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**REMUNERATION OF SHARE COMPANY DIRECTORS IN
ETHIOPIA: THE LAW AND THE PRACTICE**

BY: KAHSAY GIDAY

ADDIS ABABA

March 2014

ADDIS ABABA UNIVERSITY
SCHOOL OF GRADUATE STUDIES
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**Remuneration of Share Company Directors in Ethiopia: the Law
and the Practice**

BY: KAHSAY GIDAY

ADVISOR: ZEKARIAS KENEEA (ASSOCIATE PROFESSOR)

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT FOR THE
REQUIREMENT OF MASTER'S DEGREE IN BUSINESS LAW
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Declaration

I, the undersigned, declare that this thesis is my original work and has not been presented for a degree in any other university and that all sources of materials used in the thesis have been dully acknowledged.

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Abstract

Remuneration of Share Company Directors is one mechanism of aligning the interests of a Company and its Directors. Companies need and are also required to ensure that the level of remuneration shall be sufficient to attract, retain and motivate the caliber of directors needed to run the companies successfully while the makeup should be so structured as to knot company and individual performance.

It would be impossible to draw perfect line of 'fair and equitable' remuneration of Share Company Directors, neither too low nor excessive, that would fit all Companies. Because determining remuneration will depend on many variables like individual directors, market and Company specific conditions, in the abstract. Nevertheless this does not mean totally unattainable. The safe and less controversial mechanism, as experience of other jurisdictions and international best practice reveal, is measuring directors' remuneration against recorded and established standards and principles. In view of that legislatures and regulators set their own minimum and maximum standards to be complied by companies in determining the level of pay. These include, but not limited to, establishing independent remuneration committee, requiring remuneration policy and strategy, mandatory disclosure and shareholder 'say on pay' with compulsory or advisory shareholder approval, performance related pay, efficient and cost-effective remuneration taking in to account company's long and short term strategy.

Remuneration of Share Company Directors is regulated according to the Commercial Code in Insurances and non-financial Share Companies, but pursuant to the Directive No.SBB/49/2011 in banks. In general, remuneration of non-financial Share Company Directors is left unregulated whereas it is strictly regulated for director of banks. This paper argues that both extremes, i.e. strict regulation and leave unregulated, have negative repercussion on the governance of Share Companies in particular and economic growth and development of Ethiopia in general. In support of this assertion the paper presents some empirical evidences and arguments of corporate governance veterans, academicians, relevant government officials and shareholders. Consequently the paper attempts to show degree of impact of inadequacy of the legal and institutional framework and practical challenges of remuneration of Share Company Directors relying on the empirical data and literatures on remuneration.

Lists of Acronyms

AAU	Addis Ababa University
ABI	Association of British Insurers
AG	Aktiengesellschaft
ASTEX	Australian Stock exchange
BIS	Bank for International settlement
CEO	Chief Executive Officer
Com. C	Commercial Code of Empire of Ethiopia
ECCSA	Ethiopian Chamber of Commerce & Sectoral Associations
FDRE	Federal Democratic Republic of Ethiopia
FRC	Financial Reporting Council
GM	General Manager
GMS	General Meeting of Shareholders
IFC	International Financial Corporation
IMF	International Monetary Fund
LLC	Limited Liability Company
LSTEX	London stock exchange
MFIs	Micro Finance Institutions
MoT	FDRE Ministry of Trade
NACD	National Association for Company Directors
NBE	National Bank of Ethiopia
OECD	Organization for Economic Cooperation and Development
Plc	Private Limited Company
SA	Société Anonyme
Sh.C	Share Company

Chapter One

Proposal of the Study

1.1 Back Ground of the Study

Investment is one, but not the only, corner stone of economic growth and development from both individual and national interests' perspective. International experts who specialize on development assert that a responsible private sector is an absolute precondition for economic growth and for poverty reduction where development goals cannot be achieved by the state or the government alone.¹ A thriving private sector, with new firms entering the market, creating jobs and developing innovative products, contributes to a more prosperous society.² Where one wishes to invest money and needs the investment to be readily realizable, the Company is the appropriate vehicle.³

Incorporation gives a Company legal personality, separate from its members who established it, as a result, it may own property, sue and be sued in its own corporate name⁴ thereby undertake any juridical act, an act that have legal protection. Those who invested in the Company are only liable to the extent of their paid or promised contribution whereby creditors of a Company would have no recourse to the shareholders beyond that.⁵ The doctrine of separate legal personality and limited liability also encourages entrepreneurship, by shifting the risks of business failure away from entrepreneurs to creditors and other risk bearers.⁶ It is these and other characteristics that make a modern corporation a vehicle for the ongoing creation of work on an extreme scale.⁷ Furthermore, Companies play a critical role in shaping economic outcomes

¹ Christian Strenger et al, Key Corporate Governance Issues in Emerging Markets: Theory and Practical Execution, International Conference (HHL Centre for Corporate Governance, HHL Leipzig Graduate School of Management Leipzig/Germany June 2012), p4

² A world Bank Group Corporate Flagship, Doing Business 2014: Understanding Regulations for Small and Medium-Size Enterprises; Comparing Business Regulations for Domestic Firms in 189 Economies, 11th Ed. (Washington DC, 2013), preface

³ Nicholas Bourne, Essential Company Law, 3th Ed., (Great Britain, Cavendish Publishing Limited 2000), p3

⁴ Ben Pettet, Company Law, 2nd Ed., (Great Britain, Pearson Education Limited, 2005), p23

⁵ John Micklethwait and Adrian Wooldridge, The Company: a Short History of Revolutionary Idea, (USA, Modern Library chronicles, 2003), p xvii

⁶ Mohammed Rezal Salim, Corporate Insolvency: Separate Legal Personality and Directors' Duties to Creditors, Universiti Teknologi MARA Law Review, Vol. 2, No. 90, (2004), p1

⁷ Alan Calder, Corporate Governance: a Practical Guide to the Legal Frameworks and International Codes, (UK, MPG Books Ltd, 2008), p9

through the decisions that they make about investment, employment and trade.⁸Consequently some show the courage to the extent of saying, “the most important organization in the world is the Company: the basis of the prosperity of the West and the best hope for the future of the world.”⁹ But this does not mean that the role of the Company have been positive, all the time and in all situations.¹⁰

Companies are many types as there are many jurisdictions, for instance in the UK, there are two: public limited Company and private companies and their fundamental difference is that only public companies may invite the public to subscribe for shares.¹¹ Public companies are therefore more suitable for inviting investment by large numbers of people.¹² This gives them a greater role in the economy and community as a whole.¹³ As one would expect, the regulations governing public companies are more extensive than those governing private companies.¹⁴

Likewise there are two types of companies, Share Companies and Private Limited Companies, in Ethiopia. Share Companies can, also, be categorized as financial and non-financial companies based on whether they have engaged in the financial business or not. Currently there are 12, 215 non-financial Companies of which 12029 are Plcs and 186 are Share Companies.¹⁵ Similarly there are 19 banks (3 state owned), 15 insurance companies (one state owned), and 19 MFIs Operating in Ethiopia.¹⁶With regard to their difference, Share Companies are free to engage in any business, unless contradicted public policy, but private limited companies are prohibited from undertaking financial business activities.¹⁷ They have also difference in the minimum capital and membership requirements. In addition, it is only Share Companies that can sell shares on public subscription.¹⁸ It is mandatory for Share Companies to be governed by board of

⁸Mary O'Sullivan, *The Political Economy of Comparative Corporate Governance*, Review of International Political Economy, Vol. 10, No. 1, (Feb., 2003), p24

⁹Micklethwait & Wooldridge, *Supra* note-5, p xv

¹⁰ *Ibid*

¹¹Janet Dine, Company Law, 4th Ed.(Palgrave Macmillan, UK, 2001), p11

¹² *Ibid*

¹³ Janice Dean, Directing Public Companies: Company Law and the Stakeholder Society, (Cavendish publishing limited, Great Britain, 2001), p1

¹⁴ Dine, *Supra* note-11,

¹⁵ Data Obtained from IT department of FDRE MoT, on November 18, 2013

¹⁶ For more detail and full information see <http://www.nbe.gov.et/financial/> accessed on December 31, 2013

¹⁷ Commercial Code of the Empire of Ethiopia, Negarit Gazeta-Extraordinary Issue No.3, Proc. No.166/1960, year 19, No.3, (Addis Ababa, 1960), Art.513

¹⁸ *Id*, Art. 510, for instance members of PLCs may not be more than 50 members but in Share Companies no maximum limit at all.

directors, but for Plcs it is optional. Due to the separation of ownership and control on the one hand and transfer of shares on the other, obviously governance of Share Companies is relatively more complex.

Governance of companies matters much irrespective of its type or the activity engaged in. The question of how companies should be governed to enhance Company and economic performance has been widely discussed by various corporate lawyers and writers in the arena Company issues. Globally, corporate governance had become a major, and highly contentious, issue and Corporate governance systems contain mechanisms which are internal to the Company and mechanisms which are external to the Company. The former are the mechanisms which are put into the hands of shareholders which give them some level of ability to control or influence the board of directors.¹⁹ The external mechanisms exist in the regulatory environment in which the Company operates and will include the existence of state agencies for the detection of fraud or the existence of insolvency procedures as well as the market mechanisms such as the disciplining effect of the possibility of a hostile takeover.²⁰

Governments, play a crucial role in supporting, [in addition to the active role they play as market actors in some economies], a dynamic ecosystem for firms by setting the rules that establish and clarify property rights, reduce the cost of resolving disputes and increase the predictability of economic transactions.²¹ Enacting modern Company law is one way of doing so. Company law on its part, is crucial in market economies which sets, among other things, the legal environment for the creation and continuing operation of privately owned businesses.²² Good Company law is especially critical in transition economy countries.²³ It can encourage new investment, and provide investor protection, by setting forth clear and objective rules for a Company's ongoing internal governance; it can encourage entrepreneurship by making it easy to start up and register

¹⁹ Pettet, Supra note-4, p145

²⁰ Ibid

²¹ World bank group, Supra note-2

²² Booz A. Hamilton, Ethiopian Commercial Law and Institutional Reform and Trade Diagnostic, (USAID, January 2007),p18

²³ Ibid

a Company; and it can encourage businesses to come out of the underground economy into the publicly registered, taxpaying economy.²⁴

If good and modern company laws and rules are implemented effectively and efficiently by strong institutional framework, remarkably there could be good corporate governance. Studies in developing and transition economies show that corporate governance has a role of growing importance to play in helping both to increase the flow of financial capital to firms in developing countries and to enhance those countries' financial development as a whole.²⁵ They further show that corporate governance matters for development, more than is widely perceived, because it can contribute greatly to achieving sustained productivity growth in developing countries' real economies.²⁶ Good corporate governance would, also, make a Company more profitable, enable its growth and increase its access to external finance, domestic and international, public and private.²⁷

As organs of Company Governance, the Shareholders General Meeting and board of directors play a critical role in managing and controlling Share Companies, though the amount of power exercised by the board of directors depend on the size and type of the business, for instance in large public companies [equivalent to large Share Companies in Ethiopia] the board could have more de facto power.²⁸ Independent board of directors is usually seen as an essential element of a country's corporate governance system.²⁹ According to the agency theory directors are representative of the shareholders to jointly provide oversight, monitor and direct overall activities of the Share Company. The heart of corporate governance is [therefore] the board process (especially consideration of how board members work together as a group and the competencies and behaviors both at the board level and the level of individual directors) and structure.³⁰ As shareholders' agent, a director is ideally independent of the management, well

²⁴ Ibid

²⁵ Charles P. Oman (Editor), Corporate Governance in Development: the Experiences of Brazil, Chile, India, and South Africa, (centre for international private enterprise and OECD, 2003), p1

²⁶ Ibid

²⁷ Corporate Governance: Manual In International Finance Corporation partnership, 2nd Ed.,(Hanoi, Vietnam 2010), pV

²⁸ Carol Wangui Kamangu, The Influence of Board Attributes on Firm Value, (A Case Study of the Unit Trusts in Kenya), International Journal of Social Sciences and Entrepreneurship Volume 1, Issue 1, (March 2013), p17

²⁹ The Role of Boards of Directors in Corporate Governance, available at <http://www.developmentwork.net> accessed on January 02, 2014

³⁰ Kamangu, Supra note-28 , p21

educated, experienced and has high personal integrity. Effectiveness of the board, therefore, is very essential in today's competitive environment for it increases Company value.³¹ On the contrary directors have their own personal interests which sometimes derive them to the opposite direction of the interest of the Company and stakeholders, often called *agency problems*. Agency costs, which are manifest in various forms, are increasingly intrinsic in the modern day corporation, owing to the widening separation of ownership and control responsibilities, growing business diversification and segmentation across industry and business lines, and investor emphasis on near term performance and return outcome.³²

One way of aligning the interests of the Company and the director, so as to minimize agency problems and improving company performance is paying remuneration. Given the strategic role of the board in ensuring the long-term sustainability of a Share Company for its shareholders and wider stakeholders, it is important that remuneration levels are such as to “attract, retain and motivate” directors of the appropriate quality and caliber required to run the Company.³³ In addition they invest their time, expertise and assume huge risks in taking the responsibility of overseeing the Company. In order to align incentives, a significant proportion of directors' remuneration should be structured so as to link rewards to Company and individual performance.³⁴ Directors' remuneration should be neither excessive nor low. The question of setting the correct level and structure of remuneration is debatable but there are internationally accepted principle and standards. Various elements have to be taken into account in designing and regulating remuneration strategy. But the key principles for a transparent and accountable remuneration framework includes, but not limited to:

- *The disclosure of information on companies' remuneration policies (including bonus levels, severance pay, stock options and other benefits) and the related performance targets and criteria;*
- *The opportunity for a shareholder vote on the remuneration policy at the general meeting (which is preferably binding but may be advisory);*

³¹ Id, p26

³² Patrick Wambu, Effects Of Agency Costs on Financial Performance of Companies Listed at the Nairobi Securities Exchange , International Journal of Social Sciences and Entrepreneurship Volume 1, Issue 5, (2013), p2

³³ Ethical Investment Research Service (Eurosif),Remuneration: Theme Report, 3rd in a series,(January, 2010), p1 available at <http://www.eiris.org/files> accessed on October 24, 2013

³⁴ Ibid

- *The disclosure of individual directors' remuneration packages and the prior approval of share and option schemes by shareholders*
- *A significant part of variable remuneration should be linked to the achievement of long-term performance objectives.*³⁵

Correspondingly, none should be engaged in deciding ones remuneration and companies shall adopt their respective remuneration strategies taking in to account all their respective circumstances. Besides, directors' remuneration is expected to be determined by remuneration committees without disregarding the maximum and minimum standards of the regulator. Companies, regulators and policy makers are, therefore, required to integrate these principles with experience, caliber, and expertise of each director in the specific Company and post assumed. A good company law is supposed to include these and other principles to meet its purpose. In Ethiopia there are various laws meant to regulate Share Companies, financial and/or non-financial, including the Commercial code, proclamations, regulations and directives. There are also regulatory institutions with a purpose of regulating Share Companies including, but not limited to, NBE, MoT, Courts, and Ethiopian Bankers Association.

Increasingly, however, the problem is not primarily one of putting the right rules and principles on the codes, proclamations, regulations and directives. Globally, many countries, not all of course, now have a reasonably complete and well-written set of corporate-governance rules and institutions.³⁶ The proliferation of national corporate governance codes and the development of international benchmarks have been important in this regard.³⁷ The principal weakness now, most experts would agree, and therefore the main policy challenge for developing countries today, tends much more to be one of achieving adequate enforcement of existing rules.³⁸

In Ethiopia, however, there is a problem of inadequacy of the laws and lack of effective enforcement of the few existing principles. This paper is, therefore, intended to analysis the legal

³⁵ Id, p2

³⁶ Oman, Supra note-25, p18

³⁷ For instance, BIS principles of banking supervision and regulation, OECD Principles of Corporate Governance and the OECD-World Bank Corporate Governance Forum's Regional Roundtables are taken as international corporate governance bench marks, see Ibid

³⁸ Ibid

and institutional framework of one specific element of Share Company governance in Ethiopia, namely remuneration of Share Company Directors: the theory and the practice.

1.2 Statement of the Problem

As aforementioned remuneration of Share Company Directors is one mechanism of aligning the interests of the Company and its directors. To play its true role remuneration should be neither too low nor too excessive. The process of determining should also be fair, equitable and transparent.

According to the Ethiopian commercial code, directors' remuneration is left to be determined by the general meeting of Shareholders and Articles of association.³⁹ However, the commercial code left directors' remuneration controversial with regard to factors and processes of determination, quantum, mode and whether it is right or privilege. The new law, directive No.49/11, which is issued to address the shortcomings of the commercial code in Banks, Financial Share Companies, in the spirit of moderately regulated remuneration of Share Company directors, adds another problem to it by arbitrary fixing the amount annually and prohibiting any other benefits and incentives to directors. In doing so shareholders have no role in determining remuneration of their company's directors, it followed one remuneration package fits to all banks and directors irrespective of the board of directors' and companies' performance and other legitimate grounds of difference.

In insurance Companies, remuneration of directors is regulated by the NBE. These Share Companies are paying their directors according to the rules and principles of the Commercial Code. In practice directors receive annual remuneration and some share of the annual profits. But the payments are not taking in to account individual directors' experience, skill, contribution, performance and special efforts. Nor company performance.

On the contrary directors' remuneration in non-financial companies is left unregulated at the mercy of the directors themselves and shareholders within the ambit of the commercial code provisions. There is no specific institution charged with regulation of non-financial institutions'

³⁹ Com.C, Supra note-17, Art.353 (1&2)

directors' remuneration in practice, worsened by the passive involvement of the MoT during registration and licensing.

1.3 Objective of the Study

1.3.1 General objective of the study

Throughout the study, the paper is aimed to examine Remuneration of Share Company Directors in Ethiopia. It provides a general idea on the existing regulatory approaches, both legal and institutional, in tackling practical challenges and legal loopholes.

1.3.2 Specific objectives of the study

The following specific objectives were put together, to contribute to meeting of the general objectives. The study has an objective to:

- Raise some points with regard to Share Company governance in Ethiopia
- Assess the legal framework for regulation of remuneration of Share Company Directors in Ethiopia
- Explore how regulating institutions are approaching to remuneration of Share Company Directors of financial companies in Ethiopia and its overall repercussion
- Analyze Whether the directive issued by the NBE to regulate directors' remuneration in banks is in line with the Commercial Code or not
- Examine whether such one mode of remuneration fits all approach results in adequately addressing the problems caused the pre-issuance upheavals or not
- Review the role of shareholders participation in the governance of their Companies
- Address some practical impacts of fixing directors' remuneration in non-financial Share Companies
- Demonstrate whether there is clear separation of CEO and board Chairperson and its effect on fairness and equitability of directors' remuneration governance.
- Assess whether Ethiopia has legally recognized board structure and its impact on remuneration of remuneration in particular and share company governance in general.

- Show the status of remuneration of Share Company Directors in light of international best standards and principles

1.4 Research Questions

There are some imperative research questions raised by the paper:

- Does Ethiopia have legally recognized board structure?
- Does the Ethiopian commercial code clearly define remuneration of Share Company directors?
- Is the definition of remuneration of the directive No.49/11 and the approach of fixing of mode and level of remuneration of bank directors compatible?
- Is directors' remuneration a privilege or a right?
- Is statutory dividend defined in the Ethiopian commercial code? What about its purpose?
- Is the remuneration of bank directors sufficient to attract, retain, and motivate directors with the required skill, integrity, experience and risk assumed?
- Is the 'one remuneration regime fit all banks and directors' policy sound and workable?
- Is there any effect on the system of governance of remuneration of Share Company Directors as a spillover effect of scattered enactment and issuance of laws (non-comprehensive Company law) that regulate Share companies?
- Is there remuneration good governance in non-financial companies?
- Does the establishment of formal stock market play a role in share company governance?
- Is there a law and practice of separation of the CEO and chairperson in non-financial Share Companies? What effect does it have on remuneration of Share Company directors?
- Is there any single responsible regulating institution that oversees the running and operation of non-financial Share Companies and its impact on the overall effect of directors' remuneration?

1.5 Limitation, Significance of the Study and Scope of the Study

The research showed that what the law and the practice of remuneration of Share Company Directors in Ethiopia look like. As a result, it was adjusted to fit with the time and resources

available. It addressed only the legal and institutional problems of Share Company governance by way of remuneration. For the sake of convenience it only covers the law and the practice of remuneration in banks, insurance and non-financial share companies.

The most important limitation of this study that needs the attention of all stakeholders is reluctance of private and governmental institutions to give information/data. As there are individuals willfully cooperative, there are institutions that vividly refuse to give non-confidential information for research purposes. It will be difficult, if not impossible, to undertake similar researches which are basis of company governance improvements.

The knowledge generated by this study enables readers to grasp the necessary information with respect to the existing legal frame work and institutional monitoring practice of Share Company Directors' remuneration in Ethiopia, specifically in financial and nonfinancial companies. Further the indicated inadequacy in the legal framework governing directors' remuneration in Ethiopia will be an additional input to the already started revision of the Commercial Code. The findings of this paper will be of benefit to the legislators, directors, shareholders and all other stakeholders. It will make a way for further policy attention and research in the area.

1.6 Methodology

In this study the writer employed mainly qualitative legal research through the combination of both primary and secondary sources. With regard to data collection this research utilizes purposive sampling technique which enables the writer to obtain and evaluate appropriate information from selected individuals based on their experience, position, expertise and other attributes.

The study begins by researching on the theories and existing literature of company directors and their remuneration in national and international perspectives. Further, the study involves research on the law and practice of Share Company Directors in Ethiopia and its contributing factors from which salient conclusion and recommendations have drawn. Generally the writer employed the following sources:

Interviews: the writer has interviewed NBE officials, officials at the MoT, Company directors (financial and non-financial), Board Secretaries, Corporate advisors, Managers, Academics, bankers' association President, shareholders, advocates, court officials etc. selected using purposive sampling method which enabled the writer to get qualified information with regard to the research.

Data and Court cases: data obtained from the MoT; company Files (Memoranda of/ Articles of association) from the MoT, FDRE Federal Supreme Court Cassation Division Decisions have been used thoroughly.

Ethiopian Laws: pertinent laws like Commercial Code, Proclamations, Regulations, and Directives are examined.

Relevant law of international benchmarks and code of best practices such as OECD, BIS, IFC and World Bank group papers have been assessed in brief.

Literature: books, journals, articles, thesis's, business news papers, websites have been also explored in a nutshell.

1.7 Literature Review

There are many researches written on governance of Share Companies but with regard to the directors' remuneration there is only one article which discusses about "over view of corporate governance in Ethiopia: the role, composition and remuneration of board of directors in Share Companies"⁴⁰. Though this is pioneer and relevant, it is general with regard to 'overview of corporate governance'. In addition, there are new developments and was focused mainly in financial companies, namely banks. Therefore, this paper is different from that article for one thing it specifically investigates the law and practice of remuneration of Share Company directors' remuneration and on the other hand it covered the new developments of the directors' remuneration nationally and internationally.

⁴⁰ Hussein Ahmed Tura, Over View of Corporate Governance in Ethiopia: The Role, Composition and Remuneration of Board of Directors in Share Companies, Mizan law review, Vol.6 No.1, (June 2012), abstract

1.8 Organization of the Study

The paper comprises five chapters.

The first chapter provides general proposal of the paper. It encompasses background of the study, statement of the problem, objective of the study, questions of the research, limitation, scope and significance of the study, methodology, literature review and organization of the study.

The second chapter presents an overview on companies in general including, definition, formation, structure, supervision and regulation, theories of governance, protection and equal treatment of shareholders and the role of directors and auditors in company governance. Along the parallel sides, it also deals with Share Companies overview in brief.

The third chapter offers an assessment on the general overview of company directors and their remuneration. In the first section it discusses definition, type, structure, role of directors. In the second section it explores, definition, theories, amount and level of remuneration of company directors.

The fourth chapter examines remuneration of Share Company Directors in Ethiopia. It assesses the law and the practice of directors' remuneration in Ethiopian financial and non-financial Share Companies while the fifth chapter draws conclusion and recommendation from the whole discussion of the paper.

Chapter Two

General Overview of Share Companies in Ethiopia

This chapter deals with the general nature of companies in general and Share Companies in particular, briefly. In the literature some use company while others use corporations or firms, instead of the first, to mention, English and American writers, respectively.⁴¹ In addressing the confusion some argue that the word ‘company’ includes ‘corporation’⁴² for the first is broader in scope whilst others assert “corporations is a wider concept than companies, hence, all companies are corporations but not all corporations are companies.”⁴³ Mindful of these arguments with no significant conceptual difference, the writer opted to employ both terms indistinguishably, throughout this paper.

2.1 Definition of a Company

Writers define ‘Company’ differently viewing it from the perspective they are studying. These stretched from simple definition of the corporation as ‘it has a legal personality in dependent of its shareholders and it exists within a legal framework’⁴⁴ to ‘an organization engaged in business and a legal entity endowed by government with certain collective rights and responsibilities.’⁴⁵ None of these definitions incorporate all features of the company. Rather both include some important definitional elements that cannot tell the full-fledged meaning of a company alone.

A company is, after all, a collection of assets which have arisen as a result of capital contributions from the shareholders and retained profits arising from the trading activities.⁴⁶ As a result it may consist of two or more natural persons identified under common name; it can also be owned by a single person, or it can have hundreds, or thousands, of owners or

⁴¹ Pettet, Supra note-4, p14

⁴² American Jurisprudence, Vol.-, No.18, 2nd Ed. (jurisprudence Publishing, Inc 1965), p.551; cited in Nigusie Tadesse, Major Problems Associated with Private Limited Companies in Ethiopia: The law and the Practice, (Unpublished, AAU, 2009), p91

⁴³ Pettet, Supra note-4, p14-15

⁴⁴ Black’s Law Dictionary, 9th Ed., p391

⁴⁵ Micklethwait and Wooldridge, Supra-note-5, pxvi

⁴⁶ Pettet, Supra note-4, p53

shareholders.⁴⁷ From these discussions it is possible to show some characteristics of modern company, even if to have universally accepted definition is easier said than done. As Martin puts:

1. *It is a legal entity, with a 'personality' separate from that of its members.*

It can therefore:

a) *make arrangements to govern its own activities;*

b) *sue and be sued;*

c) *purchase, hold and dispose of assets in its own name;*

d) *hire staff, agents and contractors;*

e) *Enter into commercial contracts in its own corporate name.*

2. *It has transferable shares, which (subject at times to shareholder agreements) enable shareholders to transfer part or all of their ownership of the corporation without affecting its existence.*

3. *It has independence from its shareholders, so that the corporation's survival is not dependent on the continuing life of those shareholders.*

4. *It has limited liability, so that the shareholders have no direct liability in respect of the actions of the corporation, its debts, its contracts or the outcomes of its actions.*⁴⁸(Emphasis added)

Correspondingly, in most legal systems, a company is incorporated with limited liability and separate legal entity, whilst it holds its assets for the ultimate benefit of the associated rights of its membership.⁴⁹ It is also possible to argue that legally speaking the company is not owned by shareholders, rather it is person for its own status irrespective of the existence of shareholders and shareholding provided that shareholders own the interests in their respected contributions (shares or stocks) in the company.⁵⁰ It has perpetual existence which does not depend up on the death, insolvency or retirement of any or all shareholders or directors.⁵¹ Countries permit to set up different types of companies with in their jurisdiction and provide them various names based on their respective legal systems, economic policies, political ideologies, economic realities

⁴⁷ Roger L Miller and G.A. Jentz, Business Law Today: the Essentials, 6th Ed., (Thomson USA ,2003), p 503

⁴⁸ Calder, Supra note-7, p8

⁴⁹ Miller & Jentz, Supra note-47

⁵⁰ Langdon Dean A., Single Member Limited Liability Companies and Financial Distress, (2011), p1 available at <http://amicuscreative.com/> accessed on December 09, 2013

⁵¹ Miller & Jentz, Supra note-47,

etc.⁵² The conditions and rules for such institutions to hold legal personality are, therefore, highly reliant on the aforementioned factors.

From the Ethiopian perspective, for instance, the Commercial Code recognized six forms of business organizations⁵³ and two forms of companies⁵⁴ of which Share Company is one. In this chapter, the writer discusses the general overview of Share Companies in a nutshell as follows:

2.2 Meaning of a ‘Share Company’

‘Share Company’ has different names in various jurisdictions with almost similar features, for instance, it is called Public limited Company in UK,⁵⁵ Publicly held corporation in USA, the Aktiengesellschaft (AG) in Germany⁵⁶ and the Soci t  Anonyme (SA) in France.⁵⁷ Consequently, it would be sound to conclude that Share Companies are known in most legal systems though designated by different names and have various forms and types with common features as there are diverse jurisdictions. Almost in all jurisdictions, save some differences, Share Company is a company limited by shares and registered according to the company law of a given jurisdiction, which is a corporate body, having legal personality separate from its members, and the liability of the members to contribute to its assets in an insolvent liquidation is limited to the amount unpaid on any shares held by them.⁵⁸

⁵²Getahun Seifu, Revisiting Company Law with the Advent of Ethiopia Commodity Exchange (Ecx): an Overview; Mizan Law Review, Vol. 4 No.1, (March 2010), p107

⁵³Com.C, Supra note-17, Art.210 et seq.

⁵⁴Hamilton, Supra note-22; The types of companies are general partnership, limited partnership, Share Company, Private limited company. On the contrary others, including the writer, also argue that only Private limited company and Share Companies are forms of companies recognized under the Ethiopian Commercial Code. Partnerships are association of persons while companies are association of capitals. In companies there are relatively many members and structured administrative structures. Company is legal entity distinct from members called perpetual succession but in partnership no separate entity. In companies members are liable to the extent of their promised or actual contribution only while in case of partnership unlimited liability of partners. Free transfer of shares is a characteristic of company but limited right to transfer in case of partnership etc.

See Tadesse, Supra note-42, p93

⁵⁵Pettet, Supra note-4, p15

⁵⁶Hamilton, Supra note-22,p18-19

⁵⁷ Jean-Pierre Le Gall and Paul Morel, French Company Law, 2nd Ed., (UK, Longman group, 1992), p81-264

⁵⁸Pettet, Supra note-4, p15

Indeed, the drafter of the Ethiopian Commercial Code (Professor Escara) eloquently pointed out that, the Share Company section of the Commercial Code was independent of all debates over codification because laws governing Share Companies exist in all countries.⁵⁹

Correspondingly, the Commercial Code, defines a Share Company as “*a company whose capital is fixed in advance and divided into shares and whose liabilities are met only by the assets of the company; the members are only liable to the extent of their share holding.*”⁶⁰ The definitional elements include, inter alia, the capital of a company must be determined before its coming into existence and that it should be divided into shares; corporate liability and shareholders’ limited liability. If the Share Company is a bank, the Banking Business Proclamation provides additional requirements, “in which the capital is wholly owned by Ethiopian nationals and organizations wholly owned by Ethiopian nationals and registered under the laws of, and having its head office in, Ethiopia.”⁶¹

Once the definitional requirements are met the next step is formation requirements which will be the subject of the next section.

2.3 Share Company Formation and Structure

A Share Company comes in to existence when the promoters and founders undertake planned and conscious efforts to fulfill the legal and factual preconditions at an assortment of stages. The stages in the formation of a Share Company comprises promotion, fixing the capital and dividing it into shares incorporation or registration, capital subscription or floatation, commencement of business in which each stage has its own process.

The first stage of a Share Company formation is promotion which could be defined as “the discovery of business opportunities and the subsequent organization of funds, property and managerial ability into a business concern for the purpose of making profits therefrom.”⁶² Accordingly, the persons who are responsible for the company’s coming into existence are

⁵⁹Peter winship, Back Ground Documents of the Ethiopian Commercial Code of 1960,(HSIU, faculty of law, Artistic Printing Press, Ethiopia,1974), p60

⁶⁰Com.C, Supra note-17, Art.304

⁶¹ Banking Business Proclamation No. 592/2008, FDRE Federal Negarit Gazzeta 14th year No.57, Art.2(5)

⁶²Bernadette C. Vaz (Prof.), Formation and Incorporation of a Company, available at <http://www.bcvaz.in/company> accessed on September 21, 2013

known as ‘promoters’.⁶³ The term promotion as such refers to the sum total of activities by which the business enterprise is brought in to existence including: *first*, discovery of business idea: It begins with the conception of an idea or business opportunity.⁶⁴

Second, detailed investigations: Once the idea has been conceived through investigation made to establish the soundness of the proposition in terms of technical feasibility and commercial viability, Study market demand, availability of raw materials, machinery etc. Then after investigation is completed, most of the time, the findings are presented in a type written report, known as project report or feasibility report which helps in judging whether proposition will yield fair return on the investment and for the risks undertaken. It is also helpful in procuring licenses and finance from governmental agencies.⁶⁵

Third, once the promoters are convinced, they take steps to give the idea a practical shape, they persuade other persons to join hands with them and get the invention made, ‘assembling’. They may also acquire some patent rights. In similar terms financial plans are prepared with respect to capitalization, capital structure, time and method of capital issue etc. The financial requirements are estimated and the sources from which the money will come are decided.⁶⁶

In this regard, the Ethiopian Commercial Law uses the term founders by stating “those who signed in the memoranda of association and subscribe the whole of the capital have the legal status of founders”⁶⁷ Furthermore, in case the company is to be formed by public subscription persons who sign on the prospectus have the status of founders and this has a wide scope of covering who has initiated plans or facilitated the formation of the company albeit they are outside the company.⁶⁸ The Ethiopian law is open to cover any professional who participated in the inception of the business irrespective of the degree of participation.

However, it appears illogical to make a person, who barely (like professionals of law and accounting) facilitated the formation of the company and remain outside of the whole activities

⁶³Dine, Supra note-11, p86

⁶⁴Seyoum Yohannes, On Formation of a share company in Ethiopia, Journal of Ethiopian Law, vol.22 No. 1, (2008), p102

⁶⁵Ibid

⁶⁶ Seyoum, Supra note-64, p102

⁶⁷Com.C, Supra note-17, Art.307 (2)

⁶⁸Id, Art.307 (3 and 4)

of pre-incorporation, liable “severally and jointly”. Unless the liability is directly related to the extent of degree of participation, it puts individuals off supporting company formation, in any way, due to fear of greater liability which discourages incorporation. Rather than making such all inclusive approach of liability, it would have been better if it had left a room for interpretation by courts on pragmatic case by case basis.

From the perspective of formation of companies, countries have their respective rules, procedures and ways. Some of these could be mentioned as formation of companies between the founders (promoters) themselves, by public subscription or by both methods.

According to the Ethiopian Commercial Code a Share Company can be formed in two ways with different legal consequences. The first one is among the founders where by the law requires them to fully subscribe the fixed capital, to show in the memoranda of association that all the shares have been allocated and the sums have been deposited in a bank in the name and account of the company under formation, attached the valuation of the contribution in kind, and they have provided with all administrative organs etc.⁶⁹It is conceivable that if the Share Company is to be formed among the founders it is a business which requires relatively less capital.⁷⁰

The second is through public subscription where by the founders invite the public at large, through the instrument of prospectus, to raise the pre-fixed capital of the company according to Art.317 and Art.318 of the Commercial Code. There are other more formalities to be met in Art.319 up to Art.322 of the Commercial Code.

Besides, there are common (whether it is among the founders or public subscription) requirements, that are expected to be fulfilled, for the Share Company to be formed like minimum capital (50, 000 Ethiopian dollars) and setting the nominal value of shares⁷¹, minimum number of founders (5 persons).⁷²It should be underscored that the minimum capital requirement in financial Share Companies is increased to millions. For instance in insurance companies the

⁶⁹Com.C, Supra note-17, Art.312 (1) (a) and (b) cum. Art.316 and Art.315

⁷⁰This assertion is emanated from the fact that, in relative terms, usually the founders are less in number than the general public invited to subscribe for the shares. Consequently, for projects which require huge capital the broad based share holder participation is crucial.

⁷¹Com.C, Supra note-17, Art.306

⁷²Id, Art.307(1)

minimum paid up cash capital and deposited in a blocked bank account in the name of the insurer is increased to Birr 60million for general insurance, Birr 15million to long term insurance and 75million to obtain license for both.⁷³ In addition, the capital has to be fully subscribed and one quarter, at least, of the par value of the cash contribution has to be paid up and deposited in a bank in the name of the would be company.⁷⁴

With regard to the requirement of minimum capital there are divergent arguments. Critics contend that the limit is not only contravening current international standards and best practices but also discourages new investment and pools of capital resources.⁷⁵ Whereas proponents assert that legal minimum capital requirement is provided with the view to safeguard the interest of the creditors of the company⁷⁶ and nurture confidence in financial markets as shareholders are not personally liable to the company's creditors.

The writer supports the latter argument for it is sound to make minimum limits of capital so as to protect the interest of creditors who transact with the company coupled with the recognition of limited liability and corporate veil presence. It is also imperative to encourage huge capital accumulation for gigantic businesses that can compete in the international arena even if the minimum capital requirement is diminutive to meet the international capital requirements. In line with this, Mr. Seyoum Yohannes, concluded that:

*The reasons for requiring minimum initial capital are twofold. The first is preserving creditors from becoming involved with companies that are financially too frail. The second is to prevent investors from choosing to form a Share Company when it is too cumbersome and expensive for their intended operations. The minimum initial capital of 50,000 Birr, which the Ethiopian law requires to this end, can achieve neither of the purposes above today. Hence, there is a need to either increase the amount to reflect the current reality or follow the alternative mechanism used in the USA, according to which, the company is simply required to be 'adequately capitalized', subject to consequences where it is found to have been too thinly capitalized.*⁷⁷ (Emphasis added)

⁷³Minimum Paid up Capital for Insurers Directives No.SIB/34/2013, Art.4

⁷⁴ Com.C, Supra note-17, Art.312 (1) (a) and (b)

⁷⁵Gebeyaw Simachew Bekele, A Critical Analysis of the Ethiopian Commercial Code in Light of OECD Principles of Corporate Governance, unpublished, (Institute of Advanced Legal Studies School of Advanced Study University of London, 2012), p3

⁷⁶Seyoum, Supra note-64, p110; Tadesse, Supra note-42, p99

⁷⁷ Seyoum, Supra note-64, p125

The second stage of company formation is in-incorporation or registration that includes various formalities to be complied with of which preparation of company documents (memoranda of association, articles of association, prospectus) with the help of various experts/advisors, submitting applications with registrar are of high importance.⁷⁸ On the date of incorporation (which is stated on the certificate), the company is ‘born’ and becomes capable of exercising all the functions of an incorporated company.⁷⁹ Then incorporation of a Share Company becomes a reality by which the company is endowed with legal personality with all rights and duties according to the Commercial Code.⁸⁰

To this end, the formation of a company is a straightforward administrative process, involving the delivery of, inter alia, the company’s memoranda of association, articles of association, prospectus, and an accompanying statement, in the prescribed form of the name and residential address of the person or persons who are to become the first directors etc.⁸¹ As per Art. 324 of the Commercial Code, registration serves as publication and shall have effect of “...legal existence and personality notwithstanding that all the legal requirements relating to the formation of the company have not been complied with.”

It should be obvious from the outset that the articles of association set out the internal rules as to the operation of the company and, for example, cover matters relating to meetings, such as quorum and length of notice, voting, and matters relating to directors such as appointment and retirement, remuneration, proceedings.⁸² The publication of the registration through the official commercial Gazzeta is no more a requirement for a registered Share Company to commence business operation or it can legitimately make public offerings (immediately it acquires legal personality) pursuant to Proclamation No. 686/2010.⁸³

When the Commercial Code came up with the concept of Share Company, the main objective was to bring together large amount of capital to finance huge projects that would be difficult, if not impossible, to be accomplished by individual investors either through public subscription or

⁷⁸ Available at <http://trinscommerce.wikispaces.com/file/view> accessed on September 21, 2013

⁷⁹ Simon Goulding, *Company law*, 2nd Ed., (Great Britain, Cavendish Publishing Limited, 1999), p28

⁸⁰ Com.C, Supra note-17, Art.312 through Art.324

⁸¹ Id, Art.313 and 314 cum. Art.323

⁸² Pettet, Supra note-4, p89

⁸³ Commercial Registration and Business Licensing Proclamation No.686/2010, FDRE Federal Negarit Gazzeta 16th year No.42, Art.9

among the founders which could be inferred from its provisions.⁸⁴ Such a peculiar feature of Share Companies can be understood from the provisions of the code providing for minimum amount of capital which shows it is an association of capital and not of persons, easy transfer of shares, save some restrictions pursuant to the law or memoranda/articles of association, which may result in impermanent and plethora of shareholders and allowed to issue company bonds/debentures according to Art.429-44 of the Commercial Code.⁸⁵

The registered company has its own structure. In this regard, Henry Hansmann and Reinier Kraakman pointed out five core structural characteristics of the business corporation, namely: legal personality, limited liability, transferable shares, centralized management under a board structure, and shared ownership by the contributors of the capital.⁸⁶ Once a Share Company is formed the next question would be how the Companies are governed. In the following section the writer will discuss regulation and supervision of Share Companies which are the major characteristic of company governance.

2.4 Regulation and Supervision of Share Companies

Different writers define corporate governance in general, regulation and supervision of companies in particular, from various perspectives based on similar factors, for it has become a well-discussed and controversial topic in both the popular and business press.⁸⁷ Due to the fact that, a number of definitions have been put forward and experts' failure to reach in a single universally accepted definition, one author summarized the obscurity as follows:

Even agreeing on a generally accepted definition of governance has proven to be difficult. Because experts in different disciplines are notorious for not communicating with each other, corporate governance concepts have evolved simultaneously in various directions and there is a dearth of well-established concepts in this field. For example, legal experts approach governance predominantly from the angle of conflict of interest, economists tend to address agency costs and information asymmetry, accountants propose measures aimed at improving the reliability of information, and ethicists are concerned with morals.

⁸⁴Fekadu Petros G., Ethiopian Company Law, (Ethiopia, Fareast trading Plc, February 2004 Eth.C), p51-53 (Amharic translation by this writer); see also Winship, Supra note-59, p61 '1st paragraph' for the drafters note in this regard

⁸⁵ Fekadu, Supra note-84, p51-53 (Amharic translation by this writer)

⁸⁶ Henry Hansmann and Reinier Kraakman, What is Corporate Law?, (Yale Law School center for Law, Economics and Policy research Paper No.300,2004), p5

⁸⁷ David Larcker and Brian Tayan, Corporate Governance Matters: a closer look at Organizational, p1

Financial managers have offered their own definition, one that links governance and value creation.⁸⁸ (Emphasis added)

Commentators still mark corporate governance as an indefinable term, something like love and happiness of which we know the essential nature, but for which words do not provide an accurate description.⁸⁹ Besides, corporate governance covers a vast array of scholarship, government policy and law which lay various claims to the proper emphasis of corporate governance, the nature of the company and problems of internal control.⁹⁰

Others define corporate governance as all about an alignment i.e. about the system of legal or other mechanisms which ensure that the interests of the managers or [directors] of the company are aligned with those of the shareholders.⁹¹ Similarly, others assert that perhaps more fundamental to understand the meaning of corporate governance than any list of institutions is to grasp the purpose of corporate governance.⁹² In line with the latter, in all countries, the institutions of corporate governance serve two indispensable and ultimately undividable objectives: enhance the performance and ensure the conformance of corporations in the country where by:

The institutions of corporate governance facilitate and stimulate the performance of corporations – the principal forces behind economic wealth and growth in society – by creating and maintaining a business environment that motivates managers and entrepreneurs to maximize firms’ operational efficiency, returns on investment, and long-term productivity growth; ... ensure corporate conformance with investors’ and society’s interests and expectations by limiting the abuse of power, the stealing or siphoning-off of corporate assets, the moral hazard, and the significant wastage of corporate-controlled resources (so-called “agency problems”). These are the losses and distortions that the self-serving behavior of managers and other corporate insiders can be expected to impose on investors and society in the absence of sound corporate governance; Simultaneously, the institutions of corporate governance establish the means to monitor managers’ behavior to ensure corporate accountability and provide for the cost-effective protection of investors’ and society’s interests vis-à-vis corporate insiders.⁹³ (Emphasis added)

⁸⁸Jean-Paul Page, *Corporate Governance and Value Creation*, (USA, University of Sher Brooke , 2005), p60

⁸⁹Jean Jacques du Plessis et al, *Principles of Contemporary Corporate Governance*, 2nd Ed. ,(Cambridge, 2011), p3

⁹⁰Le Talbot, *Critical Company Law*,(Routledge-Cavendish, UK, 2008), p107

⁹¹ Pettet, *Supra* note-4, p145

⁹²Oman, *Supra* note-25, p3

⁹³*Ibid*

Taking into consideration recent developments and its important components, corporate governance has been defined by one author in a nutshell as “The system of regulating and overseeing corporate conduct and of balancing the interests of all internal stakeholders and other parties (external stakeholders, governments and local communities) who can be affected by the corporation’s conduct, in order to ensure responsible behavior by corporations and to achieve the maximum level of efficiency and profitability for a corporation.”⁹⁴

Corporate governance can be understood, in sum, as serving both to determine what society considers to be acceptable standards of corporate behavior, and to ensure that corporations comply with those standards.⁹⁵ Company’s governance also deals with the system of regulating and overseeing corporate conduct, balancing the interests of all internal stakeholders and other parties who may be affected by the corporation’s conduct in order to ensure responsible behavior by corporations and to achieve the maximum level of efficiency and profitability for a corporation.⁹⁶

Consequently, good corporate governance helps to prevent corporate scandals, fraud, and potential civil and criminal liability of the company.⁹⁷ From the empirical point of view, there is ample evidence that there are real economic benefits in following good practice in corporate governance – by doing so, managers potentially will be able to add significant shareholder value and investors will be prepared to pay a premium for investments in companies in which good corporate governance practices are followed.⁹⁸

The need for effective enforcement in turn comprises two related sets of issues that require policy-makers’ careful attention: how best to combine – and where to draw the line between – voluntary and mandatory mechanisms of corporate governance, and how best to combine judicial and regulatory means of enforcement.⁹⁹ The question of enforcement also lies

⁹⁴Plessis et al, Supra note-89, p10

⁹⁵Oman, Supra note-25, p3

⁹⁶ Plessis et al, Supra note-89, p10

⁹⁷Frederick D.Lipman and LKeith Lipman, Corporate Governance Best Practices: Strategies for Public, Private, and Not-for-Profit Organizations, (John Wiley & Sons, Inc., USA, 2006), p3

⁹⁸Plessis et al, Supra note-89, p19

⁹⁹Oman, Supra note-25, p19; It is worth noting that there are, principally, two approaches of corporate governance: mandatory or rule-based approach and voluntary or ‘soft law’ based approach. In the mandatory or rule-based approach companies are uniformly required to abide by a set of legal rules. On the other hand, in the voluntary or ‘soft law’ approach complying with the governance code or guidelines is not mandatory, but that disclosure

of course at the heart of the very distinction between relationship- and rules-based systems of governance.¹⁰⁰

Regulation is another important concept in Company governance, which is becoming source of debate in the area. Writers diverge on what constitutes the appropriate form of corporate regulation, too. But there are common feature of regulation stipulated by various writers. To put it in summery wording of Deakin and Cook:

*In the present context the term ‘regulation’ may be taken to refer to the control of corporate and commercial activities through a system of norms and rules which may be promulgated either by governmental agencies (including legislatures and courts) or by private actors, or by a combination of the two. The direct involvement of the state is not a necessary condition for the existence of regulation in this sense, since rules may be derived from the activities of industry associations, professional bodies or similarly independent entities.*¹⁰¹ (Emphasis added)

Furthermore, contemporary corporate governance reports, guidelines, commentaries and legislative packages strongly emphasize the link between sound corporate governance practices and success within the corporation and throughout the economy.¹⁰² Prudent regulation and supervision is the heart of corporate governance. The effect of corporate governance on corporate performance has long been of great interest to financiers, economists, behavioral scientists, legal practitioners and business operators though there is no consensus over what constitutes an effective corporate governance mechanism that induces agents or managers to consistently act in the interest of share value optimization.¹⁰³

In the Ethiopian context, the regulatory and supervisory power of Share Companies incorporation and operation is entrusted to the Ministry of Trade (for instance preparing model articles of association, accepting the legal documents and checking if these are inconformity with

relating to compliance is. In this regard companies have the option to comply with the standards and individual provisions or explain the reason for non-compliance with any of the provisions. The issue of ‘flexibility’ is one reason behind the adoption of a voluntary code. Since companies subject to the codes often differ significantly in terms of size, structure and organization, it is unlikely for a “one size fits all” approach to achieve its desired outcome.

¹⁰⁰Id,p20

¹⁰¹ Plessis et al, Supra note-89, p157

¹⁰² Id, p159

¹⁰³Livia Bonazzi and Sardar M.N. Islam, Agency theory and corporate governance A study of the effectiveness of board in their monitoring of the CEO; *Emerald Journal of Modeling in Management* Vol. 2 No. 1, (Emerald group publishing limited, 2007), p7

the law, registering new companies, regulating crossholding of shares among holding companies, regulating directors' remuneration etc.)¹⁰⁴ On the other hand, regulation of financial Share Companies is under the regulation and supervision of NBE.¹⁰⁵ Financial Share Companies are under strict regulation and supervision of the NBE by whom many rules are being enacted repeatedly. For instance, with regard to banking business directive about contribution in kind, legal reserve, computation of the risk weighed asset limitation of accommodation, limitation of investment bank, naming of officers, approval of appointment of independent auditors, limits on loans to related parties, limit on board remuneration and number of employees who sit on the bank board, minimum capital requirement for banks etc. are among the numerous directives, so far, issued by the NBE.¹⁰⁶ Likewise, only in the past fiscal year, 2012/13, the insurance industry saw the issuance of three different directives namely, a 36-month time limit for the reduction or relinquishing of shares in excess of five percent and a scheme for information exchange by insurers on outstanding premiums, were covered in two directives; a third directive increased the minimum paid-up capital required to provide general and long-term insurance to 60 million Br and 15 million Br, respectively.¹⁰⁷

To sum up, sources of corporate regulation are different from country to country. In Ethiopia, for instance, they include: the Commercial Code¹⁰⁸, Banking Business Proclamation No.592/2008 which encompasses detail provisions with regard to director's duties and liabilities, shareholder rights and remedies, auditors, managements, NBE establishment Proclamation and its amendments, Commercial Registration and Business licensing Proclamation No.686/2010, Directives etc. Likewise, it also encompasses self regulation including voluntary associations and auditing standards which have an influence on the corporate governance in Ethiopian Share Companies.

¹⁰⁴Com.C, Supra note-17, Arts.99, 323, and 447, 353(7), 314(2),344 and 318-387

¹⁰⁵Establishment Proclamation to Amend National Bank of Ethiopia No. 591/2008, FDRE Negarit Gazeta 14th year No.50, Art.5(7)

¹⁰⁶ For more and detail information see <http://www.nbe.gov.et/directives> accessed on October 26, 2013

¹⁰⁷ Ibid

¹⁰⁸It should be understood that all companies are required to adhere to the provisions of the Commercial Code, save some clear amendments or repeals, whether financial or non- financial Share Companies. In addition to the commercial law financial Share Companies are required to comply with other laws including, proclamations, regulations and directives issued to regulate them.

Not surprisingly, Company governance has become an issue of worldwide importance though scholars fail to come up with universally accepted definition of the term. Such lack of any synchronization regarding definition and form of corporate governance emanates due to, inter alia, diverse theoretical underpinnings of corporate governance and its complexity. It is, therefore, crucial to explore some theories to have clear understanding of philosophical foundations and appreciate the debates well, which will be discussed in the next section briefly.

2.5 Theories on Company Governance

Corporate governance can be influenced by vigilant integration of theory and empirical study. It should be noted that the main merit of theories is sought to provide explanation of corporate governance by analyzing some important issues from various perspectives. They are important in identifying of appropriate corporate governance model by which they affect the degree of state interference that is deemed appropriate in the conduct of company affairs, as well as the range of interests that compose the `interests of the company'.¹⁰⁹ Several theories have been developed by various scholars of various disciplines from the perspective of corporate governance of which the following are the major ones:

2.5.1 Shareholders Theory

In its modern version, a corporate governance system based on value creation places shareholder interests above those of the other stakeholders (i.e., creditors, employees, suppliers, customers, and society as a whole).¹¹⁰ Put in its simplest form, corporate governance is the systems and processes put in place to direct and control an organization in order to increase performance and achieve sustainable shareholder value.¹¹¹ As a result, shareholders wield absolute power and by delegating this power to the members of the board of directors, the shareholders have the last word over all the company's activities and can reap the wealth resulting from the value creation.¹¹² Indeed, because they shoulder most of the risk, shareholders have every right—within the law—to exclusively enjoy, benefit from, and dispose of the entity they created.¹¹³

¹⁰⁹Janet Dine, The Governance of Corporate Groups, (Cambridge University Press, Virtual Publishing, 2003), p3

¹¹⁰Page, *Supra* note-88, p6

¹¹¹Martin Fahy et al, Beyond Governance: Creating Corporate Value through Performance, Conformance and Responsibility, (England, John Wiley & Sons, Ltd, 2004), p163

¹¹²Page, *Supra* note-88, p6

¹¹³*Id*, p11

According to the shareholder theory any act of corporate governance should focus, primarily, on safeguarding of shareholders' interest which is the heart of corporate governance per se. Shareholder theory regards a Company as an extension of individual private property.

However this could not escape from pragmatically instigated criticisms like: shareholders are not the only ones who make investments in the corporation and the competitiveness and ultimate success of a corporation is the result of teamwork that embodies contributions from a range of different resource providers including investors, employees, creditors, suppliers, distributors, and customers.¹¹⁴ According to this line of argument, any assessment of the strengths, weaknesses, and economic implications of different corporate governance frameworks needs a broader analytical framework which includes the incentives and disincentives faced by all stakeholders.¹¹⁵

2.5.2 Stakeholders Theory

As the name indicates stakeholder theory extends the narrow center of attention, shareholder value, to stakeholders taking into consideration the interests of scores of groups and individuals who have stake in the company favoring shared value creation in the society in general. Companies are no longer the instruments of the shareholders alone but exist within the society and doing business with in the society and in the environment.

Accordingly, the purpose of a company is to serve and coordinate the interests of its various stakeholders such as shareholders, employees, creditors, customers, suppliers, government, and the community.¹¹⁶ Stakeholder theory is, therefore, an idea that each one of these is important for the existence and sustainability of the business whereby stakeholders can create together something that none of them can create alone. Inconformity with this the stakeholders in corporate governance can create a favorable external environment which is

¹¹⁴ Maria, Maher & Thomas Andersson, Corporate Governance: Effects on Firm Performance And Economic Growth, (OECD,1999), p8 Available at: <http://www.oecd.org/dataoecd/10/34/2090569.pdf> Accessed on October 19, 2013

¹¹⁵ Ibid

¹¹⁶ Yenesew Ferede , the Impact of Corporate Governance Mechanisms on Firm's Financial Performance: Evidence from Commercial Banks in Ethiopia , un published, (Ethiopia, Addis Ababa University, 2012), p15

conducive to the realization of corporate social responsibility and sustainable profitability of the company's business.¹¹⁷This theory views a company as social entity.

Correspondingly, some authors divulge that successful and sustainable organizations [companies] need to demonstrate a willingness to involve stakeholders in decision-making; to embrace a culture of transparency and accountability; to be fair and consistent in relations with stakeholders; and to have an organizational infrastructure that ensures "corporate trust."¹¹⁸ Companies are required to meet the needs of the present generation without compromising the interest of the future generation which in turn demands companies and actors of corporate governance to develop a range of strategies for dealing with this intersection of societal needs, the natural environment, and the corresponding business imperatives which are the central focus of company governance in accordance with the stakeholders theory.

Though this theory is gaining more attention, Critics argue that it will be unrealistic to accommodate the divergent interest of stakeholders (since the difficulties result from how to administer different stakeholders with various needs and demands) or it may undermine the welfare of the company where by managers or directors may use stakeholder reasons to justify poor company performance.¹¹⁹ More recently, stakeholder approach emphasizes stakeholders that can contribute to the long term performance of the company and shareholder value, and the shareholder approach also recognizes that business ethics and stakeholder relations can also have an impact on the reputation and long term success of the corporation.¹²⁰

2.5.3 Agency theory:

Corporate governance denotes the system, by which the company is controlled and governed, but in dispersed-ownership companies, like Share Companies in Ethiopian case, it carries the additional connotation that the managers and directors oblige special control, otherwise they will likely pursue their own interests.¹²¹The identification of the separation of ownership and control was the starting point for the principal-agent affiliation of company owners and those who run it.

¹¹⁷Ibid

¹¹⁸Yilmaz Argüden, Boardroom Secrets Corporate Governance For Quality of Life, (UK, Palgrave Macmillan, 2009), pX

¹¹⁹Maria et al, Supra note-114, p10

¹²⁰Id, p6

¹²¹Pettet, Supra note-4, p5

From the earliest days of the corporation, scholars, practitioners, and business executives have been worried as to how to control the unfettered agent.¹²² Where agents advance their own interests ahead of those of their principals and economic theory assumes that this will normally be the case in the absence of effective constraints that will give rise to ‘agency costs’.¹²³ In the corporate governance context, agency costs may result from incompetence, opportunism or ‘empire-building’ (which consists of increasing the size of the business to gain prestige or to make it takeover proof, rather than to benefit the shareholders) on the part of the agent.¹²⁴

According to this theory the owners are principals while managers and directors are agents with personal interests, ‘sometimes selfish and sometimes greed’. As a result there should be certain mechanism which reduces losses arising from agency problems including tie remuneration, levels of benefits and also manager’s incentive schemes by rewarding them financially or offering share options that aligns financial interest of the agents to motivate them for better performance.¹²⁵ According to the remark of Livia Bonazzi and Sardar M.N. Islam:

In agency theory, a well-developed market for corporate controls is assumed to be nonexistent, thus leading to market failures, non-existence of markets, moral hazards, asymmetric information, incomplete contracts and adverse selection among others. Various governance mechanisms have been advocated which include monitoring by financial institutions, prudent market competition, executive compensation, debt, developing an effective board of directors, markets for corporate control, and concentrated holdings. Developing an effective board of directors remains an important and feasible option for an optimal corporate governance mechanism.¹²⁶ (Emphasis added)

In line with this, corporate governance refers to those legal (and other) mechanisms which constrain managerial discretion and require the pursuit of shareholder value and anything which reduces accountability of managers to shareholders is deemed inefficient.¹²⁷ Advocates of this theory argue that the agents need to be monitored and controlled to guarantee that the principals’

¹²² H. Kent Baker and Ronald Anderson (Editors), Corporate Governance: A Synthesis of Theory, Research, and Practice, (USA, John Wiley & Sons, Inc,2010), p175

¹²³ Andrew Johnston, International Corporate Law and Financial Market Regulation: EC Regulation of Corporate Governance, (UK, Cambridge University Press, 2009),p25

¹²⁴ Ibid

¹²⁵ Lex Donaldson and James H. Davis, Stewardship Theory or Agency Theory: CEO Governance and Shareholder Returns; Australian Journal of Management, 16, 1, (June 1991,The University of New South Wales), p50

¹²⁶ Bonazzi & Islam, Supra note-103, p7-8

¹²⁷ Johnston, Supra note-123,p21

best interests are served.¹²⁸ In line with this, it defines corporate governance narrowly, to refer to those legal (and other) mechanisms which constrain managerial discretion and require the pursuit of shareholder value.¹²⁹

In this regard corporate governance mechanisms are designed to make parallel the interest of shareholders and managers by which the agency problem will be halted or reduced through various mechanisms like choosing appropriate board composition, effective auditing, motivational schemes, inspecting work reports of the agents and information asymmetry, etc. Undeniably, an effective corporate governance framework can minimize the agency costs and hold-up problems associated with the separation of ownership and control.¹³⁰ According to this theory, therefore, reducing agency costs by controlling and incentivizing the agents is the overriding objective of corporate governance to pursue the purposes of the company and to satisfy all stakeholders' legitimate interests.

Nevertheless, critics of agency theory argue that the model only considers economic outcomes and ignores the ethical dimensions of managerial decision making.¹³¹ Yet, despite the alternative models and criticisms, agency theory remains the central paradigm in the finance literature when examining managerial decision making and the relationship that managers hold with the firm.¹³²

2.5.4 Stewardship Theory

The stewardship theory of corporate governance holds that, because people [agents] can be trusted to act in the public good in general and in the interests of shareholders in particular, it makes sense to create management and authority structures that, because they provide unified command and facilitate autonomous decision making, enable companies to act (and react) quickly and decisively to market opportunities.¹³³ Correspondingly, managers and directors of a company act as responsible stewards of the assets they control setting aside their own.¹³⁴ To this end, a manager essentially wants to do good job and to be good steward of

¹²⁸Calder, Supra note-7, p11

¹²⁹ Johnston, Supra note-123,, p21

¹³⁰Maria et al, Supra note-114, p7

¹³¹Baker & Anderson, Supra note-122, p4

¹³²Id, p4

¹³³Alan Calder, Corporate Governance: a Practical Guide to the Legal Frameworks and International Codes, (UK, MPG Books Ltd,2008), p10

¹³⁴Available at http://en.wikipedia.org/wiki/Stewardship_theory accessed on October, 012013

corporate assets which signifies the absence of inherent motivational problems.¹³⁵ Thus, stewardship theory holds that performance variations arise from the structural situation in which the executive is located facilitates effective action by the non-executive.¹³⁶ Practical corporate governance is the process of developing cost-efficient corporate governance structures for an organization and instituting “best practices” by weighing costs against benefits.¹³⁷ In addition director shall be trusted rather than controlled for effective corporate governance whereby no need of independent directors. Corresponding to this theory corporate governance should first and foremost inhabit on creating these favorable structures and best practice irrespective of the naming of the directors and shareholders relationships to avoid the problems of separation of ownership and control.

2.5.5 Market Theory

The market theory of corporate governance holds that it doesn’t really matter whether managers and [directors] see themselves as stewards or agents. Because shareholders will simply sell in the market the stocks and shares of those companies whose directors are not generating adequate returns for their investment.¹³⁸ According to this theory, corporate governance mechanisms should emphasize on the appropriate mechanism of facilitating the market mechanisms. To the extent that this theory was genuinely held, it was fatally undermined by the corporate scandals at the turn of the century: shareholders in Enron (including many of its employees) were unable to sell their shares (many of which were held in pension plans) once it became clear that the company’s governance was wholly inadequate.¹³⁹

To sum up the discussion, it should be noted that each of the separate theories discussed throws light on some aspect of governance and they have contributed to the overall development of corporate governance in Practice. Furthermore, it should be understood that there is difficulty of arriving at any general, all inclusive, theory of corporate governance, given the inherent complexity of the Subject. One feature of its complexity is that companies combine economic and social roles coupled with the diversity of governance systems and process around the world.

¹³⁵Donaldson & Davis, Supra note-125, p51

¹³⁶Id, p51

¹³⁷Lipman, Supra note-97, p4

¹³⁸Calder, Supra note-7, p11

¹³⁹ Ibid

Forms of corporate governance are shaped nationally by their economic, political and legal backgrounds, by their sources of finance, and by the history and culture of the countries concerned.¹⁴⁰ Every theory has, therefore, its own strengths and weaknesses through which various notions of corporate governance have developed compared to global standards. All theories claim superiority of their models, but it can be concluded that none of them is mutually exclusive of the other, namely no single model can work perfectly.

To this end, these theories are found sprinkled in provisions of various laws of states. It is then far from misgiving, to hold that any act of corporate governance should take into account the premises of every theory of corporate governance without disregarding the premises of others with the objective of aligning as nearly as possible the various interests of individuals, companies, society and the environment in designing effective and efficient corporate governance mechanisms.

The Ethiopian Commercial Code is shareholder centered and disregards the interest of stakeholders except creditors and minimal mechanisms of reducing agency costs and high inclusion of influences of stewardship theory which result in exclusion of outside independent directors in board rooms.¹⁴¹ By allowing individual shareholders to sell their shares in an open stock market, the Commercial Code has also incorporated some premises of market theory.¹⁴² In general terms the Commercial Code is a collection of rules and principles taken from both Continental and/or Anglo American legal systems carefully chosen having in mind the Ethiopian condition and best interest no matter where they come from, it is presumed to take into consideration all theories of its time.¹⁴³

¹⁴⁰ Thomas Cane, Theories of Corporate Governance: the Theoretical Foundations, (Great Britain, Routledge Taylor & Francis Group, 2004), p ix-x

¹⁴¹ It should be remembered that, according to Art.362, 363, 364 directors are accountable to the laws, shareholders and the company. These provisions undermined the interests of other stakeholders like suppliers, customers, employees, the community and the environment.

¹⁴² Com.C, Supra note-17, Art.463

¹⁴³ Winship, Supra note-59, p61

2.6 Equitable Treatment of Shareholders and Minority Protection

The people who provide the money to run the business of the company are called members or shareholders or in some jurisdictions are called stockholders. They put money into the business by buying shares from the company and their rights and liabilities are governed by the constitution of the company contained in the memoranda and articles of association¹⁴⁴ and other relevant laws. The corporate governance framework should ensure, therefore, the equitable treatment of all shareholders, including minority and foreign shareholders and should have the opportunity to obtain effective redress for violation of their rights.¹⁴⁵

Minority shareholders are among the corporate constituencies that could be victims of influential shareholders and/or directors. because, it is usual (though not universal) for a share to carry voting rights whereby many of the decisions necessary for the running of a company can be arrived at by a majority vote of the shareholders taken at a meeting.¹⁴⁶ In sum, minority shareholders are those shareholders who, irrespective of the amount of capital they provide, are unable to exercise any significant form of control within the company.¹⁴⁷

Therefore legal and institutional framework that provides sufficient protection to minority shareholders against vices of influential shareholders and directors is required. The law is also expected to ensure equitable treatment of all shareholders, especially for minority shareholders. In every decision that affects the company's governance and performance there should be equitable treatment of the shareholders, either controlling/influential or minority, taking in to consideration their respective interest in it.

In stating the equitable treatment of shareholders Page aptly wrote:

Shareholders are the owners of the company, and each one has the right to demand to be treated as such and to benefit from the advantages associated with ownership. Accordingly, the governance system must guarantee that all shareholders benefit from the same advantages and, moreover, that they develop a sense of belonging. In addition to the protection provided by various laws and

¹⁴⁴Dine, Supra note-11, p4; for instance in the Ethiopian perspective there are various legal mechanisms like the Commercial Code, proclamations, regulations, directives in addition to the internal laws of the company.

¹⁴⁵The OECD Principles of Corporate Governance: Principle III., (2004)

¹⁴⁶Dine, Supra note-11, p4

¹⁴⁷L. Timmerman and A. Doorman, Rights Of Minority Shareholders In The Netherlands III A, p182, available at <http://www.ejcl.org> accessed on October 10, 2013

*regulations, minority shareholders count on the company's governance system to ensure that all the players have the same rights and are treated equitably—that is, that no shareholders enjoy special advantages, particularly with regard to access to information... and no shareholder should benefit from special advantages.*¹⁴⁸(Emphasis added)

Good corporate governance framework needs to protect minority shareholders from rent extraction by either managers or controlling shareholders while at the same time encouraging efficient investment by stakeholders.¹⁴⁹ The means by which this is attained varies widely across countries and, even within a single country, across industrial sectors and each country has through time developed a wide variety of capital market mechanisms and financing arrangements, legal and regulatory frameworks, and other mechanisms to address these agency problems.¹⁵⁰ The concept of minority shareholder protection is relative and can only be explained in relative terms.¹⁵¹

One of the familiar mechanisms is 'derivative action' which refers to legal mechanisms which allow minority shareholders to change the balance of power within the corporation (at least temporarily) on the company's behalf.¹⁵² It is noteworthy that derivative action differs from ordinary commercial litigation and from representative actions (such as class actions) which may seem superficially to be similar.¹⁵³ In derivative actions, the claims belong to the corporation, not to the complaining shareholders.¹⁵⁴ In principle no individual member can sue in respect of any wrong done to the company which is ratifiable by ordinary resolution of the members, but in exceptional cases members may bring an action against those doing wrong to the company, in their own name, but ultimately on the company's behalf.¹⁵⁵ They could take this derivative action if the company was not in a position to protect its own interests because the wrongdoers were in effective control.¹⁵⁶ The exception was strictly construed and generally required a fraud against

¹⁴⁸Page, Supra note-88, p15

¹⁴⁹Maria et al, Supra note-114, p30

¹⁵⁰Ibid

¹⁵¹Fekadu Petros Gebremeskel, 'Emerging Separation of Ownership and Control in Ethiopia Share Companies: Legal and Policy Implications', *Mizan Law Review* Vol.4, No.1, (march 2010), p16

¹⁵²Talbot, Supra note-90, p198

¹⁵³Michael P. Dooley and E. Norman Veasey, 'The Role of the Board in Derivative Litigation: Delaware Law and the Current ALI Proposals Compared', *The Business Lawyer*, Vol. 44, No. 2, (February 1989), p504

¹⁵⁴ Ibid

¹⁵⁵ Talbot, Supra note-90, p200

¹⁵⁶ Ibid

the company when the company was not in a position to protect its own interests because the wrongdoers were in control.¹⁵⁷

There are some legal treatments and protections of shareholder rights in Ethiopian law which comprises the same series and classes of shareholders having the same rights and subsequent changes require prior approval by such class holders.¹⁵⁸ Every shareholder has a right to participate in the net profits and to a share in the net proceeds on a winding-up plus preferred right, in proportion to his/her holding, to allotment of cash shares issued on an increase of capital.¹⁵⁹

According to Art.352 of the Commercial Code, articles of association shall provide for each of several groups, if any, to elect at least one representative on the board of directors. Correspondingly, shareholders representing 20% of the capital of the company have the right to elect one auditor under article 368(2) of the Commercial Code. Both of these rights are marked as right to vote and to participate in company governance by minority shareholders.

Moreover, shareholders representing 10% of the share capitals of a company have two rights. First, they have the right to request the court to call the general shareholders meetings. Second, they have the right to petition to the Ministry of Trade to appoint examiners to investigate and report the scandals of the company; hence the Ministry of Trade may require guarantees from petitioners for the expenses of the investigations.¹⁶⁰

Furthermore, minority shareholders have the right to apply to court for setting aside of general meeting resolutions within three months if it is found that contrary to the law, the memoranda or articles of association and they may provide sufficient security for costs, if the court requires so.¹⁶¹ Similarly, minority shareholders have the right to withdraw from the company if they dissent from the resolutions concerning any change in the objects or nature of the company or the transfer of the head office abroad and have their shares redeemed, at the average price on the stock exchange over the six months before. Where the shares are not quoted on the stock

¹⁵⁷ Id, p219

¹⁵⁸ Com.C, Supra note-17, Art.335(2)and Art.426

¹⁵⁹ Id, Art.345 and Art.470 (1)

¹⁶⁰ Id, Art.381 Cum. 391(2)

¹⁶¹ Id, Art.416 (2-5)

exchange, they shall be redeemed at a price proportionate to the company's assets as shown in the balance sheet for the last financial year provided that they comply with the legal preconditions articulated therein.¹⁶²

This may trigger another question, ‘What if the minority decided to sell on auction and refuse their shares to be redeemed by the company at the average price on stock exchange?’ The law is silent but it should be permitted for the investors (minority shareholders) can be able to generate more. On top of that the free transfer of shares allowed by the law can be restricted by Articles of association or by resolution of an extraordinary meeting¹⁶³ which would endanger the prime interest of minority shareholders who stand against the majority despite the fact that they have legitimate claim.

Nonetheless, the Commercial Code prohibited any proceedings instituted against directors without a resolution of a general meeting to that effect.¹⁶⁴ Awkwardly, article 365(3) of the Commercial Code blocked minority shareholders right to institute proceedings against the liable directors where 20% of share capitals of shareholders vote against the resolution. These are contrary to the internationally recognized corporate governance principle of right to bring ‘derivative action’ of minority shareholders to protect the interest of the company irrespective of the reaction of influential shareholders/directors provided certain legitimate conditions are fulfilled. Derivative action could prevent the company not only from the mere abuse of directors but also illicit collusions with third party debtors and/or creditors of the company not to claim or easily accept outside claims that can possibly and legitimately averted.

In case of financial institutions there is, relatively, strict regulation by the NBE through the instruments of banking Business Proclamation No.592/2008 and other directives in controlling of block holders and managers. According to the Proclamation “No person, other than the Federal Government of Ethiopia, may hold more than five percent of a bank’s total shares either on his own or jointly with his spouse or with a person who is below the age of 18 related to him by consanguinity to the first degree” and will be subjected to the meeting of the fitness criteria and

¹⁶²Id, Art.463

¹⁶³Id, Art.333

¹⁶⁴Id, Art.365(1)

approval of the NBE of the transfer of shares that make a person influential shareholder.¹⁶⁵ Besides, influential shareholder is defined by Art.2 (11) of the same Proclamation, as “a person who holds directly or indirectly two percent or more of the total subscribed capital of a bank.” Any person who violates the time Limit for reduction and/or Relinquishing Shareholdings beyond the stipulated time frame will face fine and imprisonments stated in the banking business proclamation Art.58(7).¹⁶⁶

These have great connotation in protection of minority shareholders and the policy shift towards the need to broad based capital formation through public subscription in the banking sector. On the contrary, however, such regulation is loose in the non-financial Share Companies which in turn illustrates that the Commercial Code is outdated in terms of protection of minority shareholders from the manipulating influential shareholders to build investors confidence in the emerging separation of ownership and control in such Share Companies.

By profoundly analyzing certain scientific indices used by other researchers, Fekadu Petros remarkably concluded that “...the protections lacking under the Commercial Code are the most important ones that can minimize minority shareholder exploitation by managers and/or block holders, it can be said that the law is inadequate in minority shareholder protection.”¹⁶⁷ Likewise, Professor Tilahun Teshome added that there is no, in practice, special protection accorded to minority shareholders rather they have only rights that are given to other shareholders and they are not activists for their rights. They are dominated by the influential shareholders and have lack of information how to exercise the common rights of shareholders.¹⁶⁸

2.7 Duties and Responsibilities of Directors and Auditors

A Share Company cannot be able to run by all its members like other business organizations due to the separation of ownership and control. There are three distinct organs in charge of Share Company governance, to be specific, general meeting of shareholders, board of directors and

¹⁶⁵Banking Business Proclamation No.592/2008, FDRE Federal Negarit Gazzeta 14th year No.57, Art.11(1), 4(1), and 10(1) respectively; Licensing and Supervision of Banking Business: requirements for Licensing and Renewal Of banking Business Directives No.SBB/56/2013, Art.2.3; Time Limit for Reduction and/or Relinquishing Shareholdings Directive No.SBB /47/2010

¹⁶⁶Time Limit for Reduction and/or Relinquishing Shareholdings Directive No.SBB /47/2010, Art.4

¹⁶⁷Fekadu, Supra note-151, p21

¹⁶⁸ Interview with Professor Tilahun Tosheme, former member of board of directors at Abyssinia Bank Share Company and an Advocate, AAU, Monday , done in his office, on November 12, 2013

external Auditors.¹⁶⁹ One of the shareholders' role in governance is to appoint the directors and the auditors and to satisfy themselves that an appropriate governance structure is in place.¹⁷⁰ These two organs play crucial role in corporate governance in general and Share Companies in particular due to the separation of ownership and control. In stating the role of the board of directors one author portrayed that:

The board plays a major role in the corporate governance framework. The board is mainly responsible for monitoring managerial performance and achieving an adequate return for shareholders, while preventing conflicts of interests and balancing competing demands on the corporation. When necessary, the board also has the authority to replace the management of the corporation. For example, if management is under-performing, then the board can replace the current management with new, presumably more efficient, management that will maximise the firm's profits. The board is also responsible for reviewing key executive and board remuneration.¹⁷¹ (Emphasis added)

Most companies adopt rules that make an initial sharing-out of the powers of the company between the board of directors and the shareholders in general meeting. It does so in a way which clearly makes the board of directors the primary decision-making organ of the company.¹⁷² One way of perking corporate governance up is having proactive, informed, investigative, accountable, far-sighted and learning board of directors.

Having similar roles and responsibilities Share Company Directors in Ethiopia are elected and removed by general meeting of shareholders except the first board of directors appointed by the statute of the company and approved by the meeting of subscribers.¹⁷³ Directors have the duty of managing the company, elect or revoke the chairperson unless the meeting of subscribers or

¹⁶⁹ Com.C, Supra note-17, Art.347-509: at this juncture the writer would like to let know that even if the Commercial Code does not use the term 'corporate governance', the contents of these articles reveal that board of directors, auditors and general meeting are fitting to the governance aspect of Share Companies. along the same lines, the team of Ethiopian company law experts charged to comment on the first draft on the Commercial Code recommended that the change of title of the chapter 4 to "company governance" from "directors, auditors and shareholders' meeting" see also Team of 14 National Experts, Recommendations and Position Paper of the Business Community on the Revision of the Commercial Code of Ethiopia, (Addis Ababa Chamber Of Commerce & Sectoral Associations,2008), p28 (comment No.32) and the article and Memorandum of association of 9(Nine) non-financial Share Companies have that same content i.e. refer these organs as their respective Companies governing bodies.

¹⁷⁰Calder, Supra note-133, p12

¹⁷¹Maria et al, Supra note-114, p20

¹⁷²Pettet, Supra note-4, p113

¹⁷³Com.C, Supra note-17, Art.350 and Art.354

shareholders elects so.¹⁷⁴ Furthermore, directors are prohibited from being partners with joint and several liabilities in rival companies or compete against the company either on their own behalf or on behalf of third parties unless authorized by the general meeting.¹⁷⁵ In addition, directors are responsible for:

- (a) Keeping regular records of the management and of meetings;
- (b) Keeping accounts and books;
- (c) Submitting the accounts to the auditors and an annual report of the company's operations including a financial statement to the meetings;
- (d) Convening meetings as provided in the articles of association;
- (e) Convening a general meeting without delay where three quarters of the capital are lost;
- (f) Setting up the reserve funds required by law or the articles of association;
- (g) Applying to the court where the company stops payments with a view either to a composition with creditors or the winding-up of the company.¹⁷⁶

Likewise, they are jointly and severally liable for their failure to discharge any duties imposed to them by the law, articles of association, memoranda of association, and resolution of general meetings with the care due from an agent.¹⁷⁷ Similarly, according to Banking Business Proclamation directors have, have a duty to care, diligence, honesty, integrity and good reputation.¹⁷⁸ The general conception of board of directors and their remuneration will be the subject of the next chapter, (see 3.1.4 Role of directors), due to their key importance in Company conformance, performance and governance.

The other way of improving corporate governance and thereby trimming the opportunities for corporate deceptions and agency problems down, which is correlation of the role of directors, is by having effective, independent and objective auditing system. To ensure that, the capital raised by a company is used for lawful purposes, auditors are under the duty to audit it. The auditor's duty is, without doubt, to certify whether the financial accounts present a 'true and fair' picture

¹⁷⁴ Id , Art.347 and Art.48

¹⁷⁵ Id, Art.355

¹⁷⁶ Id, Art.362

¹⁷⁷ Id, Art.364

¹⁷⁸ Pro. No.592/2008, Supra note-165, Art.14

of corporate operations.¹⁷⁹ The role of auditors, in effect, is also to ensure whether Board of Directors and the management are acting responsibly towards the shareholders' investment interests i.e. no leakages are taking place on the investment side; no wastages on the expenditure side and whether there is propriety of the expenditures or not.¹⁸⁰ By maintaining vigilance and objectivity the auditors can add value, reduce uncertainty and risk to shareholders and other stakeholders by ensuring that the company's internal controls are strong and effective.¹⁸¹

Viewing such a pivotal role in corporate governance, the Ethiopian Commercial Code requires one or more auditors and their assistants, whether physical or legal parson, to be appointed and their remuneration, be fixed by the general meeting.¹⁸² But, according to Art.369 of the Commercial Code, meeting of subscribers shall also elect auditors that serve until the first annual general meeting is held. On the other hand, persons like founders, contributors in kind, beneficiaries holding special benefits, directors of the company or one of the subsidiaries or of holding company, spouses, relatives etc. are not competent to be auditors of a company nor they can appoint directors or managers in the company they audit.¹⁸³

Being prone to criminal and civil liability of breaches of professional secrecy and other obligations auditors have the following general duties as enshrined in Ethiopian Commercial Code:

(a) audit the books and securities of the company; (b) to verify the Correctness and accuracy of the inventories, balance sheets and profit and loss accounts; (c) to certify that the report of the board of directors reflects the correct state of the company's affairs; (d) to carry out such special duties as may be assigned to them; report to the general meetings; ...to inform directors of irregularities; calling general meeting...¹⁸⁴ (Emphasis added)

In conformity with that, good corporate governance is largely the result of a sound internal monitoring system, an effective regulatory environment and adequate disclosure requirements.

¹⁷⁹Elaine Sternberg, Corporate Governance: Accountability in the Marketplace, 2nd Ed., (Great Britain, the Institute of Economic Affairs, 2004), p72

¹⁸⁰Tariq Hassan, Corporate Governance and Role of Auditors; Speech made at the ACCA Centenary Conference held in Lahore University of Management Sciences on 10 May 2004 available at <http://www2.accaglobal.com> accessed on October 10, 2013.

¹⁸¹Ibid

¹⁸²Com.C, Supra note-17, Art.368 and Art.372

¹⁸³Id, Art.370

¹⁸⁴Id, Art.373 and Art.374 through Art.380

The significance of mandatory compliance with laws and regulations through a strict monitoring and regulatory system is crucial. In order to ensure that a company's accounts serve the purpose for which they were intended, that is, to give both the members of the company and the public accurate information about the financial position of the company, the accounts must be subject to professional scrutiny.¹⁸⁵

It is beyond common understanding that the ultimate power in a company belongs to the shareholders, mainly because of their right of ownership in the capital. The next question would be how should this power be exercised in the face of separation of control and ownership? The board of directors exercises the legal and practical control that belongs to the shareholders¹⁸⁶ to run the company in the interest of the shareholders without endangering the legitimate interests of other stakeholders which will be the subject of the next chapter.

¹⁸⁵Goulding, Supra note-79, p311

¹⁸⁶Page , Supra note-88,p20

Chapter Three

General Reflections on Board of Directors and their Remuneration

In the preceding chapters the writer discussed general overview of companies. Though the capital in companies is owned by the shareholders, in large companies there is an inevitable separation of ownership and control. The real control of companies is in the hands of directors which are considered as agents of the shareholders responsible to run and oversee it on behalf of them. This chapter consists of two sections of which the first deals about general overview of directors and then the second illustrates about their remuneration.

2.1 General Over View on Board of Directors

It is a salient characteristic of our social arrangements that the owners of property often place its management in the hands of others due to manifold reason of which infancy, incompetence, lack of time and lack of the necessary expertise are the major.¹⁸⁷ Theoretically, the control of a company is divided between two bodies: the board of directors and the shareholders' general meeting though in practice, the amount of power exercised by the board varies with the type of company.¹⁸⁸ Shareholders, who are said to "own" the firm, have virtually no power to control either its day to day operation or its long-term policies.¹⁸⁹ Instead, the key players in the formal decision making structure are members of the board of directors subjected to the entitlement of [Shareholders'] approving or disapproving of only some board actions¹⁹⁰ at the general or extraordinary meetings. Who are these directors and what do roles they play in pursuing the companies missions and objectives within the general societal and environmental perspectives are some of the issues discussed in the next sub sections.

3.1.1 Definition of a Director

To begin with, the definition of the term 'director' has enormous implication upon the rights and responsibilities of directors. The Ethiopian Commercial Code does specify the minimum and

¹⁸⁷W. Bishop and D.D. Prentice, Some Legal and Economic Aspect of Fiduciary remuneration; Modern Law Review, Vol.46 , No. 3, (may,1983), p289

¹⁸⁸Available at http://en.wikipedia.org/wiki/Company_director accessed on April 19, 2013

¹⁸⁹ Pettet, Supra note-4, p152

¹⁹⁰ Stephen M. Bainbridge, Why a Board? Group Decision-Making in Corporate Governance; Vanderbilt Law review Vol. 55 No.1, (UCLA school of law), p4

maximum number of directors in Share Companies as well as their duties and responsibilities whilst it remains silent as to the definition of a director.¹⁹¹ The code provides about their appointment, removal, powers and duties and states types of remuneration and mode of payment.¹⁹² Banking Business Proclamation and the NBE Directive defines a director as “Any member of the board of directors of a bank, by whatever title he may be referred to” which is circular.¹⁹³ Simply defining a ‘director’ as member of board directors without defining what a board of directors undertakes or is responsible for, is a circular definition. But this nebulous definition has also an advantage of encompassing all individuals having such a position.

UK legislation requires a public company to have at least two directors and a private company to have at least one director unless articles of association states otherwise but states its own definition, too.¹⁹⁴ Consequently, though laws of different countries have divergent stands with regard to the definition of directors the literature has raised some important points.

To begin with, the title ‘director’ is familiar in companies, put to different uses like, referring to rank, in management and taken as one rank out of the many levels within a company. To be precise, human resource director, executive director, director general, managing director, finance director are common.¹⁹⁵ Others take the term ‘director’ as one of group of managers at the highest level in a company who control it and are in charge of making decisions about how it is run.¹⁹⁶ Although persons running the company are usually called directors, other names are sometimes used, for instance, managers, governors, or committee of management.¹⁹⁷ Still others misunderstand the term director as one of the executives. The problem is that the term has been used very indiscriminately and thus, overtime, its very precise legal meaning has become devalued.¹⁹⁸ These are some of the misconceptions of directors and their inherent difference with

¹⁹¹Com. C, Supra note-17, Art.347 (2)

¹⁹²Id, Art.353

¹⁹³Proc. No. 592/2008, Supra note-61, Art.2 (6) Cum. Limits on Board Remuneration and Number of Employees Who Sit on Bank Directives No.SBB/49/2011, Art. 2.4

¹⁹⁴ UK, Companies Act 1985, section-282cumulative section-8(2)

¹⁹⁵ See for more illustration, <http://en.wikipedia.org/wiki/Director> Accessed on April 19, 2013

¹⁹⁶See <http://dictionary.cambridge.org/dictionary/business-english> accessed on April 19, 2013

¹⁹⁷ Charles Wild & Stuart Weinstein, Smith and Keenan’s Company Law, 14th Ed., (Pearson Education Limited, UK, 2009), p287

¹⁹⁸Bob Garratt, The Fish Rots From the Head: The Crisis In Our Boardrooms: Developing The Crucial Skills Of The Competent Director, 2nd Ed., (Great Britain, Profile Books Ltd ,2003), p xiii

management which is responsible for the day to day operation of a company's business within the ambit of its business objective, directors' supervision and strategic oversight.

Others use the designation 'director', to mention one of the "board members" which is the subject of this paper. According to business dictionary, a director is "an appointed or elected member of the board of directors of a company who, with other directors, has the responsibility for determining and implementing the company's policy."¹⁹⁹ This definition is pathetic in a sense that it gives directors with the responsibility of implementation of company policy which is primarily the duty of the management.

Black's law dictionary on its part, defines board of directors as "the governing body of a corporation, elected by the shareholders to establish corporate policy, appoint executive officers, and make major financial decisions."²⁰⁰ Collectively, a board of directors is, therefore, a body of elected or appointed members who jointly oversee the activities of a company or organization.²⁰¹

To sum it up, though it is difficult to give a unanimously accepted and a precise definition of who a director is, the term may be perceived by its clinical features and roles played by the person given the title. Hence, organizations around the world use the term 'director' to denote a member of their governing board-the person with ultimate accountability and liability for the performance and behaviors of the whole organization.²⁰² Likewise, the board of directors is a group of individuals which is responsible to strategically direct a company, overseeing of managements and stewardship towards the shareholders and a company in particular as well as society and environment in general. Directors act on the basis of resolutions made at directors' meetings, and derive their powers from the corporate legislation and from the company's articles of association.²⁰³ Board of directors could only have supervisory role and only managerial role, or could have both managerial and supervisory role based on the corporate policy of the concern jurisdiction.

In the next section the writer will consider, in brief the various, categories of directors.

¹⁹⁹ Available at: <http://www.businessdictionary.com> accessed on April 19, 2013

²⁰⁰ Black's Law Dictionary, 9th Ed., (2009), p196

²⁰¹ Available at: http://en.wikipedia.org/wiki/Company_director accessed on April 19, 2013

²⁰² Garratt, Supra note-198

²⁰³ Available at : <http://www.businessdictionary.com/definition/company> accessed on September 19, 2013

3.1.2 Types of Directors

There are various categories of directors like shareholder directors and non-shareholder directors. Based on the stock interest they have, shareholder directors are these directors that have shares in a company whereas non-shareholder directors, as the term itself indicates, are the ones that are not shareholders. The other category is ‘executive and non-executive’ based on role they play in the daily operation of the company; executive director acts as a director as well as member of the management and employee of the company but a non-executive would be there to provide expertise and experience for the board and are usually paid annual retention and their expenses are covered for giving their advice and attending board meetings.²⁰⁴ The other category is independent and non-independent from the stand point of their direct or in direct interest in the company. An independent director is a non-executive director who is not a member of management and who is free of any business or other relationship that could materially interfere with – or could reasonably be perceived to materially interfere with – the independent exercise of his/her judgment.²⁰⁵

Most importantly, there are two known categories of directors, namely an inside director and outside directors from the angle of their relationship to a company which are also the subject of discussion in this subsection. This category is different from the ‘Shareholder and non-shareholder’ category for inside director might be a non-shareholder but an employee of a company. Likewise, it is different from the ‘executive and non-executive’ category for inside director could be Shareholder but non-executive. But inside director is, a director who has an interest in a company emanated from being an executive or a shareholder, or any similar relationship that could impair his/her independent decisions. Some use the term independent directors to say outside director and inside director instead of executive director.²⁰⁶

To avoid these confusions, the writer employed these terms precisely. An inside director is, therefore, a director could be an employee, officer, major shareholder, or someone similarly connected to the organization. Inside directors represent the interests of the entity's stakeholders,

²⁰⁴ Andrew Keay, Company Directors’ Responsibilities To Creditors, (Routledge-Cavendish, UK, 2007), p6

²⁰⁵ Australian Securities Exchange, Corporate Governance Council, Corporate Governance Principles and Recommendations, 2nd Ed., (2007), p16

²⁰⁶ Rüdiger Fahlenbrach et al, the Dark Side of Outside Directors: Do They Quit Ahead Of Trouble? (January 2012), p2 available at <https://research.mbs.ac.uk/accounting-finance> accessed on December 20, 2013

and often have special knowledge of its inner workings, its financial or market position, and so on. An outside director is a member of the board who is not otherwise employed by or engaged with the organization, and does not represent any of its stakeholders.²⁰⁷ A typical example is a director who has no real direct or indirect interest in the company and acting as a director.

Independent outside directors bring outside experience and perspective to the board which keep a watchful eye on the inside directors and on the way the organization is run.²⁰⁸ Outside directors are often useful in handling disputes between managers, inside directors, or between shareholders and the board. They are thought to be advantageous because they can be objective and present little risk of conflict of interest. On the other hand, they might lack familiarity with the specific issues connected to the organization's governance. In particular, outside directors may have weaker incentives to expend effort, may have higher information acquisition costs, and may be more dependent on the CEO for their information.²⁰⁹

From Ethiopian perspective, the Commercial Code demands “only members of a company may manage the company” which has a tendency of excluding, at least does not require, independent outside directors.²¹⁰ Along the same lines, in financial Share Companies the NBE directive unequivocally prohibited employees of banks from being eligible to be a member of the board of directors.²¹¹ But the directive of NBE stated nothing about the inclusion of independent outside directors, or any equivalent category which in turn raises the question of board structure adopted in Ethiopia.

3.1.3 Board of Directors’ Structure

As discussed, in chapter two of this paper, problems stemming from the separation of ownership and control are described by the theory of agency and it is one of the main tasks of corporate law to master these agency problems and the inevitable costs caused by these problems (agency

²⁰⁷Michael Weisbach, Outside Directors and CEO Turn over, *Journal of Financial Economics* 20/88, (North-Holland, 1988), p432

²⁰⁸Available at http://en.wikipedia.org/wiki/Company_director accessed on April 19, 2013

²⁰⁹Fahlenbrach et al, Supra note-206

²¹⁰Com.C, Supra note-17, Art.347 (1)

²¹¹Limits on Board Remuneration and Number of Employees Who Sit on Bank Board Directives No. SBB/49/2011, Art.5

costs).²¹² An effective board is one that facilitates the effective discharge of the duties imposed by law on the directors and adds value in a way that is appropriate to the particular company's circumstances.²¹³ To ensure that the management is submitted to an effective monitoring institution, in terms of formal corporate structures, there are different board structures. Investigating jurisdictions around the world, Bob Garratt puts review of board structures with their respective weaknesses as follows:

(1) The non-executive board-wholly comprises non-executive directors, notionally independent, who decide policy and strategy ...it is weak where power is concentrated in the hand of the chief executive officer;

*(2) The executive board, mostly, found in family companies, owner directed business and the subsidiaries of multi-and transnational companies around the world. Its members are primarily executives which enable them to know what is happening inside the business. Nevertheless, there are chances of delivering their fiduciary duty through independent thought and, open, critical review of proposals to the board is low. It is weak in monitoring the outside world and is dominated by the managing director ;(3) two-tier or senate- which has upper board that deals with the policy and strategy issues and lower board that represents the various interests in the company; and (4) Unitary board-it assumes, backed by law, that all directors are and accept the same responsibilities and liabilities for the performance of the enterprises...independent directors are crucial to both the performance and conformance of the unitary board so that the interest of shareholders and other stakeholders are heard and protected.*²¹⁴ (Emphasis added)

In summary, one tier and a two tier model are common with their respective advantages and disadvantages. In one tier board structure; supervision, governance and management of the company are entrusted to a single body with no legal separation of duties.²¹⁵ The board of directors is chosen as a general body which consists of executive or inside directors, who are engaged in the daily management of the company, and of non-executive directors, who are

²¹²Jean J. du Plessis et al, German Corporate Governance in International and European Context, 2nd Ed.(Germany, Springer-Verlag Berlin Heidelberg, 2012), p8

²¹³ASEX, Supra note-205

²¹⁴Garratt, Supra note-198, p39-45

²¹⁵Gertrud Erismann -Peyer et al, The Insider's View on Corporate Governance :The Role of the Company Secretary, (Great Britain, Palgrave Macmillan, 2008), p181

expected to fulfill a supervisory role within the board.²¹⁶ Within one body, competence may be divided between different persons though this does not mean that the company has two tiers.²¹⁷ The 'unitary' board structure relies on an internal division of responsibility, typically between nonexecutive (corporate governance) and executive (business decision making) directors.²¹⁸ A good examples of one tier system is the US and UK structure of board which consists of executive directors (professional employees) and non-executive directors.²¹⁹ Other countries that operate (solely or predominantly) with the single-tier model include Spain, Cyprus, and Turkey.²²⁰

Conversely, two-tier system is composed of two top boards characterized by legal separation of supervisory function (supervisory board) and management function (management board).²²¹ Management board undertakes the daily management while the separate supervisory board is responsible for monitoring and advising the management board and the appointment and removal of management board members.²²² This system usually operates through a management board chaired by the CEO and composed of entirely of executive members, which is accountable to a supervisory board consisting largely or exclusively of non-executive and independent board members.²²³ The primary task of the supervisory board is, therefore, continuous supervision over company operations in all areas of activities.²²⁴ Metaphorically speaking, the supervisory board serves as a 'sparring partner' of the management board, as it is besides its advisory function, supposed to act as a counterbalance.²²⁵ More specifically, German law, [often cited as a model for two tier-structure], dictates that supervisory board members are not simultaneously a member of the management board, but instead have to monitor and control the members of

²¹⁶ Jean J. du Plessis et al, German Corporate Governance in International and European Context, 2nd Ed., (Germany, Springer-Verlag Berlin Heidelberg, 2012), p9

²¹⁷ Vutt, Margit, Legal Regulation of the Board Structure of Public Limited Liability Companies in the Light Of Regulatory Communication Between the European Union And Member States: Juridical International XI/2006, p.119

²¹⁸ Michael Armstrong And Helen Murlis, Reward Management, 5th Ed., (United Kingdom, Kogan Page Limited, 2007), p528

²¹⁹ Ibid

²²⁰ Richard Westlake, Guidance for the Director of Banks: IFC Global Corporate Governance Forum Focus 11, (IFC, 2013), p29

²²¹ Peyer et al , Supra note-215

²²² Ibid

²²³ Westlake , Supra note-220

²²⁴ Christine A. Mallin, International Corporate Governance: A Case Study Approach, (University of Birmingham, UK, 2006), p160

²²⁵ Plenssis et al , Supra note-216

the management board.²²⁶ Furthermore, the supervisory board members represent the company in all types of disputes with management board members, hire the auditor(s) and appoint management board members. The CEO may be also the member of the supervisory board but would not usually be its chair person.²²⁷ Thus, it seems fair to argue that the supervisory board represents the central inspectorate from the stakeholders' (including shareholders) point of view.²²⁸

Countries that have adopted two-tier board structures in their system are Germany, Austria, Netherlands²²⁹, and Indonesia.²³⁰ In these countries, for instance in Germany, the supervisory board members are faced with increasingly complex tasks and challenges, specifically due to regulatory challenges in the aftermath of various corporate scandal and the recent financial crisis.²³¹

Both the one-tier and two-tier board systems have inherent strengths and weaknesses.²³² While the one-tier system allows a flexible division of scopes of duties within the board and helps to put in place a common responsibility of executive and non-executive directors, the neutrality of supervisors can be questioned since the monitoring, appointment and removal processes have overtones of some kind of self-control and dubious self-organization.²³³ Thus, it can be asked if the representation of shareholders' interests is really guaranteed. The biggest concern relates to the role of the executive directors and whether they genuinely hold the CEO/MD to account, which is hard to sack your own boss.²³⁴ But the joint responsibility of executive and non-executive directors ensures that the necessary information will be available to all members of the one-tier board, and this is seen as another advantage.²³⁵

²²⁶ Christian Lazar et al, Remuneration of Non-executive Directors in German Listed firms: an Empirical note; HHL Research Paper Series in Corporate governance, No. 12, (may 20, 2013) , p3

²²⁷ Westlake , Supra note-220

²²⁸ Lazar et al, Supra note-226

²²⁹ Peyer et al , Supra note-215, p34

²³⁰ Westlake , Supra note-220

²³¹ Lazar et al, Supra note-226

²³² Plenssis et al , Supra note-216

²³³ Cf Kerstin Hartmann, Die Aufsichtsratsvergütung als Erfolgsfaktor im deutschen Corporate Governance System, (Peter Lang Verlag, Frankfurt 2003) 18, 31.; cited in Plenssis et al , Supra note-216

²³⁴ Westlake, Supra note-220; 'CEO' refers to-Chief Executive Officer while 'MD' stands for Managing Director of a company. CEO is called MD when s/he is member of the Board in addition to being a chief manager of the company.

²³⁵ Plenssis et al , Supra note-216,

A frequent criticism of two-tier structure is rather bureaucratic and hinders time-efficient decision making and it can enable also some manipulations by the management board, since the latter typically provides most of the information upon which the supervisory board's decisions are based.²³⁶ Similarly, the two-tier system might suffer from rigidity and a rather remote from control.²³⁷ In more technical terms: separate legal bodies for executive and non-executive managers may well amplify the asymmetric distribution of information between both, worsening the inherent principal-agent-problem.²³⁸ In contrast to that, a high degree of neutrality and a clear division of the respective duties of the two organs can be ascribed to the two-tier board system, which is based on the idea of a separate management board and a supervisory board. In addition, the supervisory board is also often dependent on the management board, especially as far as acquiring relevant and updated information is concerned.²³⁹

New comparative company law researches are revealing, notwithstanding structural differences between two-tier and unitary board systems, the similarities in actual board practices are significant.²⁴⁰ Both the unitary board and the senate board appoint members of the managerial body, either the management board in the two-tier system, or a group of managers to whom the unitary board delegate authority in the unitary system. The function of non-executive directors in one-tier board structures and supervisory directors in two-tier board structures is to fill the gap between the uninformed shareholders as principals and the fully informed executive managers as agents by monitoring the agents more closely.

In addition, both the unitary board and the supervisory board usually have responsibility for ensuring that financial reporting and control systems are functioning appropriately as well as the corporation is in compliance with law.²⁴¹ These structures are strikingly similar in roles and the differences are found in political environment and aspirations rather than board themselves.²⁴²

²³⁶ Martin Schulz and Oliver Wasmeier, The Law of Business Organizations: A Concise Overview of German Corporate Law, (Germany, Springer, 2012), p41

²³⁷ Comparative Study of Corporate Governance Codes Relevant to the European Union and its Members (January 2002), p4–5 cited in Jean Jacques du Plessis et al, Supra note-89, p88

²³⁸ Schulz & Wasmeier, Supra note-236, p41, foot note11

²³⁹ Supra note-237

²⁴⁰ Ibid

²⁴¹ Ibid

²⁴² Garratt, Supra note-198, p39

In view of that, it is pathetic to propose that one board structure is superior to the other. That is a ‘unitary board structure’ could not simply be rejected in favour of a ‘two tier board structure’ or vice versa, because deciding on a particular board structure will depend on many variables (for example, the size of the company, the quality of persons sitting as non-executive directors, the corporate culture within a particular corporation etc).²⁴³Therefore, the ‘fit-all board structure’ does not exist, but that does not mean that sound corporate governance principles to ensure an effective board structure could not be extracted generally.²⁴⁴

It is becoming a widespread agenda to include non-executive professional directors irrespective of the board structure adopted in a given jurisdiction. Because the tasks of the executive are challenging and time consuming that requires a profound business and other experiences. In this perspective, the demand for effective supervision is reflected in the latest regulatory initiatives though out the world in the aftermath of the recent financial crises. A key issue in all these plans is to strengthen the effective monitoring and control by non-executive directors. It seems fair to guess, that altogether this will substantially increase the demand for experienced and effective non-executive directors.²⁴⁵

There are also states which are in between the two board structures. For instance, France, Italy, and Spain have a priority for unitary boards although they offer other structures in their company laws whilst Switzerland imposes a strict two-tier structure to banks but leaves the choice to all other companies.²⁴⁶

According to the composition requirement of board of directors, the Commercial Code of Ethiopia has contentious articles. Only members of a company may manage the company which is a clear acontrario exclusion of non-members that is non-shareholders. Likewise, Art.348 (3) & (4) vividly articulates that “the general manager is an employee of the company and may not be a director” which is an indication that all members of the board of directors are non-executive directors or shareholder directors.²⁴⁷This claim can be affirmed by reading Art.349 of the

²⁴³Plessis et al, Supra note-89, p89

²⁴⁴Id, p91

²⁴⁵Lazar et al, Supra note-226 , p2

²⁴⁶Peyer et al , Supra note-215, p34

²⁴⁷ The same position is held by the Draft of the Commercial Code of the Federal Democratic Republic of Ethiopia under Art.348 (4), Another point worth noting is, the Amharic version of this article does not mandatorily exclude

Commercial Code which requires directors to deposit as security with the company their registered shares as is fixed by the memoranda of association (non-shareholders are precluded from sitting as a member of the board) which is further strengthened by the NBE directive which strictly excluded employees from being directors in the banking sector.²⁴⁸ In its preamble the directive made clear that ‘there is a need to separate board and executive functions, so as to ensure proper checks and balances, in banks.’²⁴⁹ Who should supply information to the board?

On the other hand, Art.363 (2) stipulates that “The articles of association shall specify whether the directors are jointly responsible as managers or agents of the company or whether one only of the directors is responsible.” From this perspective, if one director or more directors are specified to be responsible as managers, then, there will be a possibility of executive and non-executive directors which goes in clear incongruity with the above provision.

If no director is given a responsibility and others become non-executive directors the board structure of the Ethiopian Share Company will be “non-executive dominated” board which is operationally weak for lack of adequate information to discharge its duties. Conversely, if majority of directors are specified as managers, then the structure of the boards will be “executive dominated” board which is also another weak board due to domination of the managing director. This will be exacerbated by the absence of non-shareholder directors or independent outside directors who could alleviate the two predicaments.

The Commercial Code fails to clearly separate the role of the board chair man and Chief Executive Officer which is another shortcoming. As the name indicates, the role of the board chairperson is within the role of the board, specifically to chair ultimately the tasks, duties and responsibilities of board of directors in the company where as the role of the CEO is to manage the day to day conduct of the affairs of the company.

There could be the likelihood of three board structure in non financial Share Companies which is one aspect of anachronistic stance of the Commercial Code which fails to clearly specify what board structure is adopted either compulsorily or optionally, unless fixed in the forthcoming

from being a member of the board, unless it is the result of poor drafts man ship it will be another paradox within the same article and may open a room for interpretational controversy.

²⁴⁸Directive No.SBB/49/2011, supra note-211

²⁴⁹ Id, Preamble

Commercial Code.²⁵⁰ This in turn results in the absence of patent managerial and supervisory distinction of the board of directors under the Commercial Code.

In financial Share Companies employees are precluded from sitting as directors which may result in having non-executive board of directors. Purely non-executive director's board structure also suffers from lack of adequate information for making practical decisions. Nevertheless, this is vital in reducing conflict of interest and can serve as appropriate means to separate between the managerial and board functions²⁵¹ which in turn avoid unnecessary influence of the management. All the same, still there is no mandatory law for financial Share Companies to have outside directors who could be used as non-executive directors in one-tier board structures or supervisory directors in two-tier board structures to fill the gap between the uninformed shareholders as principals and the fully informed executive managers as agents by monitoring the agents more closely according to the agency theory.

Pragmatically speaking, there is an only one tier-board structure, governance boards, which comprises stockholders and has sub-committees to facilitate the task of director ship. There are no outside directors in our board rooms. There are technical advisory bodies, that have only specific tasks and contract based remuneration for temporary purpose like consultancy committee for building construction.²⁵²

Despite these momentary consensuses in one tier board, the legal frame work is living a room for confusion and mishandling of the legal loophole. Therefore, having legally recognized board structure is one important component of company governance in Ethiopian Share Companies. The remaining question is that what role directors can play, as a group or individual, with respect to the company performance and conformance which will be covered in the next section.

3.1.4 Role of Directors: General Perspective

In becoming directors, individuals should realize the important duties that they owe, the extensive powers they wield with the substantial obligations and responsibilities with which they

²⁵⁰ Nevertheless the Draft of the Commercial Code of the Federal Democratic Republic of Ethiopia appears with no change in this regard, unless some pertinent modifications made on the way.

²⁵¹ Directive No.SBB/49/2011, supra note-211, Preamble

²⁵² Interview with Professor Tilahun Tosheme, former member of board of directors at Abyssinia Bank Share Company and an Advocate, AAU, Monday, done at his office, November 12, 2013

must comply.²⁵³ In stating the role of a board and individual directors ABI, (Association of British Insurers), also articulated that “board of directors are appointed by shareholders to run companies and act in their interests with a fiduciary duty to act in the best interest of their shareholders when determining remuneration; it is their responsibility to promote the long-term success of the company, taking into account the interests of employees, suppliers, customers, community, the environment and the society.”²⁵⁴ According to this assertion, directors are bound to keep a balance between the conformance and performance objective of the company.

Though the legal responsibilities of boards and board members vary with the nature of the company, and with the jurisdiction within which it operates, good corporate governance requires competent board of directors as a supervising body for the executive management of a company.²⁵⁵

In corporate management theory, the idea that the board of directors should not only be a senior executive committee, but ought to take a broad-ranging, long term view of the company’s activities and objectives has been mooted.²⁵⁶ The long term enhancement and prosperity of the corporation for the benefit of all its stakeholders is the board’s primary goal.²⁵⁷ Accountability to all who directly contribute to the company’s activities, and for the company’s reputation and status, rests with the directors.²⁵⁸ In approving the indispensable directorial task and its wider stakeholder morality effect, Mills gives further details as follows:

It is [the board] the keeper of the company’s conscience and the measure of corporate morality. By setting the standards of corporate courage it delimits the management’s morale. From the boardroom to the shop floor, both productivity and performance are most closely affected by morale, which is most visibly affected by visible morality. The effective company meets its creditors on time, especially the small ones; does not abuse its suppliers or maltreat its physical environment; is clinically correct with its customers, employees, auditors, analysts, shareholders, lenders and taxmen.²⁵⁹ (Emphasis added)

²⁵³ Keay, Supra note-204, p4-5

²⁵⁴ Robert Talbut, Association of British insurers, ABI principles of remuneration (November,2012) ,ii (a)

²⁵⁵ Hussein, Supra note-40, P46

²⁵⁶ Dean, Supra note-13, p8

²⁵⁷ Ibid

²⁵⁸ Ibid

²⁵⁹ Mills, G, Controlling Companies, 1988, p21; Cited in Id, p9

Moreover, according to the stakeholders theory, directors are expected to give priority in assessments of the network of the stakeholders (who directly contribute to the company's performance and are affected by the company's output) in their company and the requirements and relative claims of each of them which urges careful handling so as to retain their trust and confidence for the future.²⁶⁰ The objective of directors as 'stewards' would be also to care of the company's property and to benefit the 'owners' (shareholders), the 'labourers'(employees), the 'tenants' (customers), the local community and the natural environment.²⁶¹

Any corporate governance system needs to enable businesses to be driven forward and if the board does not make a sufficient time and effort to construct an effective strategy and keep it under regular review, all the efforts of management and employees will not produce optimal results²⁶², if not out of results at all. Consequently, individuals who lack the capacity to contribute to a strategic vision for a company are not needed on its board.²⁶³The quality of individuals who are elected to the board has a direct correlation with the quality of advice and oversight the board provides to the management.²⁶⁴Even the technical experts and specialist executives can be asked to advise directors as and when required but cannot replace the broader remit of directors which has also been said to function as the 'corporate conscience' setting the overall standards and reviewing major plans from legal and ethical stand points.²⁶⁵

Furthermore, directors play irreplaceable monitoring role in comparison with managers including: providing a meaningful and independent check that focuses on the corporation's structure, process of management, and decision making techniques; second, the board should choose, evaluate, and, if necessary, discharge all senior corporate officers; third, it should review and approve major corporate policies and long-range objectives.²⁶⁶ Indeed, giving substance to the monitoring task of the board might be the most valuable contribution the law could make.²⁶⁷

²⁶⁰Id, p14

²⁶¹ Id, p70

²⁶²Id, p9

²⁶³ Id , p9

²⁶⁴ David Larcker and Brian Tayan, Corporate Governance Matters: a Closer Look at Organizational Choices and Their Consequences, (Pearson Education Inc., 2011), p95

²⁶⁵Dean, Supra note-13, p9

²⁶⁶Goldschmid, HJ, The Governance of the Public corporation: Internal Relationships in Schwartz, DE Commentaries on Corporate Structure and Governance: the ALI-ABA symposiums 1977-78, 1979, p174; as cited in Dean, Supra note-13, p9

²⁶⁷ Id, p10

It has been also argued that, to be effective monitors, directors will need intelligence, integrity with courage.²⁶⁸ In addressing the contemporary problems of corporate crisis, from the milieu of role of directors, Bob Garratt firmly and convincingly argues that:

*...the present global corporate governance crisis in the private and public sectors is a complex mixture of directorial ignorance, strategic incompetence, and greed....a key to resolving the present crisis is to induct, train, and appraise directors as true professionals and to accept the intellectual, moral and behavioral consequence of this. And...unless such a systematic upgrading of directorial competence and board performance is undertaken, then the west's economic and political systems will rapidly erode, with serious consequences for its global power.*²⁶⁹ (Emphasis added)

Several guides to directorship emphasize that directors are distinguished from management by their longer time horizon and broader strategic outlook consequently directors should not be appointed merely because they have succeeded in management roles or served in executive posts, but because they have the special foresight capability.²⁷⁰ Tricker has summarized the major functions of board of directors as “formulating corporate policy, developing strategic thinking, supervising business performance and accounting to owners and others.”²⁷¹ As can be noted vividly the first two are long-term forward-looking business roles whereas the second pair of tasks relates to the current activity as a whole.²⁷² It must be for the board to set business targets and plan for the long term while the management then focused on meeting those targets and keeping company operations running smoothly.²⁷³

To this end, the board’s functions to ‘direct, govern, guide, monitor, oversee, supervise and comply’ should be distinguished from management’s function to ‘manage the day to day business of the corporation’.²⁷⁴ To be successful, the board must have an appropriate balance of functional and sector skills capabilities and experience and be supported by committees (audit,

²⁶⁸ A.F. Conard, *The Supervision of Corporate Management: A Comparison of Developments in European Community and United States Law* (1984), 82 Mich. L.Rev., 1459, at p1468; cited in Christopher S. Axworthy, *Corporate Directors: Who Need Them?; The Modern Law Review*, Vol.51, No.3, (may, 1988), p278

²⁶⁹ Bob Garratt, *Thin on Top: Why Corporate Governance Matters And How To Measure And Improve Board Performance*, (Nicholas Brealey Publishing, UK, 2003), p1

²⁷⁰ Dean, *Supra* note-13, p61

²⁷¹ Tricker, RI, *Corporate Governance: Practices Procedures and Powers in British companies and their Boards of directors*, 1984; cited *Id*, p89

²⁷² *Ibid*

²⁷³ *Id*, p61

²⁷⁴ Plessis et al, *Supra* note-89, p91

remuneration and nomination) that have the necessary character, skills and knowledge.²⁷⁵ Therefore, directors have also common fundamental responsibilities to exercise a reasonable level of care, loyalty, and relevant skills (often referred to as “a director’s fiduciary duty”).²⁷⁶

In Ethiopia the role of directors is similar to what is discussed herein (see section 2.7 of this paper), so the writer opted to leave it to avoid redundancy.

Now the remaining question is, ‘is there anything directors receive from the company in lieu of the service they render and for the profound responsibility they shoulder? What should its amount be? Who determines its quantum, type and mode, could it be the same all over the world? These and other issues are addressed in the next section.

3.2 General Remarks on Remuneration Board of Directors

Though contentious, for the service they render directors may claim payment of some kind. The recent financial crisis has shone tremendous light upon the theory and question of directors’ remuneration policy in the financial sector where the level and type of remuneration provided in the run up to the crisis, and in some instances following it, has led to emotional and populist responses from policy makers and commentators alike.²⁷⁷ Starting by definition, general concepts of directors’ remuneration will be discussed in brief as follows.

3.2.1 Definition of Remuneration

‘Director’s remuneration’, in some jurisdictions, known as ‘director’s compensation’ or ‘executive pay’, lacks single definition, and the concept is a debatable one. Some take it as any payment made by a company to its directors by whatever name it is called and whether in cash, kind or money’s worth, or by way of perquisite, amenity or benefit or by discharging an obligation, amounts to ‘remuneration’.²⁷⁸ Others describe it as payment in fixed cash, like the current Ethiopian position in bank directors, which will be the subject of detail discussion in the

²⁷⁵ London Stock Exchange, Corporate Governance for Main Market and AIM Companies, (White Page Ltd, United Kingdom, 2012), p96

²⁷⁶ Westlake, *Supra* note-220, p2

²⁷⁷ Mark Sykes, Agency Theory And Remuneration Policy: Performance Incentives in the Financial Sector, p1 available www.tcd.ie/Economics/SER accessed on December 28, 2012

²⁷⁸ Chitvan Bakshi, Director’s Remuneration available at <http://legalservicesindia.com/article/article/director> accessed on January 1, 2013

next chapter. For that reason, one might not be surprised to find that there is no agreement on the definition of what constitutes Share Company directors' remuneration. From the first assertion, it is possible to comprehend that the term 'remuneration' includes service contracts as well as financial and non-financial compensation and incentives²⁷⁹ which embody several compensation components such as:

- *A basic remuneration (fixed remuneration) rewarding, among other things, the basic willingness to hold a director position. Within this context, the fixed remuneration is [not] performance-based.*
- *A function and effort-related remuneration as a reward for (i) participating or chairing a committee, and (ii) personal efforts, for instance, by means of attendance fees.*
- *A component dependent on firm performance, which can be further divided in a short-term and a long-term component. Short-term components focus on a performance measure for the fiscal year under review. The long-run component is supposed to ensure the development of sustainable firm performance. It takes into account more than one fiscal year in the performance measurement;²⁸⁰ (Emphasis added)*

But often times, if not always, directors obtain variable or fixed payments or both from the company either as statutory or conventional due to the gigantic duties and responsibilities shouldered on them.²⁸¹

To sum it up remuneration is, irrespective of the type and nomenclature, any payment that can be paid to the member of the board, for the service rendered in the face of the necessary and prudent regulation on its accomplishment for several reasons, like to prevent diversion of corporate funds for personal use and unduly excessive payments that can bring upheavals to the entire economy as seen in the recent financial crisis of 2008/09. Consequently, laws of some countries lay down the overall maximum of directors remuneration which can be paid by public companies or a

²⁷⁹Calder, Supra note-133, p79

²⁸⁰ Lazar et al, Supra note-226 , p10

²⁸¹ It should be noted the pressing question at this time is not whether directors receive payment or not but on other consequential issues like type, mode and quantum of the payment.

subsidiaries of a public companies while others either left it to the articles of association to set the maximum amount or totally to decide whether these are payable or not and if so, on what basis and type.²⁸² Pragmatically speaking, through various provisions legislative check is exercised on director's remuneration whereby it sets the limits for maximum and minimum remuneration under various conditions to ensure that the remuneration is in the interest of the public.²⁸³

Does remuneration have an effect on the performance and conformance of companies? Is there any theoretical justification to pay directors either as of right or privilege? These are discussed in the next sub section.

3.2.2 Theories of Remuneration

There are different theories of remuneration which justify the allegation that directors should be paid for their services though the amount and type of payment might be varied.

The first is *Reinforce theory* which puts forward that behavior which has a rewarding experience is likely to be repeated. Implication of remuneration in this theory is that high directors' performance followed by a determination to craft future directors' performance more likely.²⁸⁴ Remuneration reinforces the high level performance of directors and serves as an adequate incentive to company development as well as protection of stakeholders' interests.

The second is *Expectancy theory*. According to this theory, there is strapping link between rewards and behavior which illustrates motivation as a product of valance, instrumentality and expectancy.²⁸⁵ In this regard if the directors expect nothing after discharging their duties, it is unlikely to behave eagerly in pursuing the vision and mission of the company.

The third, *Agency Theory*,²⁸⁶ Focuses on the divergent interests and goals of the company's shareholders and directors by which director's remuneration can be used to align these interests

²⁸² Bakshi, Supra note-278

²⁸³ Ibid

²⁸⁴ Naha Speaks, Meaning and Theories of Remuneration Available At <http://Nehaspeakshr.Blogspot.com> Accessed On January 5, 2013

²⁸⁵ Ibid

²⁸⁶ Directors are agents of the company as a distinct entity not as an individual shareholder within it with their respective interests sometimes that may conflict with the interest of the shareholders. To mention non-

and goals.²⁸⁷ Furthermore, theory of agency dictates that remuneration paid to the director is called an agency cost i.e. the directors are acting on behalf of the company as agents for which they have to receive an incentive.²⁸⁸ If the company fails to pay them, the notion of humans as self interested and generally unwilling to sacrifice personal interests for the interest of others, which is both old age and widespread, comes to front to hinder the companies' performance.²⁸⁹ Correspondingly, proponents of this theory suggest that in order to increase the director's effort, remuneration should be sensitive to performance which assumes efforts and company's performance move in the same direction.²⁹⁰ According to the agency theory of firms, the price the shareholders must pay for hiring managers [and appointing of directors] to run the business on their behalf includes the costs of monitoring the potentially self-seeking behavior of those managers.²⁹¹

The fourth theory is *-Equity Theory*, which demonstrates that when a director perceives inequity in remuneration, it can result in lower productivity, higher absenteeism or increase in turnover thereby equity directly impacts motivation, commitment and performance of directors.²⁹² Proponents of equity theory argue that directors consider the ratio of their inputs (how hard they work) to their outputs (how much they get paid) and then compare that ratio to a referent, for example another employee, or an individual in another, similar company and they will respond by raising (if the payment is equitable) or lowering their work efforts, in order to re-establish equity.²⁹³

shareholder/outside directors are not within the realm of shareholders with a responsibility of rendering professional responsibility. Remuneration is one way of alignment of these interests and plays a pivotal role in creating sense of inclusiveness in the profits of the company they are working in. see theory of Agency-chapter two of this paper.

²⁸⁷Ruth Bender, How Executive Directors' Remuneration Is Determined In Two Ftse 350 Utilities_; Corporate Governance Journal, Volume 11 Number 3, (Blackwell Publishing Ltd ,July 2003), p207

²⁸⁸ Speaks, Supra note-284

²⁸⁹ Catherine M. Daily et al, corporate governance: Decades of dialogue and data, The Academy of Management Review, Vol. 28, No. 3, (Jul.20003), p371-382, available at <http://www.jstor.org/stable/300040727> accessed on December 21, 2012

²⁹⁰Ergun Dogan & Russell Smyth, Board Remuneration, Company Performance, And Ownership Concentration: Evidence From Publicly Listed Malaysian Companies; Asean economic bulletin , Vol. 19, No. 3 (December 2002), p321,

²⁹¹ Utset, MA, Towards a bargaining Theory of the Firm (19195) 80 Cornell Law Review 540, 546-47; as cited in Dean, Supra note-13, p62

²⁹² Speaks, Supra note-284

²⁹³ Ruth Bender, How Executive Directors' Remuneration Is Determined In Two Ftse 350 Utilities; Corporate Governance Journal, Volume 11 Number 3, (Blackwell Publishing Ltd ,July 2003), p207, p208

These four theories of remuneration justify that the payment made to directors is necessary for the sustainable and long-term performance and conformance of the company. According to the agency theory, directors of companies do not bear all the consequences of their decisions as they do not own all shares of the corporation. From this perspective, it is indispensable to establish various types of market and contractual mechanisms to motivate or monitor the agents so that they will better align their interest with those of shareholders and other stakeholders.

Currently, the argument against the payments of remuneration to directors seems to lose a ground from both logical/theoretical and practical standpoints. However, the argument for the directors' remuneration as of right is not immune from criticism. Then what are the arguments against and in favor of adopting the directors' remuneration as a matter of right or as privilege would be the subject of the next discussion.

3.2.3 Is directors' Remuneration a Right or a Privilege?

If remuneration is a right, directors can claim it as such at any time irrespective of the shareholders reaction and/or financial status of the company save some exceptions like criminal or disciplinary liabilities that entail punishment of any sort. On the other hand, if remuneration is a privilege, directors are entitled in specified circumstances such as when the company is earning profits/have dividend or when the articles of association or shareholders' general meeting allow them expressly.

There are divergent views on directors' remuneration of which critics diverge on the notion that 'directors are always entitled to payment of remuneration' as of right. As a director is not an employee of the company some writers contend that s/he is not entitled merely by holding office to any remuneration for the services he/she renders unless it is declared in the agreement of the company and directors or memoranda/articles of association dictates otherwise.²⁹⁴

Leaving it, to be decided by articles of association or ordinary [Shareholders] resolution, the House of Lords in one land mark case, *Guinness V Saunders and another (1989)*, stated that directors are not entitled to any remuneration at all if there has been no such resolution.²⁹⁵ Nor

²⁹⁴ Goulding, Supra note-79, p249

²⁹⁵ Pettet, Supra note-4, p149

will they be able to argue that they should succeed under a ‘quantum meruit’ for the value of their services.²⁹⁶

More severely some argue to the extent of ‘denying of remuneration’ if directors fail to show some contract or agreement to be inferred from the articles of association irrespective of the service they rendered for they are not employees of the company.²⁹⁷ The argument towards the privilege nature of remuneration is expounded as follows:

*It is less arguable that directors are being paid for what they have undertaken in companies, nonetheless there is a serious point here in that directors remuneration is not an automatic right of a director, it is a privilege afforded to most directors through a company's Articles of Association ('the Articles') and a provision in the articles as to directors' remuneration does not constitute an express contract between the directors and the company. The result is that a director has no contractual claim for remuneration merely on the ground that the articles authorize a fixed sum. But where a director has been serving on the basis of 'the articles' the courts will infer an implied contract of payment of remuneration in terms of articles.*²⁹⁸ (Emphasis Added)

Remuneration, if any, is only paid as a consequence of an agreement between a director and a company.²⁹⁹ A director is not bound to give continuous attention to the affairs of the company and his duties are of an intermittent nature to be performed at periodic board meetings and committees of the board on which he/she serves.³⁰⁰ Therefore, the company’s constitution will usually provide for the payment of directors and provide for how the amount is to be calculated.³⁰¹ Directors’ remuneration is one of the most contentious issues in the field of corporate governance, and companies are advised to choose a cautious and circumspect approach to the question of Board of Directors remuneration.³⁰²

Conversely, proponents argue that directors’ remuneration is right at the heart of corporate governance and is also a central battleground between the stewardship and agency theories of

²⁹⁶Ibid

²⁹⁷Moriarty v Regent’s Garage and Co [1921] 1 KB 423, p446 cited in Goulding, Supra note-79, p249

²⁹⁸Bakshi, Supra note-278

²⁹⁹Roger Mason, 501 Questions and Answers for Company Directors and Secretaries, 2nd Ed.,(Great Britain, Thorogood Publishing Ltd,2009), p78

³⁰⁰Pettet, Supra note-4, p161

³⁰¹Goulding, Supra note-79, p250

³⁰²International Finance Cooperation, Corporate Governance : Manual , 2nd Ed., (Hanoi, Vietnam , October 2010), p162

corporate governance.³⁰³ Similarly others argue that remuneration of board of directors should be seen in light of their constructive roles and responsibilities assumed³⁰⁴ and hence, should be a right not a privilege.

Affirming payment as a right, others state that directors are generally underpaid for their work and the onerous responsibilities they shoulder.³⁰⁵ On the contrary critics, within the ambit of payment as of right, argue against the hefty fees directors receive for attending meetings, millions of dollars paid as severance payments, huge payouts as bonus, and other benefits.³⁰⁶ Directors extract value, for example, through compensation packages that pay large fixed salaries and provide significant additional payments or fees if a company meets or exceeds performance.³⁰⁷

More recently, the global financial crisis has served to highlight the inequalities that exist between executive directors' generous remuneration and the underperformance of the companies that they direct and the concomitant impact on shareholders who may lose vast sums of money, sometimes their life savings, and employees who may find themselves on shorter working weeks, lower incomes, or being made redundant.³⁰⁸ The excessive practices of directors' remuneration may encourage risk taking for short term benefits which can undermine the proper functioning of companies responsibly.³⁰⁹ Directors are fiduciaries, and because of this, they must not profit from their relationships with the company.³¹⁰ Reasonable care should be taken to implement remuneration amount and structure.

The debate on directors' remuneration has rumbled on through the last decade, but with the increase in institutional investor activism and the scandals and the subsequent collapses associated with a number of large corporations in different parts of the world, the focus is truly

³⁰³ Calder, Supra note-7, p79

³⁰⁴ A.C Fernando, Corporate Governance: Principles, Policies, And Practices, (Pearson Education, 2006), p104, cited in Hussein, Supra note-40, P67

³⁰⁵ Ibid

³⁰⁶ Fernando, Supra note-304

³⁰⁷ Aldo Musacchio, Experiments in Financial Democracy: Corporate Governance and Financial Development in Brazil, 1882-1950, (Cambridge University press, USA, 2009), p137

³⁰⁸ Directors' performance and Remuneration, p192 available at www.oup.com/uk/orc/bin accessed on January 05, 2013

³⁰⁹ Hussein, Supra note-40, P67

³¹⁰ Pettet, Supra note-4, p149

on curtailing excessive and undeserved remuneration packages.³¹¹ There is now emphasis on ‘payment for performance’ in such a way that theoretically was present before the global financial crisis but in practice, all too often was not put in to effect³¹², taking in to account the long-term and short term strategies. Even in the 2008-2009 financial Crisis where remuneration of director and chief executives was a bone of contention between all politicians, stakeholders, shareholders and/or the public at large, it is not remuneration as such that caused angst, but ‘excessive’ remuneration.³¹³

In summary, there is a major concurrence in the literature and wide spread recognition in the national and institutional rules on international company law and practice that directors shall be paid for what they have served. The argument for the directors’ remuneration as of right is winning the debate so as to motivate the directors to align better with the interest of the shareholders and the company in particular and stakeholders in general.

Nevertheless there is another contention with regard to the mode and amount of the payment which will be the subject matter of the next sub section.

3.2.4 Mode and Quantum of Remuneration

Director remuneration is a recurring theme for shareholders, regulators and wider stakeholders³¹⁴ of which its quantum and mode is the most prominent one. With regard to the mode of remuneration, as seen in the definition part, it is the full package of compensation in cash, whether variable or fixed, received by a director from a company which may also include bonus payments, stocks, options to buy stocks, and other benefits. The balance between fixed or base pay and variable (short and long term incentives) is much debated.³¹⁵

Companies need and are also required to ensure that the amount of remuneration (quantum) shall be sufficient to attract, retain and motivate the caliber of directors needed to run the companies successfully while the makeup should be structured so as to knot company and individual

³¹¹Supra note-308

³¹²Ibid

³¹³ Plessis et al, Supra note- 89, p127

³¹⁴Eurosif, Supra note-33

³¹⁵ Ibid

performances.³¹⁶ This desire is expected to be balanced against the company's interest in not paying excessive remuneration and it is important that there be a clear relationship between long term performance and remuneration.³¹⁷ This asserts that remuneration should be competitive but yet staying within a reasonable limit is of utmost importance. To prevaricate excessiveness jurisdictions employ some legislative measures including setting maximum and minimum amount but leaving the remaining, setting maximum, leaving to the company by outlining procedural requirements or rarely fixing the amount rigidly. These are mostly implemented in line with the recoded and established standards of corporate governance.

By and large, the way in which boards of directors are paid tends to reflect the pay philosophy of the organization as a whole.³¹⁸ Consistently, the benchmark is that high boardroom pay can and should be an outward sign of corporate achievement.³¹⁹ A number of corporate governance codes recommend that a significant proportion of remuneration should be performance-related, most importantly; the call for clear, quantified and stretching targets for variable pay is a key concern for many investors.³²⁰

It is easier said than done, if not impossible to draw the perfect line of fair and equitable remuneration, neither too low nor too excessive in the abstract. Nevertheless, the safe and less controversial mechanism is measuring directors' remuneration against recorded and established standards especially in case of non-executive directors for the payment of executive directors who have regular wages and benefits as member of the management, is universally accepted. An executive director is an employee and is therefore presumably entitled to the minimum wage, though this has not been properly tested.³²¹ Most of the time, executive directors receive compensation for expenses not remuneration despite some deviations and new developments to attract, retain and motivate executive directors. The convergence of the regulatory approaches to company directors' compensation in the EU, the U.S. and [Germany] demonstrate the similar

³¹⁶ David Roul, Company Governance Actors and Contemporary upheavals: Role of Board of Directors in East Asian Listed Companies, (United Kingdom, Kogan Page Limited, 2013), p320

³¹⁷ ASEX, Supra note-205, p35

³¹⁸ Armstrong & Murlis, Supra note-218, p527

³¹⁹ Id, p528

³²⁰ Eurosif, Supra note-33

³²¹ Mason, Supra note-299

need in finding appropriate answers to the dramatically increasing payments for company directors.³²²

There are internationally accepted standards to approach the line of ‘fair and equitable’ directors’ remuneration of which the need for a formal and transparent procedure in developing remuneration policy³²³ is one. In the same way, establishing procedural requirements for the pay setting process and introducing sophisticated disclosure rules are the “globalized” answer for addressing the pronounced changes in remuneration practices which in turn demonstrates the preference of the law makers for disclosure obligations.³²⁴ Similarly the OECD principles of corporate governance stipulates that “a strong disclosure regime that promotes real transparency is a pivotal feature of market-based monitoring of companies and is central to shareholders’ ability to exercise their ownership rights on an informed basis is powerful tool for influencing the behaviour of companies and for protecting investors.”³²⁵ Disclosure should include, but not be limited to, material information on remuneration policy for members of the board and key executives, and information about board members, including their qualifications, the selection process, other company directorships and whether they are regarded as independent by the board.³²⁶ Companies are generally expected to disclose, therefore, information on the remuneration of board members and key executives so that investors can assess the costs and benefits of remuneration plans and the contribution of incentive schemes, such as stock option schemes, to company performance.³²⁷

On a basic level, shareholders expect that remuneration will be tied to performance and the design, structure and implementation of the compensation programmes will be clearly linked to the long-term strategy of the company.³²⁸ It is, after all, in the interests of shareholders that the employees and the board are motivated to achieve the same goals and to deliver corporate success.³²⁹ This means shareholders want clear disclosure of the performance matrix selected by

³²²Christoph Kumpan (Dr.), Performance and Remuneration of Company Directors: Legal Approaches in Germany, the European Union, and the United States of America; Strani pravni život 1/2008, p104 available on <http://www.singipedia.com> accessed on November 15, 2013

³²³LSTEX , Supra note-275, p18

³²⁴ Kumpan , Supra note-322, p87

³²⁵ Annotation to the OECD Principles of Corporate Governance: Principle V., (2004), p49

³²⁶ Id, A.4, (2004), p51

³²⁷ Id, p52

³²⁸ LSTEX , Supra note-275, p42

³²⁹ Armstrong & Murlis , Supra note-218

the company so that investors may understand not only how the programmes work but also how that remuneration is earned.³³⁰ The disclosure is also imperative in preventing abuses and securing transparency on the remuneration policy design and implementation.

From the side of regulators and shareholders, it is not directors' remuneration as such that causes trouble, but the excessive and disguised remuneration. Company law provisions are expected, therefore, to include the requirement for a directors' remuneration report, and the right of shareholders to vote on this report.³³¹ Similarly, recent developments in law-making demonstrate the preference of the law-makers for transparencies where by companies have to disclose more and more details about their director's compensation.³³²

For instance, the European Commission (EC) recommends that listed companies have regulatory regimes for directors' remuneration including a remuneration policy and the disclosure of individual directors' remuneration, stock option schemes, and other forms of remuneration and the cost of all stock incentive systems.³³³ Though disclosure is mandatory in almost all countries, compulsory shareholder voting (right to 'say on pay') is not adopted by all jurisdictions. Evidently, in principle, 'say on pay' initiatives promote shareholder activism, giving owners more power and influence to shape boardroom pay.³³⁴ Some countries' legislations require the shareholders are given a right to set remuneration policies and binding vote on the approval of remuneration policies and packages, namely the Netherlands, Norway, Sweden; others like France, Germany, UK^[335], Australia³³⁶ advisory; and still others made it voluntary or in response to the shareholder resolutions like Spain and Switzerland.³³⁷ One can comprehend from this discussion that disclosure practices vary significantly across the world despite its global

³³⁰ LSTEX, Supra note-275, p42

³³¹ Ibid

³³² Kumpan, Supra note-322

³³³ Eurosif, Supra note-33, p3

³³⁴ Martin J. Conyon and Graham V. Sadler, Shareholder Voting and Directors' Remuneration Report Legislation: Say on Pay in the UK, (2009), p3 available at <http://ssrn.com/abstract> accessed on November 28, 2013

³³⁵ UK: Directors' Remuneration: The new regime for listed companies – our detailed summary of the new Regulations available at <http://hsf-employmentnotes.com> accessed on November 16, 2013; In the new Regulation come in to force on 1 October 2013, applicable all UK-incorporated, main market listed companies, for the first time, shareholders will have a binding vote on the pay policies of the companies in which they invest. Directors' remuneration reports will also be restructured and split into policy and implementation reports, with new disclosures required including a single total pay figure for each director. Directors' remuneration reports will also be restructured and split into policy and implementation reports, with new disclosures required including a single total pay figure for each director.

³³⁶ Plessis et al, Supra note-89, p129

³³⁷ Eurosif, Supra note-33, p1-2

recognition. Moreover, transparency is gaining increasing importance in [Germany], the EU and in the U.S. as a viable means to aid in monitoring remuneration practice.³³⁸

Furthermore, it is a basic principle of good governance that no one should be involved in deciding their own pay and so remuneration policy for all executives, not just directors, should be settled by a remuneration committee with independent oversight made up of independent nonexecutives for setting remuneration policy of the board.³³⁹ This is another parameter where by conflict of interest free and transparent remuneration is possible. Hence, remuneration committees consisting of independent or primarily of independent directors, informed decision making and other “procedural” prerequisites have been introduced by the law.³⁴⁰ These requirements are much easier, [than reasonableness of compensation] to prove and such an approach takes into account that remuneration decisions are ultimately business judgments which fall under the realm of the business judgment rule.³⁴¹

In sum, by linking remuneration with corporate and director performance, the performance-based remuneration scheme ensures that the interests of shareholders and incentives are thus created for directors to maximize corporate value. Practically speaking, it is difficult to fix on particular board remuneration (both in terms of quantum and structure) that fits-all companies and jurisdictions, for it will depend on many variables, market and company-specific conditions. But this does not mean totally unregulated, in view of that legislatures and regulators set their own minimum and maximum standards to be adhered by companies in determining the level of pay. These include, but not limited to, establishing independent remuneration committee, mandatory disclosure and shareholder say on pay with compulsory or advisory shareholder approval, performance related pay, efficient and cost-effective remuneration taking in to account in to company’s long and short term strategy etc.

How Ethiopia has approached the ever controversial task of limiting the line of transparent and equitable remuneration of Share Company Directors in law and practice will be addressed in the next chapter.

³³⁸Kumpan , Supra note-322, p85

³³⁹LSTEX , Supra note-275, p78 see also Principles of Good Corporate Governance: Code of Good Practice for Boards and Director, 2nd Ed. (Spain Madrid, November 2005), p15

³⁴⁰ Kumpan , Supra note-322, p103

³⁴¹ Ibid

Chapter Four

Remuneration of Share Company Directors in Ethiopia: The Law and the Practice

In the previous chapters the writer tried to show how addressing share company governance in general and directors and their remuneration in particular are indispensable in developing and formulating effective and efficient company law. Likewise, the writer showed that determining the process and amount of remuneration of company directors is controversial and debatable worldwide. This problem is visible especially in Share companies, where directors have huge responsibility and controlling power to oversee all policies, activities and interactions.

In this chapter, the writer discusses how, by whom, and on what basis directors' remuneration is determined. He also discusses the setting process in light of international practices and standards. The issue of remuneration starts from the definitions in the laws designed to regulate remuneration of Share Company Directors which will be dealt with in the next section.

4.1 Definition of Director's Remuneration under Ethiopian Laws

In the Ethiopian Commercial Code, the law is silent with regard to the definition of directors' remuneration. It only incorporated its constituents, undetermined fixed annual remunerations and specified share in the net profits of a financial year subjected to deductibles, as well as the possibility of non-payment if no dividend is distributed to shareholders irrespective of the level of profit.³⁴²

On the other hand, the NBE directive gives remuneration a broad perspective and defines it as, "remuneration includes board compensation and allowance paid to each director" whereby the first refers to "an amount of money paid in kind or in cash to cover incidental costs related to their board membership while the latter refers to any money other than board allowance that is paid, in cash or otherwise, to a director from the bank's net profit or from any other sources".³⁴³ The position towards the meaning of remuneration seems more or less comprehensible comparative to the definition of directors. Because, it goes to include any payment in cash or in

³⁴²Com.C, Supra note-17, Art.353 (1) and (2,3&6,)

³⁴³ Directives No.SBB/49/2011, Supra note-211, Art.2.6, 2.2 and 2.4

kind, from any source either to cover the incidental costs related to their board membership or board allowance.

Directors' remuneration, to conclude, is not a clearly defined concept, in the Commercial Code which is meant to regulate Share Companies of any nature, whether financial or otherwise, whilst it is widely defined in the directive issued to regulate the banking Share Companies as the aforementioned discussion demonstrates. So, understanding the approach of the new directive in light of the international conception of remuneration as mentioned in chapter three (section 3.2.1) of this paper would be worthwhile.

The other issue worth discussing is whether remuneration is a right or privilege in Ethiopia which will be the subject of the next section.

4.2 Is Directors' Remuneration a Right or a Privilege in Ethiopia?

The Commercial Code articulates that “*Directors may receive a fixed annual remuneration, the amount of which shall be determined by a general meeting and charged against general expenses; the articles of association may provide that the directors may receive a specified share in the net profits of a financial year...*”³⁴⁴ It says “...*may receive and ...may provide...*” which are phrases to imply the non-mandatory nature of the legal provisions. Consequently, the concern is ‘can directors claim remuneration as of right or only paid if the shareholders’ general meeting and/or articles of association stated so?’ The new directive of NBE is silent as to whether directors can avail themselves of remuneration as of right instead the directive leaped to set the maximum amount.³⁴⁵

From the wording of the Commercial Code, it seems that the approach is a privilege for directors, that is to say they can only be paid if either the general meeting resolved to that effect or the articles of association provided to that effect. If both fail to allow them, however, they cannot claim as of right. This can be substantiated by the affirmation that “only members of the company can manage it” there by the legislature might have the view that the directors can benefit from the annual profits as shareholders. This can be further strengthened by the fact that

³⁴⁴Com.C, Supra note-17, Art.353 (1&2)

³⁴⁵ Directives No.SBB/49/2011, Supra note-211 Art.4.1

directors are not permanent employees of the company which in turn weakens the argument for remuneration as of right.

On the contrary it would be tenable to argue that every company is obliged to pay its directors remuneration for the service they render. The amount shall be determined by the general meeting or articles of association. After all, in line with the provisions of the Commercial Code, it is the quantum or amount that is being decided by the general meeting, not the remuneration per se. Whether the directors are entitled to remuneration or not, is left without clearly expressed by the commercial Code. The argument in favor of remuneration is a right could be, therefore, substantiated by the fact that the legislature crossed to point out who should decide its amount taking for granted that remuneration should be paid to directors in lieu of the service they render. Companies are being led by Boards of directors, which are responsible, inter alia, for policy related matters, approval and follow-up of annual programs and budget, the appointment of the Chief Executive Officers.³⁴⁶ Arguing that remuneration is a privilege, not a right, could be inconceivable for it is incongruous to expect director such huge responsibilities for free. Had it not been for the compulsory intent to be paid, how would the legislature imagine directors will agree to assume such a painstaking duties and assume serious liabilities? By the same token, it would be ridiculous to imagine any reason why the then Ministry of Commerce and Industry, now the Ministry of Trade, is empowered to order the reduction of no-existing remuneration.³⁴⁷

Likewise, it is made clear in Art.353 (6) that there shall be no payment of net profits to board of directors, where no dividend has been distributed to the shareholders, which could be another corroboration of the claim that the fixed remuneration is a right of a director for no condition is stated in the law, to be claimed by board of directors. Along the same lines, once shareholders have decided to pay, at their general meeting, remuneration becomes compulsory unless found excessive. Therefore, remuneration is a right though its amount would be determined by the general meeting provided that there is sufficient, effective good governance and performance even if it is not provided in the articles of association. In practice, fortunately, all Share

³⁴⁶ For instance see Hiber sugar Share Company prospectus No.01/o1, p18 available at <http://www.hibirsugarethiopia.com/index>, accessed on January 17, 2013

³⁴⁷ Com.C, Supra note-17, Art.353 (7)

Companies pay their directors either according to the resolution of general meeting or articles of association or directive of the NBE in case of Banks.³⁴⁸

Furthermore, the Commercial Code requires that the amount to be allocated to directors in the net profits may not exceed 10% and is calculated after deduction of reserve funds provided by law or the articles of association, resolution of the general meeting, or amounts carried forward as well as the ‘*statutory dividend*, where provided in the articles of association or where not provided, a sum representing 5% of the paid up value of shares which have not been redeemed.’³⁴⁹ The Commercial Code neither defined statutory dividend nor stipulated its purpose.

If one approaches to the background document of the Commercial Code there is no clue as to the issues aforementioned.³⁵⁰ The Commercial Code only stated that statutory dividend should be deducted from the net profit before allocation out of the net profit is made to the board of directors.

However, according to Zekarias Keneaa there is a clue, in the Commercial Code that would be of help to relate the term “statutory dividend” in Article 353(4) (b) to those terms envisaged in Article 337 and 457 as “statutory interest” or “fixed” or “interim interest.”³⁵¹ This is discernible from the provisions of Article 337(2) that runs: “These shares do not confer any right to that part of the dividend representing the statutory interest.” It may, therefore, be argued that the term “statutory dividend” in Article 353(4) (b) is the same with “statutory interest” “fixed interest” or “interim interest.”³⁵² Zekarias goes farther to suggest that, it would be difficult to argue that the term “statutory dividend” in Article 353(4) (b) of the Commercial Code represents the share allocated to founders in the Statutes of formation in accordance with the provisions of Article

³⁴⁸Interview with Professor Tilahun Tosheme, former member of board of directors & Shareholder at Abyssinia Bank Share Company and an Advocate, AAU, Monday , November 12, 2013

³⁴⁹Com.C, Supra note-17, Art.353 (4)

³⁵⁰winship, Supra note-59, p63

³⁵¹ Zekarias Keneaa (Associate Professor of law), Analysis of the Issues under the Commercial Code, Unpublished,(AAU, 2013), p1

³⁵² Ibid

310 of the Commercial Code, which shall be necessarily paid out of the net profits in the balance sheet and only for a period not exceeding three years.³⁵³

The latter, i.e. profit allocated to founders, whenever is fixed, in the Statutes of formation, has nothing to do with “statutory dividend.” First of all, “statutory dividend” is distributed by way of interest and not, as such, as profit. Moreover, it may only be paid in the interim, i.e., during the period of preparatory/construction works, pending a company’s resuming its normal business, and for a specified period stated in the Articles of Association [Art. 457 (2)].³⁵⁴ Furthermore, Zekarias raised an intriguing question “where would the amount to be paid to founders fit in the provisions of Article 354?” He answered the question by visualizing that accounting might have an answer for that question and what is to be paid to founders statutorily, must have been forgotten by sheer oversight from the ambit of Article 354 of the Commercial Code.³⁵⁵

According to the above argument, every Share Company is required by the law to deduct 5% of the paid up value of shares which have not been redeemed before it allocates certain amount of the net profit, to directors during the interim time for the period specified in the articles of association. It begs another important question, ‘for how long would the Share Companies deduct statutory dividend if the articles of association fails to state the period of time?’ Corresponding to the above argument, it would be sound to imagine that until the Share Company resumes normal business which could be determined on a case by case basis. If one closely scrutinizes Article 457 of the Commercial Code ‘fixed or interim interest’ would be paid to shareholders even where there is no profits. If there is no profit, how would one imagine payment of directors’ share in the net profits, reasonably? The Commercial Code prohibited payment of such a ‘specified share’ where no dividend is distributed to the shareholders even if there is profit. But one would imagine that Share Companies are required to reserve such statutory dividend, fixed or interim interests before allocating to their directors at a time of profit which might be paid to their shareholders at the lean season, (where there is no profit). In

³⁵³ Ibid

³⁵⁴ Ibid

³⁵⁵ Id, p2

practice, however, there is no such statutory dividend deductible from the net profits though the law appears to be mandatory and the construction of the academicians is convincing.³⁵⁶

Nevertheless, the amount of remuneration is continuing to be a bone of contention both among academics and in practice. The amount and level of remuneration in Share Companies is divergent based on whether it is financial or non-financial company. Even with in financial Share Companies it is divergent among banks and insurances despite the fact that many banks and insurance are sister companies. In banks remuneration is according to the Directive of the NBE whereas in insurance companies it is according to the Commercial Code.³⁵⁷ As a result, the writer preferred to treat them separately.

4.3 The Practice relating to Directors' Remuneration in Financial Share Companies in Ethiopia and its Anomalies

Financial companies include, which principally include banks, insurance companies and microfinance institutions which are directly associated with financial services and are under the strict regulation and supervision of the NBE.³⁵⁸ Being a director in a financial institution especially in a bank is full of risks and countless duties. Shareholders and stakeholders expect the board to check and control the management, while the management and some influential shareholders crave to lessen such control so as to satisfy their own capital interest, which requires experience, personal integrity, individual expertise, commitment and wisdom of a board and individual directors.³⁵⁹ Shareholders' interests may be divergent substantially from those of other stakeholders, especially on risk, where shareholders prefer volatility and may have short-

³⁵⁶Biniam Terfa member of the board of directors at Awash International Bank & Insurance Share Companies (he has already notified for the general meeting of share holders of the Bank that he will not be re-elected for the next term of office despite his nomination to continue) and Consultant and Attorney at law, done at his office on November 20, 2013; Professor Tilahun, supra note-348

³⁵⁷Interview with Birhanu Getaneh Shareholder, former member of the board of directors and former CEO, currently serving as corporate advisor of United Bank Share Company; Shareholder and member of board of director at the United insurance Share Company; Premier Switch Solution (PSS), [a joint venture (JV) between Awash, United and Nib banks to provide card banking service], Board Chair man, done at his office, United Bank Sh.C Head office, on December 30, 2013; Kefale, infra note-389

³⁵⁸ See <http://www.nbe.gov.et> for more detail information with regard to these financial institutions. The writer chose to focus on banks because Insurance Share Companies and microfinance institutions are not subjected to specific directive with regard to the remuneration of directors.

³⁵⁹ Professor Tilahun, supra note-348; Biniam Terfa, supra note-356

term perspectives³⁶⁰ where as banking business requires beyond that. Ideally, this presupposes an uphill struggle to balance these and other conflicting interests.

Given that banks deal with money which is sources of all ‘evil and good’, any decision would require addressing of all interests around banks, which in turn needs extra-time, effort, patience, and dedication.³⁶¹ In this regard, there are committees, to minimize the weight of the precarious bank work to the lowest possible manageable scale of which loan, audit and risk committees are mandatory while remuneration, technical assistance and human resource committees are non mandatory, regardless of the silence of the Commercial code.³⁶² There are also assistant committees based on commission and contractual pay for instance for commencement of new construction project which needs special professional research and other technical assistances.³⁶³

In terms of effects of company mal-governance banks are, without a doubt, different from other companies in that their collapse can affect a very wide circle of people and institutions, and undermine the financial system itself, with severe impact on the whole economy.³⁶⁴ Business of banks is opaque and complex and can shift rather quickly.³⁶⁵ Banking is also a business of trust and requires that the confidence of the whole society on the bank or the system for the business to sustain.³⁶⁶

The sound and safe operation of banks is, therefore, of strategic importance not only in fostering economic development but also in ensuring social and economic stability.³⁶⁷ Based on these premises, national governments have been involved directly or indirectly in the running of corporations including banks which have in different degrees been championing one reform or

³⁶⁰ Hamid Mehran et al, *Corporate Governance and Banks: What Have We Learned from the Financial Crisis?; Federal Reserve Bank of New York Staff Reports No. 502*, (2011), p4

³⁶¹ Siraj Abdela, member of the board of directors at Nib Insurance Share Company, a shareholder at Nib International Bank, and Consultant and Attorney at law, done at National Theatre Café, on November 21, 2013; Birhanu, Supra note 357

³⁶² Biniam Terfa, supra note-356

³⁶³ Ibid

³⁶⁴ Westlake, Supra note-220, p13

³⁶⁵ Mehran et al, supra note-360, p3

³⁶⁶ Emeka Offor, *Corporate Governance Reforms in Banks: Lessons from Nigeria?*, p1 Available at: <http://ssrn.com/abstract> accessed on November 28, 2013

³⁶⁷ Emilius Avgouleas, *International Corporate Law and Financial Market Regulation: Governance of Global financial Markets (the Law, the Economics, the Politics)*, (USA, Cambridge University Press, 2012), p5

the other in an attempt to sustain confidence in the banking system and protect the economy from collapse or crisis.³⁶⁸

Because of their special nature and position in the economy, in Ethiopia, banks are usually subject to special laws and regulatory oversight from NBE in addition to the Commercial Code.³⁶⁹ Emerging empirical research practices suggest that directors in banks would face throat-cutting issues that require special personal integrity, adequate breadth of skill, experience of each director more than any company.³⁷⁰ Boards need to meet the expanding expectations of regulators, shareholders, and the public, while maintaining focus on key board responsibilities.³⁷¹

Taking in to consideration such a huge responsibility and risks posed, banks are expected to have board of directors that support, control, check and discipline the management by wisdom and professionalism in view of the long term and short term objectives of a company, rather than undertaking responsibilities by common sense and with a mentality of ‘short termism’.³⁷² Not surprisingly, one of the most often cited components of effective governance is the ability and willingness of bank directors to challenge a management and engage in good dialogue to ensure that the company’s actions and decisions take into account the wide range of factors that could affect stakeholders.³⁷³

However, if board members are to carry out their responsibility to challenge management, they must have the expertise necessary to grasp the complexity of the business.³⁷⁴ To attract, retain and motivate members of board of directors with distinguished personal integrity, independent judgment and experience presupposes, among other things, commensurate remuneration.³⁷⁵ To set the level of director’s remuneration, it is important to find an appropriate balance between providing a fair return for the role, and ensuring that it is not high.³⁷⁶

³⁶⁸Offor, supra note-366

³⁶⁹Siraj, supra note-361

³⁷⁰Westlake , Supra note-220, p27

³⁷¹ National Association of Corporate Directors (NACD), Governance Challenges 2013 and Beyond, p23 available at www.NAVDOnline.org accessed on November 29, 2013

³⁷²Birhanu, supra note-357

³⁷³ Mehran et al, supra note-360, p11

³⁷⁴Id, p11

³⁷⁵ Biniam, Supra note-356

³⁷⁶ Westlake , Supra note-220, p47

The quantum and amount of remuneration of board of directors, in Ethiopia, is one of the touchiest issues of corporate governance, particularly in banks, and has a tendency of continuing as an issue as long as its source is not dried out by a research based mechanisms.³⁷⁷ When the banking business was opened to the private sector, following the lifting of the prohibition of the association of capital and of persons, banks started to collect huge profits and pay excessive remunerations pursuant to the provisions of the Commercial Code that caused public outcry and threatened the banking governance.³⁷⁸ Regulation of remuneration in banks was weak and there were no hard and fast rules to prevent such an unwarranted remunerations and its effect to banking governance.³⁷⁹ The excessive remuneration in terms of the fixed and net share profit payments are often alike to the so called “*fat cat packages*” which erode company capital and dividend return to shareholders.³⁸⁰ For instance, some banks paid 9% of 300 million birr which is big and the consequence was twofold. Shareholders made unhealthy competition to be elected to serve and the major shareholders started to act illegally to appoint persons who protect their interests which in turn disturbed the banking system.³⁸¹ Looking at the pay levels a position in a bank board started to be considered a ‘honorary post’ to which everybody endeavors ‘day and night’ to get and retain a seat in boards of banks.³⁸²

Especially, minority shareholders started to become curious about such an increasing payment due to the fewer dividends they receive at the end compared to the directors that have been elected by them. Consequently, groupings based on different factors started and turned out to be sinister in the banking governance which was unquestionably a threat to the healthy financial sector in general.³⁸³

Similarly bank managers of higher position joined the opponents of the excessive remuneration, for they thought unparalleled less salary they receive and weighty responsibility they assumed in

³⁷⁷Professor Tilahun, supra note-348

³⁷⁸ Interview with Mahari Redae (Assistant Professor), former member of the board of directors at Sky Bus Share Company and Anbesa Insurance Share Company, Now shareholder at both Share Companies, Addis Ababa University School of Law, done at his office, on November 22, 2013

³⁷⁹ Ibid

³⁸⁰ Joseph E.O. Abugu, Monitoring directors’ remuneration, fat cat packages and perks of office, Journal of Financial Crime Vol. 19 No. 1, (Nigeria, University of Lagos, Emerald Group Publishing Limited, 2012), p6

³⁸¹ Abera Degefa (Ass. Prof.), Former director and Shareholder, at Zemen Bank SC., AAU, January 18, 2013 at his office; and Interview with Professor Tilahun Tosheme, former member of board of directors at Abyssinia Bank Share Company and an Advocate, AAU, Monday, November 12, 2013

³⁸² Ibid

³⁸³ Professor Tilahun, Supra note-348

carrying out the day to day activities of banks based on the policies of directors.³⁸⁴In addition officials of NBE were surprised by such payment and worried much about it. They stated that how can directors receive such an excessive payment by only working once a week or twice a week with less works whereby personal jealousy of the officials aggravate the situation.³⁸⁵ Public outcry, a public perception that directors are ‘milking’ staggering corporate cows unjustly, coupled with the scale and far reaching effects of the global financial crisis, attracted the cautious attention of the government and regulators in relation to directors’ remuneration in banks.

Correspondingly there was a practical fear, that the disagreement between board and management might give rise to board squabbles which might in turn cause ineffective board oversight and control functions in banks.³⁸⁶ The fact that banks have grown in their size, scope, complexity, and of their profits making both NBE regulation and market discipline less effective, hitherto.

Engulfed in such pragmatic contentions, it was therefore natural for NBE to closely follow the situation in the banking sector and assess the main causes so as to react and mitigate the signs of mal-governance through comprehensive regulation and responsible monitoring of financial Share Companies. Consequently, NBE conducted a survey that revealed directors have been receiving close to a million Birr (*highest*) and 102, 000 Birr (*lowest*) annually, which has become a source of complaints from the shareholders and other stakeholders who did not get elected to the banks’ boards.³⁸⁷ In view of alleviating the tribulations and public dissatisfactions, the NBE has limited through a directive, the annual remuneration of members of board of directors of all banks to 50, 000 in lump sum with monthly allowance of 2,000 and proscribed any employee of bank from sitting on the board. Furthermore, banks are also prohibited from paying the directors any benefits, in cash or in kind, in what so ever and at any time³⁸⁸with a view to avoid the excessive

³⁸⁴Biniam, Supra note-356

³⁸⁵Professor Tilahun, Supra note-348

³⁸⁶Biniam, Supra note-356

³⁸⁷ Eden Sahle, Ethiopia: Central Bank Limits Board Directors' Compensation (17 January 2011) available at <http://allafrica.com/stories/201101180574.htm> accessed on January 14, 2013; Professor Tilahun, supra note-348; Biniam, Supra note-356, Birhanu, Supra note-357, Ass. Prof. Mahari, Supra note-375

³⁸⁸Directives No.SBB/49/2011, Supra note-211, Art.2.2 and 2.4

remuneration being paid by banks to directors. It should be noted that both monthly allowance and fixed annual payment are taxable.³⁸⁹

The directive followed wide approach in defining remuneration by incorporating any payment in cash or in kind, fixed or variable, from the bank account or from any other source.³⁹⁰ However, it stubbornly fixed the amount irrespective of the resolution of the general shareholder meeting or articles of association in this regard and level of performance of a bank. The background to issue such a directive also recognizes that the sound corporate governance is vital for the health of individual banks and the banking sector as a whole. But excessive remunerations recently being paid by banks to directors have become a threat to the banking system which in turn triggers the need to separate board and executive functions so as to ensure proper checks and balance in banks.³⁹¹ The questions are; did this directive solve the problem? Why the directive followed wide approach in its definition of directors' remuneration, but come out with a narrow and rigid solution in permitting it? And some other practical questions are addressed in the following paragraphs.

Buttressed by the new directive, the issues remuneration of bank directors grew in to another phase of heated debate and controversies. Arguments for and against the directive are flooding from academics, practitioners and bank officials.³⁹² That is to say, practitioners, professionals, writers and officials of NBE have taken various stands either in support of or against such an approach and the existing tribulations of directors' remuneration.

In support of the directive an individual, who claimed to be a shareholder in one of the private banks in Ethiopia, marked that directors are not appointed for their competence. Rather, shareholders place them as their own person on the board to ensure they have agents to guarantee them a constant flow of millions of Birr in loans and advances.³⁹³ He added that being a director is a 'lucrative job' by which the directors be paid much without reference to company objectives

³⁸⁹ Interview with Kefale Zegeye, Shareholder at Buna International Bank Share Company and Nib International Bank Share Company, Board Secretary and Corporate Advisor of the President (CEO) at Buna International Bank Share Company, done at Buna International Bank Share Company Head office on November 15, 2013

³⁹⁰ Directives No.SBB/49/2011, Supra note-211, Art. 22, 2.3, 2.6, and Art.4

³⁹¹ Directives No.SBB/49/2011, Supra note-211, Preamble

³⁹² Lion's share of these arguments stands against the directive, especially bank veterans and company law academicians argue strongly for the amendment of the directive.

³⁹³ Andnet Semere, Laudable Directive May Draw Talent to banks, Addis Fortune News Paper Vol.10, No.561, Available at http://addisfortune.com/Vol_10_No_561 accessed on January 14, 2013

and sometimes in violation of directives of the NBE, large shareholders handpick directors, to serve their prime interest, irrespective of any justified selection criteria for director ship.³⁹⁴

As a result, the shareholder added, being a painstaking problem that cannot be solved by remuneration committees³⁹⁵ with or without the board, NBE's recent protection measures should be appreciated and further strengthened for competent professionals rarely exist on the board of directors; yet, the few that are there do not always go after money. Such professionals may now have the opportunity to come in and make a difference.³⁹⁶ He concluded by urging the authorities at the NBE to further reshape the environment with new directives to guarantee the independence and competence of directors and external auditors³⁹⁷; limit large borrower shareholders from appointing their own agents as directors; and dominating such appointments through cumulative shareholdings in a plethora of their private limited companies.³⁹⁸

Likewise one NBE official states that "limiting the payment of directors would attract only those interested in the work and not those seeking a position for the benefits, which would dry the problem from its source and create peace in the industry".³⁹⁹ Equally, one academician and practicing director at one bank, contend that such a draconian regulation should be continued at least until professionalism and workable legal and institutional frame work flourishes. Given that directors would benefit from the general growth of the company as shareholders, the annual remuneration set by the NBE is sufficient to give back for the extra time and effort they spend as directors.⁴⁰⁰

Currently officials of the NBE, who are interviewed by the writer, remain divided with regard to amendment and re-consideration of the Directive. Some support conducting post-directive survey and amend if the complaints are well-grounded⁴⁰¹, while others strongly refuse the issue

³⁹⁴Ibid

³⁹⁵Currently there are remuneration committees within the board of directors but are responsible to propose salaries of employees for remuneration of directors is already determined by NBE.

³⁹⁶Andnet, Supra note-393

³⁹⁷Micro-Financing Business Proclamation, No.626/2009, FDRE Federal Negarit Gazzeta, 15th year No.33, Art.15; Pro. No.592/2008, Supra note-165, Art.28

³⁹⁸Andnet, Supra note-393

³⁹⁹Aden, Supra note-387

⁴⁰⁰Ass. Prof. Abera, Supra note-381

⁴⁰¹Interview with Ato Alemayo Kebede, Change Management and Communication Directorate, Director, NBE, done at his office, on November 21, 2013; Interview with Ato Befukadu Gashaw, Domestic Economic Analysis and

of amendment of such directive which was labeled as a just law to solve all corporate mal-governance of remuneration in banks.⁴⁰²

Affirming the abovementioned and other predicaments that urgently demanded regulation of directors' remuneration in the banking sector, for the reason that market failure at the heart of the corporate governance regime in financial Share Companies, critics firmly assert that the NBE came up with a solution that escalated the existing heated debate and controversy than solving the problem.⁴⁰³ Equally, they argue that NBE came up with directive that has not justified to the area meant to regulate where shareholders and bankers were not duly consulted, the market value of labour and mental effort to direct a bank was not assessed.⁴⁰⁴

The writer concurs with the critics who are of the opinion that the directive appeared with only one rigid solution to alleviate the problem. Instead of developing effective and efficient governance of banks, inter alia, by augmenting the competence of directors, reducing scandals and 'palm greasing' through reinforcing the role and independence of auditors, the NBE arbitrarily fixed the remuneration which would in turn exacerbate the problems. This hastily issued directive would produce, if applied for long, devastating effect to the banking sector in particular and financial industry in general.⁴⁰⁵

Narrowly focusing on popular complaints, NBE has overlooked broader, farsighted, sustainable, reliable and more transformative governance of remuneration by concentrating on alleviating symptoms.⁴⁰⁶ Nowadays, directors are operating in a new environment where shareholders, regulators, and stakeholders have greater influence in the boardroom than ever before and risks and crisis situations are occurring with greater frequency and amplitude which imposes huge

Publication Directorate and Economic Modeling and Stastical Analysis Directorate Director, NBE, done at his office, on November 25, 2013

⁴⁰² Interview Ato Merga Waqwoya, Principal Examiner, NBE, done at his office, on November 25, 2013

⁴⁰³ Professor Tilahun, Supra note-348; Biniam, Supra note-356; Birhanu, Supra note-357; All questioned the breadth and depth of the research to address the prevailing banking governance problem as result of excessive remuneration and other short comings. They stated that though there were other causes, NBE only focused on remuneration and mainly consulted the then crying shareholders and valued the hidden jealousy of some NBE officials who reacted furiously and emotionally.

⁴⁰⁴ Biniam, Supra note-356

⁴⁰⁵ Ibid; Professor Tilahun, Supra note-348; Siraj, supra note-361

⁴⁰⁶ Professor Tilahun, supra note-348

responsibility on directors to ensure that their companies are prepared for these challenges, both present and future.⁴⁰⁷

When viewed from outside being a director in Ethiopian banks seems to be trouble-free. However, it is cumbersome and demands special dedication with countless committee works and endless meetings which in turn demands reasonable remuneration. Consequently, professionals are leaving the work, discouraged by the low and fixed remuneration i.e. experts are either pushed away or exposed to corruption and other internal arrangements to satisfy some shareholders or customers like borrowers through commissioning.⁴⁰⁸

The peanut amount fixed by the NBE is like a punishment and emotional response compared to the excessive payments that used to be made to directors which is discouraging. Individuals should not be rewarded taking in to account ‘the time they spent at work place only’ but also the ‘risk assumed and the quality of service’ they rendered though, in practice, directors meet two or more days per week for three to five hours of extensive works.⁴⁰⁹ They take home bulky documents to analyze it for the next meeting which is boring and time consuming. If such annual payment is divided to the hours they spent and compared to the risky responsibility they shoulder, susceptible to 15 years of rigorous imprisonment⁴¹⁰ if things went wrong, it is extremely small. In the same way, if one examined the payment of experienced clerks in light of directors’ remuneration at this time, it would be higher than the latter. After all, banks are profit making companies and their directors shall be motivated by certain performance-based incentives to invest their time and talent without reservation.⁴¹¹ The draconian pay regulation is deriving the talented away from banks towards other unregulated Share Companies or out of directorship.⁴¹²

In international experience, what is needed is not strict regulatory control of excessive remuneration, but shareholder supervision of corporate remuneration policies.⁴¹³ On the contrary, the NBE’s directive strictly prohibited shareholders from deciding the quantum and mode of

⁴⁰⁷ NACD, supra note-368, p3 available at www.NAVDOnline.org accessed on November 29, 2013

⁴⁰⁸ Professor Tilahun, supra note-348; Birhanu, supra note-357; Biniam, Supra note-356

⁴⁰⁹ Ibid

⁴¹⁰ Pro. No.592/2008, Supra note-165, Art.58

⁴¹¹ Professor Tilahun, supra note-348

⁴¹² Birhanu, supra note-357;

⁴¹³ Sternberg, Supra note-179, p71

remuneration taking in to consideration the short term and long term objectives of the company and performance of board of directors. Performance-related pay is intended to ensure that directors will advance shareholders' and stakeholders' interests provided that these are designed taking in to account risks as well as business opportunities. As discussed in chapter three (section 3.2.4) of this paper, shareholders' right to 'say on pay' and shareholders' approval of remuneration policy are two important principles devised to alleviate the problem of excessive remuneration. The directive violated these two international principles and rights of shareholders. Practically speaking the NBE has done nothing to boost shareholders' activism, whether in terms of organizing or enlightening to know their rights and duties, except the arbitrary intervention in capping directors' remuneration.⁴¹⁴

NBE should , therefore, develop mechanisms of identifying strategic opportunities associated with shareholders empowerment and activism, a system by which shareholders would influence director behaviour and decisions (on excessive remuneration) by exercising their rights as owners of the stock. It is also the position of this writer that in order to increase participation in the corporate governance, it would be necessary to gain shareholders' confidence by giving them more power and influence, especially a 'say on pay' and 'vote on remuneration report', to shape the boardroom pay mode.

It would also be against the principle of providing incentives to directors to maximise the interest of shareholders and the bank pursuant to agency theory of remuneration governance. Similarly, the fact that company directors are often motivated by things other than money, like intrinsic interest in the job, and, more dangerously, desire for power, has no bearing on what constitutes just remuneration.⁴¹⁵ Directors are human beings with all social and economic needs.

One of the biggest challenges for the NBE would be identifying and encouraging best practices while being mindful that one remuneration package cannot fit to all banks in regulating directors' remuneration. The contemporary international trend towards remuneration demands to be dependent on company-specific situations and competence and controlling skill of the board which in turn forced remuneration determination to take in to account existing performance and

⁴¹⁴ Biniam, Supra note-356

⁴¹⁵ Sternberg, Supra note-179, p69

achievements of each bank. To be effective and efficient, governance tempts to be implemented in a way that it fits the culture and organization of the individual company that can vary enormously from company to company depending on factors such as size, ownership structure and the complexity of its activities.⁴¹⁶ Remuneration as one, if not the key, component of company governance in banks requires flexibility with a strict follow up by setting maximum and minimum standards to be fulfilled instead of fixing rigidly, for sustainable success of banks and to boost the sense of inclusiveness of directors.⁴¹⁷

How can one reasonably expect equal payment of board members who would remain passive and submissive to management with less record of performance on the one side and ideal board of directors who have undertaken all duties and functions to generate millions of profit for the shareholders they represent? It would also be illogical to recognize equal payment of directors in a bank with hundreds of branches, thousands of shareholders, thousands of employees, carrying out complex national and international transactions, thousands of customers, and directors in a bank with only one branch, not more than 10 shareholders (even sometimes only founding members), less than fifty employees, only few customers, and only few simple transactions. The former bank requires, inter alia, extra efforts, time, skill, personal integrity, and experience whilst the latter relatively ordinary directorship.⁴¹⁸ Experts in banking governance stipulate that relatively banks demand objective benchmark for setting directors' remuneration that should take into account all market factors influencing the role, industry, complexity, size, time etc. of board members and the company.⁴¹⁹

Nobody finds it odd to claim that 'one-remuneration regime fits to all banks approach' has proven to be ineffective and wrong. Banks should be allowed, therefore, to adopt a company-specific approach which is more appropriate to their circumstances like workload of their respective boards and size of their business, with in the ambit of regulation of NBE from which the maximum and may be the minimum standards are supposed to emanate.

⁴¹⁶ Financial reporting council, the UK approach to corporate governance, (October 2010), p4 available at <http://www.frc.org.uk/Our-Work/Codes-Standards/Corporate-governance> accessed on January 15, 2013

⁴¹⁷ Andnet, Supra note-393

⁴¹⁸ Birhanu, supra note-357

⁴¹⁹ Westlake , Supra note-220, p47

The NBE can turn the ‘Competition’ to hold directorship in banks in to opportunity, as an input in drawing strategy and research based mechanism of reducing mal-administration in the board room and large shareholders behind it, rather than simply unwarranted regulation that undermines the comparative advantage, destroys competition and encourages recklessness.⁴²⁰ Besides the NBE could also introduce, in collaboration with banks or other stakeholders, revolving in this area, trainings and induction of directors where by the skill and the ethical behaviour of each director would be enhanced.⁴²¹ This includes professional development training, upgrading of governance Skills and ensuring that they understand banking strategy, local and international banking regulatory structures and the latest thinking on risk.⁴²² It would also be imperative to encourage broad self evaluation so as to design appropriate further professional development or consult advisors.⁴²³

In this regard, officials of the NBE have told the writer that corporate governance directive is in the process of drafting though declined to disclose its content.⁴²⁴ The writer expects that the forthcoming directive would alleviate all the above loopholes of the directive. In addition, there shall be mandatory remuneration reports and disclosures which are very valuable means of communication between the company and its shareholders. Disclosure requirement prompts the board to justify pay choices and the pay-setting process, may enhance the accountability and visibility of the remuneration committee sharpen shareholder monitoring, particularly by inducing institutional shareholders to play a more activist role.⁴²⁵

Most of the practicing directors are nominated and appointed by majority shareholders subjected to the approval of the NBE.⁴²⁶ Such a director would be in a complicated spot, because the person that has appointed him/her will often assume the director to influence the board to act favorably toward the controlling shareholder.⁴²⁷ To retain their integrity and avoid being

⁴²⁰ Birhanu, supra note-357 and Biniam, Supra note-356

⁴²¹ The newly inaugurated Ethiopian Corporate Institute may facilitate induction and training of directors which is responsible for regulating volunteer business entities of the country based on a set of code of conducts. For more details See www.2Merkato.com, the biggest Ethiopian business portal accessed on November 10, 2013

⁴²² Westlake, supra note-220, p45

⁴²³ Id, p48

⁴²⁴ Merga, Supra note-402

⁴²⁵ Guido Ferrarini And Niamh Molone, Executive Remuneration In The EU: The Context For Reform; Oxford Review Of Economic Policy, Vol. 21, No. 2 (2005), p311

⁴²⁶ Siraj, supra note-361 and Merga, Supra note-402

⁴²⁷ Westlake, supra note-220, p28

compromised in this way, experts strongly advise directors to ensure that their “sponsors” understand their obligation, once they join a board, to act in the best interest of the bank, and not of any individual shareholder, which is a decisive tension within the board room unless resolved or understood by the controlling shareholders which is unusual.⁴²⁸ Where directors are expected to act on behalf of all shareholders collectively, they are specifically required not to act in the interest of any single shareholder or shareholding group at the disadvantage of others.⁴²⁹ If banks fail to incentivize and pay adequate remuneration to their directors, major shareholders might easily manipulate this to safeguard their advantage by compensating the frustrated directors which easily bow to the pressure mounted on them by such individuals.

The educational requirement for being a director is “at least seventy five percent of a bank's board members shall hold a minimum of first degree or equivalent from recognized higher learning institution; and the remaining board members should, at a minimum complete general secondary school.”⁴³⁰ Garratt argues that “a board sits at the intersection of the organizational effectiveness and efficiency cycles as the centre of the business brain, taking a ‘helicopter view’ of policy and strategy issues”⁴³¹ which demands directors to be always learners and professionals. It would be easier said than done, to discharge all the responsibilities of a director who only completed high school by accommodating all interests. A director with low educational background can be some times, if not oftentimes, easily acquiescent with the dominant shareholders with majority share and noticeable clout which is the source of all quandaries.⁴³² International practices reveal that directorship in banks requires additional skills and specific experiences in addition to normal educational backgrounds.

For instance, the Basel Committee identified that the board of a bank needs experience in finance, accounting, lending, bank operations and payment systems, strategic planning, communications, governance, risk management, internal controls, banking regulation, auditing, and compliance.⁴³³ Furthermore, all members of board directors in banks should have, inter alia,

⁴²⁸ Ibid

⁴²⁹ Id, p32

⁴³⁰ Licensing and Supervision of Banking Business: Amendment for New Bank Licensing and Approval of Directors and CEO Directive No. SBB/39/2006

⁴³¹ Garratt, Supra note-198, p35

⁴³² Biniam, Supra note-356

⁴³³ Westlake, Supra note-220, p35

sound business judgment, integrity, strategic thinking, analytical skills, financial literacy, financial industry understanding, and appreciation of changes in the bank's environment, teamwork, courage, and emotional intelligence.⁴³⁴ Board directors need to ensure that their professional governance skills and their understanding of the bank and financial markets sector remain sharp, especially in a fast-changing market.⁴³⁵

As mentioned above, the NBE focused on harshly controlling the payment rather than focusing on these important values. As human beings, directors with such special qualifications, require incentives in addition to internal motives (professional satisfaction by serving their company) and portion of the profits they obtain as a shareholder to play their truly collective and individual role. The remuneration seems also inequitable, if not daunting, to inspire an effective and efficient farsighted board that moves 'land to heaven' to achieve the astonishing vision and mission of the company.

There is a clear contradiction between the Commercial Code and the directive, in allowing and prohibiting flexible remuneration and shareholders to take part in the determination of directors' remuneration, their agents.⁴³⁶ Furthermore, as can be vividly understood from its background document, the purpose of the relevant Commercial Code provisions with regard to directors' remuneration is to limit and make proportionate to avoid excessive payments not cut it rigidly. It is designed to reduce the gaps that might allow directors to abuse their position by fixing for themselves enormous remuneration packages, especially variable ones, which is easily vulnerable.⁴³⁷

These beg an intriguing question: Does the authorization of the NBE by the Banking Proclamation to issue directives give the remuneration directive a status of a Proclamation so as to prevail over the Commercial Code, for it is the special law and lately enacted law? The answer for this question is arguable where by legality of the NBE's directive is also disputed. Equally one would imagine its enforceability at the time when the articles of association permit and general meeting approved equitable and fair amount due to the noticeable proper functioning of the board but the directive precluded such payment blindly without weighing its consequences

⁴³⁴ Ibid

⁴³⁵ Id, p45

⁴³⁶ Biniam, Supra note-356& Siraj, Supra note-361

⁴³⁷ Winship, Supra note-59, p63

on the governance of banks. Some argue that in a clear contradiction between the directive and Commercial Code, the former should be void for the latter is higher in hierarchy. If directives contradict proclamations under the guise of delegation, it would easy be further abused by the regulator.⁴³⁸ Whereas others strictly oppose the illegality of the Directive saying that the NBE is authorized by the Proclamation to issue directives to regulate directors' remuneration. They farther argue that if the directive is termed to be illegal it will be difficult for the regulator to discharge its duties. According to this argument, the directive have a powers of a proclamation concerning the subject delegated the NBE.

These controversial positions have been taken by the Federal Courts. For instance, in the Civil Case between NBE and United Insurance Share Company, the Plaintiffs, Federal First Instance Court and the Federal High courts held that a directive shall not be allowed to violate the Commercial Code where by the latter has a status of a proclamation. Whereas the Federal Supreme Court Cassation Division quashed the decision of the lower courts by stating that the directive has a status of a Proclamation from which the power to issue a directive is delegated to NBE due to, inter alia, lack of expert knowledge of the legislature to enact detail laws in the area.⁴³⁹

The writer concurs with the position of the illegality of the directive for the reasons stated above. In addition, if every directive holds a position of a proclamation, it would dismiss the very purpose of hierarchy of laws during interpretation and opens a room for further violations of proclamations by directives which may in turn paralyzes the sovereign power of the legislature to enact laws primarily. Further, the delegation should not be taken as a way to violate enabling laws.

By and large, genuine shareholders who know the work load and responsibility of directors did not oppose the performance-based, flexible, payments but what they resisted was excessive payments and corruptions within the board rooms. Shareholders demand prudent regulation of

⁴³⁸Supra note-436

⁴³⁹ For more detail See NBE Vs Eyesus Werkzafu et al., Federal Supreme Court Cassation Division Decisions, Volume 11 (, December 15, 2003 EC, Civil Case No.44226) , p478-481 ; It should be noted that Decision of the Cassation Division Bench is binding up on courts of any level in Ethiopia, according to Federal Courts Proclamation Re-amendment Proclamation No.454/1997, FDRE Federal Negarit Gazzeta 11th year No.42, Article 2 (1).

the banking sector governance.⁴⁴⁰ For instance, two months before the issuance of directive Directives No.SBB/49/2011, Awash International Bank had come up with a new remuneration policy that limited directors remuneration (to not more than 450,000 annual payments and less than five percent of the net profit) by a committee (composed of directors, management, shareholders, independent experts from various disciplines) and it was approved unanimously, at the general meeting of shareholders, (i.e. without no dissenting opinion from the shareholders), in accordance with the Commercial Code which shows that shareholders are brilliant enough to reward their hard-working board of directors reasonably.⁴⁴¹

A board inadequately remunerated and left with no other benefits will unquestionably become passive or captured by management. It would be so poorly incentivized to oversee and direct the company management in the interest of shareholders, stakeholders and the community. This happened for a variety of well-established reasons including: social ties, conflict of interests where directors are from the influential shareholders; board dynamics which often result in deference and politeness towards the CEO, despite the fact that the most important role is to ‘hire and fire’ the latter etc.⁴⁴² Worst of all, if one discerns the remuneration of senior directors of a bank with high skill, experience and profound personal integrity are only paid peanuts, but the minimum salary of fresh CEO is more than 50, 000 monthly plus other benefits.⁴⁴³ How could one expect directors to have moral standing to challenge and discipline a senior CEO who comes with millions of loan deals buttressed by major shareholder influences?

This becomes the most appalling simply because board structure in Ethiopian banks is purely non-executive for employees are prohibited from sitting as members of the board.⁴⁴⁴ Further, experienced and retired bank CEOs are refusing to hold directorship that has higher risks but with too low remuneration, comparative to the former post.⁴⁴⁵ International empirical studies reveal that non-executive directors would always have less information than the management, so they cannot be expected to know every detail of operations or every transaction or product in

⁴⁴⁰ Birhanu, supra note-357

⁴⁴¹ Biniam, Supra note-356

⁴⁴² Ferrarini & Molone, Supra note-425, p310

⁴⁴³ Birhanu, supra note-357; Biniam, Supra note-356; Kefale, Supra note-389; and Siraj, supra note-361

⁴⁴⁴ Directives No.SBB/49/2011, Supra note-211, Art.5

⁴⁴⁵ Birhanu, supra note-357

detail.⁴⁴⁶The asymmetry of information escalates domination of directors by the Chief Executive Officer, who knows every detail of the business. Independent, experienced, well-resourced, informed, and competent directors are able to withstand any overbearing influence of senior management and be more likely to judge performance in the shareholders' and company's interests.⁴⁴⁷

In Ethiopia, if this scenario continues, banks would be left to be at the mercy of the strong shareholders and management with less check and balance, no control, ultimately the legitimate interest of the company and shareholders would be undermined or at least would be below the expected level of board of directors' leadership and supervision.⁴⁴⁸ Instead of safeguarding, challenging but legitimate interest of all stakeholders, members of the board are shifting to protect group interests, mired in embezzlement and other misuse of their power which is truly a threat to the banking business.⁴⁴⁹

How can one expect a director to 'think like an owner' and thereby enthused to espouse an ownership mindset? That is, have a passion for the bank's long term objective success, take personal and legal responsibility for it, spend extra-time to understand things s/he doesn't know! .Ultimately it would be utterly hard to expect such a director to wield extra-effort at a deep personal level to the success of the company over long term matters.

Bank directors are continuing to serve despite the low remuneration. Why they do prefer to continue if the remuneration is out of line? There are multiple possible answers given by shareholders, directors, former member of boards of directors and practitioners, who are close to banking business. The reasons include, but not limited to, first most of the directors are majority shareholders and leaving directorship, [in a situation where professionals and experienced individuals are reluctant to hold the post of directorship], would risk their huge investment.⁴⁵⁰ Major shareholders are serving as directors, therefore, not for the insufficient payment that does not cover one meeting table costs, nor it does worth their time and effort, but they tolerate it to

⁴⁴⁶ Westlake , Supra note-220, p24

⁴⁴⁷ Ferrarini & Molone, Supra note-425, p310

⁴⁴⁸ Biniam, Supra note-356

⁴⁴⁹ Siraj, supra note-361

⁴⁵⁰ Biniam, Supra note-356

save their high stake.⁴⁵¹ Secondly others believe that it is ‘crazy directive’ that may not stay for long, patience would be better.⁴⁵² Third others are retired individuals that do not deserve more than that amount or have no professional experience to compete in the market there by this job will serve them as transition. Finally, there are individuals who are in the board room either to benefit themselves or other sponsors.⁴⁵³

The writer would also like to posit that this inequitable and pre-determined remuneration will hold down the infant banking in-corporatization on the verge of the Ethiopia’s accession to the WTO with its hardships. Inevitably, there are challenging competitive conditions ahead for the huge global financial institutions that demand extra-effort and caliber of each board member. Thus, by undertaking deep research and consulting best international remuneration practices on the one hand and taking in to account director and company-specific situations in Ethiopia on the other, the NBE may set a system from which equitable and fair remuneration of board of directors would possibly be drawn by each bank in the near future. The regulatory framework of the NBE should be geared towards making sure that remuneration should strike an appropriate balance among interests in companies and the individual directors as well as the needs of the markets by establishing procedural requirements for the pay-setting process and on disclosure.⁴⁵⁴

Adequate and fair rewards are, therefore, important prerequisites for good company and board performance⁴⁵⁵ and conformance. The popular saying goes “*when you offer peanuts you get only monkeys*” meaning without attractive remuneration the best, qualified and experienced persons will not offer themselves as directors of risky banking business.⁴⁵⁶

In real terms, both extremes would hurt rightful interest of shareholders, banks, and all stakeholders ‘excessive’ remuneration by allowing individuals inequitable payment to satisfy

⁴⁵¹ Ass. Professor Mahari, Supra note-378

⁴⁵² Siraj, supra note-361; Biniam, Supra note-356; Professor Tilahun, supra note-348

⁴⁵³ Siraj, supra note-361

⁴⁵⁴ Kumpan , Supra note-322, p104

⁴⁵⁵ Martin Hilb, New Corporate Governance: Successful Board Management Tools, 4th Ed. (Switzerland, Springer,2012), p214

⁴⁵⁶ Yechuri Naga Sumangali, Change in the Position of the Independent Directors for Corporate Governance: In Indian Scenario, p7, available at: <http://ssrn.com/abstract> accessed on November 28, 2013

their selfish interest while low would dampen individuals from using their talent, time and effort to strengthen the overall performance of banks.⁴⁵⁷

To sum it up, obviously for the healthy competition and development of banks in Ethiopia, sane and well-considered intervention of the NBE is required so as to alleviate the problems of banking governance.⁴⁵⁸ If banks are to attract capable, committed independent and experienced members to their boards, and retain them, they need to ensure that they reward them adequately.⁴⁵⁹

Therefore time is ripe for the NBE to amend the directive and continue its regulation without interfering in the banking business arbitrarily. Commensurate payment on the one hand generates market candidates for the directorship post and on the other hand stimulates (economic incentive) directors to do all they can to avoid losing such a position or to be re-elected. NBE should not replace the boards and shareholders in setting remuneration level and structures of each bank but it should exercise prudential regulation and supervision limited in scope that does at least enhance the flexible and performance based payments. Regulating remuneration too strictly would erode bank soundness and stability in Ethiopia. The answer to the problem of remuneration lies in introducing international norms and standards without compromising those that already exist in the Commercial Code.

4.4 Practices of Non-financial Share Company Directors' Remuneration in Ethiopia: the forgotten threat

As a rule, in non-financial Share Companies, directors' remuneration is regulated by the Commercial Code. As discussed in the preceding section, directors' remuneration is needed to be strongly linked to performance, particularly given the rising quantum of directors' remuneration and be justified by pay arrangements to the satisfactions of shareholders, regulators, and other stakeholders.⁴⁶⁰ The remuneration package for Directors must, therefore, be sufficient to attract, retain and motivate adequately qualified Directors adequately to run the company successfully.

⁴⁵⁷ Ass. Professor Mahari, Supra note-378

⁴⁵⁸ Ibid

⁴⁵⁹ Westlake , Supra note-220, p47

⁴⁶⁰ Financial Reporting Council, Directors' Remuneration :Consultation Documents, (UK, October 2013), p9 available at www.frc.org.uk accessed on November 17, 2013

At the same time avoiding paying more than is necessary to meet this objective, and to ensure that their independence is not compromised.⁴⁶¹

The writer has observed some randomly selected files of non-financial Share Companies in the Ministry of Trade archives of which 9 (nine)⁴⁶² have been analyzed critically with regard to the composition, structure and remuneration of their directors. Some Memoranda and Articles of association of these Share Companies observed, demand that only shareholders can be directors but none of them have a clause on the competence and professional qualification study of their directors while others remain silent even as to who can be a director. Owing to the silence of the Commercial Code, none of the companies require their directors to have a specific professional qualification and experience to run the company. If only members are going to direct the company, observably all would have one structure, non-executive board of directors. Similarly, there is no clue with regard to the requirement of establishment of committees or the appointment of independent professional directors and experts in the area where the company is intended to engage in.

The Commercial Code fails to set clear rules on the separation of the role of the board chair person and the CEO. Following this, some Share Companies insert clauses that their CEO may be member of the Board of directors to be called managing directors like Selam Bus Lines Share Company.⁴⁶³ Similarly, others are being represented and run practically, for instance Hibir Sugar Share Company.⁴⁶⁴ This unification results in over-concentration of power in the hands of an individual. Such fusion of power also increases the skepticism that directors can be easily dominated and undermined by the extremely powerful CEOs which might in turn weaken the checks and balances that was supposed to exist in running a company. In addition, separation of board chairperson and the CEO also avoids abuse of power. The role of the Chairperson and CEO should, therefore, be separate and independent to ensure an appropriate balance of power,

⁴⁶¹Code of Good practice , Supra note-339

⁴⁶²Sky Bus Transport system Share Company, Bahirdar Edible Oil Share Company, Africa Juice Tibila Share Company, Selam Bus Line Share Company, NCH Trading Share Company, Hedassie Transport Share Company, Duka Travel Tour Lodge Share Company, Comoros general trading Share Company, and Sodore Resort Hotel Share Company.

⁴⁶³For instance see Article of Association of Selam Bus Lines Share Company, Art.18 (1), available at FDRE Ministry of trade achieves accessed on November 18, 2013

⁴⁶⁴ See for more details Bewket Abebe, (Fortune Staff Writer), Hibir Sugar SC, which narrowly escaped liquidation a month ago, signed a memorandum of understanding (MoU) with the Ethiopian Metal & Engineering Corporation (MetEC), Addis Fortune Vol.14, No.701, (October 06, 2013)

increase accountability and greater capacity of a board for independent decisions.⁴⁶⁵ Equally, it would also be tricky for board of directors to discipline, the CEO, their boss.

With regard to the number of board members, eight of the Share Companies analyzed have odd number of members while one has even, eight members (Africa Juice Tibila Share Company). In decision making the Share Company with 8 board members requires absolute majority for decision which has solved the problem of potential deadlock in making critical decisions of the company. Directors are required to hold meetings principally once a month or at least once in two months period even though in one of the companies' articles provides for making at least once within three months (Sodore Resort Hotel Share Company). One company requires its directors to meet when the business of the company requires (Africa Juice Tibila Share Company).

None of the Memoranda/ Articles of associations comprises a provisions or the need for remuneration policy. Some failed to incorporate even a word on the remuneration of their directors. In all those Share Companies, which provided for remuneration of their board, they stated that it is to be determined by the general meeting of shareholders in accordance with Art.353 of the Commercial Code. However, according to the articles of association of one Share Company the chairperson of the board shall determine the amount of remuneration and when the company starts to earn profit 10% of the net profit will be awarded to the board of directors.⁴⁶⁶

There are intriguing legal questions that arise here. First, simply 10% without any extra-effort and company and board achievement contravenes the objective of the Commercial Code. Second what if no dividend is distributed to the Shareholders, which is against the mandatory provision of the Commercial Code.⁴⁶⁷ Third, the chairperson of the board is a member of the board of directors. It is an international corporate governance principle that none should decide her/his own remuneration rather it should be decided by an independent and competent remuneration committee.⁴⁶⁸ Fourth, it is also against the requirement of the Commercial Code which demands

⁴⁶⁵ Annotation to OECD Principles, principle VI.E, p63-64

⁴⁶⁶ Article of Association of Comoros General Trading Share Company, art.21, available at FDRE Ministry of trade achieves accessed on November 18, 2013

⁴⁶⁷ Com.C, Supra note-17, Art.353 (6)

⁴⁶⁸ See section 2.3.4.of this paper

the general meeting to decide the amount of directors' remuneration.⁴⁶⁹ If boards of director is empowered to determine the amount of their remuneration, there could be conflict of interest and its fairness and reasonability would be questioned as the chairperson might reward his/her self or crew members excessively.

The spirit of the Commercial Code in fixing the maximum at not more than 10% of the net profit after deducting the entire deductible amounts appears to be linking incentive with performance and extra effort of the board for its realization. This can be inferred from the background documents of the Commercial Code, "*The remuneration of the directors must be limited if one wishes to avoid inequitable payments and ...it expresses the desire to maintain a certain proportion between the remuneration of the directors and that of the company's other personnel...*"⁴⁷⁰ But, in some Share Company Memoranda/articles of association, there are no profit conditions attached to be awarded such an amount.⁴⁷¹ In this regard another Share Company states that if the net annual profit is less than 30% the board of directors will be receive 1%, if it is greater than 50%, the board will receive 2% and if no profit no benefit, which seems to link performance with incentivizing its board, though the monthly allowance provided there is 100 birr which is peanut.⁴⁷² Another Share Company allows the directors to decide the quantum of the remuneration. For instance, in the last fiscal year, its directors had Birr 1000 annual payment and received 3% of the annual net profit.⁴⁷³ None of the Share Companies state whether the share in the net profits would be awarded to directors even if no dividend has been distributed to the shareholders though the law dictates non-payment of remuneration to directors in the latter event.⁴⁷⁴

There is more sober divergence in the determination of the amount of the remuneration. For instance, one company allows its directors to receive up to 10% of the net annual profit in addition to the annual remuneration determined by the general meetings of shareholders if the

⁴⁶⁹ Com.C, Supra note-17, Art.353 (1)

⁴⁷⁰ Winship, Supra note-59, p63

⁴⁷¹ For instance see Article of Association of Comoros General Trading Share Company, Art.21, available at FDRE Ministry of trade achieves accessed on November 18, 2013

⁴⁷² Article of association of Hedasse Transport Share Company, art.19, available at FDRE Ministry of trade achieves accessed on November 18, 2013

⁴⁷³ Written information from the Finance Head of (Wrt. Yabsira), Selam Bus Line Share Company given to the writer. The Share Company has currently five directors.

⁴⁷⁴ Com.C, Supra note-17, Art.353 (6)

company becomes profitable by more than 20%.⁴⁷⁵ On the contrary, others allow their directors to be paid only monthly allowances. For instance Sky bus Share Company paid only the fixed monthly remuneration.⁴⁷⁶

There is nothing indicated as to mandatory information disclosure with directors' remuneration though the law sets mandatory provision of the balance sheet submitted to the annual general meeting to show the total amount of the remuneration, allowances, annuities, retirement benefits and benefits in kind given to directors.⁴⁷⁷ The statements of companies either say nothing as to remuneration of their directors or simply report as directors' expense in their annual statements. In the absence of disclosure obligations and lack of procedural requirements for the remuneration setting process and its amount, coupled with the absence of independent professional directors and competent remuneration committees, there might be arbitrary remuneration decisions though there is no accurate empirical evidence in that regard.

From these observations one can conclude that non-financial Share Companies are exceedingly dissimilar in their remuneration and the payments they to make of their directors which in turn may become a potential threat to the non-financial Share Companies. It should be clear that the desired similarity is not in the amount but in the setting process and in structure.

On the discrepancies, the writer approached the Ministry of Trade experts to know how these companies are being regulated. Admitting that shareholders are expressing their frustrations on the regulatory role of the Ministry and its practical repercussions on the governance of non-financial Share Companies, one official states that Ministry of Trade is playing only a passive role in regulating these companies. "It is not really exercising its real power of regulating non-financial Share Companies", he added. Although individuals or group of shareholders lodge a complaint, so long as the directors are complying with the provision of Memoranda/Articles of associations the Ministry is not, most of the time, if not all the time, intervening to bring industrial peace and to play its true regulatory role.⁴⁷⁸

⁴⁷⁵Article of association of Article of association of NCH Trading Share Company, Art.15, available at FDRE Ministry of trade achieves accessed on November 18, 2013

⁴⁷⁶Ass. Professor Mahari, Supra note-378

⁴⁷⁷Com.C, Supra note-17, Art.362 (1)

⁴⁷⁸ Interview with Tekalign Kedir, Legal Expert in the FDRE ministry of trade, done at his office , on November 18, 2013

Correspondingly, one trade registration and licensing supervisor, restates that if the directors and other major shareholders act in conformity with the Memoranda/Articles of association, there would be no mechanism that the Ministry would intervene in the internal affairs of the business. Likewise, if the general meeting of shareholders by majority vote decides the directors' remuneration, no need of intervention of the Ministry of Trade to please minority shareholders', irrespective of the degree of excessiveness, if any.⁴⁷⁹ Shareholders are complaining about excessive and unfair benefit of directors and founders in the Share Companies but they are told to go to court rather than getting remedies from the Ministry by the latter giving letters as to who is at fault.⁴⁸⁰ There are instances where founders and directors collect unfair interests and other benefits of shareholders money by not commencing business for five to six years giving unsatisfactory reasons.⁴⁸¹

Some shareholders state that the Ministry of Trade is there only to register Share Companies that 'rob the public money' through public subscription instead of properly regulating them. None stands to ask founders and directors despite the excessiveness of the amount paid not only in terms of remuneration but also under different titles. By and large, the directors in Share Companies are, mostly, the founders themselves and can do as they like under the cover of Memoranda and Articles of Association drafted by themselves. They usually are also majority shareholders and do what benefits them not to the Company or its other shareholders. If the Ministry of Trade is there only to give license, which body should regulate them remains unanswered, in spite of the fact it is an important question raised by shareholders.⁴⁸²

However, the Commercial Code empowers the Ministry of Trade to reduce an excessive remuneration taking in to account the special benefit which have been allocated to directors having the status of founders, and taking in to account the position of the company; the salaries and benefits of its employees and based on the position of shareholders representing not less than

⁴⁷⁹ Interview with Alebachew Sitetaw, Trade Registration and License Supervisor, Ministry of Trade, done at his office, on 19 November, 2013

⁴⁸⁰ Case Ato Getachew Tesfaye et al Vs Ato Fanuel Dege et al, FDRE-Federal First Instance Courts : Lideta 5th, assigned bench, Commercial Case No.192158, Date 18/04/2005 EC., had there been prudent non-financial regulation the conflict could be possibly prevented. For one thing the source of the conflict seems simple for the directors or General Manager does not get open room for abuse for the other why the Ministry of Trade writes a letter to the courts while it is possible to give administrative solutions.

⁴⁸¹ Tekalign, Supra note-478

⁴⁸² Interview with Ato Yalew Belete and 4 others who required their name to be withheld, Shareholders in 3 anonymous Share Companies, conducted at the head office of the MoT, on November 18, 2013

10% of the capital.⁴⁸³ If one closely observes this position of the law, one can comprehend that the Ministry is obligated to take in to account all possible circumstances to order the reduction of the excessive remuneration which seems to be a sound approach though disregarded by the Ministry's experts as a ground to intervene. Having such a regulatory power has scores of implications starting from early solving of disputes, reducing of unwarranted litigation costs, establishing good corporate governance in Share Companies and protecting the interest of the company and its shareholders without compromising the interest of other stakeholders and the environment.

The writer would like to posit that to avoid over payments and abuses by directors, the regulator is required to fill the gap by setting clear research-based mechanisms of remuneration and its setting process than setting aside problems to be solved by courts. Seen comparatively, the gap between the international standards and Commercial Code provisions is as wide as the gap between the law and the practice. Worst of all, even the legal rules that exist are not properly enforced. At present, there are only few regulatory roles of the Ministry of Trade to enforce the law and prevent excessive remunerations and payment related abuses. As laws and regulations have not been enforced, they have fallen in to disuse and often been forgotten as precisely being observed in the fate of the Commercial Code provisions in regulation of the non-financial provisions. Ass. Prof. Mahari argues that the Commercial Code part that regulates Share Companies has been forgotten for it was side lined by the policy change of the Dergue. The officials of the Ministry of Trade fail to remember that they have a duty to regulate Non-financial Share Companies.⁴⁸⁴

It must also be noted that companies would not be at absolute freedom, rather there could be strong market forces regulation in the area if they prudently regulated to establish healthy business competition. However, leaving directors' remuneration to mere market forces regulation would open a wide room for abuses by directors and influential shareholders which would result in unjustifiably rewarding themselves or one another. To prevent excessive payment and corrupt business environment regulatory intervention of the Ministry of Trade is of high importance. The passive involvement of the Ministry of Trade is worsening the situation of corporate governance

⁴⁸³ Com.C, Supra note-17, Art.353 (7)

⁴⁸⁴ Ass. Professor Mahari, Supra note-378

of non-financial Share Companies especially at their early stage of business operation. After all, the Ministry of Trade is duty bound to close all possible windows of abuse. Due to these gaps there have been various news headlines in the press and many court cases that discourage establishment and operation of Share Companies, like Real Estate Companies and other non-financial Share Companies.⁴⁸⁵ There are also other Share Companies with huge capitals and thousands of shareholders narrowly scalped liquidation.⁴⁸⁶

Furthermore, the Commercial Code does not require the transparency of remuneration setting process guide, disclosure and shareholders' approval of remuneration policy and remuneration report which allows shareholders and other stakeholders to properly exercise their role in the corporate governance⁴⁸⁷ of non-financial Share Companies. Among other things remuneration policy would help shareholders to make informed decisions with regard to remuneration and approval of the reports forwarded to them. In the absence of remuneration policy, it would be unimaginable to set principles in advance, to inspect the quantum, objectivity and impartiality of directors' remuneration. These are also against internationally recognized best practices to reduce discretionary power of the competent body to determine the amount.⁴⁸⁸ The Commercial Code also ignores, inter alia, the establishment of committees related to remuneration, auditing and nomination which in turn plays an indispensable role in establishing good corporate governance environment.

The futurity of a company is highly intertwined with the commitment and efforts of directors. In light of this the current company governance requires holistic re-examination of regulation and supervision of directors' remuneration in non-financial Share Companies. Currently, it could be said that non-financial Share Companies establishing and operating in Ethiopia are more or less self regulated. Should regulators wait until a huge collapse occurs? Although there are public out

⁴⁸⁵ For instance see Eleni Araya (Fortune Staff Writer), Board Members Seek Government Support in Access [Real Estate] Debacle, Addis Fortune Vol.14, No.697, (September 08, 2013)

⁴⁸⁶ For instance Hibir sugar factory has 16, 438 shareholders which was narrowly escaped liquidation when its board of directors and shareholders held an extra-ordinary meeting on august 31, 2013 and voted in favour of its continuation. For more details see Bewket Abebe, (Fortune Staff Writer), Hibir Sugar SC, which narrowly escaped liquidation a month ago, signed a memorandum of understanding (MoU) with the Ethiopian Metal & Engineering Corporation (MetEC), Addis Fortune Vol.14, No.701, (October 06, 2013)

⁴⁸⁷ Fong, Supra note-484 Adrian Fong, Practicing Corporate Governance through Corporate Disclosure?, Working Paper, (Faculty of Law, Chinese University of Hong Kong), p9

⁴⁸⁸ Vuk Radović (PhD) , Boomerang Effect of Incentive and High Remuneration on Independence of Board Members , p169 , available at: <http://ssrn.com/abstract> accessed on November 28, 2013

cries and prolonged litigations, no one has paid serious attention to the problem. The only solution is court dispensation of cases which is last resort in commercial dispute resolution methods, and is becoming wretchedly complicated problem to the in-corporatization of non-financial Share companies. Had it been implemented properly, regulation would have prevented these unnecessary controversies from occurring.

In view of preventing such predicaments, the regulators should prepare guidelines and monitor their compliance with regard to directors' integrity, experience and expertise, foresight, directing qualities and ability to understand the overall company performance, composition, structure, remuneration policies and disclosure of each. Furthermore, the regulators should facilitate shareholders activism by letting them to be more vigilant in appointing only people with impeccable integrity and adequate qualifications as directors of companies they invest in. The economy does not stand on banking business alone. Rather, all Share Companies should be given reasonable attention from the perspective of enhancement, regulation and supervision. It is an undeniable fact that non-financial companies are not as serious as banks but the former should not be left at the mercy of directors and major shareholders. As things stand now, non-financial share companies may be said totally forgotten.

On the other hand, directors' remuneration' in financial companies is over regulated by the NBE whereas there is under-regulation in non-financial companies. What a mixed system? It is a gray system that appears to rest at the two extreme ends of regulation ...strictly regulated...left unregulated (a forgotten threat!).

If the two extremes [draconian and rigid regulation of the NBE of Banks on the one hand and the passive role of the Ministry of Trade in Non-financial Share Companies on the other] persist, both would become threats to the corporate governance of their respective sub-sectors which might significantly affect the overall economic situation in Ethiopia. This would slow down the pace of development in the Ethiopian economy: in banks by draining the talent, qualities and caliber of directors while in the non- financial Share Companies by discouraging investors not to subscribe shares in the areas which have great repercussion on the required corporatization.

Chapter Five

Conclusion and Recommendations

From the above mentioned discussions, the writer would draw the following conclusions and recommendations.

5.1 Conclusion

Board of directors are believed to play indispensable role in governing, directing, guiding, monitoring, overseeing all activities, some labeled it as conscience, of Share Companies. Consequently if the board does not invest sufficient time and effort to construct an effective policies and strategies and keep it under regular review, all the efforts of management and employees will not produce optimal results, if not impossible at all. Directors are expected to act in the legitimate interest of the Company, shareholders, stakeholders' and the environment. It is the duty of shareholders to elect directors that have, inter alia, extra quality, skill, experience, personal integrity and independent judgment as well as directors who know their duties and rights from all perspectives.

In Share Companies separation of ownership from control leads to information asymmetries and some sort of discretionary power of directors. Coupled with directors' need for motivation, these leave a room for directors to act in their own self-interest to the detriment of the genuine interests of the Share Company, shareholders, and other stakeholders. The regulators and Stakeholders employ various mechanisms to control and minimize abuses and spillover effect of information asymmetry. In this regard, directors' remuneration is a key mechanism to align directors' inherent need for incentives with stakeholders' interest to control abuses. Justifications for the payment of remuneration have developed by the diverse theories of remuneration such as Reinforce, Expectancy, Agency, and Equity theories. More less all Share Companies are paying their directors.

The current debate is, well and truly, on the basis, process of setting, amount and mode of remuneration with a view to curtail excessive and undeserved remuneration packages. The remuneration is needed to be sufficient to attract, motivate and retain the quality and caliber of directors needed to successfully run companies while the make-up should be so structured as to

link company and individual performance. Practically speaking, however, it would be difficult to exactly draw the line of fair, equitable and reasonable directors' remuneration. Jurisdictions employ various methods and standards to narrow the gap. These include requiring mandatory remuneration policy, adoption and disclosure; enhancing shareholder activism, payment disclosure requirements, setting process guide lines, setting maximum limit and condition of payments.

In Ethiopia, Excessive directors' remuneration and banking mal-governance and notable subsequent public outcry raised widespread shareholders', other stakeholders' and regulators' concern about the inadequate governance standards of directors' remuneration in the banking sector. To address the quandary, some stakeholders and shareholders responded by lodging series of complaints and lobbying NBE. Likewise others started to take internal measures of correcting the excessive remuneration by setting maximum thresholds. NBE as a regulator on its part, reacted by issuing different directives to deal with such problems, of which directive No. 49/11 that limited the directors' remuneration in the banking Share Companies is the one.

To alleviate the specific problem, of excessive remuneration, the NBE appeared with a directive that limits the directors' remuneration only to a taxable amount of Birr 50,000 annual and 2000 monthly allowances even if it defined remuneration widely. Proponents of the directive state that the directive is appropriate regulatory measure to keep away the system from the problems of excessive directors' remuneration, corruptions, and unnecessary competitions within shareholders in particular and achieve the missions and objectives of banks in general.

Opponents (including the writer) on their side, however, challenge that the directive is rigid and could not accommodate changing circumstances. The regulator could use such unhealthy competition to hold sits on the board, to boost banking governance. Evidently, it is below the market level compared to bank payments, equivalent professionals who are in the management or even low ranked bank officers and senior clerks. For instance, monthly remuneration for one fresh CEO with less experience, and sometimes less educational background, is Birr 50, 000 a month plus other benefits.⁴⁸⁹ But a director is required to challenge and discipline a CEO, who is

⁴⁸⁹ Birhanu, supra note-357

junior in experience, education, and have relatively less risky position, but paid better. It would be difficult for a director to be morally strong to discipline and monitor the CEO and other senior managers who appears with millions of loan deal backed by major shareholders.

Instead of developing effective and efficient remuneration governance of banks by augmenting the competence of directors, reducing scandals and ‘palm greasing’ through reinforcing the role and independence of auditors, remuneration committees, setting guidelines, maximum variable range of remuneration, the NBE simply fixed it arbitrarily. Absolutely, it denied shareholders right to participate in governing their company which is in contradiction with the spirit of the Commercial code and international practices. The Directive should not be allowed to contradict the Commercial code.

Board rooms should be occupied by those who are really and truly qualified for such positions and understand the enormous responsibilities which such directorship entails, and are willing and able to dutifully and diligently discharge such responsibilities. Banking is risky and requires extra-quality and profound personal integrity, equally, extra-motivation in the view of accommodating all rightful interests revolving around the company.

This in turn presupposes commensurate remuneration that reflects the company’s objectives for good corporate governance as well as sustained long-term value creation for shareholders and stakeholders within the competitive national and international market. One remuneration approach does not fit all Companies and at all times. It would be absurd to pay equal amount to directors who run a bank with hundreds of branches, thousands of shareholders, hundreds of employees, carryout very complex national and international transactions, generated millions of profits with directors who oversee one branch, few shareholders, handful of employees, less profit etc. by disregarding, professional background, work load and experience, risk, personal integrity, what not!

Remuneration proposals should be proposed by each bank’s remuneration committee re-examined by the board of directors which would annually evaluated against performances. It would be better if it take into account the size, risks assumed, complexity of the duties, experience and expertise of each director but within the maximum limits set by the regulator. It

should also be approved by general meeting of shareholders after testing if all pre-requisites are taken in to consideration and reported to the regulator for checking of final compliance.

This rigid, ‘one remuneration regime fits to all directors, companies in all circumstances’ approach is deriving directors, who have the required qualification and experience, out of banks. Practicing directors are claiming that the existing directors are there only for the following reasons: first most of the directors are majority shareholders and leaving directorship, [in a situation where professionals and experienced individuals are reluctant to hold the post of directorship], would risk their huge investment.⁴⁹⁰ Major shareholders are serving as directors, therefore, not for the insufficient payment that does not cover one meeting table costs, nor it does worth their time and effort, but they tolerate it to save their high stake.⁴⁹¹ Secondly others believe that it is ‘crazy directive’ that may not stay for long, patience would be better.⁴⁹² Third others are retired individuals that do not deserve more than that amount or have no directorship experience to compete in the market thereby this job will serve them as transition. Finally, there are individuals who are in the board room either to benefit themselves or other sponsors illegally.

On the contrary, directors’ remuneration in insurance Share Companies is regulated by the rules and principles of the commercial code. But even in insurance companies, there is no payment performance relation; rather they pay to all directors, equally irrespective of individual caliber, experience, extra-efforts and performances including the chairperson.⁴⁹³ The Commercial Code does not require them to prepare their respective remuneration policy, too. Most of insurance companies are sister companies of banks and the risks and responsibilities of bank director is much higher than his/her corresponding person at the insurance company.⁴⁹⁴ Conversely, the average remuneration of Insurance company director is more than 6 times higher than bank director.⁴⁹⁵ What a weird system!

Fairly speaking, regulating of effort of NBE, which is often complex and its effectiveness remains verified, to minimize systematic financial risks is irreplaceable and should be continued

⁴⁹⁰ Biniam, Supra note-356

⁴⁹¹ Ass. Professor Mahari, Supra note-378

⁴⁹² Siraj, supra note-361; Biniam, Supra note-356; Professor Tilahun, supra note-348

⁴⁹³ Siraj, supra note-361 & Birhanu, supra note-357

⁴⁹⁴ Birhanu, supra note-357; Biniam, Supra note-356; & Kefale , Supra note-386

⁴⁹⁵ Siraj, supra note-361 & Biniam, Supra note-356

firmly. Likewise, it is beyond doubt that some of, but not all, its roles in regulating and supervising the financial institutions are in the right direction and closing major gaps. Notably, there are good moves in avoiding major shareholder dominance, power concentration, regular follow up, setting minimum capital etc. which saved the financial sector from crisis.

But, all the problems of remuneration that have been before the issuance of the directive are continuing intensively. The desire to eradicate all abuses and excessive remuneration must not lead to excessive constraints that would end up having worse consequences for the development of banks, the existing or the emerging. The principle goes 'pay best to get the best'. Thus, such a demand for revisiting should not be viewed as an idea to undermine or oppose to the irreplaceable regulatory role of the NBE but rather to overhaul and shed light on it. directors' remuneration ' becomes vicious circle whereby the rigid approach of the NBE leads to further problems that only made the predicaments worse unless urgently re-examined.

In non-financial companies, keeping the threshold (minimum) and ceiling (maximum) limits of the Commercial Code, companies have divergent mode and process of remunerating their directors. It is not the quantum that is desired to be similar, but the process of setting, who should determine, on what criteria should have been similar. Practically speaking, there is no specific institution to regulate directors' remuneration in non-financial companies. None checks whether they comply not only with the best principles and international standards but also with the age old Commercial Code rules.

There are practical flaws compared to the law and benchmarked to international best practices, owing to Company themselves or regulating institutions. In the first place, these Companies are ignoring the general requirement 'that there should be a formal and transparent procedure for fixing the remuneration packages of individual directors and no director shall be involved in deciding his/her own remuneration.' In this regard it has been shown that directors decide their remuneration though subjected to approval of the general meeting of shareholders for formality purpose.

Secondly there are no guidelines or benchmarks prepared to indicate the way companies set remuneration of their directors. Thirdly, the basis of the payments is not clear. Fourthly, Companies have no remuneration policies that address base pay and net profit sharing. Fifth,

Establishment of remuneration committees that are responsible for recommendation of remuneration is not mandatory requirement. In addition in some companies, not all of course, there is fusion of power of CEO and Board Chair person. In some companies the chair person is empowered to determine the amount of remuneration. Even in some Share companies board of directors are deciding their remuneration. Further, Articles of association empowers directors to reward to 10% of the net profit irrespective of the distribution of dividends to shareholders and contribution of individual director.

As international experiences indicate, if there is no remuneration policy, it would be hard for the shareholders and regulators to understand whether the annual or monthly payments made to directors are in line with long and short term objectives of the company and other legitimate benchmarks. In the absence of explicit legal compulsion to disclose, shareholders and other stakeholders are rarely in possession of detailed information of the remuneration packages.⁴⁹⁶ So long as remuneration remains unregulated, directors would still be having a field day in enriching themselves at the expense of the company and its shareholders.⁴⁹⁷

Both extremes impair Share Company directors' remuneration governance, (over regulation and under regulation), and are regulation failures with their own devastating effect on remuneration of Share Company Directors in Ethiopia. Ineffective regulations exacerbate rather than calm the situation.⁴⁹⁸ If remuneration is not well regulated, it can constitute a burden on the company's free cash flow, which can hurt the corporation, its creditors, and shareholders.⁴⁹⁹ The end objective of regulating remuneration in Share Companies should be to formulate the possible optimum remuneration scheme that motivates directors to maximize company's performance taking into account governance arrangements, through nationally developed guide lines which are consistent with selected international best practices on directors' remuneration but taking into account legitimate interests of stakeholders.

5.2 Recommendations

The writer would like to suggest the following salient recommendations:

⁴⁹⁶ Abugu, Supra note-380, p10

⁴⁹⁷ Id, p16

⁴⁹⁸ Nicholas V. Vakkur et al , Corporate Governance Regulation: How Poor Management is destroying the Global Economy, (John Wiley & Sons, Inc., USA, 2013) preface

⁴⁹⁹ Abugu, Supra note-380, p10

1. In the selection and appointment process, members of boards of directors should be professionals who are able to carry greater responsibilities of directorship, and understand globalization, corporatization and able to make all inclusive decisions vis-à-vis introduction of successive and continuous evaluation of board of directors' effectiveness.
2. Any attempt to give a legislative solution (only fixed or predetermined amount) for the question of fair and equitable remuneration is doomed. In order to ensure that remuneration is performance-based and function related, a balance should be established between fixed and variable remuneration and make allocation of the variable component conditional upon predetermined and measurable performance criteria. Companies should be allowed to adopt a specific system that can and should help attract and retain top directors of outstanding ability and to highlight and reward those behaviors required each of them. Equally, remuneration should be derived from an explicit pay philosophy and strategy consciously developed to support the company's business strategy, organizational structure and within objective principles. To create healthy competition and boost comparative advantage, remuneration should be regulated by the market, being mindful of meeting the national and international strategy of competition, company and directors' performance, risks assumed, work load, work complexity etc. Instead of following one remuneration regime fit-all banks approach, the directive of the NBE should, therefore, be amended to incorporate the limits of maximum payments and research-based guide lines to increase or decrease payments and to avoid abuse (i.e. under or excessive payments).
3. Shareholders should have a say on mode and amount of payment to their directors, and be provided with mandatory remuneration report by boosting sufficient shareholder activism: both institutional and individual. However, it should be noted that, remuneration should be approved but not be set by the shareholders. Because, first, the shareholders may not be experts in remuneration matters and, second, payments and benefits should, first and foremost, respond to market forces and the performance of the company and individual director's role.
4. The Commercial Code should allow establishment of Remuneration Committee that set the remuneration. Its members should be with definite role and composition, limited term of office, independent but accountable. The primary objective of the committee should be to make sure that the remuneration is fair and equitable from all perspectives having no party's illegitimate interest in mind when determining remuneration to avoid laziness and carelessness.

5. Similarly, the Commercial Code should require boards to set up Audit committee and Nomination committees (with a view to nominate independent directors, general manager/CEO and other senior managers appointed by the board) to perform with their respective functions and responsibilities in line with the best international practices and experiences. The nomination committee shall set, in advance, nominating and appointing criteria in an open and transparent manner.

6. To increase shareholders activism, Share Companies should also establish shareholders' relations department which primarily aimed at facilitating, assimilating the information required and listening to the views of shareholders by facilitating communication between the company directors and shareholders.

7. Directors' remuneration in non-financial Share Companies require prudent regulation but if the existing situation of unregulated non-financial Share Companies continued, it would unquestionably obstruct the emerging corporatization and free competition. It paves a way for the continuation of the existing 'kiosk mentality' i.e. individuals will tend to choose to invest in personal kiosks and underground economy than establishing Share Companies for they are losing confidence on the prudent regulation of such companies.

8. Non-executive directors would always have less information than the management, so they cannot be expected to know every detail of operations or every transaction or product in detail.⁵⁰⁰ In view of that, Art. 347 of the Commercial Code should be amended to incorporate independent outside directors, who are independent of management and free from any business or other relationship that could materially interfere with their independent judgments.

9. Non-financial Share Companies should ensure Separation of CEO and Chairperson which are becoming wretchedly complicated problems to the determination of equitable and commensurate remuneration of non-financial Share Company Directors due to concentration of power, unwarranted control of and influence of board decisions, determination of directors' remuneration etc.

10. The controversial approach of the Commercial Code with regard to the legally recognized board structure adopted in Ethiopia should get solution for it is one important component of Share Company governance in general and equitable directors' remuneration in particular. Ethiopia should adopt a clear board structure by considering her circumstances and international

⁵⁰⁰ Westlake , Supra note-220, p24

benchmarks either leaving it to companies by setting clear guide lines or specifying any of the possible structures.

11. There should be independent institution to regulate and supervise non-financial Companies so as to fill the gaps in the existing legal and Institutional frameworks. Practically speaking, the existing share company directors' remuneration practice is violating not only the international best practices and principles of remuneration but also the principles enshrined in the age-old Commercial Code.

12. Formal Stock market should be developed to play its Share Companies' regulatory role, especially non- finance share companies, and facilitate exit of minority shareholders to avoid the spillover effect of underperformance and manipulation of majority shareholders or mangers.

13. The reform of the forthcoming Commercial code on Share Company governance should create a clear statutory regime in which minority shareholders may bring derivative actions on behalf of Share Companies.

14. There should be comprehensive amendment of the Commercial Code to have modern and 'business friendly' rules and principles that encourage international and national competitive companies, rather than making fragmented amendments (too hard to collect for research purposes or otherwise) to accommodate continuous demands of changes, current and future developments. The multiplicity of laws scattered here and there results in confusion, hard ship which demand contemporary, comprehensive and commendable Commercial Code.

15. The regulators are required to assess whether Share Companies are complying with the mandatory rules and principles of remuneration policies and packages so as to take timely and appropriate measures. Furthermore, the laws enacted should be examined on the ground if these are serving their prime purpose. Regulation is not one time event but requires regular surveys, investigations and researches.

16. Public private Consultative forums on Company governance in general and remuneration of Share Company Directors in particular, Should be organized consistently and continuously to rectify the current problems and to create enabling environment for Share companies to play their true role in Ethiopian economy.

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Interviews

Interview Ato Merga Waqwoya, Principal Examiner, NBE, done at his office, on November 25, 2013

Interview with Mahari Redae (Assistant Professor of Law), former member of the board of directors at Sky Bus Share Company and Anbesa Insurance Share Company , Now shareholder at both Share Companies, Addis Ababa University School of Law, done at his office, on November 22, 2013

Interview with Abera Degefa (Assistant Professor of Law), Director and Shareholder, at Zemen Bank SC., AAU, done at his office, on January 18, 2013 at his office

Interview with Alebachew Sitetaw, Trade Registration and License Supervisor, Ministry of Trade, done at his office, on November 19, 2013

Interview with Ato Alemayo Kebede, Change Management and Communication Directorate, Director, NBE, done at his office, on November 21, 2013

Interview with Ato Befukadu Gashaw, Domestic Economic Analysis and Publication Directorate and Economic Modeling and Statically Analysis Directorate, Director, NBE, done at his office, on November 25, 2013

Interview with Ato Yalew Belete and 4 others who required their name to be withheld, Shareholders in 3 anonymous Share Companies, conducted at the head office of the MoT, on November 18, 2013

Interview with Biniam Terfa member of the board of directors at Awash International Bank & Insurance Share Companies (he has already notified for the general meeting of share holders of the Bank that he will not be re-elected for the next term of office despite his nomination to continue) and Consultant and Attorney at law, done at his office, on November 20, 2013

Interview with Birhanu Getaneh Shareholder, former member of the board of directors and former CEO, currently serving as corporate advisor of United Bank Share Company; Shareholder and member of board of director at the United insurance Share Company; Premier Switch Solution (PSS), [a joint venture (JV) between Awash, United and Nib banks to provide card banking service], Board Chair man, done at his office, United Bank Sh.C Head office, on December 30, 2013

Interview with Kefale Zegeye, Shareholder at Buna International Bank Share Company and Nib International Bank Share Company, Board Secretary and Corporate Advisor of the President (CEO) at Buna International Bank Share Company, done at Buna International Bank Share Company Head office, on November 15, 2013

Interview with Professor Tilahun Tosheme, former member of board of directors at Abyssinia Bank Share Company and an Advocate, AAU, Monday, done in his office, on November 12, 2013

Interview with Siraj Abdela, member of the board of directors at Nib Insurance Share Company, a shareholder at Nib International Bank, and Consultant and Attorney at law, done at National Theatre Café, on November 21, 2013

Interview with Tekalign Kedir, Legal Expert in the FDRE ministry of trade, done at his office, on November 18, 2013

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