan H Goldberg, 'Merger Control' in Vinod Dhall (ed) *Competition Law Today*, (Oxford University Press, 1st ed, 2007), 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), 165-177; See also Alan A Fisher et al, 'Price Effects of Horizontal Mergers' *California Law Review*, Vol 77, No 4 (Jul 1989), 777-827

[62] International Competition Network: Investigation and Analysis Subgroup, *ICN Merger Guidelines Workbook* ('ICN Workbook'), (April 2006), 45

[63] EC Horizontal Merger Guideline, 2004, Article 40

[64] ICN Workbook, n 62, 42-43; US, Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines ('FTC guidelines'), (August 2010), 25, s 7.2; OFT guidance s 5.5.12-13; UKCC guidelines, Article 3.41; Whish, n 55, 860

[65] EC Horizontal Merger Guideline, 2004, s 43; Whish, n 55, 861

[66] H. Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice,* (West Publishing, 1994), 445 and 447; See the European Commission's Horizontal Merger Guidelines

[67] ICN Workbook, n 62, 11; EC, *Horizontal Merger Guideline*, 2004, s 24; Office of Fair Trading, *Mergers: Substantive Assessment Guidance* ('OFT guidance'), (May 2003), Article 4.7-4.10; UK Merger references: *Competition Commission Guidelines* ('UKCC guidelines'), (June 2003), Article 3.28-3.31

market power to increase profit margins, or reduce output, quality or variety.[68] Mergers can result in non-coordinated anticompetitive effects based on a range of factors, including high market concentration, restricted consumer choice, weak competitive constraints from other market players, lack of buyer power, and elimination of a potential competitor or new entrant.[69]

2.2.2. Vertical Merger

Vertical mergers occur when two entities which operate at different but complimentary levels of the production chain combine.[70] For example, a merger between a raw material supplier and a manufacturer of a final product from that raw material is a vertical merger. Vertical mergers may involve backward integration, where a company purchases another company at an earlier stage in the production chain, or forward integration, where a company purchases a company at a later stage of the production chain.[71]

Vertical mergers do not pose as much of a danger to competition as horizontal mergers. In fact, they can be beneficial to both firms and consumers by facilitating long term investment, enhancing the quality of the product, and creating efficiencies by reducing transaction costs.[72] Vertical integration may also help firms compete with monopolists or vertically integrated competitors.

However, vertical mergers may also harm competition by foreclosing rivals.[73] Foreclosure can consist of input foreclosure and customer foreclosure. Input foreclosure occurs when the merged entity restricts products or services in the downstream market for other market players, thereby increasing their cost of production.[74] Customer foreclosure occurs when the merged entity refuses to buy from upstream competitors, depriving them of customers.[75] Finally, vertical mergers may also harm competition by

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[68] ICN Workbook, n 62 at 39, s C.4; Mergers can also cause other non-coordinated effects: ICN Workbook at 40, s 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, n 55, 808

[69] ICN Workbook, n 62, 42-43; OFT guidance, Article 4.26, 4.27; UKCC guidelines, Article 3.58; Whish, n 55, 859

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

[71] Ibid; See Tiwari, n 1, 122

[72] OECD/World Bank, *A Framework for the Design and Implementation of Competition Policy and law*, (1991), 43

[73] Tiwari, n 1, 120

[74] Ibid, Article 34

[75] Ibid, Article 58

allowing companies to coordinate. This can occur, for example, if competitors become more symmetrical after a merger.[76]

2.2.3 Conglomerate Merger

The third type of merger is a conglomerate merger, which involves a merger between entities in unrelated markets. Conglomerate mergers are divided into: 1) pure conglomerate mergers, where merging entities are not connected in any manner; 2) product extension mergers, where the acquiring entity's product is complementary to acquired entity's product; and 3) market extension mergers, where the merging entities seek to enter a new market.[77]

Conglomerate mergers are also less likely to harm competition than horizontal mergers. However, conglomerate mergers can threaten competition in a number of ways.[78] Firstly, they may allow companies to dominate markets in various portfolios of products. Secondly, they may lead to anticompetitive practices like tying and predation.[79] Thirdly, they may lead to coordinated behavior.[80]

3. Merger Regulation: from international experience to Ethiopian law

Part three of the FDRE Trade Practice and Consumer Protection Proclamation regulates mergers. This legislation defines a merger to include two businesses amalgamating, pooling their resources under a joint venture, or one business directly or indirectly acquiring another's shares or assets.[81] A person will take control of another business where he can influence decision making in that business's affairs or administrative activities.[82]

The following sections assess how Ethiopian competition law addresses threshold limits, pre-merger notification, and substantive merger assessment, and compares Ethiopian law with international best practices.

3.1 Threshold Limits

Threshold limits determine which transactions are notified to and reviewed by competition authorities, but they do not amount to substantive assessment over a transaction.[83] Threshold limits allow competition authorities to ignore small mergers which are unlikely to affect competition, and focus only on mergers which are likely to

[76] Whish, n 55, 867; EC Non-Horizontal Merger Guidelines, 2007, Article 79-90
[77] Ibid
[78] OFT guidance, Article 6.1
[79] Ibid, Article 6.2, 6.3
[80] Ibid, Article 6.4, 6.5
[81] Ibid, Article 16(2)
[82] Ibid, Article 16(3)
[83] Whish, n 55, 828

harm competition.[84] Different jurisdictions use different threshold limits, but in any case, the companies involved should have sufficient assets or sales in a country's territorial limits for that country's authority to have jurisdiction.[85]

In United States, the Hart-Scott-Rodino Antitrust Improvements Act, 1976 sets out three alternative jurisdictional thresholds. First, the 'commerce test' states that if the undertakings involved in the transaction are engaged in US commerce, or any activity affecting US commerce, then the authorities can inspect the merger.[86] Second, the 'size of transaction test' looks into the voting securities or assets that the acquiring party will hold after the proposed transaction.[87] This test was simplified in 2001: now competition authorities will only intervene if the aggregate value of voting securities or assets the acquiring party holds exceeds US$50 million.[88] Third, the 'size of parties' test grants US authorities jurisdiction if one party has worldwide sales or assets of at least US$10 million, and the other has worldwide sales or assets of at least US$100 million.[89] These thresholds look beyond company law's boundaries, and instead consider a corporate family or group's assets or voting rights.

The EU only looks at turnover[90] when deciding whether the European Commission has jurisdiction. The Commission will have jurisdiction under the EU's primary threshold if: 1) the parties' combined worldwide turnover exceeds €5 billion; and 2) at least two parties each have Community-wide turnover of at least €250 million. The Commission will have jurisdiction under the EU's secondary threshold if: 1) the parties' combined worldwide turnover exceeds €2.5 billion; 2) at least two parties each have Community-wide turnover of at least €100 million; 3) the parties' combined turnover exceeds €100 million in each of at least three member states; and 4) in these three member states, at least two parties each have turnover of at least €25 million. The Commission will lose jurisdiction if the parties earn more than two thirds of their turnover in one member state.[91]

In the UK, authorities have jurisdiction if the enterprise being acquired has a turnover of more than £70 million.[92] Authorities can also intervene if the merger grants a

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[84] Alan H Goldberg, 'Merger Control' in Vinod Dhall (ed) *Competition Law Today*, (Oxford University Press, 1st ed, 2007), 96

[85] International Competition Network, *Recommended Practices for Merger Notification Procedures*, 1

[86] HSR Act, 1976, s 7A(a)(1)

[87] 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 (last visited on 3 May, 2013)

[88] HSR Act, 1976, s 7A(a)(2)

[89] Ibid; See also FTC Premerger Notification Office, *To File or Not to File: Introductory Guide*, September 2008, 3

[90] The term turnover is the amount derived from the sale of products or provision of services in the preceding financial year.

[91] EC, Merger Regulations, 2004, Art 46(2)

[92] UK, Enterprise Act, 2002, s 23(1)

company a 25% share in the market for a particular product supplied in the UK, or a substantial part of the UK.[93]

South African merger thresholds involve both turnover and assets, and they uniquely differentiate small, intermediate, and large mergers. The South African authorities have jurisdiction to intervene in intermediate mergers, where the combined annual turnover or total assets of merging firms is at least R560 million, and the acquired party has an annual turnover or total assets of at least R80 million.[94] They can also intervene in large mergers where the combined annual turnover or total assets of merging firms is at least R6.6 billion, and the acquired party has an annual turnover or total assets of at least R190 million.[95]

Ethiopia does not use threshold limits when deciding if its authorities have jurisdiction to review a merger. Instead, Ethiopia's Authority can block a merger if it causes or is likely to cause a significant restriction of competition, or eliminates competition.[96]

3.2 Pre-merger Notification

Many merger control regimes impose mandatory pre-merger notification for mergers of a certain size. For example, in the EU, parties must notify the European Commission of mergers which meet the threshold limits, and the European Commission will then block or approve the merger. Parties cannot get their mergers cleared or authorized other than through this route.[97]

On the other hand, the UK does not impose mandatory notification requirements for any type of merger. Instead, merging parties may voluntarily opt to notify competition authorities of their merger. Authorities can then clear the merger, or raise objections. Clearance ensures parties that the competition authority will not seek to prevent the merger if it proceeds, and can make voluntary pre-merger notification an attractive option despite the various costs involved.[98]

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[93] Ibid at s 23(3) and 23(4)

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

[95] Ibid

[96] FDRE, Trade Practice and Consumer Protection Proclamation No 685/2010, Article 15

[97] Tiwari, n 1, 123

[98] Goldberg favors the 'mandatory notification for mergers valued above certain monetary thresholds' as this 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 n 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 small firms. See Subhadip Ghosh and Thomas Ross, 'The Competition Amendment Bill, 2007: A Review and Critique' EPW 43:51, 35, (2008) 39

Ethiopian competition law demands that parties notify all mergers to the Ethiopian authorities, which must then approve the merger before it is implemented.[99] Mandatory pre-merger notification is helpful in Ethiopia because it blocks harmful mergers before they are consummated. It is more effective to prevent harmful mergers, than to allow them and regulate their anticompetitive effects using unilateral conduct laws which prevent the abuse of dominance. It can also reduce delays which result from having to publicize the merger and wait for objections, particularly because this can involve slow government bureaucracies. Even so, it is unfortunate that Ethiopian merger regulation does not provide for minimum threshold limits for merger notification.

3.3 Substantive Assessment of Mergers

Mergers often have procompetitive as well as anticompetitive effects. Competition authorities must balance these effects when deciding whether to block a merger.[100]

In the United States, the Clayton Act prohibits transactions that may 'substantially lessen competition or tend to create a monopoly.'[101] Subsequently, guidelines have laid down efficiency tests, which state that authorities should not block a merger if it increases efficiency.[102] These guidelines also state that a merger should not be permitted to proceed if it creates or enhances market power or facilitates its exercise.

Merger transactions in the US are usually analyzed by: 1) identifying the relevant product and geographic markets; 2) assessing the parties' market shares and the market concentration; 3) identifying possible anticompetitive activities the merged entity might carry out; and 4) taking account of possible procompetitive effects and efficiencies the transaction creates.[103]

Similarly, since 2004 the EU has prohibited any merger which would 'significantly impede effective competition in the common market or a substantial part of it,'[104] in particular by creating or strengthening a dominant position.[105] Before 2004 the EU only prohibited mergers which substantially lessened competition by creating or strengthening a dominant position. Commentators criticized this test on the basis that there were many mergers which threaten competition, but do not create or strengthen a dominant position, which led to the 2004 reform. As in the US, the European Commission must analyze the markets affected by the merger, assess the parties'

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[99] FDRE, Trade Practice and Consumers' Protection Proclamation No 685/2010, Article 17(1) to (3)
[100] Whish, n 55, 849
[101] US, Clayton Act 1914, s 7
[102] FTC guidelines, 29, Article 10
[103] 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)
[104] EC Merger Regulations, 2004, Article 2(1)
[105] Ibid at Article 2(1) and 2(3)

market shares and market concentration, and take account of efficiencies, including consumers' interests, technical and economic progress, and competitive alternatives. [106]

The United Kingdom blocks mergers which lead to a 'substantial lessening of competition,' and weighs the procompetitive and anticompetitive effects of a merger.[107] As in the US and EU, UK competition authorities first define the market and market concentration.[108] They then assess coordinated and non-coordinated anticompetitive effects the merger is likely to produce and weigh any efficiency against these effects.[109] Authorities will permit a merger, even if it substantially lessens competition, if it produces efficiencies which are demonstrable, merger-specific, and likely to benefit consumers, for example by lowering prices or increasing quality and choice.[110] Finally, UK authorities will approve an otherwise anticompetitive merger if the merging parties can benefit from the failing firm defence. This defence requires that: 1) the 'target' firm would exit the market without the merger; 2) the target cannot rescue itself; and 3) there is no alternative which damages competition less.[111]

The South African regime is very similar. Before approving a merger, authorities must consider the actual and potential competition in the market, barriers to entry, market concentration, any historical collusion, and the degree of countervailing market power.[112] Because of South Africa's socio-economic circumstances, authorities must consider the public interest before approving mergers. In particular, they must consider a merger's effect on employment, the ability of small businesses or firms controlled or owned by historically disadvantaged persons to compete and the ability of national industries to compete in international markets.[113]

The Ethiopian Trade Practice and Consumer Protection Proclamation has largely followed the European and UK laws. It prohibits any merger which causes or is likely to cause a significant restriction on competition, or eliminate competition.[114] Article 18 stipulates that:

1. The Authority shall prohibit mergers that cause or are likely to cause a significant restriction on competition, or eliminate competition.
2. When notified of a merger, the Authority shall immediately communicate to the applicant in writing its decision to approve or prohibit the merger.

[106] EC Merger Regulations, 2004, Article 2(1)(a), 2(1)(b)
[107] UK, Enterprise Act, ss 35, 36
[108] OFT guidance Article 3.12; UKCC guidelines, Article 2.7
[109] Ibid, Article 4.39-4.35; UKCC guidelines, Article 3.26, 3.27, 4.34-4.45
[110] OFT guidance, Article 4.34
[111] OFT guidance, Article 4.37; UKCC guidance 3.61-3.63; See also Morven Hadden, 'EC Merger Control Regime' in Gary Eaborn *Takeovers: Law and Practice* (Lexis Nexis Butterworth, 2005), 714.
[112] South Africa, Competition Act, 1998, s 16(2)
[113] Ibid at s 16(3)
[114] FDRE, Proclamation No 685/2010, Article 18(1)

3. If the Authority needs additional information, it shall request that information from the applicant within a short period of time.
4. Where the Authority deems necessary, it may approve a merger on basis that it is modified in certain ways.
5. The Council of Ministers may specify by regulation those mergers that are subject to supervision.

The Proclamation also allows the Authority to exceptionally approve a merger if its efficiencies outweigh its anticompetitive effects, so long as the merger cannot achieve its efficiencies without restraining competition.[115] This allows the Authority to balance the merger's costs and benefits, and is necessary to promote healthy competition. Like in South Africa, merger regulation in Ethiopia should consider the public interest, and take account of domestic and international market competition, efficiency and consumer protection. In addition, dominance is not harmful in itself, and mergers should only be prohibited if their anticompetitive effects outweigh their procompetitive gains.

Furthermore, the Proclamation provides for exemptions. The Council of Ministers may exempt all mergers in a certain industry from review, if that industry is deemed essential for facilitating Ethiopian economic development.[116] This gives the Council a very wide discretionary power, and so it might erode the purpose of the Proclamation itself. To maintain the Proclamation's purpose, the government should issue guidelines to help the Council of Ministers exercise its broad discretion.

Generally, competition bodies around the world are reluctant to make mergers unlawful per se, because they often have beneficial effects. This stands in stark contrast to cartel agreements and abuses of a dominant position. Accordingly, a competition authority's duty is to identify and prohibit mergers which have an adverse impact on competition, and which produce few benefits. Authorities must therefore carefully balance efficiencies against harms to competition.

Finally, unlike in South Africa, the Proclamation does not mention factors which the competition authorities should consider while analyzing a merger. The Ethiopian authorities could more accurately assess mergers if guidelines detail which criteria they should consider, including international competition, barriers to entry, countervailing market power, likelihood that the merged entity will increase prices, and any 'failing firm' defence.

[115] Ibid, Article 19
[116] Ibid, Article 20

4. Joint Ventures

Competition authorities and academics globally disagree about whether merger regulation should also regulate joint ventures. Different jurisdictions use merger regulation to regulate joint ventures in different ways. A joint venture includes 'any arrangement whereby two or more parties co-operate in order to run a business or to achieve a commercial objective.'[117]

In the EU, since 2004,[118] parties must notify full function joint ventures which meet threshold criteria to the European Commission. For a joint venture to be fully functional, it must: 1) be jointly controlled, 2) have sufficient assets and financial resources to operate its business autonomously, and 3) exist for long enough to bring about a lasting change in market structure.[119] The Commission will assess a joint venture which does not fulfill the above criteria as an agreement which may be anticompetitive under Article 101 TFEU.[120]

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 therefrom.'[121] The FTC reviews joint ventures involving acquisition of assets or voting securities from a for-profit venture under the HSR Act. This essentially treats these sorts of joint ventures as mergers, where the parent companies acquire shares in a newly formed joint venture vehicle.

Ethiopian competition law does not explicitly address joint ventures, and their status is therefore unclear. If Ethiopian law treats joint ventures as acquisitions, like American law, then Ethiopian authorities can review joint ventures involving a transfer of assets or securities under merger rules. Reviewing joint ventures under merger regulation would increase the burden on the competition authority as competitors could object to more transactions.

5. Conclusion

Ethiopia has promoted its free market economy in a number of ways since 1991. The Transitional Government in 1991 promised to reduce its intervention into the economy, and promote a free market and domestic and foreign private investments.[122] The FDRE Constitution also authorizes the government to formulate policies that ensure all

[117] Nishith Desai Associates, *Joint Ventures in India*, April 2011, available at http://www.nishithdesai.com/Research2011/Paper/Joint%20Ventures%20in%20India.pdf (last visited on 4 May, 2013)
[118] Before 2004, the EU distinguished between concentrative and cooperative joint ventures. Parties only needed to report concentrative joint ventures which met threshold criteria to the European Commission.
[119] EC Merger Regulations, 2004, Art 3(4)
[120] Whish, n 55
[121] US, Department of Justice and Federal Trade Commission, Antitrust Guidelines
[122] TGE, *Ethiopia's Economic Policy during the Transitional Period*, n 3

Ethiopians benefit from the country's intellectual and material resources.[123] Thus, the ruling party (EPDRF) emphasized in 2000 its intention to use free markets as an engine of economic growth, among other economic policy objectives.[124]

Ethiopia also prohibits unfair competition under its Commercial Code, Civil Code and Criminal Code. The government introduced its first formal competition law in 2003 by enacting the Trade Practice Proclamation. Although this legislation promoted free markets and consumer protection, it lacked clarity, and did not comprehensively address important issues related to abuse of dominance, merger regulation, consumer protection, and independence of implementing institutions. To remedy these faults, and further strengthen the free market economy and consumer protection, the Federal Parliament introduced the Trade Practice and Consumer Protection Proclamation in 2010.

The preceding sections of this article review Ethiopia's competition laws, focusing on merger regulation, and critically examine them in light of international best practices. In particular, they address threshold limits, pre-merger notification, and substantive merger assessment. The FDRE Trade Practice and Consumer Protection Proclamation has drawn on the US and EU's highly developed regimes, and is similar to them.

Nevertheless, Ethiopian merger regulation lacks definite threshold limits, which obstructs its authority from preventing harmful mergers, protecting consumers and ensuring free trade. Ethiopian law should, therefore, provide for threshold limits and regularly readdress these limits in light Ethiopia's rapidly changing economy. Ethiopia could learn from the ways developed jurisdictions have coped with problems arising from their changing economies.

Furthermore, Ethiopian agencies need to issue clear guidelines explaining which mergers have anticompetitive effects. Ethiopian law should provide guidelines similar to those of the EU or US, which prescribe how to assess a merger's coordinated and non-coordinated effects.

Finally, Ethiopian competition law should clarify how it treats joint ventures. It is unclear whether Ethiopian law treats joint ventures as mergers or as anticompetitive agreements. Both approaches have their advantages, so Ethiopian law must give this appropriate consideration. Moreover, like South Africa and other jurisdictions, Ethiopia should pass merger regulations which promote employment, give benefits to previously deprived and abandoned entities, and ensure national entities can compete in international markets. These elements of merger regulation play a vital role in facilitating economic development and acceptance of competition law among market players and consumers.

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[123] FRDE Constitution, 1995, Article 89(1)

[124] EPDRF, *Revolutionary Democracy: Development Lines and Strategies*, n 5