# ADDIS ABABA UNIVERSITY
# SCHOOL OF GRADUATE STUDIES
# FACULTY OF LAW

*"Assessment of Consistency between COMESA's and Ethiopian Anti-Competitive Merger control regimes: Policies, Laws and Enforcement Practices"*


**BY:**

Yonas Abebe Anteneh

**Advisor:**

Solomon Abay (PHD)



**July 2015**

**Addis Ababa**

# ADDIS ABABA UNIVERSITY
# SCHOOL OF GRADUATE STUDIES
# FACULTY OF LAW

## Approval Sheet by the Board of Examiners

*"Assessment of Consistency between COMESA's and Ethiopian Anti-Competitive Merger Regulations: Policies, Laws and Law Enforcement Practices"*

**I hereby certify that this is my original work. Works of others included in this thesis are properly cited.**

Yonas Abebe ____________________

**Approved By Board of Examiners**

**Advisor** ____________________ ______________
Signature

**Examiners**

1. ____________________ ______________
Signature

2. Name ____________________ ______________
signature

# ADDIS ABABA UNIVERSITY
# SCHOOL OF GRADUATE STUDIES
# FACULTY OF LAW

*"Assessment of Consistency between COMESA's and Ethiopian Merger Control Regimes: Policies, Laws and Law Enforcement Practices"*

**BY:**

Yonas Abebe Anteneh

**Advisor:**

Solomon Abay (PHD)

A thesis Submitted to the School of Graduate studies of AAU in Partial Fulfillment of the Requirements for the Master of Laws Degree at the School of Law, Addis Ababa University

**July 2015**

**Addis Ababa**

## ACKNOWLEDGEMENTS

First and foremost, my thank goes to the Almighty, Jesus as he is always by my side. In addition, this thesis would not have been possible but for the immense support and contribution of many people I have encountered at various stages in my life. Nothing can convey the depth of gratitude I feel to my beloved family. They have been very supportive of my academic pursuits.

This thesis would not have been what it is now but for critical and constructive comments of my Supervisor, namely Dr., Solomon Abay. He scarified his precious time in commenting the paper. His fatherly and scholarly approach is also immense

THANK YOU ALL!
YONAS

# TABLE OF CONTENTS

Acknowledgement

Table of Contents

Lists of Figures

List of Annexes ....... v

Abbreviations and Acronyms....... vi

Abstract ....... vii

**Chapter One**

**1. Proposal of the paper/ General Introduction**

1.1. Background of the Study....... 1

1.2. Statement of the Problem ....... 6

1.3. Objective of the Study ....... 6

1.4. Significance of the Study ....... 7

1.5. Scope of the Study ....... 7

1.6. Method of the Study....... 8

1.7. Limitation of the Study....... 8

**Chapter Two**

**2. The General Overview of the Relationship between COMESA's and Ethiopian Competition Regimes**

2.1 Brief Overview/Salient Features of COMESA's and Ethiopian Competition Regimes

2.1.1 COMESA's Competition Regime

2.1.2 Ethiopian Competition Regime

2.2 Relational Issues

2.2.1 The Relationship between CCR and Ethiopian Competition Rules

2.2.2 The Relationship between CCC and TCCPA

**Chapter Three**

**3. Assessment of Consistency between COMESA's and Ethiopian Anti-Competitive Merger Regulations: policies and laws**

3.1 The Concept of Anti- Competitive Merger Regulation

3.2 COMESA's and Ethiopian Policies and Laws on anti- Competitive Mergers

3.2.1 What Constitutes Mergers?

3.2.2 Pre- Merger Notifications

3.2.3 Assessment of Mergers

3.2.4 Orders to be Rendered

**Chapter Four**

**4. Assessment of Consistency between COMESA's and Ethiopian Merger Control Regimes: Enforcement Practices**

4.1 Overview of the Merger Guidelines under the two Regimes

4.2 Merger Review process in practice

4.3 Concurrency of Jurisdiction between CCC AND TCCPA

**Chapter 5**

**5. Major Findings and Recommendations**

**Bibliography**

## LIST OF FIGURES

**Figure 1** The specific processes and procedures of a merger control review and the broad procedural framework

## LIST OF ANNEXES

**Annex 1** Merger Filing form under the TCCPA

**Annex 2** Merger Filing form under the CCC

**Annex 3** Notification requirements under the TCCPA

**Annex 4** List of Merger Cases

Annex 5 COMESA request for TCCPA for making an assessment

## ABRRRIVATIONS AND ACRONYMS

| | |
|---|---|
| **COMESA** | A Common Market for Eastern and Southern Africa |
| **CCC** | COMESA Competition Commission |
| CCR | COMESA Competition Regulations |
| EC | European Community |
| EU | European Union |
| FDRE | Federal Democratic Republic of Ethiopia |
| FTA | Free Trade Area |
| IDS | The Industrial Development Strategy |
| NCA | National Competition Authorities |
| FDRE | Federal Democratic Republic of Ethiopia |
| RECs | Regional Economic Communities |
| **SPLC** | Substantial Prevention or Lessening of Competition |
| **TCCPA** | Trade Competition and Consumers' Protection Authority (Ethiopia) |
| **TCCPP** | Trade Competition and Consumers' Protection Proclamation no. 813/2013 |
| **UNCTAD** | United Nations Conference on Trade and Development |

# CHAPTER ONE
## Introduction

### 1.1. Background of the Study

COMESA has adopted and implemented a regional competition policy in order to ensure fair competition and transparency among economic operators in the region.[1] The development of the COMESA regional competition policy is pursuant to the provisions of Article 55 of the Treaty establishing the Common Market, which requires the Council to make regulations to regulate competition within the Member States.[2] The COMESA competition policy is embodied in two legal instruments introduced in December 2004 – the COMESA Competition Regulations (Regulations) and the COMESA Competition Rules (Rules), together known as COMESA Competition Regulations. The Regulations apply to "anti-competitive business practices, conduct relating to merger and acquisition and to consumer protection, which have an appreciable effect on trade between member States and which restrict competition in the Common Market."[3]

One of the major elements of the COMESA Regulations which is the current priority at the enforcement agency, *which is also the main theme of this paper*, is related to anti competitive merger regulation. The Regulations has provided a number of provisions relating to merger control. Apart from that, the CCC has published Merger Assessment Guidelines in August 2014, in response to the calls for greater clarity and legal certainty in relation to the supra-national merger control regime recognized under the CCR. The COMESA merger control regime became a looming reality with the establishment of the CCC where mergers with a community dimension (i.e, where the matter affects competition in more than one Member State)[4] are due for notification. The COMESA regime, with a view to have an effective competition framework that could be properly implemented at a member state level, has provided several obligations on member states. To begin with, the COMESA Treaty makes the regulations binding on all Member States and encourages co-operation between COMESA and Member States in respect of

[1] DLA Cliffe Dekker Hofmeyr, Something New Out of Africa: The COMESA Competition is Born; March, 2013, P.1

[2] The Treaty Establishing a Common Market for Eastern and Southern Africa, available at: http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf, P. 2

[3] The COMESA Competition Regulations, 2004, 17 COMESA Gazette Number 12, (20 November 2012), article 3; available at: http:// www.comesa. Int/attachments/article /26 /2012_ Gazette_ Vol_17_ Annex_12, pdf.

[4] Id, article 6

competition enforcement. It provides that any regulation "shall be binding on all Member States in its entirety."[5] Member States are bound under the COMESA Treaty to take steps "to confer upon the regulations of the Council the force of law and the necessary effect within its territory."[6] On the other hand, the CCR requires Member States to "...take all appropriate measures...to ensure fulfillment of the obligations arising out of the Regulations..."[7] These suggest that some form of domestication of the regulations may need to take place. And all in all, existing national competition policies shall be harmonized and brought in line with the regional policy to ensure consistency in regional policies, avoid contradictions and provide a regionally predictable economic environment.[8] Despite this, as one of the challenges facing the COMESA competition regime, many of the member States that have signed COMESA treaty, including Ethiopia have not yet conferred the Regulations the force of law and the necessary effect within their territory. Some sort of inconsistency, and contradictions between the COMESA and national competition policies, laws and practices has been noticed, which might make enforcement of the COMESA Regulations difficult as a matter of practice and leads to potential public international law concerns.

In this regard, it is necessary to examine the scenario in Ethiopia, as a member state subject to the jurisdiction of the CCC, by focusing particularly on the merger control regime. As it is known, Ethiopia has adopted a specific law dealing with competition; entitled TCCPP no 813/2013. The proclamation applies to "anticompetitive practices within, or having an effect within Ethiopia"[9]. And for the implementation of its provisions, the proclamation has established an institution, TCCPA[10] having a power to investigate, prosecute and adjudicate anti competitive acts. Apart from this, regulation of merger, which is the main focus of this paper, is one of the elements covered under the TCCPP where TCCPA receives and decides on merger notifications. Given that Ethiopia has adopted its own competition policy, the extent to which the Ethiopian competition law, policy and law enforcement practice is in line or consistent with that of the

[5] Treaty establishing COMESA; Supra note 2, article 5
[6] COMESA Competition Regulations, Supra note 3, article 5
[7] Ibid
[8] User Guide for Business and Industry on the COMESA Competition Regulations, December 2004, p.4
[9] Trade Competition and Consumers' Protection Proclamation no. 813/2013, Federal Negarit Gazeta, 20th yr No.28, article 4
[10] Id, article 27

COMESA counterpart, with specific reference to the merger control regime, is something subject to examination. And hence, the paper, by limiting itself to only one of the elements of the Ethiopian competition law, which is regulation of anti- competitive merger, attempts to assess the consistency between the COMESA and Ethiopian policies, laws and law enforcement practices on anti-competitive merger regulation.

*This paper is organized into five chapters.* The first chapter of the paper is reserved for introduction. The second chapter reviews the relationship between the COMESA and Ethiopian Competition regimes. The third chapter reviews the COMESA and Ethiopian policies and laws on merger regulation and issues of consistency revolving around the same. The fourth chapter assesses the consistency of enforcement practices of the legal regime governing anti- competitive mergers. The last chapter concludes with suggestions/ recommendations.

## 1.2. Statement of the Problem

It's said that an effective regional competition law framework that can ensure the proper functioning of market economies is indeed a vital component for any effective African economic integration. This can, however, only be true if the regional competition regime is to be properly implemented and function effectively at member states level. Though COMESA, with full understanding of these facts, has adopted its own competition regime having a comprehensive legal and institutional framework, there are a number of challenges that are encountered in effecting the regional competition regime agenda on a national level. This is claimed to have been attributable to several factors. The fact that COMESA Member States have been remarkably slow in giving the force of law to the Treaty and the Regulations in their national legal systems, and that many of them have not domesticated and/or incorporated the Regulations in to their local laws- might be among the core factors hindering effective enforcement of the Regulations within the Common Market. These factors can lead to potential public international law concerns which undermine the COMESA core value proposition as a 'one stop shop' as COMESA will look to Member States with jurisdiction over companies to enforce the regulations. And the concern could continue to be the main challenge to the regional competition regime and in turn affecting the regional economic agenda unless COMESA and member states are jointly working hard to ensure harmonization of national laws with the regional regulations to achieve uniformity of

interpretation and application of competition law and policy within the Common Market so as to provide a regionally predictable economic environment.

Ethiopia, a member state subject to the COMESA competition regime, is not an exception in this regard. Despite the effort it has exerted to come up with comprehensive amendments to the former competition law and come up with a new proclamation (TCCPP), the regional competition framework, more importantly, the merger control regime, has not been as such given the necessary legal effect and properly considered in the amendment process, which in effect creates a doubt on Ethiopia's commitment to comply with its treaty obligations. Though Ethiopia as a sovereign state has entered into COMESA Treaty and undertook to be bound by its provisions and regulations issued under, domestication of the regional competition regulations, more specifically the rules relating to merger regulation, for the purpose of eliminating or reducing differences between the CCR and TCCPP, has not been achieved. This has resulted in having contradictory/inconsistent policies, laws and enforcement practices between the community and the national system, particularly on the merger control regime. More importantly, disjunction between the national and community legal system has also been created which in turn result in jurisdictional overlap between the CCC and TCCPA, mainly on merger regulations.

And hence the study attempts to examine issues of consistency as shortfalls of the general relationship of the regional and Ethiopian competition framework, particularly focusing on the merger control regime. In the mean time, the study assesses and appreciates the harmonious interplay of those two regimes as reflected with their consistent merger regulation policies, laws and enforcement practices. And finally it has come up with possible solutions which can ensure consistency and uniformity between the two merger regulation regimes.

Based on the above statements of the problem, the researcher has attempted to address the following couple of research questions:

---

- ✓ Are the Ethiopian anti competitive merger policies, laws and enforcement practices consistent with the COMESA regime?
- ✓ What Reforms does this imply?

## 1.3. **Objectives of the Study**

- As it has been stated earlier, both COMESA and Ethiopia do have their own merger control regime as an element of their competition framework. And there are no research works done to assess the extent of consistency or harmonious interplay of those two regimes. And hence, the *general objective* of the study is to assess the *consistency or otherwise* of the COMESA and Ethiopian policies, laws and enforcement practices regulating anti-competitive mergers and to recommend the possible measures that should be taken at a national and regional level so as to ensure consistency between the two merger control regimes. *Specific Objectives* of the study might include;
    - To fulfill the requirements of the LLM program at the AAU School of law,
    - To specialize in the field of study,
    - To contribute to knowledge in the area of anti-competitive merger regulation,.

## 1.4. **Significance of the Study**

Generally, the study is considered to have its own academic, policy and other significance.

- ✓ As the study is the first of its kind in dealing with the consistency of the COMESA and Ethiopian merger control regimes as part of the relationship between COMESA's and national competition regimes, it would open the door for further research on the assessment of the relationship and consistency between the COMESA and member states' (more importantly Ethiopia's) competition regimes as a whole. It will serve as a stepping stone for further or related study.
- ✓ As the study shows major inconsistent policies, laws and enforcement practices of the COMESA and Ethiopian merger control regimes, it gives critical and specific information to the law making body (to enable it to amend the proclamation) and to the policy maker (to enable it to reformulate its policies) so that the rules and policy can be brought in line with the regional policy and the COMESA Regulations.

- ✓ It also gives direction to the enforcing institution (TCCPA) to adopt an enforcement practice which is consistent with the CCC's merger review practice.

## 1.5. Scope of the Study

The study is limited to discussing the consistency between the COMESA and Ethiopian policies, laws (as incorporated in the COMESA Competition Rules and Regulations and the Ethiopian Trade Competition and Consumer's Protection Proclamation no. 813/2013) and enforcement practices (as reflected in merger guidelines and administrative decisions of the enforcement authorities under the two merger control regimes). Apart from this, however, a brief discussion on the relationship between the COMESA and Ethiopian competition regime as a general framework will be made.

## 1.6. Methodology of the Study

The research has been qualitative. And policy documents, laws, merger assessment guidelines and administrative decisions under the two regimes are analyzed in order to answer the research questions. The policy documents, laws and administrative decisions are obtained from the COMESA website, and the Corporate Communication Section of the Ethiopian Trade competition and consumers' protection authority. The researcher has also made an extensive and in-depth review of the available literature in the area of the COMESA and Ethiopian competition framework. Besides, in order to assess consistency in terms of merger review practices of the two regimes, interviews are organized for representatives of TCCPA and the CCC with regard to merger review process.

## 1.7. Limitations of the Study

The research is constrained by shortage of time and inaccessibility of enough information from the enforcement authorities. Besides, absence of a stock of variety of cases under the Ethiopian enforcement authority is also the limitation of the paper.

# CHAPTER TWO

## General Overview of the Relationship between the COMESA and Ethiopian Competition Regimes

In Africa, we find the COMESA, which is the most advanced of all REC's in respect of Competition law. The regional COMESA competition law regime has been introduced to apply to all member states, some of which already have national competition laws in place while others have no dedicated domestic competition laws at this stage.[11] Some of the countries who have adopted their own competition policies have also established institutions for its enforcement. Ethiopia, as a member state to COMESA, has adopted a specific law or proclamation dealing with competition, entitled TCCPP no. 813/2013, which also establishes an institution, TCCPA, with the task of implementing its provisions. Ethiopia has therefore adopted its own competition regime at a national level, while at the same time; subject itself to the COMESA competition policy at a regional level. And, this necessarily calls for the discussion of how the Ethiopian regime should relate to the COMESA regime. Before embarking on the review and analysis of the general relationship between the regimes, however, it is essential for the study to provide the salient features of the policy, legal and institutional frameworks governing the COMESA and Ethiopian competition regimes.

### 2.1. Salient Features of the Regimes

#### 2.1.1 The COMESA Regime

The regional integration objectives of COMESA are geared towards economic liberalization (to reduce barriers to a free market economy) within the common market with the ultimate aim of forming an economic community.[12] To this end, members have agreed to abolish all non-tariff

[11] Q and A on the COMESA Competition Regulations; Answers to the Most Commonly Asked Questions about the COMESA Competition Regulations, p.12, available at http://www.comesa.int

[12] Vincent N. Angwenyi, Competition Law and Regional Integration: COMESA, Munich Intellectual Property Law Center (MIPLC), Master Thesis (2012/13) p.2

barriers to trade among themselves.[13] Having these economic objectives of the regional integration in mind makes easier for member states to contextually frame the competition policy objectives of the COMESA. And therefore, anti- competitive conduct has been considered as one of the main non-tariff barriers to trade which has to be removed by effective competition policy for the effect of private barriers to market access can be as effective as the government barriers in hindering effective market access.[14] And accordingly, article 55 of the COMESA Treaty sets out the foundation for the development of the COMESA competition policy and subsequent COMESA Regulations. Article 55(3) specifically mandates the council of ministers to make Regulations to regulate competition within the Member States. Pursuant to this Article, COMESA has adopted a regional competition policy through the publication of regulations in December 2004 known as the COMESA Regulations, which are supplemented by the COMESA Competition Rules, 2004, followed by a number of guidelines to assist in the interpretation of the COMESA Regulations. The COMESA regulations apply to "all economic activities conducted by private or public persons within or having an effect within, the Common Market, which have an appreciable effect on trade between member States and which restrict competition in the Common Market."[15] The regulations were adopted to prohibit anti- competitive practices, to establish a supra national merger control regime, and to address other competition law and consumer protection matters that have a regional dimension.

Three competition bodies have been established for implementation of the regulations. The "CCC", which is established under Article 6 of the Regulations and is responsible for enforcement of the merger control framework and prohibitions against anti-competitive business practices and. It monitors and investigates anti-competitive practices of undertakings within the Common Market.[16] In all these situations, CCC is empowered to order parties to cease infringing activities, imposes fines, take such other actions as is necessary to address the illegal conduct.[17] BOC is intended to determine cases it receives from the Commission. It hears appeals from, or

[13] COMESA Treaty, Supra note 2, article 4(1)a,

[14] Diane P. Wood, Antitrust: A Remedy for Trade Barriers? Asian Law Program, Japan Information Access Project, Washington, D.C., available at: http://www.justice.gov/atr/public/speeches/0170.pdf, which succinctly captures the effect of anti-competitive conduct as a private barrier to trade.

[15] The COMESA Competition Regulations, Supra note 3, article 3

[16] Id, article 7

[17] Id, article 8

reviews any decision of, the Commission that may, in terms of the Regulations, be referred to it. It also issue determination on any conduct prohibited in terms of the Regulations.[18] The COMESA Court of Justice is a final court of appeal with broad jurisdiction in that it can accept appeals from decisions of the Board and its decisions are final and not open to appeal.

#### 2.1.2. The Ethiopian Regime

Starting from the transitional period, the Ethiopian Government has tried to implement a number of economic policy objectives that have substantial implications for competition including; promoting competition, avoiding price and quality abuses, protecting consumers, and privatizing some public enterprises.[19] The government has also implemented a series of reform programmes that includes; the structural adjustment measures; deregulation of domestic prices; liberalization of foreign trade; and abolition of subsidies; promulgation of a liberal investment law as well as a new labor law for the promotion."[20] Despite these different restructuring works that have been put in place, smooth competition in the actual market, however, has not been guaranteed as there are structural barriers inherited from the previous system which created monopolies in various sectors which could only be dealt with appropriately if competition is regulated.[21] With this understanding, the Ethiopian Parliament passed the TPP no 329/2003. In 2010, the Ethiopian government amended the TPP, using the TPCPP no 685/2010. Despite this, a number of gaps and loopholes were identified in the proclamation and it was eventually revised in 2013 and issued as the TCCPP no 813/2013. There is no however regulation or directives promulgated by the concerned authorities for the implementation of the proclamation.

The objective of the proclamation is to protect the business community from anticompetitive and unfair market practices, and to establish a system which promotes competitive markets.[22] And, the proclamation is applicable to "any commercial activity or transaction in goods or services

---

[18] Id, article 15

[19] 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

[20] Mamo E.Mihrtu, Fikremarkos Merso, and Kassahun Melesse, Study on the Impact of the Trade Related Issues in the Economic Partnership Agreement on Ethiopia, Draft Final Report, 27 October 2010, p.98

[21] Hailegebriel G. Feyissa, European Influence on Ethiopian Antitrust Regime: A Comparative and Functional Analysis of some problems; Mizan Law Review Vol.3 No.2 (Sept 2009), p.272

[22] Trade Competition and Consumers' Protection Proclamation Supra note 9, the Preamble

conducted or having effect within the FDRE."[23] The proclamation provides for prohibition of anti-competitive trade practices, namely, abuse of dominance, anti-competitive agreements, concerted practices and decisions and unfair competition. The proclamation has also dedicated a section dealing with regulation of mergers. Most importantly, the Proclamation establishes the TCCPA (the Authority) as an autonomous federal agency which is accountable to the Ministry of Trade and Industry.[24] The Authority is charged with implementing Ethiopia's competition law, and administers Ethiopia's merger control regime. When pursuing these responsibilities, the Authority can review merger notifications, adjudicate cases, impose administrative sanctions, and order wrongdoers compensate victims.

From what have been discussed so far, two competition regimes (national and regional) are therefore in a field, to which economic operators in Ethiopia are a subject, which may in some cases be able to be competing and that the relationship of which should be defined. And hence, it is now time to briefly discuss, as a general framework for subsequent chapters, the issue of how the Ethiopian competition regime should relate to the COMESA regime.

### 2.2. The Relationship

It is said that the relationship between regional and member states' national competition policies is something that should be addressed in any regional competition regime.[25] As a regional competition framework is like a policy chain link between the national and regional interests, a sound regional competition policy framework needs to address how national frameworks should relate to the regional competition framework if it is to be properly implemented and also function efficiently on the Member State level.[26] And in the following discussions, the paper will try to discuss how the Ethiopian competition policy, law and enforcement practice should relate to the COMESA framework by relying on the COMESA legal instruments, which includes the Treaty, Competition Regulations, and Rules and also relevant rules and principles of public international

[23] Id, article 4
[24] Id, article 27(1)
[25] Vincent, Supra note 12, p.4
[26] Ibid

law. In doing so, the paper, for the purpose of convenience, has tried to deal with the issue from two perspectives:

- In terms of the potential contradiction of laws/policies, what would be the relationship between the COMESA and Ethiopian national competition laws and policies? Their consistency?
- In terms of the possible jurisdictional overlap, what would also be the relationship between the COMESA and Ethiopian national competition authorities?

### 2.2.1. The Relationship between the COMESA Competition Regulations and Ethiopian Competition Rules

The major point that should be discussed under the purview of the relationship between the COMESA and Ethiopian competition laws is related to the issue of consistency and enforceability of the COMESA Competition Regulations in the Ethiopian territory._Looking at the treaty establishing COMESA, Ethiopia, as a member state to COMESA, has given a mandate to the COMESA Council to make regulations to regulate competition within the Member States,[27] which indicates its willingness to be bound by the regulations to be issued by the Council. In compliance with this rule, the COMESA Treaty makes the competition regulations issued under binding on all Member States including Ethiopia by stating that any regulation "shall be binding on all Member States in its entirety"[28] from the date they have entered in to force. This could normally means that no further step would need to be taken on by Ethiopia to give effect to the provisions of the COMESA Regulations at a national level. The CCC also avers that this is sufficient to render the regulations binding and enforceable in all Member States including Ethiopia. Ethiopia is therefore required to enforce the provisions of the regulations in its territory and cannot adopt a competition law which is inconsistent with what is provided under the regulations. On the other hand, the Treaty binds Ethiopia as a member state to take steps to secure the enactment of and the continuation of such legislation to give effect to this Treaty and in particular "to confer upon the regulations of the Council the force of law and the necessary effect

[27] COMESA Treaty, Supra note 2, article 55(1)

[28] Id, article 10(2)

within its territory."[29] This, however, suggests that some form of domestication of the regulations may need to take place before they have the force of law. In such a case, Ethiopia should therefore domesticate or incorporate the regulations in to its local laws. Apart from this, Ethiopia has a general obligation to comply with COMESA law, including those provisions which require as a sovereign state to confirm that the regulations have the force of law in its territory the default of which entails sanctions.[30]

Coming to the rules under the Regulations with respect to how the Ethiopian competition policy and law should relate to that of the COMESA counterpart, the CCR requires Ethiopia to "...take all appropriate measures, whether general or particular,...to ensure fulfillment of the obligations arising out of the Regulations or resulting from action taken by the Commission under the Regulations ..." which can basically includes domestication of the Regulations into its local laws. Ethiopia shall also abstain from taking any measure which could jeopardize the attainment of the objectives of the Regulations.[31] Furthermore, the Regulations also provides for " ... objective of the harmonization of national laws including Ethiopia's with the regional Regulations to achieve uniformity of interpretation and application of competition law and policy within the Common Market''.[32] Besides, Article 3(3) of the COMESA Regulations also indicates that there is supremacy of the COMESA Regulations over national and even regional regulatory entities as regards the conduct within its scope which enables the COMESA rules to take precedence over Ethiopian national laws. Furthermore, seeing from the perspective of principles of public international law, as Ethiopia has ratified COMESA treaty and assumed the obligations there under, it should be loyal to the treaty it signed and the obligations it has assumed. If Ethiopia ignores the treaty it signed and international obligations it assumed, and takes actions or formulate policies and laws against the international duties it assumed, then some potential public international law concerns which undermine COMESA's core value proposition as a 'one- stop shop' can be raised.[33] Ethiopia is therefore required to incorporate the COMESA competition rules and regulations into its local law. Where there is a conflict between the COMESA and

[29] Id, article 5(2)b

[30] Id, article 171

[31] COMESA Regulations, Supra note 3, article 5

[32] Id, article 7(2)c

[33] Cliffee Dekker Hofmeyr; Supra note 1, p.2

domestic competition law, the COMESA Competition Regulations take precedence over national law, so that where a clash occurs it is the former which must be applied.

In sum, it can be easily inferred from the above legal instruments that the Regulations are binding on Ethiopia in its entirety which can render it enforceable in the Ethiopia's territory. Ethiopia should therefore, take all the necessary measures to fulfill its obligations arising out of the regulations. It should confirm that the Regulations have the force of law and the necessary effect within its territory. It is required to achieve the incorporation of the Regulations into its domestic laws so that the rights and duties contained therein may become applicable and enforceable domestically in its territory. Ethiopia shall make sure that its national competition policy is harmonized and brought in line with the regional policy to ensure consistency in regional policies, avoid contradictions and provide a regionally predictable economic environment.[34] It shall ensure that the relationship between the CCR and Ethiopian competition law should not be manifested by contradictory/conflicting/ inconsistent policies and laws. There should be a high degree of convergence between COMESA Competition Regulations and domestic competition laws. Its competition law should be modeled upon the provisions of the regulations.

Till now an effort has been made to examine, in a brief manner, how Ethiopian competition policy and rules should relate to that of the COMESA regional policy. And in the following section, the paper tries to address how the Ethiopian competition authority's enforcement practices should relate to the COMESA enforcement practices.

---

### 2.2.2. The Relationship between COMESA Competition Commission and Trade Competition and Consumers' Protection Authority

In this sub sections the paper will try to address two major points as relational issues among the two competition authorities; namely the issue of jurisdictional overlap and that of cooperation. In the previous discussions, we have seen that the CCC and TCCPA are organs responsible for implementing the COMESA regulations and Ethiopian competition law respectively. The TCCPA comes to the picture when a problem occurs within its confined national territory as it has a little power to deal with anti-competitive practices originating outside its territory even if they have

[34] User Guide on Merger and Acquisitions under the COMESA Competition Regulations, December, 2004, p.3

seriously adverse effects, given the jurisdictional and practical limitations of its enforcement powers. Whereas, the CCC is essentially aimed at conduct and arrangements that have a regional dimension and that is therefore out of the reach of the national authorities and provides a remedy for anticompetitive practices and behavior of a cross-border and regional nature.[35] The CCC will not affect the ability of the TCCPA to deal with its national competition problems. One can therefore notice that the COMESA and Ethiopian competition regimes are devised for or intended to deal with anti-competitive practices of a distinct nature (national/ regional). This can easily be inferred from the competition rules of the regimes. The CCR states that the Regulations apply to "all economic activities conducted by private or public persons within or having an effect within, the Common Market; and anti-competitive business practices, conduct relating to merger and acquisition and to consumer protection, which have an appreciable effect on trade between member States and which restrict competition in the Common Market."[36] On the other hand, the scope of application of the Ethiopian Competition law is limited to any commercial activities or transaction in goods or services conducted or having effect within the Federal Democratic Republic of Ethiopia. [37] And hence, where a problem affects only Ethiopia, only its laws will apply. The COMESA Regulations applies only when a problem has a regional dimension (i.e, where the matter affects competition in more than one Member State) and is of a cross border issue. However, this does not always hold true as there is possible jurisdictional overlap or uncertainty between the two regimes. Here the paper is referring to the jurisdictional overlap between the regimes in terms of regulated conducts or sphere of application and institutional competencies.

It is clear that the COMESA ambition is to introduce a federal competition law regime similar to that operating in the EU. Article 10(2) of the COMESA Treaty specifies that a regulation shall be binding on all Member States in its entirety. Furthermore, the Regulations shall apply to all economic activities having an effect within the Common Market and to conducts covered by parts 3, 4 and 5[38] of the COMESA Regulations which have an appreciable effect on trade between Member States. Additionally, article 3 of the regulations provides that the COMESA Regulations

[35] Q and A on COMESA Competition Regulations, Supra Note 11
[36] COMESA Regulations, Supra note 3, article 3
[37] Trade Competition and Consumers' Protection Proclamation, Supra note 9, article 4(1)
[38] These parts are in respect anti-competitive business conduct and practices, mergers and acquisitions and consumer protection.

have primary jurisdiction, "over an industry or a sector of an industry which is subject to the jurisdiction of a separate regulatory entity (whether domestic or regional) if the latter regulates conduct covered by Parts 3 and 4 of these Regulations". It has a primary jurisdiction over all matters with a community dimension (ie, where the matter affects competition in more than one Member State). Though, as noted earlier, various provisions seek to clarify that the jurisdiction of the COMESA Regulations spans only economic activities having an effect within the Common Market and which have an appreciable effect on trade between Member States, there are still lingering issues that may give rise to overlaps with the member states national authorities like that of TCCPA.[39] And, the guidelines issued by the CCC to clarify and provide guidance in respect of the COMESA Regulations, has also failed to address such a pertinent jurisdictional issue.[40] Cases with a regional dimension can have a national perspective where they have an effect within a member state including Ethiopia. Anti-competitive arrangements or practices having a regional dimension within the Common Market may in certain cases originate from activities occurring within member states like Ethiopia where such activities have an effect on the Common Market. Besides, even in cases where the activities are restricted to member states like Ethiopia there is still bound to be a regional dimension in some instances.[41]

To illustrate this with a hypothetical case, an economic actor in Ethiopia that only has operations in Ethiopia may engage in anti-competitive conduct that is caught by the provisions of the TCCPP and hence will be regulated by the TCCPA. However, though the economic actor is only operating in Ethiopia, its conduct may result in a market access barrier for an economic actor from Zimbabwe who intends to enter the Ethiopian market hence having an effect on the Common Market. At this point the Commission's jurisdiction over the conduct may come into play. It is also not inconceivable that the TCCPA will insist that it retains jurisdiction on cases with a regional dimension as long as there is an effect within its jurisdiction. In such case, therefore, jurisdictional overlap between the regimes would be created.

In sum, there is a potential problem of jurisdictional overlap between the Ethiopian and COMESA regimes in terms of regulated conducts and institutional competencies, which will affect the

[39] Vincent, Supra note 12, p.39
[40] Freshfields Bruckhaus Deringer; COMESA's Merger Control Regime; Where Are We Now?, July 2013, p.1
[41] Vincent, Supra note 12, p.39

proper implementation and enforcement of the COMESA Regulations. This, more practically, applies to the merger control regimes, which we will discuss in detail in chapter 4. The problem arises primarily because of the jurisdictional uncertainties already arising from the general scope of the COMESA Regulations. And, there is no system in place to facilitate the allocation of cases between the CCC and TCCPA as a national authority. The point at which the line has to be drawn between the jurisdiction of the TCCPA as a national competition authority and the Commission is also quite uncertain. There is no clear provision or guidance as to whether a matter falling within the jurisdiction of the Commission reduces the jurisdiction of the TCCPA in respect of those particular matters. The fact that the competencies of the CCC and TCCPA at the regional and the national level may overlap as noted above means that undertakings in the Common Market would be put in a difficult situation. An undertaking or individual may be required to provide information, produce documents or even appear personally to give testimony for purposes of investigations to both TCCPA and also the CCC. The undertakings premises may also be subject to entry and search orders from different authorities. The risk of sensitive business information such as trade secrets leaking out is very high in such a situation given the inability to properly control the information flow. It also cannot be ruled out that the undertaking may be subject to different penalties or multiple fines in respect of the same conduct. The expense incurred both in terms of time lost and money spent will also be quite high.[42]

Apart from the issue of jurisdictional overlap, the writer deemed necessary to discuss how the Ethiopian competition authority's enforcement practice should relate to that of the COMESA merger review practice by relying on the COMESA rules relating to the relationship between member States, their Competition Authorities and the CCC. First and for most, TCCPA should make sure that its decisions, rulings, and its overall enforcement practice (including its enforcement guidelines) are consistent with that of the CCC. Moreover, TCCPA must not take actions, which would thwart the objectives of the Regulations even if Ethiopian national competition law has not explicitly prohibited the actions.[43] The COMESA rules basically dictate that the relationship between the CCC and TCCPA, as a member state's authority, should be based on cooperation, support and joint enforcement of competition standards. The COMESA

[42] Ibid

[43] COMESA Regional Competition Policy; A Manual for Competition Authorities; March 2003,p.6

regulations require the relationship between the CCC and TCCPA to be characterized through a system of cooperation. This could take place through various forms. To mention some, Ethiopia as a member state, with its competition authority, is required to make the necessary investigations when the Commission transmits applications and notifications to it for establishing infringement of Article 16 and 18 of the CCR or getting negative clearance.[44] The TCCPA as a competent authority of member states shall therefore undertake or carry out investigations requested and considered necessary by the Commission.[45] The TCCPA, therefore, has the right to express its views in investigations which are being carried out by the CCC and also upon the procedure taken by the CCC.[46] Apart from these, the Commission, in carrying out its duties of investigations, has a right to obtain all necessary information from that of TCCPA.[47] TCCPA should therefore cooperate in sending all the necessary information relevant to the investigation which is being carried out by the CCC. The TCCPA, like anyone else, may request that the Commission to investigate a competition issue believed to have a regional dimension. Furthermore, the Commission has also the right to take decisions about investigations in Ethiopia in close consultation with the TCCPA.[48] Ethiopia, therefore, with its competition authority is required to co-operate with the commission/ the board to ensure that the commission can carry out its investigations effectively. The cooperation should not only be limited to investigation. It should also extend to enforcement of decisions as implementing some decisions of the CCC may require co-operation from institutions in member States. The TCCPA is therefore required to carry out whatever necessary so that the CCC's and Board's decision can be enforced in its territory.

So far, an effort has been made to discuss briefly the relationship between the COMESA and Ethiopian competition regimes as a general framework to the subsequent chapters. And the paper, in the following subsequent chapters, will try to examine and assess, in a very detailed manner, the extent of consistency between the COMESA and Ethiopian competition regimes, by limiting itself only to one of the elements of their competition framework, which is, anti-competitive merger regulation.

---

[44] The COMESA Competition Rules, 2004, Rule article 40 (1) available at: http:// www.comesa. Int
[45] Id, article 43(1)
[46] Id, article 40(2)
[47] Id, article 41(1)
[48] Id, article 44(4)

## CHAPTER 3

## Assessment of Consistency between the COMESA and Ethiopian Anti-Competitive Merger Policies and Laws

Let me just begin with a discussion of few points on the concept of anti-competitive merger as incorporated under the COMESA and Ethiopian merger control regimes. It has been said in the previous chapter that merger regulation is at the fore front of the operational concern of the regimes. The regimes concern with mergers and adopt merger regulation frameworks simply because mergers can have anti-competitive effects by altering the structure of markets. In other words, regulation of mergers under the regimes is basically based up on the premise that, irrespective of their many benefits, mergers generally has implications for the concentration of, and ability to use, market power, which, in turn can impact negatively upon competition and harm consumer welfare by foreclosing other players from entering the market, reducing the number of business entities operating in a market, and increasing the market share controlled by the merged entity that may create risk of abuse of dominance.[49] The basic principle, in both regimes, for exercising merger control is therefore that it is better to prevent giving rise of market power from happening than to control the exercise of market power after the merger has taken place, that is to say prevention is better than cure.[50] The regimes are actually regulating anti-competitive mergers by reviewing mergers to determine their effects on competition. The competition laws of both COMESA[51] and Ethiopian[52] regimes work *ex ante* and require firms to communicate their

---

[49] 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, p.117

[50] Ibid

[51] The COMESA Competition Regulations, Supra note 3, article 24(1)

[52] Trade Competition and Consumers' Protection Proclamation, Supra note 9, article 10(1)

intention to merge or take over another firm especially where the new entity is likely to have substantial market power. After an initial scrutiny, if the authorities under the two regimes think that the merger might have a negative impact on competition they shall conduct an investigation, at the end of which they may authorize the merger conditionally or unconditionally or it may prohibit it.[53] Despite this, laws of both regimes require authorities to ensure that beneficial mergers are permitted to proceed and are not unduly hampered which require a delicate balancing act of prohibition and permission in merger control.[54]

With these, the paper will directly move to assessing the COMESA and Ethiopian policies and laws on major components of the concept of anti- competitive merger and issues of consistency revolving around the same. For the purpose of convenience and justified by the extent of interrelation, issues revolving around policy and legal consistency will be treated together as the merger regulation policy are embodied under and can be inferred from the merger control rules. And hence, the paper begins with a discussion of how merger is construed under the regimes, followed by the analysis of the requirement of notification of merger transactions and that of assessment of anti-competitiveness and finalizes with the orders to be given by the authorities on notified mergers.

### 3.1 What Constitutes Merger?

Looking at the COMESA rules and policy rationales regarding what constitute merger, part 4 of the regulations, the title of which is "merger and acquisitions", has a particular importance. Merger, as defined under the regulations, means "the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of another.[55] A merger, for the purpose of the regulations, is the direct or indirect acquisition or establishment of any interest which enables the holder thereof to exercise any control ("controlling interest") on the business activity or assets of another. And achieving a controlling interest may be established by any means, including purchase of shares, purchase or lease of assets, or amalgamation or combination._The regulation has also defined what a controlling

[53] Id, article 11(1) and COMESA Competition Regulations, Supra note 3, article 26(7)
[54] Id, article 11(2); COMESA Competition Regulations, Supra note 3, article 26(1)
[55] COMESA Competition Regulations, Supra note 3, article 23(1)

interest is and explained the term in relation to two basic concepts; Asset *(*any control whatsoever over the asset*);* and Undertaking *(*any control whatsoever over the activities or assets of the undertaking*).*[56] Though control can take many forms, control should be defined as the ability of the acquiring party to exercise a "decisive" influence over the target (E.g- the ability to determine a majority of the votes that may be cast at a general meeting of the undertaking; is able to appoint or to veto the appointment of a majority of the directors of the undertaking; has the ability to determine the appointment of senior management, strategic commercial policy, the budget or the business plan of the undertaking);[57] Acquisition of nonvoting securities, therefore, does not alone confer the possibility of exercising decisive influence over an undertaking. The mere acquisition of a minority interest without exercising influence over the affairs of the undertaking is incapable of conferring the possibility of exercising decisive influence on an undertaking, not constituting a "controlling interest" and as a result not being a "merger."[58] In sum, for a transaction to be considered as merger, the COMESA merger control policy requires, among other things, establishment of controlling interests which can enable the acquirer to have a decisive influence on the target.

Coming to the Ethiopian merger control rules, unlike the COMESA's regulations, where the section dealing with merger is entitled as "merger and acquisition" the title of section 2 of the TCCPP, which deals with merger control, reads as "Regulation *of merger*" though the content of the section also covers acquisitions in addition to merger proper. Coming to the issue of what constitutes merger under the Ethiopian regime, the proclamation defines merger to include two or more businesses organizations previously having independent existence amalgamating, pooling the whole or part of their resources for a commercial purpose, or one or group of persons directly or indirectly acquiring another's shares or assets or taking control of the management of the business of another person through purchase or any other means. "[59] Though there is consistency between the regimes in many respects on how merger is construed, there are some issues that

[56] Id, article 23(2)

[57] The Common Market for Eastern and Southern Africa, COMESA, COMESA Merger Assessment Guidelines, August 2014, Prepared in Accordance with the CCR, 2004, section 2.6

[58] Id, section 2.7

[59] Trade Competition and Consumers' Protection Proclamation, Supra note 9, article 9(2)

should be examined as an issue of consistency. The first one relates to the issue of controlling interests.

A careful examination of TCCPP indicates that the Ethiopian merger regulation policy does not require the existence of a decisive controlling interest or influence by the acquirer for a transaction to be considered as merger. Though there is an element of a controlling interest under the proclamation, as a merger in some cases, can also occur when a person or group of persons take control of the management of the business of another[60], (which is only one scenario and does not include controlling interests over an assets), ability of the acquirer to exercise a decisive controlling interest or influence is not taken into consideration in all cases of acquisitions. The extent of the influence or the control seems to be immaterial for an acquisition to be considered as merger. The mere acquisition of a minority interest (e.g. nonvoting securities), be it shares, securities, and assets, without exercising influence over the affairs of the undertaking, could be considered as a merger. It is for this reason that the authority is practically reviewing any acquisitions as we are going to discuss under chapter 4. In this sense, the Ethiopian merger regulation policy deviates from that of the COMESA as it tries to regulate any acquisitions with minority interests which are most likely to raise no competition concerns, without a need to establish a decisive influence on the part of the acquirer. In a contrary manner, however, the repealed proclamation no 685/2010 seemed to have recognized the issue of a decisive influence by stating that 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.[61]

In this connection, the writer deemed necessary to raise the issue how the COMESA and Ethiopian merger control rules treat a Joint Venture. In general, joint ventures are joint commercial undertakings by two or more parties where the parties retain their distinct identities. A joint venture includes 'any arrangement whereby two or more parties co-operate in order to run

[60] Id, article 9(2)b

[61] Trade Practice and Consumers' Protection Proclamation No 685/2010, Federal Negarit Gazeta, 16th Year No.49, article 16(3)

a business or to achieve a commercial objective.[62] Joint ventures are not explicitly recognized or mentioned in the definitions/basic provisions of merger control under both jurisdictions. The COMESA regulations are silent as to its application to the creation of a joint venture or a change of control in a joint venture. The rules succinctly provide for an obligation to notify the acquisition or establishment of a controlling interest which amounts to the exercise of control, without specifying if such control can be exercised jointly. The CCC's proposed interpretation in its merger assessment guideline is that control can be exercised jointly by one or more undertakings. The interpretation further noted that some joint ventures involve the integration of parts of the business activities of the undertakings to the joint venture, which can result in a reduction or elimination of competition between the undertakings to the joint venture in the joint venture's field of activity. Whether it does so, however, depends on the relative permanence of the joint venture and the degree of autonomy it enjoys from its parent companies.[63] Therefore, for a joint venture to constitute a "merger", it must be a "full function" joint venture. A Joint venture is only caught by the COMESA rules if it performs on a lasting basis all the functions of an autonomous entity.[64] A joint venture will not meet this definition if it only takes over one specific function within the parent companies' business activities without access to the market (for example, joint ventures limited to research and development or production, the distribution or sales of its parent companies' products or services and therefore acts principally as a sales agency).[65]

*Coming to the Ethiopian anti-competitive merger control rules,* the proclamation does not explicitly address joint ventures, and their status is therefore unclear. Some argues that the Ethiopian law treats joint ventures involving a transfer of assets or securities as acquisitions. Some also argues that joint venture agreements can be regulated by the provisions relating to anti-competitive agreements. And many insists that joint venture can be treated as a merger transaction as it can fall under the phrase in article 9(3)/a/ which reads "pooling of resources". Therefore, there is no a clear legal rule or guideline which clarify how joint venture is treated under the Ethiopian

---

[62] 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)
[63] COMESA Merger Assessment Guidelines, Supra note 57, Section 2.11
[64] Id, section 2.12
[65] Id, Section 2.13

competition regime. It is unclear whether Ethiopian law treats joint ventures as mergers or as anticompetitive agreements. This is one of the areas that make the Ethiopian merger control policy inconsistent from that of the COMESA. In addition, even if one can argue that the proclamation is intending to treat JV as a merger transaction, the Ethiopian competition law has not recognized the concept of full function joint venture unlike the COMESA merger control rules. This can also be taken as the other policy deviation between the two merger control regimes.

So far an effort has been made to address the consistency of the COMESA and Ethiopian merger control policies and laws with respect to what constitutes merger. It is now time to go deal with the consistency of the COMESA and Ethiopian policies and laws relating to pre- merger notification of mergers.

### 3.2. The Requirement of Notification

As it has been stated earlier, both the COMESA and Ethiopian merger control regimes are actually controlling mergers by mandatorily requiring merging parties to notify or communicate their intention to merge or take over another firm to the competition authorities, which, in turn must carry out a process of review. Parties cannot get their mergers cleared or authorized other than through this route. Looking at the COMESA merger control rules, the Regulations provides that "A party to a notifiable merger shall notify the CCC in writing of the proposed merger as soon as it is practicable but in no event later than 30 days of the parties' decision to merge."[66] Likewise, the Ethiopian merger control rules also demand parties to notify all mergers to the TCCPA before they implement them. Any business person who proposes to enter into an agreement or arrangement of merger is required to give notice to the Authority all the details of the proposed merger.[67] The notification requirement is further strengthen by the proclamation which provides that "the concerned government office shall require the presentation of approval of the authority before registering a merger in the commercial register."[68] Under both competition regimes, therefore, parties to a merger are mandatorily required to make notifications which shall be made in writing and in a form and manner prescribed by the authorities, which also has to be

[66] The COMESA Competition Regulations, Supra note 3, article 24(1)
[67] Trade Competition and Consumers' Protection Proclamation, Supra note 9, article 10(1)
[68] Id, article 12

accompanied by information and particulars which authorities may reasonably require. Both the COMESA and Ethiopian merger control policies have also provided legal consequences for failures to notify. Under both legal regimes, the authorities are empowered to impose a penalty on merging parties who participates in a merger in violation of the duty to notify.[69] Apart from this, under both legal regimes, any merger transaction implemented without a notification, as required under the rules relating to mergers, will not have a legal effect. The COMESA regulations provides that any notifiable merger carried out in contravention of the part relating to merger and acquisitions shall have no legal effect and no rights or obligations imposed on the participating parties by any agreement in respect of the merger shall be legally enforceable in the Common Market.[70] It must be noted, however, that the Regulations do not prohibit the parties from implementing a notifiable merger before making a notification.[71] Like that of the COMESA regulations, a merger which has been carried out without complying with the parties' duty to notify a proposed merger to the authority will not have a legal effect under the Ethiopian merger control regime. Implementation of a notifiable merger that has not been notified to the authority will result in the merger having no legal effect, and no rights or obligations imposed by such a merger shall be legally enforceable.[72] In this sense a consistent merger control rules can be envisaged.

What is inconsistent with what is provided under the COMESA regulations (where the Regulations do not prohibit the parties from implementing a notifiable merger before making a notification) is that, the Ethiopian merger control policy does not allow parties to a merger to implement their proposed merger before making a notification to that effect.[73] Parties to a merger cannot even register their merger transaction in registering authorities let alone implementing their proposed mergers as registering authorities are required under the law to request a merger clearance letter from the TCCPA.[74] This is one of the areas where you see merger control policy inconsistency between the two regimes. This policy deviation has very much to do with the issue of whether or not a mandatory notification requirement under the regimes has an effect of

[69] Id, article 42(4); COMESA Competition Regulations, Supra note 3, article 24(4)
[70] The COMESA Competition Regulations, Supra note 3, article 24(2)
[71] COMESA Merger Assessment Guidelines, Supra note 57, Section 5.32
[72] Trade Competition and Consumers' Protection Proclamation, Supra note 9, article 9(2)
[73] Ibid
[74] Id, article 12

suspension of transactions. This is to mean that whether or not the parties notifying merger do have an obligation to suspend the transaction before obtaining a clearance from the competition authorities. Under the COMESA regime, though the regulations provides for mandatory filing, it does not prohibit implementing or closing a merger prior to clearance. The Regulations do not create a suspensory merger regime and a merger that is notified to the Commission may be implemented at any stage after notification.[75] No obligation on parties to suspend the transaction. The CCC has confirmed that closing prior to clearance will not result in penalties, but will expose the parties to the risk that the CCC later finds the transaction to be anticompetitive and imposes remedies or orders it to be unwound. The policy considerations is that the absence of standstill obligations will substantially mitigate the implementation risks for deals raising no competition issues that would otherwise have been caused by the regime's long review periods[76] though parties should be cautious when implementing a notifiable merger before receiving a decision as the Commission may determine that such a merger is unlawful and require parties to dissolve the merger.[77] On the contrary, the Ethiopian merger control policy opts for mitigating the implementation risks for deals raising substantial competition issues that would otherwise have been caused if there is no suspension. As a result, the law provides that "no agreement or arrangement of merger may come into effect before obtaining approval from the authority.[78] In addition, the law has put an obligation on concerned government offices to require the presentation of approval of the authority before registering a merger in the commercial register. And, any person who has implemented or participated in a merger without getting approval from the authority will be administratively liable. Therefore, unlike the COMESA merger control policy, where the Regulations only impose an obligation to notify and where parties do not need to wait for approval for implementing their merger, the Ethiopian policy dictates a suspensory regime. The Ethiopian law, not only penalizes failure to give notice as it is in the case of COMESA, but also implementation of merger without obtaining approval from the authority, which is not the case under the COMESA regime. This is therefore another area where the Ethiopian merger control regime has a major policy deviation from that of the COMESA regime.

[75] COMESA Merger Assessment Guidelines, Supra note 57, Section 5.32

[76] Cameron Firth and Rahul Saha, COMESA Merger Control: An Overview and Recent Developments; King and Wood Mallesons, LP, 21 January 2013, p.1

[77] COMESA Merger Assessment Guidelines, Supra note 8, Section 5.32

[78] Trade Competition and Consumers' Protection Proclamation, Supra note 9, article 9(2)

One major issue that should be addressed here in connection to this policy deviation is related to *notification timing.* As a result of the fact that COMESA merger regulation policy has adopted a non- suspensory regime, the COMESA Regulation has provided a filing time limit for making notifications. The regulations provide that party to a merger shall notify the commission of the proposed merger as soon as it is practicable but in no event later than 30 days of the parties' decision to merge.[79] Filings must be made within 30 days of the "decision to merge". The policy consideration behind the existence of filing time limit has something to do with the non suspensory nature of the regime, which necessitates some sort of time limit for notification as the Regulations do not prohibit parties from implementing a notifiable merger before making a notification. Unlike the regulations and the above policy consideration behind, the Ethiopian merger control rule has not recognized a filing time limit for notifications. The proclamation simply provides for mandatory notification requirement without providing timing for such notification. Parties to a merger are therefore at liberty to file their notification at any time before, of course, they implement their proposed merger. The proclamation has taken this position simply because, as the Ethiopian merger control policy has adopted a suspensory legal regime (that parties cannot register and implement their proposed mergers before obtaining a clearance from the authority), there is no need to define a filing time limit. This makes the legal regime inconsistent from what is provided under COMESA. And the inconsistency is the result of the suspensory legal regime Ethiopia is pursuing.

The second major area of inconsistency between the COMESA and Ethiopian merger control regimes that the writer would like to address under the purview of the requirement of notification related to notification threshold limits. As we know, threshold limits essentially set out for the purpose of notification requirements, allow competition authorities to ignore small mergers which are unlikely to affect competition, and focus only on mergers which are likely to harm competition by lessening their administrative burden.[80] With this in mind, the COMESA merger regulations has recognized the concept of threshold limits by explicitly providing that, a merger is

[79] COMESA Competition Regulations, supra note 3, article 24(1)

[80] Hussien Ahmed Tura, Ethiopian Merger Regulation, The University of Oxford for Competition Law and Policy Work Paper, CCLP(L) 36, p.15

notifiable and that notification is mandatory if the merger is with a value at or above the threshold prescribed by the Board of Commissioners, with an approval by Council of Ministers of the Common Market.[81] Unfortunately, though the Council has exercised its powers, the merger filing threshold prescribed under the Rules[82] adopted in November 2012 was set at zero as a starting point both in terms of asset and turnover. This is therefore generally means that all mergers must be filed regardless of their size though there is a proposal made by the CCC at raising the current thresholds for business. However, here the bottom line is that the COMESA merger control policy has adopted the concept of thresholds limits though the current thresholds are set at zero. Coming to the Ethiopian merger control rules, though like that of the COMESA regime, all mergers are currently required to be notified; TCCPP has not recognized the concept of notification thresholds. The TCCPP requires any agreement or arrangement of merger by any business person to be notified to the authority.[83] And it does not use or provide for minimum threshold limits that determine which transactions are notified to and reviewed by the TCCPA. There is no room and reference in the proclamation where by threshold can even be set in the regulation to be issued by the council of minister, or in guidelines to be issued by the TCCPA, as the proclamation mandatorily requires all merger transactions to be notified to the authority. And, hence it seems that the Ethiopian merger control policy desires to review all agreement of merger, including those small mergers which are unlikely to affect competition, instead of focusing on mergers which are likely to harm competition. This makes the regime inconsistent with that of the COMESA policy.

So far, the paper has tried to examine the policies and rules governing pre-merger notifications under the COMESA and Ethiopian merger control regimes by pointing out some issues of inconsistency. In the next sub section, the paper examines the COMESA and Ethiopian laws and policies regulating the assessment of anti-competitiveness.

### 3.3. Assessment of Anti-Competitiveness

---

[81] COMESA Competition Regulations, supra note 3, article 23(4)

[82] Rules on the Determination of Merger Notification Threshold, 17 COMESA Gazette Number 15 (20 November 2012)

[83] Trade Competition and Consumers' Protection Proclamation, Supra note 9, article 10(1)

Once competition authorities receive notifications of mergers, they have to examine the anti-competitive effects of that merger. The Ethiopian and the COMESA merger control regimes are not different in this respect. Both regimes have provided rules and procedures for substantive assessment of anti-competitiveness of notified mergers. Generally speaking, what the authorities under both regimes do up on receiving notifications is to assess the effects of notified mergers on competition. Once a notification is deemed submitted and the merger notification fee is received (in case of COMESA), the authorities will examine the merger notification for completeness, that all of the information and supporting documents required are received by the authorities. If the authorities consider that the notification is complete, they will then commence the assessment process. In this regard, the COMESA regulation provides that the CCC shall examine a notified merger as soon as a complete notification is received.[84] And, if the notification is incomplete; the examination begins on the day following receipt of complete notification. Coming to the Ethiopian merger control rules, the proclamation states that "the authority *up on receipt* of notification investigates the possible adverse effect of the proposed merger."[85] This gives a clue that the TCCPA shall begin the assessment process as soon as it received a complete notification. However, even in cases where the authorities begin the assessment process considering the notification is complete, they may, at any time during an assessment, request information, documents or other evidence from any party.

The authority under the Ethiopian regime for instance, in the course of investigating the possible effect of a proposed merger, is empowered, where deemed necessary to require the parties to the merger to submit additional information or document within a specified period of time.[86] Apart from this, as part of the merger review process, the authorities may contact customers and competitors of the merging party to conduct an inquiry for the purposes of determining whether or not to approve a merger. Under the COMESA regulations, the CCC may, where necessary, undertake any inquiry to ascertain any competition concerns.[87] Similarly, the proclamation under the Ethiopian regime allows the authority, in the course of investigation, to invite, by a notice published on a news paper having a wide circulation, any business person who is likely to be

[84] COMESA Competition Regulations, supra note 3, article 25(1)
[85] Trade Competition and Consumers' Protection Proclamation, Supra note 9, article 10(2)
[86] Id, article 10(3) a

[87] COMESA Competition Regulations, supra note 3, article 26(5)

affected by the said merger, to submit his written objections, if any, within 15 days from the date of publication of the notice.[88]

From the discussion made so far, it can be safely concluded that the rules which are provided under the COMESA regulations and that of the TCCPP on merger assessment proceedings and procedures are more or less consistent. However, it should be noted that the rules which are provided under the COMESA regime on merger assessment proceedings and procedures are detailed enough and more elaborated. The regulations and the merger assessment guidelines issued under have provided detailed guidelines on how assessment of merger is to be conducted by stipulating the procedural steps and phases of investigation and what the CCC is required to do in the course of assessment. In a contrary manner, however, in the Ethiopian legal regime, there are no clear legal rules, both under the proclamation and the guideline issued, which provides detailed procedures for merger proceedings with which the assessment by the authority could be conducted. That is to mean, the Ethiopian merger control rules do not clearly provide how assessment/ investigations are to be done, the procedures and phases of investigations to be followed in the course of assessment, the time when the authority should commence and finalize its investigation and other procedural elements of the review process which are addressed under the COMESA regime. This makes the Ethiopian merger control rules different from that of the COMESA regulations with respect to merger proceedings.

More importantly, however, what the writer, at this juncture, would like to discuss as an issue of inconsistency with respect to merger assessment proceedings is related to time limits provided for merger review. The COMESA merger regulation policy has provided a time limit for CCC to reach a decision on notifications. The Regulations provides that, "the Commission must make a decision on the notification within 120 days after receiving the notification."[89] Such period will commence on the date on which a complete notification has been received by the Commission. The CCC therefore has 120 days to complete its review on a notifiable transaction. If, prior to the expiry of the 120-day period provided, the Commission has decided that a longer period is

[88] Trade Competition and Consumers' Protection Proclamation, Supra note 9, article 10(3)b
[89] COMESA Competition Regulations, supra note 3, article 25(1)

necessary, it shall so inform the parties and seek an extension from the Board"[90], subject to the possibility of extending this deadline if it requires more time so long as all such extensions do not cumulatively exceed 30 days.[91] Apart from this, if no decision is taken within 120 working days, the merger shall be deemed to have been declared compatible with the Common Market.[92] In a contrary manner to the COMESA Regulations, The TCCPP, in any of its provisions, does not provide a time limit within which a decision on notifications has to be given. The previous proclamation, which was proclamation no. 685/2002, had a provision which states that "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."[93] This provision, though vague in nature, is more or less speaks in terms of timing for review. On the contrary, the current proclamation is silent as to the time limit for decisions which leads to the conclusion that the TCCPA can take any time long to finalize its merger review process. This makes the regime inconsistent with the COMESA merger control policy, which intends to ensure certainty of deals and transactions by providing a time limit for review. The absence of legally binding shorter time limit in the Ethiopian regime coupled with the suspensory regime the merger control policy is pursuing will negatively affect certainty of deals and transactions raising no substantial competition concerns, which makes the regime inconsistent with that of the COMESA regime.

Having briefly looking at the rules provided under both regimes with respect to the issue of merger proceedings, in the following discussions, an effort will be made to assess the COMESA and Ethiopian policies and laws regulating to merger assessment considerations or substantive assessment of anti-competitiveness of mergers. As we know, the core component of any merger control regime is the assessment of proposed mergers to determine their possible effects on competition. Every system of merger control sets out a substantive test to determine whether or not a merger ought to be blocked and must decide upon a standard of proof required before a competition authority can block a merger. A substantive test usually involves the examination of various factors to assess whether the proposed merger will negatively impact competition. In this

[90] Id, article 25(2)
[91] COMESA Merger Assessment Guidelines, Supra note 57, Section 6.3
[92] Id, article Section 6.17
[93] Trade Practice and Consumer's Protection Proclamation , supra note 61, article 36

regard, both the COMESA and Ethiopian merger control rules set out a substantive test to determine whether or not a merger should be approved or prohibited.

Under the COMESA merger control regime, the Commission assesses each merger notified to it to determine whether it is more likely than not to give rise to a Substantial Prevention or Lessening of Competition (SPLC).[94] And the major test for clearance is whether the merger would substantially prevent or lessen competition, in particular through the creation or strengthening of a dominant position. Similarly, the Ethiopian merger control rules has provided that the test for clearance for a proposed merger is whether or not a merger is likely to have a significant adverse effect on trade competition. The proclamation provides that the authority shall, up on receipt of the notification of merger, investigate the possible adverse effect of the proposed merger on trade competition.[95] The authority is required under the proclamation to determine whether the agreement or arrangement of merger causes or is likely to cause a significant adverse effect or restriction on competition, or eliminate competition.[96] Therefore, like that of the COMESA legal regime, the merger assessment considerations in assessing the impact of merger under the Ethiopian regime take into account competition related factors. Like the case of COMESA, where determining ***substantial*** prevention of competition is necessary in the assessment process, the authority's review is also concerned with determining whether a merger is likely to ***significantly*** prevent or lessen competition. In this sense a consistent merger control policy can be envisaged.

However, unlike the COMESA merger control rules, the Proclamation does not recognize and indicate the competition related factors which the TCCPA should consider while analyzing competition concerns of a given merger. Under the COMESA Regulations, the matters the CCC must take into account to determine whether a merger might substantially lessen competition in the market, are clearly provided which includes:[97] the ease of entry in the market, whether the merger will result in the removal of efficient competition, the likelihood that the acquisition

[94] COMESA Merger Assessment Guidelines, Supra note 18, Section 7.4
[95] Trade Competition and Consumers' Protection Proclamation, Supra note 9, article 10(2)
[96] Id, article, 9(1)
[97] COMESA Competition Regulations, supra note 3, article 26(2)

would result in the merged parties having market power, the actual and potential level of import competition in the market; the level, trends of concentration and history of collusion in the market; the degree of countervailing power in the market; the dynamic characteristics of the market including growth, innovation and product differentiation; the nature and extent of vertical integration in the market; whether the business or part of the business of a party to the merger or proposed merger has failed or likely to fail; and whether the merger will result in the removal of efficient competition. Apart from what has been provided under the regulations, the CCC has also provided, under the merger assessment guidelines, a number of detailed competition and market related factors which should be considered in the course of investigation. A wide range of assessment considerations have been elaborated under the guidelines.

Coming to the Ethiopian merger control regime, however, the merger assessment considerations that should be taken into account by the authority in determining whether a merger might significantly lessen competition in the market are not clearly identified under the Ethiopian merger control rules, which makes the assessment to be relied on the wide discretionary power of the TCCPA, where the TCCPA can or cannot takes in to account the merger assessment considerations recognized under the COMESA Regulations. The above listed assessment considerations are not incorporated under the Ethiopian merger control regime where TCCPA are not required to take a consideration to, which makes the regime in consistent with that of the COMESA regime. Above all, however, the major point that should be an analyzed under the discussion of substantive assessment of anti-competitiveness of mergers is related to public interest considerations. The COMESA Regulations, in addition to competition factors to be used as a test for clearance a proposed merger, suggest that the CCC's review also takes into account public interest factors in assessing the impact of a merger.[98] And, for the purpose of the regulations, in order for the Commission to determine whether a merger is or will be contrary to the public interest, the Commission shall take into account all matters that it considers relevant in the circumstances and shall have regard to the desirability of:[99] maintaining and promoting

[98] Id, article 26(4)
[99] Ibid

effective competition between persons producing or distributing commodities and services in the region; promoting the interests of consumers, purchasers, and other users in the region, in regard to the prices, quality and variety of such commodities and services; promoting through competition, the reduction of costs and the development of new commodities, and facilitating the entry of new competitors into existing markets. In here one might raise the question that the Regulations appear to conflate public interest with competition concerns. However, though the factors listed above might one way or another related to competition concerns, the inclusion of the phrase "*...it considers relevant in the circumstances....*" under the Regulations shows that the public interest ground test is broad to include all matters the CCC considers relevant other than those specifically mentioned under the regulations. However it should be noted that as the CCC must look at competition effects, the CCC has no power to prohibit a merger or impose commitments purely or solely on public interest grounds. Therefore, it can be definitely said that the substantive test for assessment is based on both competition and public interest grounds.

As part of policy deviations from the COMESA merger control policy, however, the Ethiopian merger control policy does not have an explicit recognition of the taking into account of public interest considerations in assessing the impact of merger. Unlike the COMESA merger control regulation, the Ethiopian merger control policy does not suggest public interest grounds to be considered as a test for clearance. The TCCPA's review cannot take in to account public interest factors in assessing the impact of mergers. Therefore, the only test for clearance is whether the merger is likely to significantly prevent or lessen competition. This is one of the areas where major inconsistency in policy considerations is visible. The COMESA merger control policy therefore tries to achieve public interest goals as part of the Common Market Objectives. The policy allows public interest factors to be applied in reviewing mergers. However, it should also be noted under the Ethiopian legal regime that some of the factors, which are listed as public interest considerations under the COMESA regulation, could be something that can be assessed under the competition concern assessment.

The last point that should be addressed in this sub section is the issue of justifications for anti-competitive mergers. Generally, competition bodies around the world are reluctant to make mergers unlawful per se, because they often have beneficial effects as dominance is not harmful

in itself. Mergers often have pro competitive as well as anticompetitive effects. Accordingly, a competition authority's duty is to identify and prohibit mergers which have an adverse impact on competition, and which produce few benefits (when their anticompetitive effects outweigh their pro competitive gains). Authorities must therefore carefully balance efficiencies against harms to competition when deciding whether to block a merger.[100] Accordingly, the COMESA merger control policy requires the CCC to carefully balance efficiencies against harms to competition when deciding whether to block a merger. In assessing whether a merger is more likely than not to give rise to an SPLC, the Commission will consider both the magnitude and likelihood of the pro-competitive and anti-competitive effects of the merger.[101] The CCC should take into account whether the pro-competitive aspects of the transaction outweigh any detrimental effects. Once the Commission finds that competition might be substantially prevented or lessened, it shall then consider the factors that may justify a merger, which are: whether such a merger is likely to result in any technological efficiency or other pro-competitive gains that would be greater than the effects of any preventing or lessening of competition resulting from the merger and whether the merger can be justified on grounds of substantial public interest.[102]

As the issue of grounds of substantial public interest has been sufficiently dealt in the previous discussions, the paper is not going to make a detailed discussion at this point. What can be said at this juncture is that public interest grounds could be taken as factors justifying anti- competitive mergers. The Commission analyses whether the merger can be justified on substantial public interest grounds based on the factors which are provided for under the Guideline on Public Interest apart from the factors listed under the Regulations. The Public Interest Guidelines briefly describe the CCC's concept of "public interest" in the context of merger control and suggests that pro-competitive outcomes promoting the interests of consumers, the opening of markets or product development could satisfy the public interest criteria[103]. The issue of technological efficiency and other pro-competitive gains are also the factors that can justify anti-competitive mergers under the COMESA regime, which are to be determined based on the factors described

[100] Neeraj Tiwari, Supra note 49, p. 122

[101] COMESA Merger Assessment Guidelines, Supra note 57, Section 7.5
[102] COMESA Competition Regulations, supra note 3, article 26(1)
[103] Clearly Gottlieb, COMESA Issues Draft Guidelines on Merger Review and Other Issues, May 2,2013, p.4

under the merger assessment guideline. The guideline has provided a range of factors which can enable the CCC to determine the efficiency stemming from and the competitive gain of proposed mergers. In this connection it might be proper to raise few points on the concept of authorization. If, after assessing the anti-competitive effects and economic efficiency of a particular conduct or practices, the Commission considers that there are public benefits outweighing the anti-competitive detriment of the arrangement, the Commission may grant an authorization to the arrangements even if they are anticompetitive. Such an authorization is a formal finding and provides immunity from suit. For the authorization to be granted it must be shown that such benefits would *not* arise through the operation of normal competition.[104] In sum, the COMESA merger control regime is based on the policy consideration that mergers do also have beneficial effects and that not all anti-competitive mergers should be blocked if their efficiencies, pro-competitive effects and public benefits outweigh their anti-competitive effects. The merger control policy therefore takes into account efficiency and public interest considerations as part of public policy objectives.

Coming to the Ethiopian merger control regime, like that of the COMESA regime, the Ethiopian merger control policy has recognized the fact that mergers do also have pro competitive and beneficial effects and hence not all anti-competitive mergers should be prohibited. The proclamation allows the Authority to exceptionally justify and approve a merger if its efficiencies outweigh its anticompetitive effects, so long as the merger cannot achieve its efficiencies without restraining competition. This allows the Authority to balance the merger's costs and benefits, and is necessary to promote healthy competition. The TCCPP states that though the authority is of the opinion that the proposed merger is likely to have a significant adverse effect on trade competition, it may approve that merger where the merger is likely to result in technological efficiency, or other pro-competitive gain that outweigh the significant adverse effects of the merger on competition, and such gain may not otherwise be obtained if the merger is prohibited.[105] Therefore it can be claimed that the Ethiopian merger control policy, like that of the COMESA, seeks to achieve some public policy objectives which mainly include technological efficiency. The issue of technological efficiency and pro-competitive gains are considered as one

---

[104] COMESA Competition Rules, Supra note 82, article 57

[105] Trade Competition and Consumers' Proclamation, Supra note 9, article 11(2)

of the grounds justifying mergers as it is the case under the COMESA regulations. In this sense, it can be claimed that the Ethiopian merger control policy is consistent with that of the COMESA. However, unlike the COMESA legal regime, there are no detailed legal rules or guidelines which can help the TCCPA on the issue of how efficiency can be assessed, and in what conditions efficiency can be considered as a justification. The same is true for justifications based on other pro-competitive gains. However, as part of policy deviation from the COMESA regime, the Ethiopian merger control policy has totally disregarded the concept of public interest as a ground of justification. Unlike the COMESA merger control policy where a merger can be justified on substantial public interest ground, the Ethiopian merger control policy does not recognize the possibility that the authority may approve a merger, even where it is likely to have a significant adverse effect on trade competition, simply based on public interest considerations. There is no clear recognition for substantial public interest considerations under the TCCPP as it does in the case of technological efficiency and other pro-competitive gains. In sum the Ethiopian merger control policy has not recognized public interest considerations both as part of investigation process and as grounds justifying mergers, in a way the COMESA policy does, which can be considered as one of the merger control policies deviations. Furthermore, the Ethiopian competition law has not incorporated the concept of authorization which can takes into account public benefits in assessing effects of mergers, unlike the COMESA regime.

So far the paper has tried to examine the COMESA and Ethiopian policies and legal rules relating to assessment of anti- competitiveness of proposed mergers. And the following sub section will be limited to the rules and policies regulating decisions on merger notifications under the two regimes.

### 3.4. The Remedies

The CCC's powers with regard to merger decisions are wide ranging. After consideration of a merger, the Commission may approve the merger if it finds it not affecting competition or if it is justified on grounds of any pro competitive gains or on grounds of public interest. If the Commission is satisfied that the merger will be contrary to public interest, it may declare the merger unlawful or restrict the acquisition by a person of an undertaking or require that if a merger takes place, the person named in the order shall observe such prohibitions and restrictions

in regard to the manner in which business is carried out, requiring any person to take steps to secure the dissolution of any organization and generally make "such provisions as, in the opinion of the Commission, are reasonably necessary to terminate or prevent the merger or to alleviate its effects."[106] An order made in respect of a merger may provide for any of the following matters: the transfer or vesting of property, rights, liabilities or obligations; the adjustment of contracts, whether by their discharge or the reduction of any liability or obligation or otherwise; the creation, allotment, surrender or cancellation of any shares, stocks or securities; the formation or winding up of any undertaking or the amendment of the memorandum or articles of association or any other instrument regulating the business of any undertaking.[107] The CCC's power with regard to merger decisions, as provided under the Regulations, is highly tied with the fact that the COMESA merger control regime is that of non-suspensory regime. This is to mean, as there is no any obligation to suspend transaction under the COMESA merger control policy, the CCC's task, in most cases, is going to be to approve or prohibit what has already been implemented. When one takes a look at the orders the Commission can take, almost all are provided with the assumption of an already existing merger.

Looking at the Ethiopian merger control rules in relation to the power of an order of the authority, one can see some sort of deviations from what is provided under the COMESA Regulations. This mainly emanates from the fact that the Ethiopian merger control policy pursues a suspensory approach, i.e. that the regime poses an obligation to suspend implementation of a merger. And hence, it is not expected to provide a detailed power of an order for the authority as it is the case for the CCC. The proclamation has provided three possibilities with which the authority can make an order which is consistent with what is provided under the CCR. It provides that "the authority after having investigated the proposed merger, shall approve the merger, if it is of the opinion that the merger is not likely to have an adverse effect on trade competition; prohibit the merger, if it is of the opinion that the merger is likely to have a significant adverse effect on trade competition; or approve the merger subject to certain conditions, if it is of the opinion that the likely significant

[106] COMESA Competition Regulations, supra note 3, article 26(7)
[107] Id, article 26(8)

adverse effect of the merger on trade competition can be eliminated by complying with certain conditions attached.[108]

The last important point that should be addressed in relation to decision making power of authorities is the issue of revocation and amendment of an order. The COMESA Regulations provides that "the Commission may amend or revoke an order at any time.[109] The CCC can amend or revoke any order of approval or prohibition. Revocation is something related to the total or absolute cancellation of the order either in favor or against the parties to the merger, whereas amendment relates to the modification of the order without necessarily varying from the merit of the decision. Looking at the Ethiopian merger control rules in this regard, it is somehow consistent with the COMESA merger control as it has introduced the concept of revocation which was not known under the previous proclamation. The proclamation has given the power to the TCCPA to revoke a merger approval when it discovers that the approval was obtained based on the presentation of false and fraudulent evidence; and where the conditions on the basis of which the approval has been obtained are not fulfilled.[110] And the authority is required, following the revocation of a merger approval, to inform the concerned government office to cancel the merger from the commercial register.[111] However, unlike the COMESA regulations where any order be it approval or prohibition can be revoked, the proclamation has only recognized revocation of orders of merger approval. The proclamation seems to neglect the concept of revocation of an order of prohibition as there is a chance for the parties to a merger to make an appeal. However, in any justice administration system, we see lower courts/administrative agencies having a power of review of their decisions. With this understanding, the COMESA regime has incorporated both the concept of appeal and revocation of an order of prohibition. Besides the CCR has not provided conditions up on which the CCC can revoke its orders whereas, the proclamation has provided two exhaustive lists of grounds of revocation. Furthermore, TCCPA, apart from providing the concept of revocation, has not incorporated the concept of amendment of an order unlike the COMESA regulations.

---

[108] Trade Competition and Consumers' Protection Proclamation, Supra note 9, article 11(1)
[109] COMESA Competition Regulations, Supra note 3, article 26(10)
[110] Trade Competition and Consumers' Protection Proclamation, Supra note 9, article 13(1)
[111] Id, article 13(2)

The final procedure with regard to merger proceedings is that of appeal. Both the COMESA and Ethiopian merger control rules have provided for the right of appeal. Under the COMESA regime, any person aggrieved by the decision of the Commission, may appeal to the Board of Commissioners as prescribed by the Regulations.[112] The Regulations provides that the Board hear appeals from, or review any decision of, the Commission that may, in terms of these Regulations, be referred to it; The Board has the power to uphold, reject or amend the orders made by the Commission. The Board's decision may then be appealed to the COMESA Court of Justice (the "CCJ"). The CCJ may only hear appeals on points of law, lack of jurisdiction or procedural irregularities. An appeal to the Board must be submitted to the Commission within 30 days after the publication of the decision. In evaluating an appeal, the Board will have all necessary powers granted to the Commission in the Competition Rules to request information or documents, conduct investigations, hold hearings or take any other reasonable action to enable it to evaluate the appeal. The Ethiopian merger control rules are not different from what is provided under the COMESA regime. Unlike the previous proclamation, where there is no redress for complaining parties, there is a right of appeal for parties to a merger under the current proclamation. The appeal is to be made to a tribunal established namely The Federal Trade Competition and Consumer Protection Appellate Tribunal.[113] The appellate tribunal has a power to hear and decide appeals against the decisions of the authority to prohibit a merger and revoke merger approvals.

Like the case of the Board under the Regulations, the tribunal may, up on examining an appeal submitted to it, confirm, reverse or vary the decision, or remand the case, with necessary instructions to the authority.[114] Furthermore, like the COMESA regime, the decision of the tribunal is going to be then appealed to another organ, which is the Federal Supreme Court, however, only when a party claims the existence of mistake on question of law regarding a decision passed by the tribunal. Apart from this the decision of the Federal Appellate Tribunal on an appeal submitted regarding merger is going to be final.[115] Like the COMESA regime, the

[112] COMESA Regulations, Supra note 3, article 26(12)

[113] Trade Competition and Consumers' Protection Proclamation, Supra note 9, article 33
[114] Id, article 33(3)
[115] Id, article 39

proclamation has provided an applicable time limit for appeal, which is 30 days from the date of decisions, to both the tribunal and the Supreme Court. Therefore it can be claimed that the Ethiopian and COMESA merger control legal regimes regarding right of appeal are consistent in many respects.

With this the paper finalizes its discussion on the consistency of the COMESA and Ethiopian policies and laws relating to merger regulation. And in the next chapter the paper will try to examine the merger control enforcement practices of the two regimes by analyzing issues of inconsistency.

# CHAPTER FOUR

## Assessment of Consistency between the COMESA and Ethiopian Anti-Competitive Merger Law Enforcement Practices

In this chapter, the paper will try to assess the COMESA and Ethiopian anti competitive merger regulation practices and issues of consistency surrounding the same. In so doing, the important documents the paper has consistently referred at is the merger review guidelines of the two regimes. As a result of this, the writer deemed necessary to begin its discussion with an overview of the merger review guidelines.

### 4.1 The Merger Review Guidelines

As it is the case in many merger control regimes, both COMESA and Ethiopia have tried to adopt their own merger assessment guidelines with the purpose of clarifying how they intend to apply their merger control rules. Looking at the COMESA regime, the CCC has publicized its Merger Guidelines as a result of the close scrutiny and considerations from the legal and business community, with calls for the CCC to be transparent and pragmatic in its approach. It is also due to the fact that the operationalisation of the CCC and the Regulations has raised various questions from various stakeholders. The Guidelines are aiming at providing clarification regarding the enforcement of the COMESA merger control rules, which will assist in addressing some of the

questions raised.[116] The set of Guidelines relevant to merger control are basically the Merger Assessment Guidelines, Market Definition Guideline, and Guideline on the Application of the Public Interest Criteria, collectively referred to as the Merger Guidelines.[117] The Market Definition Guidelines outline the CCC's approach in defining the relevant product and geographic markets in relation to mergers. The Public Interest Guidelines briefly describe the CCC's concept of "public interest" in the context of merger control. These two guidelines, however, are in a draft stage.[118] The most pertinent guideline document relevant to merger review is that of the Merger Assessment Guideline. The purpose of this Guideline is to provide guidance to parties contemplating or in the process of merging within the Common Market. These Guidelines set out mechanisms for determining whether a transaction is a notifiable merger under the Regulations, the procedural obligations of parties to such a merger, and substantive and procedural elements of a merger assessment.[119] The information in the guideline is only for a general guidance and the guidelines do not constitute a legal document and should not be relied on as a statement of law.[120] However, the CCC in actual practice is using them as a guideline in its process of merger review.

Coming to the Ethiopian merger control regime, the authority, for the proper functioning of its review process or with a view to conduct its review based on an implementation manual, has issued a Merger Assessment Guideline (የ ውህ ደት ማስ ፈፀ ሚያ ሰ ነ ድ in Amharic) in 2014. The guideline is basically prepared with the objective of laying down procedural guidance which can enable the authority to properly enforce the power and responsibility given to it in relation to merger control. Though the document is more of an implementation manual in nature and does not constitute a legal document to be relied on, it is a manifestation of the practical enforcement of anticompetitive merger rules of the regime as the authority is basically relying on it in all of its merger review undertakings.[121] However, unlike the COMESA merger assessment guidelines, it can be firmly said that the guidelines of TCCPA does not provide detailed guidance on the application of the merger control rules. The guideline is not drafted in a way it can properly

[116] Clearly Gottlieb, Supra note 103, p.4
[117] Ibid
[118] Id, p.7
[119] COMESA Merger Assessment Guidelines, Supra note 57, p.7
[120] Ibid
[121] An interview made with Ato Nebiyu Belete ,Head of a Research Department, which is Responsible for Merger Review undertakings, on March 22, 2015

address many of the substantial and procedural elements of merger assessment (issues like which mergers have anticompetitive effects, how to assess a merger's coordinated and non-coordinated effects, and what the merger assessment considerations are). The guideline, in almost all of its provisions, is simply reinstating what has been stated under the proclamation. As it will be indicated later, the guideline in some cases has recognized some points which even have not been known in the proclamation, like the issue of post merger review, and public interest considerations.[122] It should also be noted that, unlike the COMESA regime, we do not have a market definition and public interest guidelines which can be claimed as a sin qua non for any merger review undertaking.

The guideline is organized into three major parts. The first chapter has a very detailed discussion on the conceptual framework governing anti-competitive merger and merger regulation in general. In this part significance, scope and objectives of the guideline has also been highlighted. Apart from this, it tries to define what constitutes mergers, forms a merger might take and advantages of a merger. Part two deals about notification process and covers, though not in detail, some merger assessment considerations. Issues like decisions on merger notifications, time limit for review, appeal on a decision, revocation of merger approval, and post merger review are also treated under this part. The last part discusses miscellaneous provisions where guidance on merger filing fee, confidentiality, and the rights and obligation of the parties to a merger in the merger review process is provided.

So far an effort has been made to examine the merger assessment guidelines of the two regimes which are a manifestation of the enforcement practices of the two merger control enforcing authorities and on which their actual merger assessment is based. Now, it is time to assess how merger is actually regulated and reviewed by the authorities under the two regimes, and issues of consistency revolving around the same.

## 4.2. The Merger Review Practices

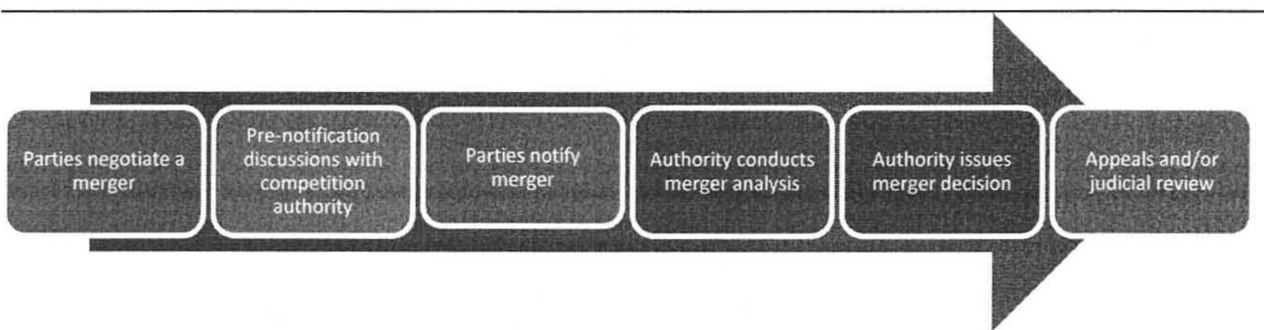
It can be said that both the COMESA and Ethiopian anti-competitive merger regulation regimes have not been as such sufficiently tested in practice as the concept of anti-competitive merger is a

[122] The Federal Trade Competition and Consumers' Protection Authority, Merger Implementation Manual, 2014, section 6.3.3 and section 9.

relatively recent phenomenon for both systems. With this limitation, however, the paper has tried to assess the existing practical merger review processes and procedures of the respective regimes. And for the purpose of this chapter, the period of merger review is typically measured from the time of a completed notification by the parties to the issuance of a decision by competition authorities.

*Processes and procedures of merger review*

In a nut shell, the specific processes and procedures of a merger control review and the broad procedural framework under the enforcement practices of the CCC can be summarized in the following graph;




When we take a look at the Ethiopian merger review practices in a very general way, it is not as such different from the above broad procedural framework, except that there is no pre- merger notification discussion to be made between the parties and the TCCPA, as it is discussed subsequently.

*Pre- merger notification meetings*

Under the COMESA enforcement practices, once parties to a merger negotiate the terms and conditions of their merger proposal and decide to notify the same to the CCC, the first task of the CCC is to conduct pre–merger notification discussions with the parties to the proposed merger. The CCC starts its review process by conducting pre- merger notification meetings.[123] Prior to notification, the Assessment Guidelines permit the CCC to have pre-merger notification meetings with the merging parties to ensure that the CCC completes its merger assessment in the quickest possible manner and to avoid unnecessary notifications. Such consultations may take place in

[123] COMESA Merger Assessment Guidelines, Supra note 57, Section 4.1

person, by phone, or by any other means the Commission determines to be appropriate to enable the parties and the Commission to clarify matters such as whether or not a transaction is a merger; whether or not a merger is required to be notified; the requirements of Form 12 and unavailability of required information; and other matters.[124] In this connection, the CCC's merger control practice has also recognized the concept of what is known as "*comfort letter*". Under this practice, an acquiring party may, alone or jointly with other parties, submit to the CCC a reasoned request for a comfort letter, including any information and supporting documents, determining that a merger is not a notifiable merger because it would not have an appreciable effect on trade or restrict competition.[125] In evaluating a comfort letter request, the Commission will take into account the facts and circumstances of the merger, including the combined annual turnover or value of assets in the Common Market of the merging parties. Up on receipt of the request, the Commission might provide a comfort letter stating that no merger notification to the Commission is required or inform the requesting party or parties that a merger notification to the Commission is required.[126]

Unlike the CCC's practice, the same scenario is not recognized under the TCCPA's merger control practice. Neither the guideline nor the actual enforcement practice of the TCCPA has developed such a trend though, in some cases, there might be some informal exchange of information or clarification sessions. The process therefore commences from the notification stage. The authority does not sit together with parties and discuss matters requiring clarifications like the issue of whether or not a transaction is a merger, and whether or not a merger should be notified. This is going to be decided after the parties have made a notification. Furthermore, unlike that of the CCC; The TCCPA's practice does not recognize the practice of receiving a comfort letter.[127] In this sense the TCCPA's enforcement practices deviate from that of the CCC's.

*Pre- Merger Notification Stage*

[124] Ibid

[125] Id, Section 4.2

[126] Id, Section 4.6

[127] An interview made with Ato Tilahun Binalif , an Merger and Acqusition Expert at the Research Department, on February 12, 2015.

As it is indicated under chapter 3 of this paper, both the COMESA and Ethiopian merger control rules do provide a mandatory notification requirement. The practice under those two regimes is not different from what is provided under the legal rules. The respective authorities under the regimes are actually controlling merger agreements by providing a mandatory notification requirement. If we take a look at the COMESA merger assessment guidelines and the CCC's notice of merger form 12, they clearly provide that all proposed mergers regardless of their size must be notified to the CCC. And as a result, a number of merger proposals have been notified to the CCC. So far, 72 notifications have been presented to the CCC. Out of these, 66 of them are finalized while 6 of them are under investigation.[128]

If one also see the Ethiopian merger control enforcement practices, like that of COMESA, notification of merger proposals is mandatory in the sense that both the merger guideline[129] and the actual practice of the TCCPA indicate the necessity of notifying merger proposals to the authority. The fact that authorities registering mergers are actually requiring parties to a merger to present merger clearance letter from the authority so as to make a registration is also another indicator of the requirement of notification.[130] Practically speaking, institutions like Ministry of Trade, Ethiopian Investment Agency, and that of the Document Authentication and Registration Office require merger clearance letter from the authority before effecting registration of merger transactions. This all has been done simply because the law requires them to do so and that the authority has distributed a circular to these authorities stating such responsibility.[131]

Though such practice indicates that notification is mandatorily required and that there are also some other governmental bodies involved in the process, it is not consistent with that of the COMESA enforcement practices. This is mainly because the COMESA merger control practice does not require a transaction to be suspended until merger approvals are obtained as the system pursues a non- suspensory regime. Despite this, the enforcement practice of TCCPA requires those mentioned authorities to refuse to register merger transactions except for the approval letter

[128] An Interview Made with Mr. Willard Mwemba, Merger and Acquisitions Manager of the CCC, March 29/2015

[129] Merger Implementation Manual of the TCCPA, Supra Note 122, section 6.1

[130] Ibid

[131] An Interview Made with Ato Tilahun Binalif, Supra note 127

of the authority, the effect of which is that the transaction would not have a legal effect. The practice, in some cases, even goes to the extent that parties to a merger cannot conclude a legally binding merger agreement, which is required to be registered for its validity and to have an effect on third parties, as the Document Authentication and Registration Office does not register the agreement before obtaining a merger clearance letter from the authority. This is therefore one of the areas where you see inconsistency of enforcement practices.

Save this inconsistency, however, the Ethiopian merger control practice, like that of the Commission, advocates the requirement of pre- merger notifications. As a result, a number of notifications have been presented to the authority as of 2013. So far, around 80 merger arrangements have been notified to the authority, among which, 70 of them have been already finalized while 10 of them are in the process of review.[132]

With the adoption of mandatory notification requirement, both the CCC and TCCPA have created departments that are in charge of receiving merger notifications. Looking at the CCC, it is the Merger and Acquisitions department that is primarily responsible for merger review. In a similar way, TCCPA has also organized a department responsible for handling merger notifications, which is a Research Department.[133] Unlike that of COMESA however, we do not see a separate merger control department in the Ethiopian competition authority as the department is not only intended to address merger notifications. The department is basically responsible for conducting researches relating to competition and consumers' protection issues. Taking note of this fact, the authority is currently planning to create an independent department that is reserved only for merger control activities.[134]

Having a preliminary discussion on the requirement of notification under the merger control enforcement practices of the two regimes, the paper, in the following discussions, will try to address some pertinent issues that should necessarily be discussed under a pre- merger notification stage of any regime. This includes; the issue of *how mergers are construed, filing thresholds, the form and manner of filing notifications, the question of who must notify, filing time limit,* and *completion of notification procedures.*

---

[132] Ibid
[133] Ibid
[134] Ibid

To start with the issue of what kind of transactions is construed to be merger and can be reviewed by the authorities, the paper has found out that the practice is more or less similar to the legal merger control rules provided under both regimes. The CCC is actually entertaining transactions that only constitute a merger agreement as construed under the Regulations and the guidelines. And in any merger notifications, the most important question that the CCC should address, in determining what constitute merger, is the issue of "control" used in the context of controlling interest (decisive influence).Acquisitions of non-voting securities and minority interests are not being entertained. This can easily be inferred from the collection of merger cases the writer has reviewed under the website of the CCC. For instance, if we take a look at the decision of the Twelfth Meeting of the CID (Committee of Initial Determination) involving the Acquisition by Robert Bosch GmbH of Hytec Holdings (Pty) Ltd, the CCC considers the transaction as a merger transaction as it involves acquisition by Robert Bosch GmbH ("Bosch") of *controlling interest* in Hytec Holdings (Pty) Ltd ("Hytec").[135]

Coming to the practice of TCCPA, the compiled report of the Research Department and also the interview made with Ato Tilahun Binalif has asserted that TCCPA is actually receiving notifications of transactions that constitute a merger agreement as defined under the proclamation. However, the issue of the concept of controlling interest (explained in terms of decisive influence) is something that should be discussed at this juncture. We have seen in the previous chapter that the concept of decisive influence is missing under the Ethiopian merger control policy. And accordingly, the authority treats and considers any transfer of interests (including acquisitions of non voting securities and minority interests) as merger transactions and reviews them without making sure the existence of a decisive influence that is created by the acquirer. The registering authorities are also practically requiring merger clearance letters for any share acquisitions and transfers.[136] This makes the enforcement practices of the authority inconsistent with that of the COMESA practice.

---

[135] Grohe Luxembourg Four S.A Vs Main Street 1254 (Proprietary) Limited, Case File No.CCC/MER/6/20/2014 (Decisions of the 13th meeting of the CID), Robert Bosch GMBH Vs Hytec Holdings (pty) Ltd, Case File No. CCC/MER/8/29/2014 ( Decisions of the 12th meeting of the CID), Improchem Proprietary Limited Vs Southern Africa's Water Treatment Business, Case File No. CCC/MER/9/32/2014 (Decisions of the 14th meeting of the CID).

[136] An Interview Made With Ato Tilahun Binalif, Supra Note 127

In here, the writer also deemed necessary to touch up on how the merger review practices of the two regimes treat the issue of capital increase or expansion. Under the merger review practice of the CCC, an internal restructuring, where one undertaking already controls the other undertaking, does not constitute a merger transaction.[137] In a contrary manner, however, an internal capital increase within an undertaking, where the acquiring undertaking already controls the target, is construed as a merger transaction under the merger review practice of the TCCPA. To mention, a decision has been given on notification regarding two companies[138], namely "Global PS Mining Investment Company Limited" and "Global PS Mining and Exploration DMCC", that are registered as shareholders in a company known as "Ternater General Business Private Limited". These two companies have decided to increase their capital or expand their shares within the same company have made a notification to the authority. The authority has treated such transaction to be construed as a merger transaction, and has given a decision of approval on the notification. In this sense, an inconsistent merger control practice can also be envisaged.

Still on the issue of what constitutes mergers, unlike that of the practice of the CCC, the practice of TCCPA shows that merger is said to have been occurred even when a mere individual, who does not have any pre- existing business, acquires interests from shareholders of a certain business organization, which has no any effect other than replacing the position of the previous shareholders. In a notification case[139] involving a transfer of shares, a certain company named, "Oilea Holding B.V" has agreed to transfer all of the shares it has on a company named "Weyira Oil PLC", to a certain individual named Mr.,Yosef Asrat Neway, who has no any pre-existing business. The authority receiving the notification has considered the transaction as a merger agreement and has given a decision of approval on the notification. This practice is clearly inconsistent with that of the practice of the CCC as the COMESA regime is intended to regulate transactions between business undertakings or individuals.

---

[137] COMESA Merger Assessment Guidelines, Supra note 57, Section 2.16

[138] A decision Given on August 30/2014 regarding merger cases involving Global PS Mining Investment Company Limited and Global PS Mining and Exploration DMCC making a capital expansion in a Ternater General Business Private Limited.

[139] A Decision given on December /2007, Merger Notification Regarding the proposed Merger involving Ato Yosef Asrat, Olay rozes Ethiopia PLC and Oilea Holding B.V

In this connection it is worth mentioning the actual treatment of Joint venture under the two merger review practices. So far, as confirmed by Mr., Willard, the CCC has not reviewed and decided on notifications of Joint Venture agreements or cases involving JV. Despite this, however, if notifications involving JV comes to the attention of the CCC, the approach to be taken by the CCC is going to be consistent with the interpretation given under the guideline, that it should perform on a lasting basis all the functions of an autonomous entity.[140] In Ethiopia, save the arguments revolving around the treatment of JV (that they should be treated as anti-competitive agreements, not as merger transactions), the interview made with Ato Tilahun binalif ascertained that the authority considers JV agreements as merger arrangements which could be reviewed and decided up on by the authority. The merger assessment guideline has also recognized JV as one form of merger.[141] Unfortunately, however, the writer could not able to get cases involving JV as the authority so far has never received a joint venture proposal.[142] Nevertheless, one thing is clear that the idea of full function JV is not known under the Ethiopian merger review practice even though cases involving JV can be reviewed as merger transactions.[143] In this regard therefore, it can be claimed that the enforcement practice of the TCCPA in relation to JV is inconsistent with that of the COMESA.

The second point that should be discussed under a notification stage of the merger review practices of the two regimes relates to the issue of *filing threshold*. Under the practice of the CCC, for a merger to be construed, it shall have met the merger notification threshold as prescribed under Rule 4 of the Rules on the Determination of Merger Notification Threshold. A merger is required under the Rule to be notified when the threshold of combined annual turnover or assets provided is exceeded. This assertion seems to be superfluous currently due to the non-existent of thresholds. As the threshold is currently set at zero, CCC is receiving and reviewing all merger arrangements regardless of the size of undertaking involved. However, there are efforts which are being made by the CCC at raising the current thresholds.[144]

---

[140] COMESA Merger Assessment Guidelines, Supra note 57, Section 2.11-2.15
[141] TCCPA's Merger Assessment Guidelines, Supra Note 122, section 5.2.3
[142] An Interview Made With Ato Tilahun Binalif, Supra note 127
[143] Ibid
[144] An Interview made with Mr., Willard, Supra note 128

Similarly, if one takes a look at the Ethiopian merger review practice, there is no limitation with regard to the amount of transaction. As it has been indicated earlier, the TCCPP has not provided a room for prescribing a merger filing threshold as it requires any merger agreements to be notified with no exception. Therefore it is reasonable to expect that, in actual practice, all merger arrangements have to be notified to the authority. Despite this, the authority is practically trying to prescribe a threshold by forming a committee, composed of legal and business experts that is responsible for making study and researches and come up with certain threshold limit.[145] Apart from this, though not being implemented, the merger guidelines currently have also tried to prescribe a threshold (those mergers with a combined transaction value of exceeding 25 million Ethiopian birr are required to be notified).[146] Despite the guidelines effort, however, any proposed merger regardless of the size of undertaking involved are actually being notified to the authority.[147] However, what makes the practice of TCCPA inconsistent with that of the CCC is that the COMESA regulations has recognized the concept of threshold and that the CCC is currently working on raising the threshold limit, while the TCCPP has no room for threshold limits to be prescribed. The writer has also a strong position that the authority's practical efforts in prescribing thresholds is fruit less and is not something legally acceptable as the TCCPA cannot by itself prescribe threshold limits without any delegated power that has been given by the law maker under the proclamation.

Still under a notification stage, the third point the paper will try to address relates to the *form and manner of notification*. The COMESA regulations provides that notification shall be made in writing and in such form and manner as may be prescribed and it shall be accompanied by such information and particulars as the Commission may reasonably require.[148] And accordingly the CCC in its merger assessment guidelines provides that merger notification must be made by the notifying party on the prescribed Form 12, and include the information and all supporting documents requested therein.[149] Form 12 provides form instructions that parties to a merger should fulfill. Parties who are going to make a notification to the CCC should fill out all parts of the filing from or Notice to the best of their knowledge and attach all required documents. The

[145] An Interview made with Mr. Nebiyu, Supra note 121
[146] The TCCPA's Implementation Manual, Supra note 122, Section 6
[147] An Interview Made With Ato Nebiyu, Supra note 121
[148] COMESA Competition Regulations, Supra note 3, article 24(3)
[149] COMESA Merger Assessment Guidelines, Supra note 57, Section 5.3

applicant, however, has the right to identify confidential information by duly completing Form 2 - Request for Confidentiality and submitting it jointly with this Notice.

Applicants are required under the notice to give several information including; executive summary of merger information ( the nature of the transaction, the areas of activity of the notifying parties, the market on which the transaction will have an impact and the strategic economic rationale for transaction), the statement of merger information (which includes name and address of undertaking controlling the undertaking filing the notice, and undertakings controlled by the undertaking filing the notice), information about undertaking filing the notice (which includes most recent fiscal year turnover, value of assets; the assets, shares or other interests being acquired; whether the shares or other interests are being purchased, leased, combined or otherwise transferred; the intended structure of ownership and control after the completion of the merger; and pre-merger structure of ownership and control of your undertaking), relevant market information ( which includes a list of all markets in which the parties to this transaction sell their products and/or services; the estimated market share of the merging parties; the estimated market shares of the merging parties' competitors; a description of existing barriers to market entry; an estimate of the time it will take potential competitor(s) to enter the market; the name and contact details of each entrant to the market during the last three (3) years; an estimate of the value and volume of the COMESA market as a whole (i.e., production less exports and plus imports); an estimate of the capital expenditure required to enter the market on a scale necessary to gain a significant market share, both as a new entrant and as a company which already has the necessary technology and expertise; an assessment of any effects the merger may have at regional level, issues of failing firm , if any), product information (which includes products and/or services that the undertaking filing the notice and all other acquiring/target parties sell and all substitute products, the contact details of the providers, turnover in each geographic area, contact details of aggregate purchasers and five customers), business relationships among merging parties. Apart from this, applicants are also required to submit some documents with the notice. These include annual reports of your undertaking for the last three (3) years; financial statements of your undertaking for the last three (3) fiscal years; current list of shareholders of your undertaking; current list of directors of your undertaking; copy of the merger agreement; internal memoranda analyzing the proposed merger; board resolutions

appointing company representatives for the purposes of this merger and the letter appointing legal representatives for the purposes of this transaction; and any other document which may assist the CCC in making a decision on the proposed merger.

Coming to the Ethiopian merger review practice in relation to the form and manner of filing notifications, notification is to be made in writing and unlike that of the practice of the CCC, parties proposing a merger has to physically appear to the authority to fill the filing form prepared[150] though the authority is planning to make the notification process accessible by allowing applicants to notify their transactions via email, post, fax and other means. Like that of the CCC, TCCPA has also developed a filing notice/ form (attached at the annex part) with which a notification is to be made. The merger filing form, which contains pre-conditions notifying parties should fulfill up on notification, is prepared both in Amharic (የ ውህ ደ ት ጥያ ቄ ማመል ከ ቻ/ ማቅ ረ ቢ ያ ቅ ፅ ) and English version. The form prepared by the authority requires provision of a number of information that includes the name and address of individuals/undertakings filing the notice, list of names of enterprises involving in the merger, the areas of activities of the enterprises, name and address of the undertaking to be controlled by the notifying party, business license, tax payer identification number, the amount of interest to be acquired in USD, the nature of the merger transaction, total fiscal year turnover of the undertakings, products or services that all involving undertakings sell, kinds of inputs used for their products and services, the sectors the all involving enterprises are engaged, their current status and intended structure of ownership or control after the completion of the merger. Apart from this, the authority has also provided, in its merger assessment guidelines, the preconditions applicants should fulfill in filing notifications and documents which have to be submitted with the filing notice.[151] Undertakings are required to present a renewed business license, evidence indicating that they are tax payers, internal memoranda analyzing the merger, copy of their merger agreements, stamps of business organizations on the filing form, and other related documents. Apart from this, the guideline has provided special preconditions for foreign national companies which are also recognized under the investment proclamation no 769/2012. In case fully foreign national companies are involved in a merger transaction, the guideline requires the companies to invest a 100,000 dollar in

[150] TCCPA's Merger Implementation Manual, Supra note 12, section 6.2
[151] Id, Section 6.2.1

engineering, architecture, consultancy and printing sectors while 200,000 dollars should be invested in other sectors. In case the merger transaction involves foreign national companies making joint investments with domestic investors, 50,000 dollar has to be invested in the above listed sectors while 150,000 dollars is needed in other investment sectors.[152]

In assessing consistency, the writer has found that information and particulars that should be included, and the documents that are required to be presented under the practice of TCCPA are not in line with ones that are provided under the COMESA Merger Assessment Guidelines and that of the filing notice. It does not require all the relevant information and documents which are required to be submitted under the COMESA filing notice. Though the filing form requires some important information from applicants, the form is not prepared in a way the authority can acquire statement of detailed "merger", "market" and "product" information, which are crucial in assessing the possible effects of mergers and are recognized under the COMESA merger review practice. The same is true for the documents that are required to be submitted. Though the guideline requires the presentation of some documents, it does not require all the important documents which are provided under the COMESA filing notice, which are relevant for the authority to have a clear picture of the transaction in assessing the effects of merger. The required information and documents under the filing notice of the authority are of simple introductory information about the parties to a merger. And some of them are meant for an objective other than regulation of the anti-competitive effects of the proposed merger. If we, for instance, see the requirement provided on foreign national companies, it has nothing to do with merger control enforcement as there are independent organs established for making sure that the investment laws are implemented. In this sense, therefore, an inconsistent enforcement practice can be noticed.

The fourth point that should be examined still under a notification stage is related to the question of *who must notify*. With respect to whether or not all parties to a merger are individually required to notify the CCC, the COMESA merger review practice indicates that the CCC can accept joint notification or notification from either party. Notifications can therefore be made by either of the parties to a merger.[153] Coming to the authority's practice, however, the notification form provides

[152] Ibid
[153] An Interview made with Mr. Willard, Supra note 128

that all parties to the merger are obliged to individually/independently submit a notification to the CCC. The actual practice does also favor what the filing form states.[154] This makes the practice of the TCCPA inconsistent with that of the practice of the CCC.

The fifth point the paper has tried to address under a notification stage is that of the issue of filing time limit. The COMESA merger control practice, as provided under the guidelines, has recognized a time limit for filing notifications. Both the merger assessment guidelines and that of the filing notice stated that mergers shall be notified as soon as it is practicable but in no event later than 30 days of the parties' decision to merge.[155] On the contrary, the Ethiopian merger review practice does not recognize a filing time limit. As the proclamation has not provided such a time limit, it is reasonable to expect that the practice does not also impose an obligation on parties to a merger to make a notification within a certain time limit fixed. This is asserted by the interview made with Ato Tilahun Binalif. He stated that parties are actually filing notifications when they are required by registering authorities to present a clearance letter and this can be any time after the conclusion of the merger agreement.[156] Therefore, parties to a merger can notify the authority any time before implementation, which is an inconsistent practice from that of the CCC. What matters most for TCCPA is the fact that parties should not implement their merger agreement without notifying to the authority and that the registering authorities do not register mergers without obtaining merger clearance from the authority.

The last point that should be addressed under a notification stage is that of *completion of a notification procedure*. The first task of the authorities under both regimes once they receive notifications from parties to a merger and before they commence their assessment process is to make sure that notifications have been completed, that is, checking whether all the required information or documents have been submitted. Under the practice of the CCC, after a notification is deemed submitted and the merger notification fee is received, the CCC will examine the merger notification for completeness and either: confirm that the Commission has received a complete notification or advise the notifying party that the notification is incomplete, identify any omitted information or documents and fix a time limit for submission of such

[154] An Interview made with Mr. Tilahun Binalif, Supra note 127
[155] COMESA Merger Assessment Guidelines, Supra note 57, Section 5.1
[156] Interview with Ato Tilahun Binalif, Supra note 127

information or documents.[157] And, the COMESA merger review practice has clearly indicated the actual date of completion of notification procedure. And, notification is deemed complete once the merger notification fee is paid and all the relevant information as requested in the Form 12 is submitted to the Commission. [53] Once a notification is considered to be complete, the Commission shall issue a certificate of completion indicating that the notification procedure has been completed, that bears the actual date which will be the commencement date for assessment of the merger.

Under the TCCPA, once the Investigation and Research Department receives notifications from parties to a merger, it will then send the notification to the Committee established for a merger review process with a responsibility of proposing decisions for the General Director. And one of the main duties of the Committee is to check whether or not the notifications made are complete.[158] Here the writer would like to raise two major practices which deviate from the merger review practices of the CCC. Firstly, unlike that of the COMESA, neither the guideline nor the actual practice tells when the exact date of completion of notification is though it might be reasonable to think that notification is deemed complete once all the relevant information and documents as requested in the Form are submitted to the authority. This is mainly because the authority is not really concerned to take note of the date of completion of the notification parties to a merger has filed since the proclamation has not provided a time limit for making decisions. Apart from this, there is no such a practice of issuing a certificate of completion. Secondly, unlike the practice of the CCC, if the parties to a merger have not submitted a complete notification, what the authority does in actual practice is that it notifies the parties to a merger in writing and in the form of decision that the proposed merger is not approved. There is no such a practice as fixing a time limit within which the omitted information will be provided. Practically, two cases[159] have been rejected by the authority basing itself on the justification that formality requirements have not been met. One is related to the requirement imposed on foreign national companies. The other case relates to a notification made with an omitted document (renewed business license of the notifying party). In both cases, the authority has closed the case notifying the parties that the notified mergers are not approved for not complying with the formality requirements.

[157] COMESA Merger Assessment Guidelines, Supra note 57, Section 5.19

[158] An Interview Made with Ato Tilahun Binalif, Supra note 127

[159] Ibid

Once the authorities under the two regimes ascertain that the proposed notifications are complete, the next step is going to be conducting other post notification activities. Under the COMESA merger review practice, ascertaining the fact that the notified merger falls within the scope of the regulations is one of the primary post notification activities. Where the Commission concludes that a notified merger falls within the scope of the Regulations, it shall notify this decision to the merging parties as soon as it is practicable but not later than 30 calendar days.[160] Apart from this, the CCC determines whether or not the notification is required to be notified or not. If a merger notified to the Commission is subsequently determined that notification was not required under the Regulations, the CCC will inform the notifying party and arrange for the return of any notification fee paid no later than 30 days following completion of notifications.[161] Coming to the practice of the TCCPA, once the Committee under the TCCPA determines that the notification is complete, it then ascertains whether or not the notification falls within the scope of the Proclamation. However, unlike that of the CCC, there is no such a practice of notifying parties that their notification falls within the scope of the proclamation within a certain fixed period of time. And also, there is no time limit provided for the authority to inform the notifying party when it determines that notification was not required under the proclamation.[162]

Up on ascertainment of the fact that the notified merger is of notifiable and has fallen under the scope of the regulation, the CCC will publish the summary of the notification, at the same time indicating the names of the undertakings concerned, their country of origin, the nature of the merger and the economic sectors involved.[163] The CCC's filing notice states that once the authority has accepted notifications, executive summary of merger information will be published. This summary (up to 500 words) will be published on the Commission website at the date of notification. As with all notifications, details of the proposed mergers are made available on the Commission's website and the Commission invites comments on proposed mergers from the public. In doing so, however, the Commission shall take account of the legitimate interest of undertakings in the protection of their confidential information. The summary should not contain

[160] COMESA Merger Assessment Guidelines, Supra note 57 section 5.21
[161] Ibid
[162] An Interview Made with Mr. Tilahun Binalif, Supra note 127
[163] COMESA Merger Assessment Guidelines, Supra note 57, Section 5.5

confidential information or business secrets. The notifying party may also request that any documents or information submitted be treated as confidential by submitting a reasoned request for confidentiality in Form 2 (attached in the annex).[164] Under the practice of TCCPA, unlike that of the CCC, it does not seem to have developed an equivalent practice of publicizing notices of notifications and details of proposed mergers. Neither the guideline nor the actual enforcement practices of the TCCPA require such a trend of publicizing brief summary of notifications. The system does only recognize the practice of publicizing a notice which invites business persons, who are likely to be affected by the proposed merger, to submit their written objections, though this has not even been actually practiced[165]. Even in such cases, unlike the practice of the CCC practice, where publication is mandatory, publicizing a notice under TCCPA is permissive.

*Merger Analysis*

Having dealt with the post notification activities following notifications, what comes next is the issue of merger analysis or assessment of proposed mergers. In assessing the actual merger analysis of the two regimes, it is important to initially examine the practical merger assessment proceedings of the respective authorities. Begging from the practice of the CCC, the general procedure is that the CCC starts its investigation process as soon as notification is received provided that the notification is complete. Once the CCC receives notifications, the Director will examine whether the notified merger is worthy investigating. It will then send the proposed merger for an assessment to the Merger and Acquisitions Division, if it believes that assessment is needed.[166] The examination period begins on the working day following receipt of complete information. The Commission makes a decision on a merger within 120 days after receiving the notification.[167] The Commission, however, may extend the period with the approval of the Board by giving prior notice of an extension to the notifying party so long as all such extensions do not cumulatively exceed 30 days. The Commission will provide prior notice of an extension to the notifying party.[168] Coming to the practice of the TCCPA, though the guideline does not provide a time limit for initiating investigations, the practice of the authority indicates that assessment commences as soon as the notification is received. However, the Ethiopian merger review

[164] Id, Section 5.7
[165] An Interview Made with Mr. Tilahun Binalif, Supra note 127
[166] An Interview Made with Mr. Willard, Supra note 128
[167] COMESA Merger Assessment Guidelines, Supra note 57, Section 6.2
[168] Id, Section 6.3

practice does not recognize a time limit for decision making as the proclamation does not provide a time limit for merger review. Despite this, the assessment guideline has provided time limits within which the authority has to render decisions.[169] The time limits provided under the guidelines is not uniform in that, for medium scale mergers (those mergers with a combined transaction value of above 25 million Ethiopian birr, but not exceeding 120 million birr) decisions should be given within 30 days with a possibility of extending the time limit for 15 days. And with respect to large scale mergers (those with a value exceeding 120 million birr), decisions should be given within 60 days with a possibility for extending this time limit for 30 days. However given the fact that the guideline is not legally binding on the authority, and that TCCPA is currently reviewing all merger arrangements, these time limits are not being actually implemented. If we, for instance, see a merger case involving amalgamation of 6 business organizations[170], the TCCPA took 5 months to render its decision on the notification. Therefore, it can be said that, unlike that of the COMESA merger review practice, the Ethiopian merger review practice does not recognize time limits for merger review as those provided under the guidelines are not binding even on the authority itself and cannot be claimed by the notifying parties. The other problem with those time limits which are provided under the guidelines is that the guideline authorizes the authority to extend the time limits on its own initiative with its own investigation Directorate with the approval of the director without obtaining approval from an independent organ, like we have BOC under the COMESA regime.

With such a time limit provided under the practice of the CCC, the CCC's assessment is made in two phases. Phase 1 commence on the first day of the 120-day review period and will expire no later than 45 days thereafter.[171] If during Phase 1, the Director determines that on the balance of probabilities the notifiable merger is not more likely than not to give rise to an SPLC, and there are no reasonable grounds for believing that additional evidence could be obtained or further assessment made in Phase 2 which could lead the Committee to reverse or significantly improve the Director's confidence in his/her determination, then the Commission issues to the notifying

[169] TCCPA's Merger Implementation Manual, Supra note 122, Section 7

[170] A Decision on Notification Regarding Amalgamation between 6 Business Organizations( Adama Development Business Group PLC, BMHY PLC, Hulegeb Market Center, and other two entities), On Hidar,24/2006, and A Decision on Notification Regarding Acquisition of Shares of Ollay Roses Ethiopia PLC by De Ollies BV.

[171] COMESA Merger Assessment Guidelines, Supra note 57, Section 6.8

party and publish on its website a decision declaring that it does not object to the merger before the expiration of Phase 1.[172] Such decision may be conditioned upon one or more parties implementing modifications to the merger or observing prohibitions, restrictions or other conditions addressing competition issues raised by the merger. However, if during Phase 1, the Director determines the opposite, before the expiration of Phase 1, the Commission will issue to the notifying party and publish on its website a decision to proceed to Phase 2.[173] Phase 2 commence and continue until the end of the 120-day review period. During this phase, the Director who is involved in the assessment of notified mergers submits a report to the Committee setting out the economic and legal arguments as to whether the merger is more likely than not to give rise to a SPLC.[174] Determination on notifications received by the Commission is made by ad hoc Committee of Initial Determination (CID) that is to be appointed by chairperson of the CCC. And hence, the CCC issues to the notifying party and publish on its website a decision which will declare that it does not object to the merger where considering the report the Committee determines that on the balance of probabilities the merger is not more likely than not to give rise to an SPLC, or declare that it objects to the notifiable merger where considering the report the Committee determines that on the balance of probabilities the merger is more likely than not to give rise to an SPLC.[175] A decision not to object to a merger may be conditional. If on the expiration of Phase 2 the Commission has failed to issue a decision to the notifying party, then the Committee will be deemed to have issued a decision declaring that it does not object to the merger.[176]

Coming to the TCCPA's assessment procedures, once the Research Department received notifications and has delivered the same to the Committee, the committee will then decide as to whether or not the notification is worthy investigating by taking a look at the value of transaction involved in the proposed merger. If it believes that the value of transaction involved is of a small amount (not indicated using a clear parameter) and constitutes a small scaled merger, the Committee then directly proposes a decision allowing the proposed merger to be implemented without making any assessment, which of course should be approved by the General Director.

[172] Id, Section 6.9
[173] Id, Section 6.11
[174] Id, Section 6.13
[175] Id, Section 6.15
[176] Id, Section 6.17

This occurs mainly when the Committee thinks it is less likely that the proposed merger will not have a significant effect on competition given the less transactional value or transferable asset the merger involves.[177] This might be taken as phase 1 of the investigation process where quick assessment is made. If it, however, believes that the value of transaction involved in the proposed merger involves huge capital (which again is not indicated using a clear parameter), the Committee will then order the proposed merger to be assessed by the Assessment Team, which is organized within the Research Department, and composed of business and legal experts.[178] This leads us to phase 2 of the assessment process. If the investigation report of the Team indicates that the proposed merger is more likely to have a significant effect on competition, the Committee will automatically propose a decision to the General Director of rejecting the merger. On the other hand, if the Team's report shows that there is no significant effect on competition resulting from the proposed merger, the Committee will propose a decision to approve the merger. It should also be noted however that the Committee can either adopt the investigation reports of the Assessment Team or orders the Team to make further considerations. And the decision of the Committee will also have a binding effect only when it is approved by the General Director, which can approve, amend, reject or requires the committee for further considerations.[179] Practically speaking many of the decisions of the authority, as we are going to discuss in the subsequent discussions, are made without making any detailed legal and economic analysis. Only few notified mergers have been investigated and hence most of the cases are dealt under phase one of the investigation stages.[180]

Though this practice of TCCPA might be considered equivalent with that of the CCC's phase one-two stages of investigations, unlike that of the CCC, we do not find an extended procedure/ phases of assessment which are clearly provided under the merger guidelines of the authority. The guideline has not provided detailed guidance on the procedural steps and the overall merger assessment processes and proceedings. The most important area of inconsistency, however, relates to the fact that, under the Ethiopian merger review practice, the Committee has a very broad discretionary power either to require an assessment on a proposed merger or to directly

[177] An Interview Made with Mr., Tilahun Binalif, Supra note 127
[178] Ibid
[179] Ibid
[180] Ibid

propose a decision of approval on a notification without a need to make an assessment or any inquiry. And the criteria taken to or not to proceed to the next level of investigation relates only to the value of the transaction/ transferable asset. Therefore, the Committee's decision to approve mergers involving small transactional value, without a need to make an assessment is an inconsistent practice seen in light of the practice of CCC, where there is an assessment being made even in phase 1. So far the paper has tried to examine the actual merger proceedings or procedural stages of merger analysis. In the following discussions, the paper will try to address actual substantive assessment of mergers under the merger review practices of the two regimes. Once the authorities under the two regimes have decided that assessment should be conducted to appreciate the effects of proposed mergers on competition, the next step is going to be determining the merger assessment considerations. Merger assessment considerations under the practice of the CCC are associated with substantial prevention or lessening of competition (SPLC). In order to assess whether the merger is more likely than not to give rise to an SPLC, the Commission will use an analytical framework referred to as "theory of harm," in that it compares the competitive situation in light of the merger against the competitive situation without the merger (the "counter-factual" scenario).[181] Also, in making an assessment, the Commission seeks to understand the commercial rationale for the merger from the perspective of each of the parties. An important part of the commercial rationale for the merger may be potential efficiencies stemming from the merger.[182] Looking at the analytical approaches and methodologies of assessment, the CCC generally conducts its assessment by considering factors such as *market definition*; *measures of concentration*; *non-coordinated effects* (including loss of existing and potential competition and any vertical effects) and *coordinated effects* in the case of *horizontal mergers*; non-coordinated effects (including input, total input and customer foreclosure, commercially sensitive information and concerns related to conglomerate and diagonal mergers) and coordinated effects in the case of *non-horizontal mergers*; *entry and expansion*; *assessment of efficiencies*; *countervailing buyer power*; *removal of a "maverick" undertaking*; and *effects from mergers of competing buyers*.[183]

---

[181] COMESA Merger Assessment Guidelines, Supra note 57, Section 7.6
[182] Id, Section 7.9
[183] Id, Section 8.1

To give a clear picture how the CCC actually conducts an assessment, the writer has taken a sample case that has got a final decision. In a merger notification case involving the acquisition by Robert Bosch GMBH of Hytec Holdings (pty) Ltd[184], the CID noted that the transaction involves vertical integration of the businesses of the parties namely Bosch (upstream) and Hytec (Downstream) considering that they operate at different levels of the supply chain. Bosch supplies as inputs into the manufacture of its hydraulic and automation solutions as well as specializing in the distribution, marketing and sell of a wide range of products and systems to diverse range of customers in the mining and drilling industry in the Common Market. The CID, in this regard, *defined the relevant product markets* as the downstream market for the distribution of drive and control components. It then defined the *geographic market* as regional but recognized the insignificant levels of trade in these products among the Member States of the Common Market. The CID noted that the market for the supply of drive and components in the Common Market, particularly to the mining and drilling industry, is diverse with a *wide range of suppliers* and that the *market is open to new entrants* given that the region largely relies on *imports* of products and services of this nature and that there are *no significant barriers to entry*. The CID also noted the increase in Chinese ownership of the mining activities in the region and the direct link of such ownership with an increased supply of such products and services by the Chinese companies. And as result, the CID concluded that the proposed transaction will not raise significant *competition concerns* in the Common Market considering that much as the integration of Hytec into Bosch will obviously foreclose a channel of distribution for the upstream competitors of Bosch who have been using Hytec to penetrate the regional market, the *relevant downstream market remain competitive* given the existence of a large number of on-sell operators of products of similar functionality. In addition, the market *does not have substantial barriers to entry* hence there is potential for the *expansion of existing suppliers as well as the entry of new suppliers*. And, for these reasons, the CID determined that the acquisition of Hytec by Bosch is not likely to substantially prevent or lessen competition and it will not be *contrary to public interest*. The CID further determined that the transaction does not negate the single market objective. The transaction is, therefore, approved without conditions.

---

[184] Robert Bosch GmbH of Hytec Holdings (Pty) Ltd, Case File No CCC/MER/8/29/2014 the decision of the Twelfth Meeting of the Committee of Initial Determination

From the above decision, one can understand that the CCC is actually conducting an assessment taking into account several assessment considerations which are provided under the guidelines. Besides that, one can also infer the fact that the CCC is practically assessing public interest considerations using the public interest criteria guidelines it has developed. In many of the decisions of the CCC including this, we find phrases like ",,,,,the Committee determined that the merger will not be contrary to public interest…." And ",,,, the primary concern of the CCC is to ,,,,whether the transaction would be contrary to public interest.,,," This indicates that the CCC is actually considering public interest factors though they cannot be a sole ground of prohibition. The CCC is actually trying to look at public interest grounds which it considers relevant to the circumstances of the case by relying on the Guidelines on Public Interest Criteria. Mr. George Lipimile, Director and Chief Executive Officer of the CCC, once in 2013, have asserted that the CCC considers public interest considerations that are in line with the objectives of the Common Market.[185]

Coming to the Ethiopian merger review practice, the substantive assessment of effects of merger has to be treated from two perspectives. One is from the perspective of the factors that are provided under the guideline. And the second relates to the actual substantive assessment undertaking. Looking at the merger assessment guidelines, the guideline has provided substantive assessment considerations which the TCCPA should consider in making an assessment. The guideline requires the assessment to be made from three perspectives, namely, market, competition and public interest assessment.[186] In doing market assessment, TCCPA is basically concerned with the parties' current market status before the merger and the impact their proposed merger might entail in the market. These requires identification of the relevant market which mainly consists of the product and geographic market so as to determine market dominance if any. Market assessment takes in to considerations several factors including; conditions of supply and demand in the relevant market, price and quality of products, access to input, distribution channel of the products/services, market share of the parties involved in the merger, market

[185] Clifford Chance Interview with Mr. George Lipimile, Director and Chief Executive Officer of the CCC, Early Experiences of the new COMESA Competition Regime; July 2013, p. 5, available at http://www.cliffordchance.com/antitrust

[186] TCCPA's Merger Assessment Manual, Supra note 122

concentration.[187] With respect to competition assessment, the authority considers several factors including; number of market actors in the market, and their market power and access to a market dominance, ease of entry in to the market, the potential of the merger in removing competitors out of the market, the number of substitutable products in the market, the existence of import substitution, countervailing buying power.[188] Looking at public interest assessment, TCCPA makes a comparison of the effects of a proposed merger on competition and efficiencies stemming from the transaction. In so doing, TCCPA takes in to consideration several factors including: pro competitive benefits, the effects of the merger in accelerating economic development, transferring technical knowledge, and improving production, distribution, and supply of products, failing undertaking scenario, and the mergers' benefit in making small and medium scale enterprises competitive and efficient.[189] What is a problem in relation to public interest considerations is that the guidelines is trying to provide an obligation on the authority to take into account public interest considerations in its assessment undertaking while the proclamation has not recognized such considerations. Practically, neither the interview made with the members of the assessment team[190] nor the decisions of the authority on merger notifications has given a clue that public interest considerations are actually taken in to account in assessing the possible effects of mergers. Therefore, it can be safely said that there are no public interest considerations in the actual assessment process of the TCCPA.

Comparing the substantive assessment considerations provided under the TCCPA with the ones provided under the CCC, the writer has found out that though, the review practices of both regimes do recognize common merger assessment considerations (market share, market concentrations, input foreclosure, import substitution, failing undertaking scenario, loss of potential entrant scenario) and that their enforcement practices seem to consider both pro-competitive and anti-competitive effects of mergers, the authority does not have detailed guidelines which require the assessment considerations incorporated under the guidelines of the CCC to be part of its assessment, which can also enable the TCCPA to conduct deep and detailed assessment on effects of mergers. This might include; assessing the commercial rationale for the

[187] Id, Section 6.3.1
[188] Id, Section 6.3.2
[189] Id, Section 6.3.3
[190] An Interview Made with Mr., Tilahun Binalif, Supra note 127

merger, considering properly the likely effects of mergers against a counter- factual scenario, assessing separately the coordinated and non coordinated effects of mergers depending on the type of mergers (horizontal and non- horizontal), detailed assessment of efficiencies, the issue of expansion and other factors which are recognized under the guidelines of the Commission that we have tried to discuss in the previous discussions. Furthermore, unlike the case of COMESA, there are no detailed guidelines under the TCCPA on how to define a relevant market as there is no market definition guideline.

Apart from what has been provided under the guidelines, if one takes a look at the actual assessment undertakings, it can be claimed that TCCPA does not conduct a deep examination and detailed assessment of effects of proposed mergers. We do not see the TCCPA making a strong economic research and analysis on the market and competitive conditions of mergers. The assessment process and the overall activity which is being carried out by the Assessment Team can be summarized as follows.[191]The assessment basically depends on gathering various information regarding the notifying parties and their competitors, which may then be analyzed to evaluate the effects of the proposed merger. In this respect, the Assessment Team basically performs three major functions. Firstly, the experts under the Team, with a view to understand the current status of the parties to a merger, tries to directly go in person to the undertakings of the parties, and gather information like that of the types of production the parties are engaged in, their production capacity, and issues relating to expansion. The team further tries to gather information, from concerned government institutions, regarding the profiles of competing enterprises, which mainly includes the number of market actors in the relevant market, and their capital. The Team will then try to determine the estimation of the market share of the parties to a merger. And, based on the information collected, the Team will determine whether or not the proposed merger will have a significant impact on competition.[192]

All these indicate that the TCCPA's assessment undertaking is not as such strong enough which can enable the authority to address all the competition concerns a merger might entail. And more

[191]An Interview Made with Ato Tilahun Binalif, Supra Note 127
[192] Ibid

worse is that, in almost all cases, there is no assessment which is being made at this time.[193] There is no deep, detailed and actual investigation which is being made in the actual and practical enforcement practices of TCCPA. Therefore, it can be safely concluded that the assessment which is being carried out is only better than not doing an assessment. The authority has not begun reviewing merger transactions with a more organized and fashionable way. The fact that the authority lacks the necessary expertise in the area and that it does not have the required detailed guidelines, and financial capacity to conduct deep investigations could be among the major reasons.

Just to take a look at some sample merger notification cases entertained under the TCCPA, the writer has reviewed cases (attached at the annex), where there are no reasoned explanations or economic analysis in the decisions, which leads the authority to reach the conclusion it has reached. Decisions of the authority do not clearly indicate the merger assessment considerations the authority has taken into account except stating the fact that the authority has made an assessment. All these are some of the areas where the practice of the TCCPA is inconsistent with that of the CCC.

And one of the challenges facing the assessment undertaking of the team is related to the power of the authority or the Assessment Team to oblige any business undertaking to give company information as there is no any clear legal duty imposed on undertakings. Unlike the COMESA regime, there are no clear legal rules that empower the authority to undertake all necessary investigations into undertakings which includes examining the books and other business records; taking copies of or extracts from the books and business records; asking for oral explanations on the spot; entering any premises, land and means of transport of undertakings.

So far the paper has tried to examine the substantive merger assessment considerations which the CCC and the TCCPA takes in to account in assessing the effects of merger. Once the authorities have done the required assessment for the proposed mergers, the next step naturally is to render decisions on the proposed mergers.

---

[193] Ibid

*Issuance of Decisions*

Based on the report referred to it, the Committee under the CCC shall make a decision. The Commission issues a decision declaring either that it does not object to the merger, which may be subject to certain conditions, or that it objects to the merger.[194] The Commission will publish such decision on its website within 7 days after its issuance. The decision will also subsequently be published in the Board's official publication.[195] In actual practice, no decision is given objecting the implementation of the proposed merger. All notifications presented to the CCC have been approved except that a single case has been approved conditionally.[196] Under the practice of the TCCPA, once the assessment is made by the assessment team and the investigation report is given to the committee, then the committee takes a look at the investigation report submitted to it. The Committee can either adopt the report as it has been presented by the Team or request the team to make further assessment on some specific issues identified. If the committee accepts the investigation report presented to it and considers it as convincible, then it will propose a decision/ recommendation to the General Director who may approve, reject or send it back for further considerations.[197] The authority can issue a decision declaring that it approves the proposed merger if it is of the opinion that the merger is not likely to have any significant adverse effect on competition, that it prohibits the merger if it is not likely to have a significant effect on competition, and that it approves the merger subject to certain conditions. The Director accepting the proposed decision then notifies to the notifying party the decision of the authority in writing. Decisions will also be notified to some relevant registering authorities like that of Ministry of Trade and Document registration and authentication office.[198] In addition, though not in the actual practice, the merger guideline states that the decisions would be publicized with electronic media or magazines. However, no single case has been publicized. So far, no single decision has been given rejecting the proposed merger as all have been approved except that two merger cases I have discussed earlier have been rejecting only due to formality requirements. This can be related to the absence of a detailed assessment by the authority. Besides, though the authority's practice has also recognized grounds justifying anti-competitive mergers, which are technological,

[194] COMESA Merger Assessment Guidelines, Supra note 57, Section 6.18
[195] Ibid
[196] An Interview made with Mr. Willard, Supra note 128
[197] An Interview made with Mr., Tilahun Binalif, Supra note 127
[198] Ibid

efficiency and other pro-competitive benefits, no single case has been decided based on such justifications as there is no any order of prohibition which is given.[199]

*With regard to the form and content of decisions*, under the practice of the CCC, decisions are made in written form which is to be dated and signed by the Director. The CCC has developed a form (Form 13) relating to Notice of Decisions in respect of proposed mergers. The form dictates that decisions should contain statements such as the fact that the CCC has received a notice of merger on such and such date that it has decided to approve / approve with conditions, or prohibit the proposed merger, the reason for CCC's decisions, and caution as to the power of the CCC to revoke or amend this approval if it is discovered that the approval was granted on materially incorrect or misleading information; there has been a material change of circumstances since the approval was granted; or there has been a failure to comply with a condition upon which the approval was granted. Looking at decisions of the CCC from its website, the content of almost all decisions includes 4 major parts. The first part is reserved for provision of some information and relevant background, (which mainly consists, that notification has been received by the CCC on such date and the CCC's primary concern is to determine whether a merger would be contrary to public interest, and that it has asserted its jurisdiction to review the matter). The second part relates to a brief description of the parties involving in the transaction. This is followed by a description of the nature of the transactions. The last part is dedicated to competition analysis and final determination on the proposed merger would be.

Looking at the form and content of decisions under the practice of TCCPA, both the authority's guideline and the actual practice of the TCCPA indicate that decisions on merger notifications are to be made in a written form which is to be dated and signed by the general director of the authority. Looking at the content of decisions under the practice of the TCCPA, some sort of inconsistency can be noticed seen in light of the practice we have under the CCC. Decisions on merger notifications mainly consists of, as listed under the guideline, names of parties involving in the merger, the date the application is submitted, the date on which the decision is given, the type of order given, and other related information.[200]

---

[199] Ibid

[200] TCCPA's Merger Assessment Guidelines, Supra note 122, Section 8

Looking at almost all of the decisions of the TCCPA including those that are attached, they do contain basically four points. This includes; that the authority is responsible for reviewing merger transactions, description of the parties involving in the transaction, the nature of the transaction, and the final determination of the authority. Unlike that of the decisions of the Commission, the decisions of TCCPA do not include competition analysis. The final determination is given mainly based on a general assertion that based on the assessment made by the assessment team; the authority has determined that the implementation of the merger would likely or not likely to result in substantial limitation of competition. The decision does not also show the factors (at least some) which have been considered in the course of the assessment. There is no justification which is being expressed for the final determination taken on the decision. This is also one of the manifestations for lack of detailed assessment in the TCCPA's merger control practice.

*Appeal and Judicial Review*

Any person aggrieved by the decision of the Committee will have the right to appeal to the Board within 30 days after the publication of the decision. Within 14 days after receipt of an appeal to the Board, the Commission will publish on its website the names of the parties to the appeal; a reference to the decision which is being appealed; and a copy of the appeal to the Board, as submitted. Interested parties and the Commission may make reasoned submissions relating to the appeal within 30 days after the date of publication. The Board will issue a decision on the appeal within 90 days after the date of publication.[201] Similarly, the parties aggrieved by the decision can make an appeal to the Trade Competition and Consumers' Protection Appellate Tribunal within 30 days from the date the decision is given as defined under the guideline.[202] Unlike the CCC, the guideline, however, does not provide rules on the time limit within which the appellate tribunal should give decisions and with respect to publicizing the fact that appeal has been made. In actual practice, there is no single decision on which appeal is lodged mainly because there are no decisions made rejecting the implementation of mergers so far.[203]

---

[201] COMESA Merger Assessment Guidelines, Supra note 57, Section 6.20
[202] TCCPA Merger Assessment Guidelines , Supra note 122, Section 9
[203] Ibid

So far an effort has been made how merger is regulated in actual practice of the two authorities by examining the consistency of such practices. Apart from this, the writer has deemed important to deal with concurrency of jurisdictions between the TCCPA and CCC with respect to merger regulation as one of the issues of inconsistency.

### 4.3 The Problem of Jurisdiction

One of the issues that should be discussed as a major issue of inconsistency between the Ethiopian and COMESA merger control practice is the issue of jurisdictional overlap or conflicting jurisdiction among the two competition authorities. This basically refers to the potential tension between TCCPA, as a Member State national competition authority, and the Commission if the effect of a notification to the Commission is to "usurp" the jurisdiction of TCCPA insofar as mergers with a regional dimension are concerned. The paper under chapter 2 has tried to briefly describe the scope and sphere of application of the two merger control regimes. The COMESA Regulations specifically provide that its merger control provisions are applicable where both the acquiring and target firm and either the acquiring firm or the target firm operate in two or more member states and the prescribed threshold is met.[204] On the other hand, the TCCPP provides that it applies to any merger transactions conducted or having an effect within the territory of Ethiopia.[205] In principle therefore, it can be said that the COMESA regime applies to cases having regional dimension while the Ethiopian merger control regime applies to cases confined within its territory. Despite this however, there is a high potential of concurrency of jurisdictions/ jurisdictional uncertainty between the CCC and TCCPA. Given the fact that even cases with a regional dimension have a national perspective, where they can have an effect on member states, TCCPA might claim jurisdictions. The target firms in a merger, for instance, might operate in more than two COMESA member states, (which automatically can give a jurisdiction to the CCC), while the member state country in which the target is operating can also assume jurisdiction where the transaction have an effect on its territory. It is therefore inconceivable that the TCCPA will insist that it retains jurisdiction as long as there is an effect within its jurisdiction. TCCPA can also maintain jurisdiction in terms of requiring pre-merger notifications in cases of indirect changes in controlling interest which can be through a subsidiary

[204] COMESA Competition Regulations, Supra note 3, article 4

[205] Trade Competition and Consumers' Protection Proclamation, Supra note 9, article 4

of the foreign firm. And from a member State perspective these foreign firms could also include firms in other COMESA Member States, hence directly conflicting with the Commission's jurisdiction.

Though there has been no practical case so far where TCCPA has entertained merger cases of a regional dimension,[206] the overlapping is obvious. Just to have some theoretical illustrations:- In a certain industry, Company "A", a company incorporated in Ethiopia but with operations in Ethiopia, Uganda and Tanzania and an export market in other African countries including Egypt entered into an agreement for the takeover of company "B", an Ethiopian based company with sales in the East Africa region. Given that an export market within the Common Market is sufficient to trigger the jurisdiction of the COMESA Regulations such a transaction would have fallen within the jurisdiction of the Commission. It could however similarly be entertained by the TCCPA.

These are few examples or scenario showing the jurisdictional overlap and uncertainties. Despite this problem of jurisdiction, there is no system in place to facilitate the allocation of cases between the CCC and the national authorities including TCCPA. The point at which the line has to be drawn between the jurisdiction of the national competition authorities like TCCPA and the CCC is quite uncertain. There is no clear provision or guidance as to whether a matter falling within the jurisdiction of the Commission reduces the jurisdiction of the national competition authorities in respect of those particular matters.[207] Looking at the Ethiopian merger control regime as all mergers within its respective territories are notifiable to the TCCPA, there is no provision in the proclamation that seeks to divest the authorities of jurisdiction where the merger has a regional dimension. The COMESA Regulations envisage a situation where a member state may request the Commission to refer a merger for consideration at the national level where the member state is satisfied that it will predominantly affect competition in its territory, albeit it being of a regional dimension.[208] Sections 12 and 14 of the merger assessment guidelines also recognize that the Commission would require the national authorities to assist in investigations and also liaise as regards other functions. These provisions however fail to clarify where the line

[206] An Interview made with Ato Nebiyu, Supra note 121 and Mr. Willard, Supra note 128
[207] Vincent, Supra note 12, p.2
[208] COMESA Competition Regulations, Supra note 3, article 24(7)

is drawn in terms of jurisdiction. It is not clear if the Regulations establish exclusive jurisdiction of the CCC or whether domestic merger control regimes, including Ethiopia can be concurrently engaged. Even if they can provide their own help to the problem, the problem still remains in the absence of an amendment to local legislation to incorporate the Regulations.

The CCC has stated that it believes it has exclusive jurisdiction if the thresholds are met and qualifying mergers can be referred to domestic competition authorities only at the CCC's discretion. Where a merger is notifiable to the CCC, the clear intention is that separate national authorities are not required in addition to a COMESA filing (COMESA views itself as having 'primary jurisdiction' and indeed, the CCC has sought to justify its filing fee requirements based on the advantages of a 'one stop shop' for merger notification).[209] However, the CCC's view is not shared by all domestic competition authorities including Ethiopia. For instance, the Kenyan Competition Authority has stated that domestic merger control rules continue to apply even if a filing must be made to the CCC. TCCPA has also taken the same position. The interview made with an expert at the Research department revealed that the authority holds the view that it would assume jurisdiction on merger cases having regional dimension in so far as the transaction has an effect on Ethiopia.[210] In such cases, the system of parallel filings with the CCC and TCCPA will occur which significantly increases regulatory costs and administrative burdens and may potentially lead to conflicting decisions. The result of this jurisdictional uncertainty is that transacting parties to be on the safe side will most likely, in addition to filing multiple jurisdiction notifications, file a notification with the Commission and hence end up incurring additional filing fees, additional information requirements and possibly longer waiting periods for the Commission decision, which would go against the objective of having a regional regulatory framework in multijurisdictional transactions.

In sum the question of jurisdictional uncertainty is the potential feature of the relationship between the CCC and TCCPA. With this, I finalized the discussion of the assessment of consistency between the enforcement practices of the two merger control regimes. In the next

[209] Freshfields Bruckhaus Deringer , Supra note 40, p.1
[210] An Interview Made with Ato Tilahun Binalif, Supra note 127

chapter the paper will try to put the major findings of the paper and the recommendations that can be forwarded to deal with issues of inconsistency between the two merger controls regimes.

# CHAPTER FIVE

## Conclusion and Recommendations

### Conclusion

The paper has tried to assess how far the COMESA and Ethiopian anti-competitive merger policies, laws and enforcement practices are consistent. And hence, though one can detect some degree of convergence or similarities between the COMESA and Ethiopian anti-competitive merger policies, laws and law enforcement practices and that some of the merger control rules under the TCCPP has modeled upon the provisions of the Regulations, the paper has found out that there are several areas of inconsistency, where there are so many inconsistent policies, laws and enforcement practices, which can make enforcement of the regional merger control policy difficult as a matter of practice. Despite the effort Ethiopia has exerted to come up with comprehensive amendments to the former proclamation and come up with a new proclamation, incorporation or domestication of the regional competition regulations, for the purpose of eliminating or reducing major differences between the CCR and TCCPP, has been neglected, which creates a doubt on the Ethiopian commitment to comply with its treaty obligations. Ethiopia has been remarkably slow in giving the Regulations the force of law in its national legal systems, which resulted in irreconcilable differences and contradictions between the community law and its merger control rules.

And, this could be considered as one of the core factors hindering effective enforcement of the Regulations within the Common Market in general and in the Ethiopian territory in particular. This can also lead to potential public international law concerns that undermine the COMESA core value proposition as a 'one stop shop' as COMESA will look to Ethiopia as a member state with jurisdiction over companies to enforce the regulations- something that will not be possible where domestication of the regulations is a prerequisite. And the problem could continue to be the main challenge to the regional merger control regime and in turn affecting the regional economic agenda unless Ethiopia as a member state takes its part and be committed to ensure a better harmonized and predictable regional economic environment.

---

*To mention some major areas of inconsistency:-*

- *With respect to what constitutes mergers under the two merger control regimes*, unlike the COMESA regime, the Ethiopian anti-competitive merger control policy, rules and enforcement practices do not incorporate the concept of a *controlling interest* (defined as a decisive influence by the acquirer) in defining what constitutes a merger. *And with respect to the issue of how Joint Venture is treated under the two regimes,* the Ethiopian anti-competitive merger control regime seems to neglect the concept of full function joint venture which is the crucial criterion for considering JV as constituting a merger under the COMESA regime. Still on the issue of what constitutes merger, in a contrary manner to the COMESA practice, the Ethiopian merger review practice considers and entertains *internal capital increase or expansions* as constituting a merger. In addition, unlike the merger review practice of the CCC, acquisition of interest by a mere non- businessman individual (with no pre- existing business) is construed to be a merger.
- *Coming to the requirement of notification under the two regimes*, unlike the COMESA regulations (where the Regulations do not prohibit parties to a merger from implementing a notifiable merger before making a notification), the Ethiopian merger control policy does not allow parties to a merger to implement their proposed merger before making a notification to that effect. In this connection, unlike the COMESA regime, where parties to a merger do not need to wait for approval before implementing the merger, the Ethiopian merger control policy/ rules and practices create a *suspensory* merger regime (obligation on parties to suspend transactions) and

prohibits implementing or closing a merger prior to clearance. And as an extension the suspensory legal regime it has adopted the Ethiopian merger control rule has not recognized a filing *time limit for notifications*, where parties to a merger are at liberty to file their notification at any time before they implement their proposed merger, which is not the case in COMESA where there is a fixed time limit for filing. With regard to the issue of *notification thresholds,* unlike the COMESA merger regulation policy where the issue of threshold limit is introduced, the Ethiopian merger control rules have not recognized the concept of notification thresholds that determine which transactions are notified to and reviewed by the TCCPA.

- Still under a notification stage, with regard to the *form and manner of notifications under the merger review practices of the regimes*, the information and documents that are required under the assessment guidelines and filing form of the TCCPA are not in line with ones that are provided under the COMESA Merger Assessment Guidelines and filing notice. The filing form under the Ethiopian merger control practice does not require all detailed and relevant information and documents, which are required to be presented under the COMESA practice that can give full information as to the details of proposed mergers. With respect to the question of *who must notify*, unlike the COMESA practice where the CCC can accept joint notification or notification from either party, all parties to a merger are individually required to notify the authority under the Ethiopian merger review practice.
- Coming to *assessment of notified mergers*, unlike that of the COMESA regime, there are no clear legal rules and detailed guidelines which provides for merger assessment proceedings and other procedural elements of merger assessment. In this connection, unlike the COMESA merger review practices, the Ethiopian merger review practice confers the authority a very broad discretionary power to relieve some mergers involving a small transactional value from an assessment. Still under an assessment stage, with respect to *time limits* for merger review, unlike the COMESA regime, the Ethiopian regime does not provide a fixed time limit within which the authority should complete an assessment. Apart from this, unlike that of the COMESA regime, where there are clear legal rules empowering the CCC to make an investigation into undertakings in the course of an assessment, the proclamation does not, in any of its provision, explicitly authorize the authority to make necessary investigations in to undertakings and obligate the undertakings to give company information or to submit to investigations ordered by decision of the authority.

- Coming to the substantive assessment of mergers, the Proclamation does not provide and indicate the merger assessment considerations which the TCCPA should take into account while analyzing competition concerns of a given merger. The authority's guidelines have not also incorporated the necessary assessment considerations that are recognized under the COMESA enforcement practices and merger assessment guidelines which can require and enable the TCCPA to conduct deep and detailed assessment on effects of mergers. Looking at the actual merger assessment practices of the TCCPA, unlike that of the CCC, it can be firmly said that TCCPA does not make an actual assessment undertakings on effects of proposed mergers by conducting detailed economic research and analysis on the market and competitive conditions which are recognized under the COMESA guidelines and which can enable the authority to address all the competition concerns a merger might have.
- Still on the issue of substantive assessment of mergers, as part of policy deviations from the COMESA merger control policy, where the regulations indicates that the CCC's review takes into account public interest considerations in assessing the impact of a merger, the Ethiopian merger control policy does not recognize the taking into account of public interest considerations as a test for clearance. Unlike the COMESA regulations, where public interest considerations are also taken in to account as grounds justifying anti-competitive mergers, the Ethiopian merger control policy does not consider public interest grounds as justifications for anti- competitive mergers. Furthermore, the Ethiopian competition law has not incorporated the concept of authorization unlike the COMESA regime.
- Looking at decisions to be rendered on notified mergers, unlike the COMESA regulations where any order, be it approval or prohibition can be revoked, the proclamation has only recognized revocation of orders of merger approval. Furthermore, TCCPP has not incorporated the concept of amendment of an order unlike the COMESA regulations. And what is important is that, TCCPP empower the authority to revoke merger approvals only on specific circumstances (when the approval was obtained based on the presentation of false evidence and that the conditions on the basis of which the approval has been obtained are not fulfilled) while the COMESA Regulations empower the CCC to revoke any order for any reason it considers is proper. With respect to the content of decisions under the Ethiopian merger review practices, unlike that of the decisions of the CCC, there is no any reasoned explanation or justification, in any of the

decisions of the TCCPA, which is supported by some sort of economic analysis that led the authority to its final determination.

- In terms of the merger review practices of the regimes, it can be firmly said that Ethiopia does not have detailed merger assessment guidelines that can give helpful clarifications on the application of the merger control rules and set out mechanisms for determining the substantive and procedural elements of a merger assessment, which is consistent with what is provided under the COMESA merger assessment guidelines. Besides it does not also have market definition and public interest guidelines.
- At last, one of the issues, which is a manifestation of inconsistency existing between the Ethiopian and COMESA merger control regimes is the issue of conflict of jurisdiction or jurisdictional overlap. Given the fact that even cases with a regional dimension have a national perspective, there is a high potential of concurrency of jurisdictions/ jurisdictional uncertainty between TCCPA and the Commission insofar as mergers with a regional dimension are concerned as there is no clear provision or guidance as to whether a matter falling within the jurisdiction of the Commission reduces the jurisdiction of the national competition authorities in respect of that particular matters and that it is not clear if the Regulations establish exclusive jurisdiction of the CCC.

All in all, the paper has found out that there are a number of inconsistent policies, laws and law enforcement practices governing anti-competitive mergers under the COMESA and Ethiopian merger control regimes which can lead to the conclusion that the Ethiopian merger regulation regime is competing rather than complementing. The reasons behind this could be lack of capacity especially in the area of drafting, poor or lack of engagement with legislative authorities and other stakeholders in Member States.

## Recommendations

Based on the conclusions of this paper, the paper would like to recommend the possible measures that should be taken, both at COMESA and Ethiopian level, to ensure consistency between the COMESA and Ethiopian anti-competitive merger control regimes. And hence, the paper generally recommends the following:-

*At a national level,* Ethiopia, as a member state, shall make sure that its national merger control policy, law, and law enforcement practices are in line/in conformity with what it has adhered to in

the regional framework. It should respect its international obligations and be loyal and committed to the treaty obligations it has assumed under COMESA as it is not prudent for the country to continue relying on its domestic law, yet at the same time work towards the development of a regional system. It should also strive to avoid contradictions and bring consistency between the regional and its national merger control regime. It is required to harmonize its merger control rules to the regional standard. Ethiopia should take all appropriate measures whether general or particular ...to ensure fulfillment of the obligations arising out of the COMESA Regulations or resulting from action taken by the Commission under the Regulations. ...". And *for this purpose*,

- It should achieve incorporation/ domestication of the COMESA Regulations into its domestic competition law so that the rights and duties contained therein may become applicable and enforceable domestically in its territory, which is a crucial measure that should be taken by the country. It should confirm that the Regulations have the force of law and the necessary effect within its territory. In this regard, TCCPA as part of the government machinery has a critical role to play by instigating the initiation of the process and do the necessary lobbying and follow ups.
- In so doing, it should make a necessary amendment to its proclamation so as to make sure that its merger control rules are modeled up on the provisions of the COMESA regulations. A number of changes to its merger control rules are desirable for the purpose of eliminating or reducing any differences.
- It should also make some form of reform in its anti-competitive merger control policy so as to make it compatible with the regional policy.
- The Ethiopian competition authority (TCCPA) in its part should also adopt the COMESA Merger Assessment Guidelines, on which the substantial and procedural elements of merger review processes and procedures of the COMESA regime is based, so as to ensure consistency between the merger review practices of the CCC and TCCPA, which obviously requires the necessary revision on its existing merger review guidelines.
- Ethiopia shall also abstain from taking any measure which could jeopardize the attainment of the objectives of the Regulations.

With respect to the measures that should be taken at the ***COMESA level*** the paper recommends the following.

- The Commission and the COMESA secretariat should provide technical assistance to the Ethiopian competition authority that may be required to facilitate the domestication process Ethiopia should try to achieve.
- The Commission, as provided under article 7(2)b of the COMESA Regulations, should aggressively work on fulfilling its responsibility of helping Ethiopia, as a member state, promote national competition law and institution, with the objective of the harmonization of its national laws with the regional Regulations to achieve uniformity of interpretation and application of competition law and policy within the Common Market;
- As per article 10(3) of the COMESA Treaty, the Council of Minister shall issue directives, addressing Ethiopia, as a member state, setting standards towards achieving harmonization of its merger control rules with the regional framework.
- So as to ensure consistency between the enforcement practices of the two regimes, the CCC should issue Guidelines that are not binding but are largely used by national competition authorities including TCCPA. The CCC should work on capacity building and prepare training sessions for experts under the Ethiopian competition authority on the COMESA merger control regime. The Commission should also enable TCCPA to express its views on merger cases involving the country, before it takes any decision. There should be a high level of cooperation between the CCC and TCCPA in the enforcement of their merger control regimes, which might basically include exchange of information.
- COMESA Should pay systematic or rigorous attention to relational issues in that the relationship between the COMESA Regulations and that of member states' competition laws should be placed on a clearly defined and solid legal framework which can address clearly the supremacy of the laws stemming from COMESA Treaty over national laws like that of the EU system, where it has been asserted EU laws are above national laws and could not, because of its special and original nature, be overridden by domestic legal provision.
- The Commission, *as a last resort*, should also require Ethiopia, as a member state, to confirm that the Regulations have the force of law in their territories, and to invoke Article 171 (sanctions (including financial penalties) can be imposed on Member States that default in performing obligations under the Treaty) for those that default. In terms of

Article 171 of the Treaty. This would have gone a long way to address current concerns around enforceability and concurrency of jurisdictions.

With regard to the problem of jurisdiction, the paper recommends that

- The regional competition policy framework should have clarity in terms of its jurisdictional reach. The paper therefore recommends that COMESA should clearly provide guidance on whether or not a matter falling within the jurisdiction of CCC reduces the jurisdiction of national competition authorities. And in this regard, as it is the case under the EU system, COMESA Regulations should be amended so as to explicitly recognize exclusive jurisdiction of the CCC over mergers having a regional dimension so that the Ethiopian national merger regulations do not apply to them, even if they meet the national conditions for notifications.
- At the same time, it should also clearly put a mechanism/system in place at a regional level which facilitates allocation of cases between its authority and national competition agencies. In so doing, for instance, COMESA can adopt the EU system. The EU for instance has set up a system of cooperation between the European Commission (EC) and the national competition authorities that allows for the allocation of cases. Regulation 1/2003 has provisions for allocation of cases between the EC and the national authorities. It has been further elaborated on by the EC's Notice on Cooperation within the Network of Competition Authorities and facilitated through the formation of a European Competition Network, which consists of the national competition authorities and the EC. An authority is considered to be in a position to handle a case when the following cumulative criteria are met *i) the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory; ii) the authority is able to effectively bring to an end the entire infringement, i.e. it can adopt a cease-and-desist order the effect of which will be sufficient to bring an end to the infringement and it can, where appropriate, sanction the infringement adequately; iii) it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement.*" The adoption of a similar system within COMESA coupled with conclusion of cooperative arrangements and

information sharing or exchange between the national authorities and the CCC would be effective in avoiding possible jurisdictional conflicts.

- The regional framework also needs to be effectively coordinated with the national framework to ensure no jurisdictional uncertainties and overlaps exist. Harmonization should also be carried out on Ethiopian- regional level to avoid conflicts of jurisdiction arising out of concurrence of jurisdiction.
- However with the current regional legal framework, as a better way out to the problems of jurisdictional uncertainty, the paper recommends that Ethiopia, as a single member state, should abide itself to the concept of referral in that it should request the CCC to entertain cases with a regional dimension as the clear intention of the regional arrangement is to create a federal merger control regime and COMESA views itself as having primary jurisdiction.

---

# BIBILIOGRAPHY

## 1. Books, Articles and Working Papers


- Cameron Firth and Rahul Saha, COMESA Merger Control: An Overview and Recent Developments; King and Wood Mallesons, LP, 21 January 2013

- Clearly Gottlieb, COMESA Issues Draft Guidelines on Merger Review and Other Issues, May 2, 2013

- COMESA Regional Competition Policy; A Manual for Competition Authorities; March 2003

- DLA Cliffe Dekker Hofmeyr, Something New Out of Africa: The COMESA Competition is Born; March, 2013

- Freshfields Bruckhaus Deringer; COMESA's Merger Control Regime; Where Are We Now?, July 2013

- Hailegebriel G. Feyissa, European Influence on Ethiopian Antitrust Regime: A Comparative and Functional Analysis of some problems; Mizan Law Review Vol.3 No.2 (Sept 2009)

- Hussien Ahmed Tura, Ethiopian Merger Regulation, The University of Oxford for Competition Law and Policy Work Paper, CCLP(L)

- Mamo E.Mihrtu, Fikremarkos Merso, and Kassahun Melesse, Study on the Impact of the Trade Related Issues in the Economic Partnership Agreement on Ethiopia, Draft Final Report, 27 October 2010

- 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

- 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)

- User Guide for Business and Industry on the COMESA Competition Regulations, December 2004
- User Guide on Merger and Acquisitions under the COMESA Competition Regulations, December, 2004
- Vincent N. Angwenyi, Competition Law and Regional Integration: COMESA, Munich Intellectual Property Law Center (MIPLC), Master Thesis (2012/13)

## 2. Legal Instruments

- COMESA Competition Regulations, 2004, 17 COMESA Gazette Number 12, (20 November 2012), article 3; available at: http:// www.comesa. Int /attachments/2012_ Gazette_Vol_17_ Annex_12.
- Common Market for Eastern and Southern Africa, COMESA, COMESA Merger Assessment Guidelines, August 2014, Prepared in Accordance with the CCR, 2004
- Federal Trade Competition and Consumers' Protection Authority, Merger Implementation Manual, 2014, section 6.3.3 and section 9.
- Rules on the Determination of Merger Notification Threshold, 17 COMESA Gazette Number 15 (20 November 2012)
- Trade Competition and Consumers' Protection Proclamation no. 813/2013, Federal Negarit Gazeta, 20th yr No.28
- Trade Practice and Consumers' Protection Proclamation No 685/2010, Federal Negarit Gazeta, 16th Year No.49
- Treaty Establishing a Common Market for Eastern and Southern Africa, available at: http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf

## 3. Websites Accessed

- Q and A on the COMESA Competition Regulations; Answers to the Most Commonly Asked Questions about the COMESA Competition Regulations, available at http://www.comesa.int
- Diane P. Wood, Antitrust: A Remedy for Trade Barriers? Asian Law Program, Japan Information Access Project, Washington, D.C, available at: http:// www.justice.gov/atr/public/speeches/0170.pdf
- 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)
- Clifford Chance Interview with Mr. George Lipimile, Director and Chief Executive Officer of the CCC, Early Experiences of the new COMESA Competition Regime; July 2013, available at http://www.cliffordchance.com/antitrust

## 4. Table of Cases

- Grohe Luxembourg Four S.A Vs Main Street 1254 (Proprietary) Limited, Case File No.CCC/MER/6/20/2014 (Decisions of the 13th meeting of the CID),
- Robert Bosch GMBH Vs Hytec Holdings (pty) Ltd, Case File No. CCC/MER/8/29/2014 ( Decisions of the 12th meeting of the CID),
- Improchem Proprietary Limited Vs Southern Africa's Water Treatment Business, Case File No. CCC/MER/9/32/2014 (Decisions of the 14th meeting of the CID).
- Global PS Mining Investment Company Limited and Global PS Mining and Exploration DMCC Vs Ternater General Business Private Limited, August 30/2014
- Ato Yosef Asrat, Vs Olay rozes Ethiopia PLC and Oilea Holding B.V, December 2014
- Adama Development Business Group PLC, BMHY PLC, Hulegeb Market Center, and other two entities), On December /2014

- Olij Rozen International BV Vs Roses Ethiopia PLC, December 2014

## 5. Interviews

- Ato Nebiyu Belete, Head of a Research Department, Trade Competition and Consumers' Protection Authority, on March 22, 2015
- Ato Tilahun Binalif , a Merger and Acqusition Expert , Research Department, Trade Competition and Consumers' Protection Authority on February 12, 2015.
- Mr. Willard Mwemba, Merger and Acquisitions Manager of the CCC, March 29/2015