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COLLEGE OF LAW AND GOVERNANCE STUDIES

SCHOOL OF LAW

GRADUATE REGULAR PROGRAM

REGULATING MOBILE MONEY SERVICE AND COMPETITION IN ETHIOPIA: EMPHASIS ON THE PROVISION OF MOBILE NETWORK OPERATOR-LED MOBILE MONEY SERVICE

By:

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“Regulating Mobile Money Service and Competition in Ethiopia: Emphasis on the provision of Mobile Network Operator-led Mobile Money Service”

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Declaration

This is to declare that this thesis is my own work, has not been presented for any other degree and that all sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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ACRONYMS AND ABBREVIATIONS

ACH: Automated Clearing House	MNOs: Mobile Network Operators
ADR: Alternatives Dispute Resolution	M-POS: Mobile Point of Sale
AFCTA: African Continental Free Trade Area	MVNA: Mobile Virtual Network Aggregator
AFI: Alliance for Financial Inclusion	MVNE: Mobile Virtual Network Enabler
AI: Artificial Intelligence	MVNO: Mobile Virtual Network Operator
AML: Anti – Money Laundering	NBE: National Bank of Ethiopia
API: Application Programming Interface	NCFI: National Council for Financial Inclusion
Art: Article	NDEC: National Digital Economy Council
ATM: Automated Teller Machine	NDPS: National Digital Payment Strategy
B2B: Business-to-Business	NFC: Near Field Communication
B2P: Business-to-Person	NFIS: National Financial Inclusion Strategy
CBE: Commercial Bank of Ethiopia	NPS: National Payment System
CDD: Customer Due Diligence	NPSC: National Payment System Council
CGAP: Consultative Group to Assist the Poor	NPSP: National Payment System Proclamation
COMESA: Common Market for Eastern and Southern Africa	OECD: Organization for Economic Co-operation and Development
CTF: Counter Terrorism Financing	P2P: Peer-to-Peer/Person to Person
DFS: Digital Financial Services	P2B: Person-to-Business
EAC: East African Community	P2G: People-to-Government
EAPS: East African Payments System	PIID: Payment Instrument Issuers/Directive
EATS: Ethiopian Automated Transfer System	POS: Point of Sale
E-Commerce: Electronic Commerce	PSOD: Payment System Operators/Directive
EFT: Electronic Fund Transfer	QR: Quick Response
ETA: Ethiopian Telecommunications Agency	RTGS: Real Time Gross Settlement
EU: European Union	SDG: Sustainable Development Goal
FATF: The Financial Action Task Force	SIM: Subscriber Identification Module
EATS: Ethiopian Automated Transfer System	SMS: Short Message Service
FCPD: Financial Consumer Protection Directive	SSS: Securities Settlement System
FinTech: Financial Technology	TCCPA: Trade Competition and consumers Protection Authority/Administrator
FSB: Financial Stability Board	TCCPP- Trade Competition and Consumers' Protection Proclamation
G20: Group of Twenty	TCRPD: Telecommunications Consumer Rights and Protection Directive
G7: Group of Seven	UK: United Kingdom
GSMA: Global System for Mobile Association	UN: United Nation
G2P: Government-to-Person	UNCDF: United Nations Capital Development
HPR: House of people’s representatives	UNCITRAL: United Nations Commission on International Trade Law
ICT: Information communication Technology	UNCTAD: United Nations Conference on Trade and Development
ID: Identification	UNSGSA: UN Secretary-General’s Special Advocate for Inclusive Finance for Development
IFC: International Finance Corporation	USA: United States of America
IGAD: Intergovernmental Authority on Development	USSD: Unstructured Supplementary Service Data
INSA: Information Network Security Agency	WAP: Wireless Application Protocol
IPRs: Intellectual Property Rights	WBG: World Bank Group
KYC: Know Your Customer	
MFI: Microfinance Institutions	
MFSMCG: Monetary Fund Financial Statistics Manual and Compilation Guide	
M-Money: Mobile Money	
MMS/MMSs: Mobile Money Service	

ABSTRACT

Mobile Money Service (MMS) is now one of the leading digital economy transformation platforms and contributes to investment, innovation and economic growth. This thesis is concerned with assessing the regulation of MMS and competition, focused on Mobile Network Operator (MNO)-led MMS. The author employed a qualitative research approach in analyzing the pertinent laws with descriptive and exploratory methods of data analysis. Accordingly, the research reveals that the wording of the competition law does not fit the digital age and financial technology tools such as MMS. Further, the jurisdiction over anti-competitive acts on MMSs sector by the National Bank of Ethiopia and the dissolved authority for competition administration and enforcement which is now under the executive organ (Ministry of Trade and Regional integration) with a desk status is unclear. Moreover, regardless of the absence of promulgated parameters, potential ‘abuse of market dominance’ and some ‘restrictive agreements’ by Telebirr is creating a burden to other players in the MMS ecosystem. Therefore, the thesis generally recommends that first; Ethiopia must have a separate and comprehensive financial sector policy which clearly incorporates competition policy, along with establishing a national competition council and promoting competition knowledge. The country also needs to revisit the competition law in terms of digitalization, as well as the need to have an institutional and regulatory impact assessment including with market study of the MMS sector such as the market share of Telebirr, and finally, particular study should conduct whether the need to revive the dissolved authority as an independent institution or as to strengthen within its current position.

Key Words: M-Money, Financial Inclusion, Interoperability, DFSs, Inclusive Innovation, NDPS, MNO-led, FinTech, GSMA, Competition law, Ethiopia

CHAPTER ONE

Introduction

1.1 Background of the Study

Mobile Money (M-Money) use for transactions is rising through the continent of Africa and the world with the potential to transform the cash-dominant ecosystem to cashless society.¹ This fact has added to the economic development of countries as the sector is becoming a source of income and innovation in the society. Worldwide, by the end of 2023, the worth of M-Money transactions is expected to exceed from current \$2 billion daily value to \$3 billion per day² and especially in Sub-Saharan Africa, it is expected that 120 million people will use mobile devices between 2020 and 2025.³ A World Bank Group (WBG) report in 2021 reveal, Mobile services created more than \$130 billion of economic value in the Sub-Saharan Africa⁴ and is now creating progress in account possessions specifically in Africa where 33% of consumers have an M-Money account.⁵ In Ethiopia, Telebirr had over 21 million subscribers and transacted 25 billion Birr in 2021⁶ and remarkably, as of May 2023, Telebirr has 32.2 subscribers and made 375.2 billion birr of transactions.⁷ With such facts, the Ethiopian digital economy could contribute up to 39% percent of the country's GDP by 2025⁸.

¹ E Kodjo and R Selorm, 'Mobile Money Security: A Holistic Approach' (Msc thesis, University of Technology, Sweden Lulea 2013)

² GSMA, "State of the industry report on Mobile Money", Annual Report, (2021) p.4

³ GSMA, "The Mobile Economy: Sub-Saharan Africa", Annual Report, (2021) p.29

⁴ Ibid,

⁵ WBG, "Financial Inclusion, Digital Payments, and Resilience in the Age of COVID-19" The Global Findex Database (2021)

⁶ Team Shega, "Kacha becomes the first private firm to receive Mobile Money license in Ethiopia" *Shega Media & Technology PLC*, 22 July, 2023 < Kacha Becomes the First Private Firm to Receive Mobile Money License in Ethiopia - Shega > accessed on 25 June, 2022)

⁷ Elias Tegegn, 'Ethiopian Reporter' (May 21. 2023) < - Ethiopian Reporter - #1 Best And Reliable News Source In Ethiopia > accessed 22, May 2023

⁸ Ennatu Domingo 'Ethiopia's digital economy is blooming but needs investment (*The Center for Africa-Europe relations*, 21 November 2022), < Ethiopia's digital economy is blooming, but needs investment - ECDPM > accessed on 26 November 2022

While Africa is always reflected as the major center of M-Money, the practice of utilizing M-Money has also developed greatly in other regions of the globe, including in Latin America and Asia.⁹ Likewise, in developed countries, such as the UK, cash payments have fallen from six out of ten to three out of ten payments in 2018, and are expected to decrease in 15 years.¹⁰ And, recently the UK specifically enacted the Digital Markets Competition and Consumers Bill so as to toughen the digital market and also the power for UK's Competition and Market Authority.¹¹ On the other hand, Ethiopia is still known as one of Africa's inactive countries for MMSs and above all the regulation for competition and the M-Money industry is facing challenges. To these affirmations, the basic motive of this thesis is to assess the regulatory aspects of MNO-led MMS and yet focus on the capability of Ethiopian competition law regime.

1.2 Statement of the problem

Despite many breakthroughs in digital technology, from cryptography to artificial intelligence (AI) in the financial services sector; on the other hand it creates both opportunities and challenges for regulators, service suppliers, and consumers. The Global System for Mobile Communications (GSMA) report indicates that, from 2020 – 2025, from the Sub Saharan African countries Ethiopia is expected to become the second fastest growing state in Subscriber Identification Module (SIM) card subscriptions with 11% annual growth rate¹² and currently, Ethiopia has 68.9 million mobile customers.¹³ However, underprivileged infrastructures, understanding of the service, technical and financial competence, and

⁹ Kazuko Shirono, Bidisha Das, Yingjie Fan, Esha Chhabra and Hector Carcel-Villanova “ Mobile Money Part of Money? Understanding the Trends and Measurement” IMF working paper, WP/21/177, International Monetary Fund July 2021) available at: <https://www.imf.org/en/Publications/WP/Issues/2021/07/01/Is-Mobile-Money-Part-of-Money-Understanding-the-Trends-and-Measurement-461315> accessed July 2022

¹⁰ Bedir Berkay Karadogan, ‘Regulating Financial Technology – Opportunities and Risks’ (LLM Thesis, University Of Essex 2019) 12

¹¹ www.gov.uk ‘New Bill to crack down on rip-offs, protect consumer cash online and boost competition in digital markets’ (25 April, 2023) <New Bill to crack down on rip-offs, protect consumer cash online and boost competition in digital markets - GOV.UK (www.gov.uk)> accessed on 28 April, 2023

¹² GSMA, “Humanitarian cash and voucher assistance programs in Ethiopia” Report, (2021),

¹³ Team Shgea , , “Ethio Telecom vs Safaricom: The Telecom Race in figure ” Shgea Media & Technology PLC, 24 March 2023 < Ethio Telecom vs. Safaricom: The Telecom Race in Figures - Shgea > accessed on 26 March, 2023

inadequate amount of mobile phone possession are the main restraints.¹⁴ Consumers and entities had restricted access to and use financial services due to a lack of attention and trust in financial institutions.¹⁵ As MMS actors are treated as a partner for banks and usually can only function as suppliers of a technical system to a bank, M-Money players were not able to have direct access to the final consumers.

Moreover, in recent times concerns are growing as the current MNO-led MMS provider, Telebirr, is impacting the competition ecosystem. The digital market competition is expected to foster innovation, give consumers more choice and lower prices, however the current competition law was enacted before the MMSs and most digital financial services (DFSs) are begin in Ethiopia which subsequently difficult to fit the digital competition. Along with these stated problems, the competition authority is now dissolved and incorporated under the executive organ in which independence issues will be intact. Hence, this study will explore who the MMS operators are, regulatory issues of MNO-led MMS entry and operation, and the competition, by analyzing the adopted policies and rules that aimed on materializing the competitiveness of the market. Thus, with the consideration of the above statement of the problems, the thesis has made an effort to address the following research questions.

1.3 Research Questions

This thesis seeks to answer the main question as:

- How should MNO-Led Mobile Money Service and the competition in the ecosystem be regulated in Ethiopia?

In order to address this research question the following specific questions are considered:

- Are the current MMSs and competition regulations adequate and effective to govern MNO-led and the MMSs?
- What are the entry and operational requirements for MNO-led and MMSs in Ethiopia?
- If not, what regulatory approaches and reforms should be further strengthened?

¹⁴ GSMA, (n.12)

¹⁵ National Financial Inclusion Strategy (NFIS), National Bank of Ethiopia (2017) P.12

1.4 Objective of the Study

The main objectives of this study is,

- To closely describe, analyze, and explore regulatory features of M-Money in cross referencing to the general competition law.

In terms of specific objectives,

- To assess the effectiveness and adequacy of the regulation for competition and the MNO-led MMS sector.
- To identify the entry and operational MNO-led MMS and competition laws towards developing the MMS sector in Ethiopia.
- To provide recommendations for legislative improvements.

1.5 Research Methodology

This thesis is primarily a doctrinal legal research and will employ content analysis with descriptive and exploratory approaches. The paper fundamentally adopts a qualitative research approach and in line with the legal methodology techniques, this thesis has situated primary sources of data such as the text of the policies, strategies, relevant legislations and few semi-structured interviews of key informants. For secondary sources of data texts about the law such as; books, journal articles, unpublished materials, reports, working papers, capstone papers and think-tank publications', electronic databases from web services and other similar sources are collected. In order to take some lessons, experiences of some countries, mostly Kenyan, have been inferred to the benefit of some comparative analysis and as a result to take some lessons.

The thesis also consists of an empirical research method particularly by data collected from semi-structured interviews with specific key informants and sector experts. For the purpose of interviews, the author selected key informant targets that are directly involved with MMSs for instance; the National Bank of Ethiopia (NBE), Trade Competition and Consumers Protection Authority/Administrator, Telebirr Division at Ethio-Telecom, *Kacha* Digital financial service S.C, and DFS consultancy expert. These interviewees are selected based on their familiarity and direct involvement on the subject matter with purposive sampling method.

1.6 Scope of the study

The thesis mainly aims to closely describe, analyze, and explore the regulation of MMS-led and competition in Ethiopia. The DFS sector has different types thus, the paper will be limited to analyze and discuss issues related with M-Money in Ethiopia. Likewise, MMS comprises different actors such as MNOs and Mobile virtual Network Operators (MVNOs), Banks, Micro Financial Institutions and FinTech Companies, therefore, for the persistence of this paper; M-Money is limited to a service given by MNOs.

Finally, in terms of referencing, the footnote approach is used and the Oxford University Standard for Citation of Legal Authorities (OSCOLA) as referencing style as well as the rules of citation of the Journal of Ethiopian Law, particularly for domestic policies, strategies and laws.

1.7 Limitations of the Study

The local jurisprudential shortage in the research area particularly about Ethiopian practice is limited. For the purpose of this study, empirical evidence or investigations of companies that are allegedly engaging in prohibited acts are not found from the public data by the competition enforcement authority/administrator. Moreover, by the mere fact of confidentiality in the area and the competition between Kenya's Safaricom and Ethio-Telecom, it is difficult to acquire genuine data from Telebirr experts. Despite the stated limitations, some strategic efforts have been made to maintain the goal of the study.

1.8 Significance of the Study

The selection of the research topic takes into account the demand of the country and is also selected from the priority areas of research suggested by academics including with the author's knowledge of the area. The theme of the research is a novel sector. Thus, the significance of the research is evaluating the regulation for MMS and the competition law, in having an improved market competition. Moreover, the author believes, this thesis will have a role in providing conceptual matters for developing MNO-led and MMSs, which can serve as a catalyst for further research.

1.9 Literature review

Apart from intersectional matters towards M-Money, the author could not trace any particular legal publication about M-Money in Ethiopia. However, UN based, GSMA and Non Profit groups have written some non-legal papers about Ethiopian experience such a recent report by GSMA named “*Mobile Money in Ethiopia: Advancing financial inclusion and driving growth*”. Overall, this research illustrates the need to adopt M-Money with three scenarios as high, medium and low adoption levels. It is also highly recommended; the Ethiopian policy and regulations should implement personal data privacy and protection law, build up the cyber-security regulations, ensure the market liberalization, increase M-Money account transactions and balance limits, and hastening the national digital id.

There are legal theses related to the general E-Money sector such as ‘*Regulation of Electronic Banking in Ethiopia: The analysis of legal framework*’, by Bikila Ababu which attempted to identify and analyze Ethiopian policies, legal and regulatory frameworks in respect to E-Banking in Ethiopia. The author assessed the effectiveness and adequacy of the e-banking regulatory framework in balancing innovation and stability of the sector as well as the sufficiency of consumer welfare and, therefore, the author recommends, the NBE should rigorously take the foremost role in enabling and expanded to the growth of e-banking system in the country. “*Consumers and Third Parties Protection under the National Payment System Proclamation No.718/2011*” by Lemecha, Ashenafi, “*Consumer Protection in Ethiopia's Telecom Sector: New Beginnings and Prospects*” by Mekdes Bekele, “*Electronic Funds Transfer and the Case for Consumer Protection in Ethiopia*” by Simret Zewdie and ‘*E-commerce & (The Future of) Competition Regulation in Ethiopia*’ by Yohannes Mebrate are other academic literatures that are relatively connected with this thesis topic. However, most of them are focused either on consumer protection or the general E-Money concept and E-commerce. Thus, this research is a specific legal thesis for a DFS sector particularly on M-Money and competition law along with the intersectional matters such as entry and operational requirements. Therefore, with the above and other multiple sources, the author will discuss this section as the following.

M-Money is a recent phenomenon and narrated only for the last decade¹⁶ but now attention is significantly growing in recent times.¹⁷ Literature identifies that the cost of brick and mortar banking infrastructures, the 2008 global financial crisis, technology and E-commerce revolutions such as ride-hailing platforms, delivering services and then countries financial inclusion strategies, and monetary policies, are among other factors, which accelerated the adoption of MMSs. In the international, continental and local platforms, the MMS sector has plenty of participants in policies, strategies, legislations, institutions, committees, associations and NGOs, periodical working groups (papers, reports, and surveys), guidelines, manuals, and databases (statistics). MMSs have direct interaction with legal instruments of telecommunications, E-commerce and E-classifieds, data privacy, intellectual property (IP).¹⁸ Literature also illustrates anti-money laundering (AML), counter-terrorism financing (CTF), cybercrime, consumer protection, competition, remittance, and digital tax are highly related with MMS.

DFSs are mostly delivered by instruments/infrastructure including; Automated Teller Machine- ATMs (contact/card and contactless/card-less), point of sale- PoS (through cards or mobile- PoS), internet (websites), mobile financial services- MFS (M-banking and M-money), E-commerce marketplaces (websites and apps) and closed-loop prepaid cards or single-purpose cards. Generally, in MMSs; national/central banks, MNOs, FinTech companies, sectoral regulators, agents, and consumers are the key players.

M-Money mostly conducts transaction between person-to-person (P2P), business-to-business (B2B), person-to-business (P2B)¹⁹, business-to-person (B2P), government-to-person (G2P) and person-to-government (P2G). In terms of forms, MMS is divided as using from remote place and proximate place. Performing MMSs from remote places is usually executed with the delivery channels such as short messaging service (SMS) and unstructured supplementary service data (USSD) to make transactions from any remote area to a different person or

¹⁶ J. Aron and J. Muellbauer, "The Economics of Mobile Money: harnessing the transformative power of technology to benefit the global sector" (2019) oxfordmartin publications <May-19-OMS-Policy-Paper-Mobile-Money-Aron-Muellbauer.pdf > (ox.ac.uk accessed 12 July, 2022)

¹⁷ Tadegew Bogale, "Modeling Smart Mobile Money Wallet and Offline Payment," (MSc Thesis, Addis Ababa University 2016) 5

¹⁸ Dong He and *et al* 'FinTech and financial services: initial considerations' International Monetary Fund Discussion paper SDN/17/05, June 2017

¹⁹ Kazuko, Bidisha, Yingjie, Esha and Hector (n.9) p.13

merchant. On the other hand, proximity place is basically transacting by simply directing the phone device to a near field communication (NFC) equipped PoS terminal from a proximate place.²⁰ The explanations in respect to DFS and MMS access channels are more related to operational and ICT concepts. However, to list the common channels; SMS,²¹ USSD,²² voice/interactive voice response (IVR),²³ NFC and NFC-equipped mobile PoS,²⁴ wireless application protocol (WAP)²⁵, SIM toolkit,²⁶ quick response-QR (such as for Merchant with Till and Paybill number and account) and barcodes,²⁷ smart watch, and others such as Bluetooth, microchip,²⁸ are the channels to access MMSs. All the access delivery channels have different pros and cons to security issues for instance, since USSD or SMS are not encrypted, a transaction is exposed to be captured but WAP-based payments have greater security as the data is encrypted.²⁹

As Ethio-Telecom has come to shift from adopting ‘Network providing’ to ‘service oriented’ strategy and value added services, in recent years founded the first MNO-led M-Money product, Telebirr. This MMS, with its different ‘use cases’ or service offerings, it allows customers to use their “smartphones” and “feature phones” such as for; transfer, deposit, send, receive, withdraw, payment (bills and merchant), bulk disbursement (salary and pension), buying/top-up airtime and package, crowd-funding investment (such as retail national bond), fundraising (for charities’), E-Ticketing, E-Lottery, overdraft (similar with no-frill account in banking), micro-loan, micro-saving, micro-insurance, foreign remittance, public procurement venture and E-Commerce. Telebirr is planning to start using ‘Hologram

²⁰ Kristopher C. Richardson, ‘Mobile Payments in the United States: Are Regulations Adequately Protecting Consumers’, 6 U. P.R. Bus. L.J. 6 (2014). p. 8

²¹ Carolyn Lowry, ‘What's in Your Mobile Wallet: An Analysis of Trends in Mobile Payments and Regulation’ FED. COMM. L.J. 353 (2016) p.11

²² GSMA, (n. 12) p.32

²³ Ibid

²⁴ GSMA, ‘NFC Functions and Security Certification overview’ Report (2018) p.12

²⁵ Timothy R. McTaggart and David W. Freese, Regulation of Mobile Payments, 127 J Banking L. 485 (2010) p.6

²⁶UNCTAD, ‘Mobile Money for business development in the East African Community’ (2012) UNCTAD/DTL/STICT/2012/2 p.13 and 24

²⁷ Ceyla, Pazarbasioglu “Digital Financial Services”, The World Bank, (2020) p.1

²⁸ BBC Broadcasting, ‘The microchip implants that let you pay with your hand’(April 11. 2022 < The microchip implants that let you pay with your hand - BBC News> (accessed may 2022)

²⁹ Timothy R McTaggart and David W. Freese (n.25)

Technique’ and ‘Internet of Things’ technology which will advance its services.³⁰ In Ethiopia, *CBE-Birr*, *Amole*, *Hello-Cash*³¹ and *M-Birr* are the notable MMS products by financial institutions.

1.10 Chapter outline

The thesis is clustered in five chapters. The first is the introductory chapter, which contains; background of the study, statements of the problem and research questions, objectives, research methodology, scope, limitations, significance of the study, and literature review. The second chapter lays down the essence of regulation of MMS and competition including some comparative lessons. Chapter three, discussed topics on entry and operating requirements for MNO-led and MMS by Ethiopian policy, law, and governance. Whereas, Chapter four is the main part of the thesis, which dedicates the discussion to major practical challenges on regulating Ethiopian competition law towards MNO-Led and MMSs. The last chapter consists of conclusions and recommendations.

³⁰ Interview with Bruk Adhana, Chief Mobile Money Business Officer, Telebirr (October 10, 2022)

³¹ GSMA, (n 2) 55

CHAPTER TWO

Conceptual Framework and the International experiences for Competition and Mobile Money Services

2.1 Introduction

It is believed that the US Sherman Act which was enacted by Congress in 1890 as one of the first modern competition laws³² along with preceding laws such as the Magna Carta and Canada's competition act. And, the unfair competition rules of the Paris Convention also influenced some IPRs of countries such as the US.³³ In Ethiopia, *the Imported Goods Proclamation No. 38/43, Locally Produced Goods Proclamation No. 53/44 and Locally Rendered Service Proclamation, No. 133/52* tried to incorporate some competition law aspects such as barring on restrictive business practices.³⁴ However, the first notable stand-alone regulation was the 1963's *Trade Practices Decree* without an institutional regulator and then after a Trade Practices Proclamation enacted in 1965. These laws had also incorporated consumer protection issues but with limited manners.³⁵ After a long time, from 2003-2013, Ethiopia has passed three different competition and consumer protection laws and in 2003, a new proclamation was enacted to govern trade practices and subsequently repealed by the 2010s' proclamation. The latest is the Trade Competition and Consumer Protection Proclamation No. 813/2013 (TCCPP) and also there are some relevant provisions for competition law in the recent commercial code (Art. 21, 113-114, 130), the civil code (Art 2120 and 2122), criminal code (Art. 719) and other local laws that incorporate compulsory safeguard standards are directly important for competition law and enforcement.

³² Fikremarkos Merso and *et_al*, ' review of the legal and institutional framework for market competition in Ethiopia'

(2009)<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwj6npr5kaT6AhUL_rsIHAc9CMEQFnoECAyQAQ&url=http%3A%2F%2Fethiopianchamber.com%2Fdata%2Fsites%2F1%2Fpsd-hub-publications%2Freview-of-the-legal-and-institutional-framework-for-market-competition-in-ethiopia.pdf&usg=AOvVaw3WHmp9ahrnalnyz3ooy5IU > (accessed 8 July 2022) p.14

³³ Patricia V. Norton "The effect of article 10bis of Paris convention on American unfair competition law". Fordham L. Review. Vol 68, Issue 1 (1999) P.225

³⁴ Imported Goods Proclamation No. 38/43, Locally Produced Goods Proclamation No. 53/44 and Locally Rendered Service Proclamation No. 133/52

³⁵ Elias N. Stebek, 'Deliverables and Pledges under Ethiopian Trade Competition Law' Vol.11 No.1 Mizan L Rev (2017) 36

In historical development discourses of MFS, in the late 1990s, the first mobile commerce innovations with SMS was started in Finland,³⁶ and in 1997 Nokia also introduced SMS-based to buy drinks from vending machines.³⁷ Also, in 2001, the first M-Money's was started in the Philippines³⁸ and this world's first M-Money deployment was launched to help the unbanked infrastructure.³⁹ Several sources also cited *M-PESA* as the first M-Money product (meaning 'money' in Swahili language) that was founded in 2007 with an agreement between Vodafone's subordinate Safaricom and Commercial Bank of Africa.⁴⁰

In Ethiopia, M-Money is Novel. The first regulation was issued in December 2012⁴¹ and it was permitted for banks and microfinance institutions (MFI) to own the service and *M-BIRR* was the first and largest MMS in Ethiopia⁴² which started its function in 2015 despite that this MMS is now dissolved.⁴³ M-Money service *HelloCash* and Amole are one of the first few MMSs⁴⁴ in the sector. After the new NBE's directives⁴⁵ in 2020, which permits non-bank actors to participate in DFS, Ethio-Telecom's Telebirr became the first ever MNO-led MMS and *Kacha* as the first FinTech-Led MMS operator in Ethiopia.

³⁶ Jun liu, Robert j. Kauffman and Dan ma, "Competition, Cooperation and Regulation: Understanding the Evolution of the Mobile Payments Technology Ecosystem, Sch. IS, 2015, 14 (5) p, 16

³⁷ Nolan Murray, "Breaking Benjamin: Security Threats in Mobile Payment Applications" Ohio St. Bus. J. L. Vol. 11 No. 1 (2017).5

³⁸ J. Aron and J. Muellbauer,, (n 16), p.28

³⁹ GSMA, *Mobile money in the Philippines: Market conditions drive innovation with Smart Money and GCash* (GSMA Blog June, 2016) <GSMA | Mobile money in the Philippines: Market conditions drive innovation with Smart Money and GCash | Mobile for Development /blog > accessed on March 23, 2022

⁴⁰ Ross Buckley, Jonathan Greenacre and Louise Malady, "The Regulation of Mobile Money in Malawi" ,Washington U Global Stud. L. Rev Vol. 14 Issue 3 (2015) p 441

⁴¹ Regulation of Mobile and Agent Banking Services, Directive No.FIS/01/2012, National Bank of Ethiopia (2012)

⁴² Getnet Alemu, Tadele Ferede, and Alejandro Fiorito , "Identifying Binding Constraints on Digital Payment Services in Ethiopia: An Application of a Decision Tree Framework" Washington C.for Global Devt (2021)P.11

⁴³ Interview with Mr. Desta, Bayisa former CEO of M-Birr (Addis Ababa, Ethiopia July 21 2022)

⁴⁴ GSMA (n.2) p.12

⁴⁵ Licensing and Authorization of Payment System Operators, Directive No. ONPS/02/2020, and Licensing and Authorization of Payment Instrument Issuers Directive No. ONPS/01/2020 National Bank of Ethiopia, 2020

2.2 Definitions, Objectives of; Competition, Policy, and the law

Mostly, market inequalities may result from unequal policy frameworks or from market conduct and also in order to pinpoint and demarcate competition for competition law and policy frameworks, it is first important to understand what a market is. However, there are different and disputable positions for the meaning of market in the world and literature lacks a simple and plain definition of market. In the case of competition, the Organization for Economic Co-operation and Development (OECD) refers as “*competition is a situation in a market in which firms or sellers independently strive for the patronage of buyers in order to achieve a particular business objective, e.g., profits, sales and/or market share.*”⁴⁶

In the free market system, notably there are four competition market structures namely the *perfectly competitive, monopolistically competitive, oligopoly and monopoly* markets. These classifications have their own economic theories and perspectives than legal thoughts. However, to describe in short, *perfect competition* characterized as; when there is no dominant company to control prices, price determined by demand and supply after consumers’ informed, free entry/exit of market, small firms can sell the same products, different products with large quantities, and a wide number of buyers/sellers.⁴⁷ *Monopolistic competition* exists, when many sellers exist and supply different products, and sellers may control prices.⁴⁸ *Oligopoly* on the other hand is, few sellers offer a certain portion and mostly similar products in the market, there are barriers to entry, rival firms’ acts affect each other and when one of the firms decrease price the other act the same, and they also may control the price.⁴⁹ Finally, *Monopoly* is when only one seller is in the market or geographical area, unique product, more strict barriers to entry, and the seller controls the price. Monopoly is usually created by law such as patent law or by its character such as public utilities.

There are different benefits of competition with different views, but most literature reiterate the common benefits as; *lowering prices, great market efficiency, improved and new products, and also broader options for consumers.* According to GSMA, as Competition has

⁴⁶ OECD <‘Glossary of statistical terms’> (accessed 23 April 2022)

⁴⁷ University of Minnesota Open libraries, ‘Monopolistic Competition, Oligopoly, and Monopoly’ <1.5 Monopolistic Competition, Oligopoly, and Monopoly – Exploring Business (umn.edu)> (accessed October 09, 2022)

⁴⁸ Ibid

⁴⁹ Ibid

social, economic and political goals, MMS Competition and choice always create lower prices and better quality of service for consumers.⁵⁰

Competition Policy: Despite not defining the phrase ‘one economic community’ at the Ethiopian Constitution article 55(6), the legislative intent to create one economy in the country and the government is obliged to formulate socio-economic policies which guarantee the people of Ethiopia from the benefits of the nation’s intellectual and material resources. Aside from referring to different documents, Ethiopia does not have a comprehensive policy for the financial sector.⁵¹ Mostly, it can infer countries' competition policy from state's direct actions towards enterprises/firms and arrangement of the industry.⁵²

Notably, competition policies incorporates, economic matters with national and international markets (for instance; liberalizing the trade such as telecom, flexible Foreign Direct Investment, IPRs, economic deregulation, apparent public procurement)⁵³ and the law, which rules anti-competitive practices by the market players.⁵⁴ Most nations pass competition law principally to keep and support competition so that to build market efficiency and escalate consumer benefits⁵⁵ and before the market fails the state will get involved with competition laws.⁵⁶ As the last two and current competition law preamble dictates, Ethiopian competition policy is all about creating a free market economy including manifesting with other social-economic policies such as Labor, Trade and Investment, Industry and so on. Doing business and privatization reforms are important in developing competition, hence, the Ethiopia Prime Minister office introduced recently a Medium- Term Reform Roadmap for “Ease of Doing Business” However, it failed to address the goal of a digital financial market and in fact, the WBG in 2020 ranked Ethiopia as 159th from 190 nations on its policy for the ease of doing

⁵⁰ GSMA, (n.3) p.16

⁵¹ Interview with Mr. Efre Kidane, Chief Legal Expert at NBE (Addis Ababa, August 2022)

⁵² Fikremarkos (n.32)

⁵³ Kibre Moges ‘The state of competition and the competition regime of Ethiopia: potential gaps and enforcement challenges’ (2015) Microsoft Word - The state of competition in Eth-final (ossrea.net) accessed 1 June 2022

⁵⁴ Fikremarkos (n.32)

⁵⁵ Khemani R.S ‘competition policy and promotion of investment, economic growth and poverty alleviation in least developed countries’ (2007) World Bank Report No. 41334 Competition policy and promotion of investment, economic growth and poverty alleviation in least developed countries (worldbank.org)

⁵⁶ Harka Haroye, ‘Competition policies and laws: major concepts and an overview of Ethiopian trade practice law’ Mizan L Review Vol 2 No 1 (2008) 1-2

business. The NDPS indicates the competition has improved in the telecom and financial sector. But, the Digital Ethiopia Strategy suggested, the deregulation of the mobile phone market will create competition between local assemblers and imported mobile devices. The major policy document of Ethiopia, the Ten Years Perspective Development Plan, refers to competition first with the statement “*Build private sector and competition friendly bureaucracy*”. Further, it indicates its objective to build a digital economy with enhanced competitive productivity.

Objectives of competition law; detailing the goals of competition law (also called Anti-trust in USA and some countries) is not a simple task.⁵⁷ As Competition does not cure all problems in the market, there are moments in which the state needs to put restrictions for society's benefits, and most literature cite the usual objectives of competition law as safeguarding the competition practice and consumer welfare. This includes preserving the financial market from anti-competitive behavior as well as promoting competition in the market⁵⁸ and the UNCTAD also incorporates these goals of competition law in its model law.⁵⁹ As competition laws add to an effort to economic and market policies, in the last ten years, economic and market policies have inclined to choose a free market economy so that actors can compete and benefit the consumer.⁶⁰ Thus, the last Ethiopia competition law in fact incorporated both goals.

In principle, in order to protect business from unfair competition practice, there should first be a competition by itself in the market. As per article 3(1), the TCCPP’s objective is also to promote the creation of competition but there are arguments as the proclamation has to separate its objectives of Competition law and Consumer protection law.

2.3 Definitions and Objectives of Mobile Money

The World Bank has defined DFS as financial services that are delivered and used by consumers through digital technologies⁶¹ and according to the GSMA, MMS is the use of a

⁵⁷ Kibre, (n.53)

⁵⁸ Ibid

⁵⁹ UNCTAD, (Model Law on Competition) (2007) p.3-4

⁶⁰ Richard Whish and David Bailey ‘Competition Law’ (2021) 10th edition <competition law - richard whish, david bailey - google books> accessed 3 September 2022

⁶¹ Ceyla Pazarbasioglu (n.27)

mobile phone to access financial services including credits, savings, insurance and performs financial transactions⁶² with financial information on a consumer's mobile phone.

Several literature referred to the M-Money as Mobile Payment, Mobile Transfer, Mobile Wallet, Mobile Commerce or even as Mobile Banking, while speaking about M-Money. The first reason for such a diffused definition is there are many instances where a certain product in one category may have a similar function into another or the reverse. For example, if the M-Money consumer has a bank account, this consumer can transfer a certain amount of money to the M-Money account from his/her bank account and people without bank accounts can also access MMS. In respect of M-Banking it is clear that it differs from other MFSs as M-Banking users access a bank account through a mobile phone. M-Payments are different from M-Banking because they are complex and always comprise multiple actors⁶³ and the necessity of the distinction has also a role in calculating M-Banking user's fund to monetary aggregators. Despite the absence of universally accepted definition, GSMA has defined M-Money simply as "*A service in which the mobile phone is used to access financial services*"⁶⁴ and further GSMA put Mobile wallet as "*an account that is primarily assessed using a mobile phone.*"⁶⁵

The National Payment System Proclamation (NPSP)⁶⁶ and the amendment proclamation does not include any definition for M-Money or any other similar terms. Despite, article 2(2) of the amendment to Banking Business Proclamation No. 1159/2019 defines the broad term DFS still does not define M-Money. Regardless, the absence of definition of M-Money in the policy and strategy documents, the National Digital Payment Strategy (NDPS) however defines M-Money as '*DFSs provide through the use of a SIM-based Mobile phone system*' and to avoid controversies the strategy document seems to prefer to use of the broad term DFS. Currently, the NBE's directives are the relevant legislations toward the meanings of M-Money. Accordingly, the directive on the Use of Agents⁶⁷ defines M-Money as "*a type of electronic money that is transferred electronically using mobile networks and SIM enabled*

⁶² GSMA, (n.2)

⁶³ Kristopher c. Richardson, "Mobile payments in the United States: are regulations adequately protecting consumers?" J. P.R. Bus. L. No. 1 (2014), 8

⁶⁴ GSMA, "Mobile Money Glossary" (GSMA | MMU Mobile Money Glossary) accessed 23 January 2022

⁶⁵ Ibid,

⁶⁶ National Payment System Proclamation No. 718/2011 *Federal Neg. Gaz* 17th year No. 84 18th August 2011

⁶⁷ Use of Agents, Directive No. FIS/02/2020 National Bank of Ethiopia (2020)

devices, like mobile phone” On this definition, especially for the non-experts, the word ‘transfer’ might mislead M-Money as only for transferring money. However, depositing, receiving, sending, withdrawing and paying are also the other major functions of M-Money. Moreover, the word ‘like’ from the definition is stipulated because there are other devices than mobile devices that can operate with SIM such as Tablets. Subsequently, the Financial Consumer Protection Directive (FCPD)⁶⁸ under article 2(2.21) is defined, Mobile Wallet Account as ‘*an on-demand account used to receive and send money and pay for goods and services via a mobile device such as a mobile phone, but which does not have attached to it a check or overdraft facility.*’

The other terms that need to be distinguished are E-Money and Virtual Money. All digital solutions used for payments are not E-Money. According to IMF’s Monetary Fund Financial Statistics Manual and Compilation Guide (MFSMCG), E-money (M-Money) can be used for direct payments to third parties and meets the requirements for transferable deposit. It is categorized as deposits rather than currency and in other words, M-Money is included as broad money.⁶⁹ E-Money’s unit of account is fiat currencies (stored value product and account), it has a legally established issuer and is regulated whereas; virtual money such as *Bitcoin* is an invented currency where individuals or groups can be issuers and usually unregulated.⁷⁰ Therefore, Virtual Money is not E-Money and neither a credit or debit card, as no monetary value is stored on the product.⁷¹

Objective of MMS: The first notable objective MMS is **Financial Inclusion**. Financial inclusion is all about giving the unbanked and the poor access to financial services. It is now a widely alleged mechanism to help such segment of society and promote a nation economic growth⁷² and it should be stressed that financial inclusion includes ‘reaching the hard to reach,’ as poverty involves lack of access to instruments and means through which the poor could improve their lives.⁷³ In 2011, a set of financial inclusion principles was recognized in the Maya Declaration by 76 country representatives. And, in 2017, the G20 Summit has also

⁶⁸ Financial Consumer Protection Directive No. FCP/01/2020, National Bank of Ethiopia (2020)

⁶⁹ IMF ‘Monetary and Financial Statistics Manual And Compilation Guide’ Washington, 2017

⁷⁰ Tadegew Bogale (n 17), p.17

⁷¹ Kazuko (n.9)

⁷² Ross Buckley, Jonathan Greenacre and Louise Malady. (n.40) p 440

⁷³ Kevin Donovan ‘Mobile Money for Financial Inclusion’ WB e-Library

supported the Maya declaration favorably accepted digital methods to financial inclusion⁷⁴ and recently endorsed action plans to improve financial inclusion. Alliance for Financial Inclusion (AFI), a policy leadership alliance possessed and headed by the member national banks and financial regulatory institutions, provided a model policy towards financial inclusion and set of indicators in 2019. M-Money could transform financial inclusion and since M-Money is regularly connected to financial inclusion, it is important to understand in what ways and under what situations M-Money solutions can outspread financial services to the poor. Ethiopia has recently developed the second part of NFIS⁷⁵ and there are available policy and strategy documents for financial inclusions such as, Ethiopia 2030 - Ten Years' Perspective Development Plan and despite the critics by some economists, The Homegrown Economic Reform Agenda.⁷⁶

Cashless Society and Transformation to Digital Economy is another objective of MMS. Before most nations' activities for the creation of cashless society and transformation to digital economy, in history, the 'utopian treatise' is one of the most notable new thoughts about monetary systems.⁷⁷ For centuries, despite paper money being the dominant medium of exchange; costs to print, forgery, damage, potential for bacterial transmission and the influence of technology became a reality for the digital world to replace paper money.⁷⁸ However, the DFS sector also has its own running costs and security related risks. The 2008 financial crisis is also another factor in which countries are forced to change and develop regulatory and supervisory requirements on their monetary systems.⁷⁹ Under Resolution 69/313, UN Third International conference on financing for Development, countries also decided to encourage the use of digitized payment systems.⁸⁰ Africa launches "The Digital Transformation Strategy for Africa (2020-2030)", and "Agenda 2063, with the vision to connect and create a digital society and economy in Africa that will develop the life of Africans along with the Pan-African Payment and Settlement System.

⁷⁴ J. Aron and J. Muellbauer (n.16) P.6

⁷⁵ Interview (n.51)

⁷⁶ Alemayehu Geda, 'Critique of Ethiopia's PM Abiy's new "Homegrown" Policy 2019' < (PDF) Critique of Ethiopia's PM Abiy's new "Homegrown" Policy 2019 (researchgate.net) > accessed September 2019

⁷⁷ Hollow, Matthew, 'Pre-1900 Utopian visions of the 'cashless society' Uni-Munich (2012) p.1

⁷⁸ Tadege (n.17)

⁷⁹ Milena Vučinić , Fintech and Financial Stability Potential Influence of FinTech on Financial Stability, Risks and Benefits L. central Banking No 2, (2020) 54

⁸⁰ Addis Ababa Action Agenda (Addis Ababa 13 July -16 July 2015) (27 July 2015) resolution 69/313

Including the Digital Ethiopia Strategy 2020 – 2025, Ethiopia has also some major strategy documents in this regard⁸¹ and in recent years, the NBE introduced new currency, imposed daily cash withdrawal limitations and is now planning to impose fees for cash related transactions inside a bank such as on dropping off and picking up paper money, so that citizens would begin to adopt E-Money and consequently hard currency outside banks are decreasing.⁸²

In terms of common benefits of MMS, a collaboration study performed by Harvard Business School Professor and GSMA in 2016 revealed that countries with empowered regulations and easy registration procedures for M-money have greatly succeeded.⁸³

The other is the *Effective on Monetary Policy and Reducing Poverty*. The balance of the opposite outcome towards the development of M-Money in the financial market and monetary policy is debatable however, with certain improvements of financial inclusion⁸⁴, it is believed M-Money can impact the effectiveness of national bank monetary policies in terms of controlling cash supply and interest rates.⁸⁵ M-Money can be one of the mechanisms that add effectiveness to the monetary policy with transferring money and assets into the financial sector.⁸⁶ In respect to financial stability, at present there are no indications to decide as M-Money and other payment schemes bring a complete risk to the financial sector.⁸⁷ A recent research in Kenya claims businesspersons are gaining privileges from M-Money with greater productivity, safety, increment of transactions and savings, as well as poverty reduction.⁸⁸ *Formalizing transactions and contractual liability relief* are other merits of M-Money. For instance, Kenya, in order to overcome AML/CTF impacts; most Kenyans are

⁸¹ National Digital Payment Strategy 2021 – 2024, Ease of Doing Business - a Medium- Term Reform Roadmap, and, the second strategy for National Financial Inclusion

⁸² Muluken Yewondwossen, *Capital newspaper* 2023 <Currency outside banking constricts in 1st Quarter - Capital Newspaper (capitalethiopia.com)> accessed 25 February, 2023

⁸³ Abenezer Mechale ‘Mobile Money and Consumer Protection: An Analysis of Regulate Environments’ Joseph Wharton Scholars (2021) 14

⁸⁴ Joseph Mawejje and Paul Lakuma ‘Macroeconomic effects of Mobile money: evidence from Uganda’ *Finance Innovate* 5, 23 (2019)

⁸⁵ GSMA, ‘The impact of mobile money on monetary and financial stability in Sub-Saharan Africa’ Report (2019) p.3

⁸⁶ *Ibid*

⁸⁷ *Ibid* p.27

⁸⁸ World Bank ‘Leveraging Digital Financial Solutions’ Report, (2019), p.21

moving to adopt E-Money transactions.⁸⁹ M-Money is also important for⁹⁰ *Cost Minimization, getting Real-time Transaction Data, Flexibility, and Good Transparency than the banks.*

2.4 Scope and Coverage of the Competition Law

Competition law and Unfair Competition: The expressions unfair trade practices and unfair competition are usually used as similar terms in our legal regimes.⁹¹ Unfair competition is an activity that can potentially confuse consumers as to the origin and foundation of products and mostly observed in deceptive advertising and fake representation of products.⁹² Mainly, unfair competition does not impact market competitiveness whereas, competition law's fundamental coverage's are restrictive agreements, controlling dominance position and merger issues, and these concerns request a public remedy whereas not necessary for unfair competition. Moreover, subject to future regulation that may be enacted by the Council of Ministers, the regulation is expected to list unfair competition activities⁹³ since the TCCPP shows only a few.

2.4.1 Scope and Coverage under the TCCPP (exceptions and exemptions)

Approaching the TCCPP, under article 4(1) of the proclamation seems to have been presented differently in the Amharic version. The English version put both words ``commercial activity" and "commercial transaction" whereas, the Amharic version translates and put the term for "commercial activity" and in fact this term is defined under article 2(5) of the TCCPP but not for "commercial transactions." Moreover, the proclamation stipulates it has a power to govern commercial activities and transactions in goods or services that are "conducted" in Ethiopia or have an "effect" in Ethiopia. In this regard, the law is applicable even for a good and service that is not conducted in our country but that has an effect in

⁸⁹ Njuguna Ndung'u 'Taxing mobile phone transactions in Africa' Africa Growth Initiative (2019) 6

⁹⁰ Laura I. Frederick, 'Impact of Mobile Money Usage on Microenterprise Evidence from Zambia' (University of San Francisco, San Francisco, 2014)

⁹¹ Yared Kefyalew Demarso & Bogale Anja Abba, 'Trade Competition among Insurers in Ethiopia: A Critical Analysis' 11 Beijing L Rev (2020) p.449 And, Article 8 of the TCCPP

⁹² Ibid

⁹³ Such as, listed under Art 8 as 'dishonest', misleading', 'deceptive'

Ethiopia. In Kenya competition law, they also include jurisdiction as extraterritorial activities that have a connection with Kenyans.⁹⁴

Opposite to the 2010s repealed competition law, which exempts the applicability of the law on basic utilities, the current proclamation however, gives the power in determining to which trade activities are exempted from the law is given to the council of ministers. However, the council of ministers still has not set the standard for the exemption and enacts a regulation and in fact this fact will harm development of the economy.⁹⁵ By the fact that there are different executive organs (Sectoral Regulators) with different kinds of policy and economic goals, it is unavoidable to have disputes between the competition laws and other laws and policies. And, according to article 4(2) of the TCCPP, the trade activities it deems vital in facilitating economic developments are subject to exemption and such major competition issues are given to be determined by the council of ministers. In most jurisdictions, airlines, banking, utilities, railways and shipping industries are usually not subject to competition law for the sake of public interest however, subject to sector specific competition laws. As public interest (such as national security or promotion of employment) is one of the critical matters especially for large mergers, most African nations have preferred to include explicit provisions for public interest concerns in their competition laws and in fact competition policy's public interest goals run parallel with competition goals.⁹⁶

Another important issue with respect to scope of the competition law is the federal and regional states power. Under article 52(12) and (13) of the Ethiopian constitution clearly put those commercial activities between different regional states and federally funded institutions that give a service in more than one regional state will fall under the federal state jurisdiction. With this justification the TCCPP is a federal matter however, failed to visibly separate the methods on how to implement the TCCPP in the regional states and there is no independent judicial organ recognized to adjudicate competition disputes in the regional states.⁹⁷

⁹⁴ The Republic of Kenya 'Competition Act No.12 OF 2010' (2010 Competition_Act_No._2012_of_2010.pdf (cak.go.ke) accessed August 23, 2022

⁹⁵ Kibre, (n.53) and Elias, (n.35)

⁹⁶ Non-competition Goals and Their Impact on South African Merger Control: An Empirical Analysis p395

⁹⁷ Interview with Mr. Getnet TCCP -Desk Manager at Ministry of Trade and Regional Integration (September 16, 2022)

2.5 Scope and Delivery Models of Mobile Money Services

Generally, literature classifies MMS delivery models as standalone ownerships of bank/MFI-led, Non-bank/MFI-led and Hybrid of these two models. Inside the Non-bank/MFI-led model there are two types: MNO-led and FinTech Company-led delivery models. Aside from the controversies on their roles, in hybrid-led models, there are bank/MFI partnership with FinTech Company delivery model and sometimes a bank/MFI partnership with MNO delivery model.

Bank/MFI-led Model: This type of model is delivered through banks or MFIs and is when these institutions provide M-Money. It should not be mixed up with M-Banking, since M-Banking mainly operates when a mobile phone is accessing the customer's bank account but M-Money always requires a SIM card only. In other terms, banks/MFIs can own and operate M-Money and M-Banking or both. In Ethiopia, for example *CBE-Birr* is a bank/MFI-led MMS that is owned by the Commercial Bank of Ethiopia (CBE), whereas, *CBE-M-Banking* is a mobile banking and another product of this bank. It should not be mixed up with Neo-banks, as Neo-Bank is basically an online and fully internet-based banking service. Ethiopia Postal Service Enterprise is now planning to launch its own postal bank with MMS, as its financial status is not sufficient to join the banking sector in terms of as a non-bank/MFI-led MMS provider.⁹⁸

Non-Bank/MFI Institutions-led Model

A) *MNO-led Model:* Mostly, MMS is delivered by MNOs⁹⁹ and now, they are significantly providing payment services with limited connections to banks.¹⁰⁰ MNOs are usually in an exclusive position to deliver MMS as they have the network infrastructure and popularly known by consumers¹⁰¹ and such delivery models can impact the whole sector as witnessed by Kenya's *M-PESA* and Uganda's *MTN*. There are different MNOs such as Mobile Virtual Network Operator (MVNO)¹⁰², Mobile Virtual Network Enabler (MVNE) and Mobile

⁹⁸ Metasebia Teshome, Ethio post stamps priority to mobile money , *Capital Ethiopia online Newspaper*(Addis Ababa, September 18, 2022) (accessed with <Ethiopost stamps priority to mobile money - Capital Newspaper (capitalethiopia.com)> on September 19, 2022)

⁹⁹ Kazuko (n.9) p

¹⁰⁰ Ross Buckley, (n.40) p 5

¹⁰¹ Judith Rinearson 'The Next New Thing: Mobile Payments', J. payment System Law Vol 3 No.1 (2007) 85

¹⁰² Gartner, 'Information Technology Glossary' A Mobile Virtual Network Operator (MVNO)

Virtual Network Aggregator (MVNA)¹⁰³, which recently witnessed that such operators could increase the level of competition in the mobile markets.¹⁰⁴ Nigeria does not permit MNOs to provide DFS in stand-alone ownership models.¹⁰⁵ Currently, in Ethiopia Telebirr and M-Pesa are the MNO-Led MMSs.

B) FinTech Company-led Model: Mostly, the non-bank/MFI actors such as FinTech companies are permitted to perform in the sector with three approaches. The first is, the non-bank/MFI should create a partnership with a bank/MFI in order to provide the service. The second is to award a specialized license as an independent financial service supplier and thirdly, award a license to provide financial services without the need to give a separate legal entity to offer financial services.

The Financial Stability Board (FSB)¹⁰⁶ has defined FinTech as financial innovation¹⁰⁷ and such non-financial institutions could have big roles with respect to the accomplishment of a great number of citizens with significant low costs¹⁰⁸ and in 2021; FinTech was the fastest growing start-up sector in Africa.¹⁰⁹ Services provided by FinTech companies also have different business models such as: payment, wealth management, crowd-funding, and insurance service.¹¹⁰

¹⁰³ Simon IoT LLC, 'What's the Difference between MNO, MVNO, MVNE, & MVNA?' < What's the Difference Between MNO, MVNO, MVNE, & MVNA? | SIMON IoT > (accessed 12 august, 2022)

¹⁰⁴ Pham HaiSon, Le HoangSon, SudanJha, Raghvendra_Kumar, Jyotir Moy_Chatterjee, 'Governing mobile Virtual Network Operators in developing countries', Elsevier, Vol. 56 (2019) p.1

¹⁰⁵ ITU, 'Competition Aspects of DFS' Leon J. Perlman, PhD (03/2017)

¹⁰⁶ Dimitri Demekas, 'Emerging Technology-Related Issues in Finance and the IMF-A stocktaking, Working paper BP/18-02/07 (2018) p.4

¹⁰⁷ FinTech and TechFin, are different concepts with; RegTech, SupTech, SuFTech, BigTech, CompTech,. Here, simply, FinTech mostly means financial intermediary and TechFin is data intermediate according to, Stefan Zeranski and Ibrahim E. Sancak 'Digitalization of Financial Supervision with Supervisory Technology (SupTech)' J. Intl. B.Law Issue 8 (2020) p.7

¹⁰⁸ G7 Partnership 'Women's Digital Financial Inclusion' Report, (2019) p.9

¹⁰⁹ Mckinsey and Company 'Fintech in Africa: The end of the beginning' <Fintech in Africa: The end of the beginning | McKinsey > (accessed August 24 2022)

¹¹⁰ Claudio Sacrdovi, *Digital transformation in Financial Service*, (2017) 216

The expansion of FinTech and MMS in Ethiopia is new as *Kacha* is the first standalone owner of FinTech-Led MMS provider that registered in 2022 and *Chapa* as the first FinTech Company to provide a payment gateway service.¹¹¹ Thus, their role is to digitalizing the service, to register consumers, to create Artificial Intelligence (AI) credit score solutions¹¹² and so on.

Hybrid approach: It could be easy to realize that banks/MFIs and MNOs do not have the expertise on M-Money software's and FinTech or MNOs are also not financial service expertise. Absence of capacity and capital for the investment is the other pushing factor for building collaborations between different providers.¹¹³ In spite of that, partnership of MNOs and banks/MFIs can be manifested in different ways and this is creating confusion and risks. Usually, MNOs and banks/MFIs can create a partnership but in reality they choose joint venture agreements as preferable, since the legal jurisprudence of partnership imposes joint liability on the partners.¹¹⁴

Others (Third-party providers): according to consultative group to assist the poor (CGAP), Third-party providers are “*providers that are not involved in the provision of payments services, but can partner with payments providers to deliver services beyond basic payments*”¹¹⁵ Even though it is unusual, there is a modified MNO-led model/third-party led model, when a third party provides the MMS in a partnership with an MNO such as Nigeria's *PalmPay* and *OPay Pay-in*.¹¹⁶ Pakistan's Telenor partnership with an MFI called *Tameer* is also a successful MMS, however, for some nations this partnership trend is not going well.¹¹⁷ There is a fourth type of delivery model called Multi-Consortium model as some scattered literature illustrates.

¹¹¹ Team Shega (n.6)

¹¹² For Telebirr microloan service, there are more than 700 credit scores, Interview (n.30)

¹¹³ Ceyla, (n.27) p.11

¹¹⁴ Ross Buckley (n.40) p.58

¹¹⁵ CGPA, 'Digital Financial Frontiers' Report (2018) P.2

¹¹⁶ Kazuko Shirono, (n.9) p.16

¹¹⁷ Ceyla, (n.27) p 14-17

In Ethiopia, banks/MFIs gain technology by creating partnership agreements in revenue-sharing approach or through paying software licensing payments.¹¹⁸ In the revenue-sharing approach technological facility providers have a big role performing the activities including altering the products, registering users and handling agents. According to a recent study,¹¹⁹ all banks do not practically own M-Money software, rather they are bought from third party providers and such providers are usually paid for maintaining and updating the software solutions. As well, ownership for PoS and ATMs is permitted only for banks and this fact means that they are in duty to operate and maintain the deployment and implementation of these devices and systems.¹²⁰ In respect of third party providers; there are two dichotomies that are classified by the NDPS, as white-label and brown-label payment devices.¹²¹

2.6 International Experience on Regulating Mobile Money and Competition

The UNCTAD has been adopting a model law on competition and the international network called International Competition Network founded with the mission of developing competition policies and laws. The Consumer welfare standard of *Chicago* school, *Neo-Brandeisian* School and *Consumer welfare standard* of EU and UK are the major influential standards to competition law and policy.¹²² It is recalled that Botswana and India are well-known nations with separate and comprehensive competition law.¹²³

In terms of regional efforts, we do not have an institution, which regulates competition in East Africa entities despite the availability of some institutions such as the Intergovernmental Authority on Development (IGAD) and the Common Market for Eastern and Southern Africa (COMESA). These institutions focus more on ordinary economic interconnections and political issues than for the financial sectors. However, as measures to develop economic integrations, COMESA adopted a competition law and commission specially to cover anti-

¹¹⁸ GSMA, (n.12) p.26 and 34

¹¹⁹ Dawit Haile ‘Growth Challenges of Mobile Money Payment Services’ (MA, Addis Ababa University 2020) p.40

¹²⁰ National Digital payment strategy, National Bank of Ethiopia, (2021) p.27

¹²¹ Ibid. (White-label is a ‘Payment devices’ (ATMs, POS terminals) fully owned and managed by third-party non-financial service providers. Cash management is handled by the same third-party service provider’ and ‘brown-label’ is Payment devices (ATMs, POS terminals) licensed to banks but owned and maintained by third-party non-financial service providers. Cash management is handled by the licensed bank.)

¹²² Richard and David (n.60)

¹²³ Fikremarkos (n.32) p. 14

competitive and merger issues and Africa Competition Forum (ACF) is working for advocacy of competition. During the failed merger case between Ethiopian *Ambo mineral water* and *Coca Cola*, COMESA had shown its interest in terms of jurisdiction.¹²⁴ Recently the Horn of African Initiative also announced a sub-regional roadmap on facilitating trade between the countries.¹²⁵ Ethiopia is a member of these sub regional entities, however, it can be said it is difficult to sustain the agreement especially for Africa Continental Free Trade Area (AfCFTA) and it's Protocol on E-Commerce, in the absence of a competition institution in Ethiopia,¹²⁶ and it is believed also the TCCPP does not fully incorporate the *minimum regional competition law standards* such as cross-border merger issues.¹²⁷

In terms of newly emerged DFS providers, commonly, there are three different regulatory approaches that nations are following¹²⁸ and these are *Wait & See*, it is an approach with no regulation and restrictions with very limited monitoring towards the sector with fraudulent activity risks. China's previous experience and the outcome for AliPay and WeChat pay are good instances. Second, *Test & learn*, a customized approach, and a case by case framework with some supervisory attention, such as Kenya's experience and *M-PESA*. Thirdly, *Innovation Facilitators*, which is a formalized approach, a quick business entry for newly emerged and good approach as well for incumbent digital solutions.

The UN Sustainable Development Goal (SDG), UNCITRAL,¹²⁹ G20¹³⁰ and others¹³¹ are thoroughly working in terms of digital financial regulation. Africa has also an approved

¹²⁴ Interview (n.97)

¹²⁵ Horn of Africa Initiative <Regional Trade Facilitation Roadmap 2022-2025 — Horn of Africa Initiative (hoainitiative.org)> (accessed on October 7, 2022)

¹²⁶ Interview with Mrs. Yenekal kidane, Senior TCCPP Department at Ministry of Trade and Regional Integration (September 2, 2022)

¹²⁷ Ibid

¹²⁸ Ceyla (n.27) p.12

¹²⁹ Luca G. Castellani, 'The Role of UNCITRAL Texts in Promoting a Harmonized Legal Framework for Cross-Border Mobile Payments' 8 Wash. J. L. TECH. & Arts 265 (2013),p.1

¹³⁰ G20 2020 Financial Inclusion Action Plan, and Digital Financial Inclusion: Emerging Policy Approaches, are the two documents approved by G20. Moreover, G7 has also a partnership document for Women's Digital Financial Inclusion in Africa

¹³¹ UNCDF, UNSGSA, UNDP, GSMA and ITU are the most notable institutions. And, other literatures also illustrates, regional competition models such as regional referee (CAN, MERCOSUR), two-tier (CARICOM,

roadmap for Science, Technology and Innovation Strategy for Africa-2024.¹³² The East Africa Community (EAC) states on their part have recently launched the East African Payments System (EAPS) with functions of cross-border fund transfer facilitation and technology platform, and the East African Initiative also announced a sub-regional roadmap on facilitating trade between the countries.¹³³ With this growing demand, PayPal's money transfer service, Xoom, has launched international remittance payments from users in the USA, UK, Canada and Europe to M-Money wallets across key markets in Africa.¹³⁴ However, at the moment, there are no regulatory frameworks in the EAC that indicate to what level an MMS can grow.¹³⁵ Readers may be surprised at how African countries are labeled as the best destination for MMS rather than the Asians, Europe or the US. According to GSMA, Africa takes 70% of the world's \$1 trillion M-Money market. Among the countries, Kenya's *M-PESA* has the biggest and the best MMS in the continent and is a continuous leader in Africa both for innovation and statistics.¹³⁶ With this reason of achievement, MMS has become the groundbreaking national plan of financial inclusion in Kenya.¹³⁷ *M-PESA* was just established for collecting Micro-loans, however, after micro-Loan trial-run the product became well known for transferring money rather than loan collections and with additional studies Safaricom noticed there was a huge potential of local remittances. With this story, the company invented a new solution, which allows consumers to inquire about their E-Money balance, execute Bill payments, withdraw and deposit E-Money.¹³⁸ The basic reason behind the success of Kenyan story is, the regulator followed a risk-based approach and this fact creates substitutable innovation and improved financial inclusion strategy. Rather than adopting a strict regulatory scheme, with Safaricom's successful performance, the Kenyan Central Bank subsequently triggered to try and check the 'test and learn' method.

CEMAC, EAC, EAEU), joint enforcement (COMESA, EFTA, EU) and one-tier regional state model (WAEMU) are on the hand important to the development of competition.

¹³² African Union "The Digital Transformation Strategy For Africa (2020-2030)

¹³³ Horn of Africa Initiative (n.125)

¹³⁴ GSMA, State of the Industry Report on Mobile Money, Report (2021)

¹³⁵ UNCTAD (n.26) p.18

¹³⁶ Ceyla, (n.27) p.22

¹³⁷ Jane K Winn, 'Governance of Global Mobile Money Networks: The Role of Technical Standards' 8 Wash J L Tech ol. 8, No. 3, (2013) (n 166) p.200

¹³⁸ David Myerson, 'The Next Global Disruptive Innovation: Can Mobile Money Make the Journey Upmarket to Disrupt the Financial Services Industry' Nw J Int'l L & Bus vol. 39, No. 3, (2019) 7

From other continents India is a good example for MMSs. In India MMS begins with delivery services called ‘Immediate Payment Services’ launched by Indian National Payments Corporation.¹³⁹ As the internet started in the country in 1995, successively E-Commerce expanded and now M-Money is one of the crucial instruments for financial inclusion to reach the unbanked societies in India. After the Indian government announced withdrawals of banknotes for 500 and 1000 from legal tenders, the smartphone revolution subsequently increased¹⁴⁰ and also the affordability of cheap mobile devices has benefited women in underprivileged social-demographic. In this country, 80% of the adult populations have a bank account¹⁴¹ and 64 % of the commercial transactions are cash dependent,¹⁴² and the common M-Money risks such as frauds and cyber-attacks are also perceived in India MMSs. However the development of AI is tackling especially for fraudulent acts.

Finally, voluntary peer reviews of competition and consumer protection law and policy conducted by UNCTAD enable developing countries to compare their legislative framework to international best practices. They also allow reviewed countries to self-evaluate their enforcement performance. GSMA on the other hand introduced to countries and individuals to construct trust and fulfill international best practices, with the GSMA Mobile Money Certification¹⁴³.

¹³⁹ Mukund, Malini, and Harsh ‘Emergence and Growth of Mobile Money in Modern India: A Study on the Effect of Mobile Money’ Amity, Banasthali Universities and ieee.org (2020) 1

¹⁴⁰ Ibid

¹⁴¹ Illinois News Bureau, *Study examines India's policies for financial inclusion of the unbanked* < Study examines India's policies for financial inclusion of the unbanked | Illinois > accessed August 2022)

¹⁴² Mukund, Malini, and Harsh (n.139) p.3

¹⁴³ GSMA, ‘Mobile Money Policy and Regulatory Handbook’, (2021) p.3

CHAPTER THREE

The Regulations on Mobile Money Service Entry and Operation, and the Effect on Competition in Ethiopia

3.1 Introduction

In general, regulating E-money issuers should be different from Banks or from prudential regulation.¹⁴⁴ In other words, non-banking actors are considered as intermediaries for deposits (not permitted to handle consumers' funds) and prudential regulation may not easily apply for such actors except for the conventional banking sector. Thus, this fact calls into question the need for different regulation of MMS providers.¹⁴⁵

The current legislation and guidelines that permits for providing MMSs are issued by NBE and despite the long term cumbersome and restricted approach, in very recent years, the NBE's directive issued and allowed telecoms to provide MMSs, which Ethio-Telecom's Telebirr became as the first MMS. As per the amendment for NPSP, foreign based entities are now allowed to operate DFS and MMS with a regular license fees. There are recent legislations that are important for DFSs and MMSs such as the E-Transaction, E-Signature proclamations and the proclamation for National Digital Identification. There are also different national councils that are formed to lead the DFS sector, despite that; there is no national council for competition.¹⁴⁶ Nevertheless, UNCDF recommends, especially in terms of FinTechs, the NBE should consider applying a sandbox regulatory approach to encourage a long standing revolution in digital payments.¹⁴⁷

¹⁴⁴ Claire Alexandre and Lynn Chang Elisenhart, "Mobile Money as an Engine of Financial Inclusion and Lynchpin The regulations do not specify the type of institution which can provide mobile money of Financial Integrity " Wash J. Law. Tech. Arts Vol 8 Issue 3, (2013), p. 298

¹⁴⁵ Ross, (40) p 438

¹⁴⁶ National Digital Economy Council-NDEC (established by article 6 of the Electronic Transaction Proclamation No. 1205/2020), the National Payment System Council-NPSC established by article 32 of the NPSP No. 718/2011) and National Council for Financial Inclusion-NCFI (established by the NFIS).

¹⁴⁷ UNCDF, 'Ethiopia remittance review: assessment of payment and financial markets infrastructures' Report (2021), p.6

3.2 National Bank of Ethiopia and the laws on Mobile Money

3.2.1 The National Payment System Proclamation No. 718/2011 (NPSP)

As the NBE is a regulator, overseer, operator, member and catalyst for change, it can have a duty on making or enforcing of competition laws with the general law of competition with the goal of developing competitiveness in the financial market rules.¹⁴⁸ But, the coordination gap between NBE and TCCPA is immense towards regulating the financial sector.¹⁴⁹

According to the proclamation's provisions, the NBE has the power to authorize, suspend and revoke the licenses of M-Money operators including Telebirr. As per article 5(3)(b), the competition actions on the NPSP, started from imposing such as, no person can provide or introduce a new system or merge of products and obliged operators to set agent networks. The enactment of E-transaction and E-signature laws has also a big role for competition law and the author believes this is important in improving competition in the market. Speaking about the cost of services, the prices, or fees for deposit, withdrawal, and transfer are different in the Ethiopian digital payment sector and some operators including with Awash mobile wallet, CBE-birr, and M-Birr, have a regressive fee scheme for deposit, withdrawal, and transfer transactions,¹⁵⁰ From these three forms of fees, Ethiopian transfer fees are higher compared to other counties in East Africa, such as Kenya, Uganda, and Tanzania.¹⁵¹ The new NPS amendment Proclamation: One of the ground breaking laws in DFS are now promulgated by the HPR on which foreign MMS and DFS will be permitted to engage. The law also came with new definitions for DFS, company, financial institution, operator, payment instrument and subsidiary.

3.2.2 National Bank of Ethiopia Directives

Before the NBE enacted the 2020s two directives, which permitted non-financial entities to engage in MMS and DFS,¹⁵² the 2012 repealed directive on Mobile and Agent Banking

¹⁴⁸ Solomon Abay (PhD) , 'Financial Market Development, Policy and Regulation: the International Experience and Ethiopia's Need for Further Reform' (2011) p.286

¹⁴⁹ Ibid

¹⁵⁰ Getnet, Tadele, and Alejandro,(n.41) p.18-21

¹⁵¹ Ibid

¹⁵² Licensing and Authorization of Payment System Operators, Directive No. ONPS/02/2020, and Licensing and Authorization of Payment Instrument Issuers Directive No. ONPS/01/2020. And, Authorization of MFIs to Convert to Banks Directive No. SBB/74/2020) is also another important law in the sector.

Services exclusively outlawed nonfinancial institutions from performing in the Digital payment system. This was a major obstacle to the development of fair competition and it is easy to imagine the influence of Telebirr (Unicorn Company) towards the emerging small and medium FinTech companies, MFIs and other upcoming MNOs will create a burdensome environment.

According to article 4 (1) of the Payment Instrument Issuers Directive No. ONPS/01/2020, (PIID), upon application to NBE any person can get a license for PII but the bank/MFIs are only subject to a submission of an application for authorization of PII services and they are allowed to engage without a further license. As per article 6, the listed services by the issuers are cash-in/cash-out; local money transfers, domestic payments, over-the-counter transactions and inward international remittances as services that will be provided and only by Ethiopians or Ethiopian origins. The directive limits the maximum percentage for a shareholder that can hold from the company's capital¹⁵³ and there is a difference in the minimum requirement of shareholders to establish a share company in the directive and in the Commercial Code, which is the directive required for a minimum of 10, whereas the new Commercial Code article 252 requests a minimum for 5 persons. Moreover, the directive requests multiple documents and management plans with qualified personnel upon further approval by NBE. As the good part of the directive, it includes requirements of CDD, AML/CTF and merger or takeover of issuer's needs the NBE's approval.¹⁵⁴ In order to safeguard the competition, article 15 (6) the PIID, prohibits issuer's from engaging to conclude agreements with non-payment instrument business and we can relate this provision with the TCCPP article 5 (2) (g) in which a *tie-in agreement* is prohibited. However, the directive failed to incorporate a period of limitation clause in respect of the claims and penalties provided in the directive.

The PSOD,¹⁵⁵ the other important directive for the DFS sector, has five different categories of operators and these are: National Switch Operator (only one to be allowed in Ethiopia), Switch Operator; ATM Operator; PoS Device Operator and Payment Gateway Operator. In terms of minimum capital requirements, for each type of operator is varied¹⁵⁶ and the

¹⁵³ Art 4 (3) (b) (viii) put 20% as the maximum, whereas in ordinary banking business the maximum is 5%

¹⁵⁴ 15 (1) (c) of PIID

¹⁵⁵ Art (9)-(13)

¹⁵⁶ Ibid

maximum ownership percentage is double comparing with PIIID shareholder¹⁵⁷. The same with the PIIID, banks/MFIs are only subject to the submission of an application for authorization of PSO services but they will allow only for their own use. Operators are expected to submit comprehensive documents to NBE in respect of the intended system relevant information as well as personnel's and with protection justifications, and they are not allowed to own PII unless establishing a separate institution.¹⁵⁸ In respect of outsourcing services, a PSO and third party provider can have an agreement for conducting a process or operational activities and such agreements are clearly put for the DFS delivery access channels, specifically the PoS and ATM. Minimum number of shareholders varies upon the number of the operators to engage in the system. Thus, when the company plans for one type of system it is expected to fulfill 5 persons whereas to own a different and for more than one system, the minimum requirement will be 10. A positive move for the competitions, unlike the PIIID, the PSOD under article 13 (4) clearly allowed foreign companies to provide online payment 'processing' subject to the approval of NBE and mandatory agreement with the locals. Furthermore as per article 20 (4) that they can receive outsource offers from local companies and in the related with reporting, PSO and PII are obliged to report on weekly and monthly bases to the NBE for their performances.¹⁵⁹

Furthermore, the NBE enacted a recent directive which increases licensing oversight and authorizations fees against PII and PSO companies which will probably hinder the development of DFS providers.¹⁶⁰ In other experiences, such as in Spain there are no administrative fees towards DFS and Belgium imposes supervision fees on M-Money operators in proportion to the funds they administer.¹⁶¹ Despite the NBE can regulate and supervise the private banks, the NBE does not have complete implementation power towards the public enterprise, such as CBE and may not interfere if the CBE is not in line with the

¹⁵⁷ Art 4 (4.6) (b) put 40% as the maximum ownership by a person.

¹⁵⁸ Art 20 (2)

¹⁵⁹ Interview with Mr. Getu Zerihun ,Payment system oversight and follow up Expert, NBE (September 28, 2022)

¹⁶⁰ Fees for National Bank's Payment System Oversight, Licensing and Authorization Services Directive No. ONPS/07/2022

¹⁶¹ Kflip Knowledge 'Oversight Licensing Fees '<Oversight, Licensing Fees – What Do They Mean for Fintechs? - Kflip Knowledge Hub> (accessed on October 15, 2022)

NBE's laws.¹⁶² With the same logic, as far as the Ethio-Telecom is a public enterprise, the author has a position; the company will be also treated in the same manner with CBE. And with this fact, the NBE should revisit the Corporate Governance Directive in a way compatible with MMS's share company establishment features.

Here, it is essential to notice, the Communication Service Proclamation No. 1148/2019 has the most important provision, article 54, which liberalizes previously monopolized communication sector. In addition, the law stipulates that the authority determine technical standards and tariffs for the telecom industry, as well as supervise and license service providers. Most crucially, article 47 gave the Ethiopian Communication authority, the right to regulate anti-competitive acts with an exclusive power and this implies the TCCPPA jurisdiction is ousted on this particular sector. The TCRPD No. 832/2021 on its preamble also, indicated that it has a goal for encouraging competition and request licensed entities to have; code of conduct, Non-Discrimination Policy, Information in contractual agreements, price information, consumer protection standards and compliance process mechanisms that directly or impliedly will benefit to improve competition especially among MNOs in Ethiopia.

A) Interoperability in Mobile Money Services

Connectivity is the major stage on the trail to financial inclusion¹⁶³ and interoperability is the interconnection of MMSs among providers or through third parties, which benefit consumers and providers from the interoperability¹⁶⁴ and in accordance with GSMA, there are three forms of interoperability levels which are; between platforms, agents and customers.

First, MMSs basically demand a GSM network for voice calls, SMS, USSD and internet connections and thus, the availability of Network is a major demand for adoption of M-Money. It can imply that adopting *convergence*¹⁶⁵ in the telecoms, broadcasting, and information technology industries poses a variety of policy, legal, and governance matters.

¹⁶² World Bank. "Ethiopia Financial Sector Development: The Path to an Efficient Stable and Inclusive Financial Sector." Report No. AUS0001255. Washington, DC. (2019) Report, p18

¹⁶³ Dan Radcliffe and Rodger Voorhies, 'A Digital Pathway to Financial Inclusion' Bill & Melinda Gates Foundation (2012) p.7-9

¹⁶⁴ Barnabas Andiva, 'Mobile Financial Services And Regulation In Kenya' C. Authority of Kenya (2015)10

¹⁶⁵ Convergence deals with the integrations among the telecoms, broadcasting and information technology sectors.

M-Money is then the new ICT convergence innovations¹⁶⁶ and state and key parties seem to be concerned about creating strategies for costs of such integrations.

Interoperability with National Payments Switch and Application Programming Interface (API) are the most important integrations and interconnections as most literature dictates. Save with the concept of ‘closed loop wallets’¹⁶⁷ such as a prepaid card, that works only with one specific payee, interoperability is the desire and ability for consumers to transfer E-Money between different E-Money accounts at different networks.¹⁶⁸ In fact, it is one of the most important expected features of payments and financial market resources to allow sharing and accessibility of DFS infrastructures.¹⁶⁹ In Kenya, the MMS interoperability is greatly benefiting the competition market and costs for MMS services are significantly decreasing.¹⁷⁰ And, according to GSMA¹⁷¹ technical integrations such as APIs and Software Development Kits (SDKs) have vital roles in interoperability of transactions and also as the World Bank Group, there are four groups of APIs which are ‘Payment’, ‘Data’, ‘Ecosystem expansion’, and ‘Consent and identity’ with different goals.¹⁷²

On the other hand, API is practiced for the aim of interconnecting with one another and substituting data in a straight way without physical person’s contributions during transactions. When a DFS provider opens their APIs, this response makes them broadly accessible for other companies to utilize. With examples, API is the one that makes it easy for ride-hailing applications to contact other companies’ map and payment systems¹⁷³ and the integration between any android phone and Google’s Android Operating System as another instance for API.¹⁷⁴ However, if the security level of APIs is not well used and managed it

¹⁶⁶ Tiru Beza Bereket , Gee-Hyun Hwang ‘Determinants of Behavioral Intention and Usage of Mobile Money Services in Ethiopia’ J. D.C I Vol 18 No.2 (2020) p. 32

¹⁶⁷ Clearbridge Mobile Co. ‘Open Vs. Closed loop mobile payments’ < Open vs. Closed Loop Mobile Payments | Clearbridge Mobile > (accessed August 24, 2022)

¹⁶⁸ GSMA, (n.2) p.77

¹⁶⁹ UNCDF (n.147) p.24

¹⁷⁰ Getnet (n.42)

¹⁷¹ GSMA, *The fintech behind mobile money: The power of developer tools to drive innovation* (Wednesday 15 June, 2022 GSMA | The fintech behind mobile money: The power of developer tools to drive innovation | Mobile for Development accessed June 20 2022)

¹⁷² Ceyla (n.27)

¹⁷³ CGPA, *open API’s for Digital Finance*, <Open Apis For Digital Finance | Cgap > (accessed august 2022)

¹⁷⁴ ITU (n.105)

can cause huge financial market system instability and risks.¹⁷⁵ Electronic Funds Transfer (EFT) is another technical integration but it is the oldest E-Payment system in the ecosystem.

The other important integration concept is AI. M-Money and AI are highly interacted and important for mutual benefits such as risk management (for assessing creditworthiness), customer service, robo-advisor. Recently, MTN's service called MTN-chat bot is gaining an advantage from AI.¹⁷⁶ Lastly, Blockchain, despite it is not regulated in many countries including Ethiopia, Distributed Ledger Technology or Blockchain, is an important technology protocol that permits data to be shared straightly between individuals or bodies in a network, with the absence of intermediaries.¹⁷⁷ Thus, it can easily imply how important distributed computing¹⁷⁸ such as Blockchain is and there is a need to consider integrating it with MMS subject to legal protection of consumers and the public.

As is the case in almost all parts of the Sub-Saharan countries and according to the Digital Ethiopia Strategy,¹⁷⁹ Ethiopians' use of digital payments is limited by Internet penetration, limited access to financial services, limited infrastructure and connectivity. The lapsed NFIS acknowledges also, the key impediments are very limited consumption of regulated financial services with numerous causes¹⁸⁰ and shortage of Electric power and warehouse technology are major impediments.¹⁸¹ And, for such reasons, the preamble of the NPSP shows the NPS is the crucial financial infrastructure in Ethiopia.

In Ethiopia, the digital payment interoperability infrastructure was started in 2016 after EthSwitch was founded in 2011. Currently, the National Switch Operator, EthSwitch S.C has a statutory recognition for interoperability¹⁸² and this share company integrated the ATM,

¹⁷⁵ Milena Vučinić (n.79) p.53

¹⁷⁶ GSMA , *AI and Mobile Money: Bridging the Financial Inclusion Gap* (Thursday 16 April, 2020 accessed June 12, 2022)

¹⁷⁷ GSMA, *Mobile Operators and Fintech' Report* (2017) p. 10

¹⁷⁸ Distributed computing and Cloud Computing are different concepts and recently Ethio-Telecom started Cloud Computing technology

¹⁷⁹ *Digital Ethiopia 2025: A digital strategy for Ethiopia Inclusive prosperity* (Ministry of Innovation and technology),p.64

¹⁸⁰ National Bank of Ethiopia (n.15) p.12

¹⁸¹ UNCTAD, 'Ethiopia's drive to advance digital transformation' BRI PROJECT/PB 02 April, 2022

¹⁸² Oversight of the National Payment Systems; Licensing and Authorization of Payment System Operator's Directive, No. ONPS/02/2020, National Bank of Ethiopia, (2020). Art 9 (2)

POS, E-Banking services and all banks are required to link with this National payments switch. The NPSP was not able to define interoperability whereas, the PSOD, Art. 2.15 stipulated in its long definition interoperability as technical and legal compatibility schemes. However, Ethio-telecom goes on by its own to integrate Telebirr with other financial institutions and this creates critics on crossing the mandate of EthSwitch.¹⁸³ EthSwitch is authorized to process and clear interbank direct debit and credit transfers and cheque payments through Ethiopian Automated Transfer System (EATS), ACH (Automated Clearing House) and with Real Time Gross Settlement (RTGS) under NBE's settlement. The Securities Settlement System (SSS) is also another technical system used by the NBE and soon to study about Central Bank Money/digital currency.¹⁸⁴

The Payment instrument issuer's directive (PIID) of NBE instructs an issuer to comply with interoperability;¹⁸⁵ and currently, ATM, POS, and M-Banking are interoperable.¹⁸⁶ Thus, interoperability is not an easy task as Kenyan itself launched interoperability of MMS in 2022 after 15 years of *M-PESA*'s establishment.¹⁸⁷ On the other hand, EthSwitch S.C statutory granted right under the PSOD is debatable among experts.¹⁸⁸ There is also an argument as to whether to assess the need for another National Switch operator, as consumers could gain less network costs and quality of products.¹⁸⁹

¹⁸³ Metasebia Teshome, Ethio telecom goes solo in integrating telebirr , *Capital Newspaper* <Ethio telecom goes solo in integrating tele birr - Capital Newspaper (capitalethiopia.com)> accessed 20 November 2022

¹⁸⁴ Interview with Mr. Getu Zerihun ,Payment system oversight and follow up Expert, NBE (September 28, 2022)

¹⁸⁵ Art. 15 (11) of the PIID

¹⁸⁶ EthSwitch S.c , *Enables Digital Wallet, Mobile and Internet Banking Interoperability* (November 15, 2021 EthSwitch Enables Digital Wallet, Mobile and Internet Banking Interoperability – EthSwitch S.C accessed June 23, 2022)

¹⁸⁷ Abraham Augustine 'Mobile money in Kenya is now fully interoperable' *Techcabal* <Mobile money in Kenya is now fully interoperable | TechCabal> (accessed on 25 July, 2022)

¹⁸⁸ Interview (n.51)

¹⁸⁹ Tajebe Getaneh Enyew, 'Shared Automated Teller Machine (ATM) Network in Ethiopia: Appraisal of the Competition Concerns' 9 Bahir Dar U JL (2019) p.236

B) Mobile Money Service and Consumer Protection

Despite there is a distinction between customer and consumer,¹⁹⁰ the NPS treats both terms equally.¹⁹¹ Generally, most literature discusses consumer protection in terms of the safety of deposited consumers' funds, transparency of transaction cost, data privacy, cyber-attack, digital fraud and so on. As M-Money is a real-time payment/instant, which is transferred electronically from one party to another, it has its own risk.¹⁹²

The consideration for nations to have consumer protections begins with the UN Consumer Protection Guideline and accordingly the principles for good business practices are *Fair and equitable treatment, Commercial behavior, Disclosure and transparency, education and awareness-raising, Protection of Privacy, Consumer complaints and disputes*. In terms of transparency of transaction costs by the service provider, for instance, the Competition Act No. 12 of 2010 of Kenya Section 56 obligates that a consumer must be informed by an MMS supplier about costs and levies during MMSs use. The same with Ethiopia, the Telecommunications Consumer Rights and Protection Directive No. 832/2021 (TCRPD), under article 12 obliged companies to inform transaction costs to consumers and article 14 of the TCCPP also includes most principles from the above UN guideline.

The NBE's Financial Consumer Protection Directive No. FCP/01/2020 (FCPD) is the other major consumer protection law. Article 4 of this directive stipulate; *fair treatment, transparency and disclosure, product design and suitability, data protection and complaint handling mechanism* as the core obligations of any financial institution to comply with. As part of consumer protection mechanisms, Telebirr owner Ethio-telecom introduced an Omni-channel cloud based contact center.¹⁹³

¹⁹⁰ Ashenafi Lemecha, 'Consumers and Third Parties Protection under the National Payment System Proclamation No.718/2011' (LL.M Thesis, Addis Ababa University (2017) p21

¹⁹¹ Simret Zewdie, 'Electronic Funds Transfer And the Case for Consumer Protection in Ethiopia', (LL.M, University of Oslo (2013) p.8

¹⁹² Jonathan Greenacre and Ross Buckley, "Using trusts to protect mobile money customers", Sing. J. Legal Stud Vol 2014 No. 1, (2014), p.7

¹⁹³ Capital Newspaper, <Enterprises to reap big from Ethio telecom's new contact center venture - Capital Newspaper (capitalethiopia.com)> accessed on October 18, 2022

In respect to the fate of consumers' electronic funds, there are three critical issues in which countries follow different approaches.¹⁹⁴ The first issue is where to deposit consumers' funds, either in a central bank, single bank, or multiple banks. The second matter is allowing for investing funds to other liquid assets that collected from consumers fund and thirdly, what to do with the collected interest¹⁹⁵ from consumers deposited funds.

One of the possible reasons behind the protection of consumer funds are to proactively prevent risks such as if the partner bank becomes illiquid or bankrupt and in some countries such as Tanzania and Kenya, the central banks allowed MNOs to work and deal with several banks.¹⁹⁶ Some nations also give the option to decide for MNOs themselves to either deposit the funds at regulated financial institutions or invest the customer funds in low-risk securities, such as government securities and Malaysia, Philippines, Bolivia, and Philippines are known for this trend.¹⁹⁷ In terms of the place to deposit, El Salvador for instance directs the institutions to put in the central bank and in Seychelles, MNOs need to split consumers fund to multiple banks in order to avoid high risk of the bankruptcy of the host bank whereas, Kenya follows different approach the law directs MNOs should give the incurred interest to charities. NBE in this regard, clearly stipulate in the directive, the interest collected from the M-Money account will be for consumers¹⁹⁸ but silent as to deposit the funds in a single bank or different banks. The rights and obligations of consumers in MMS are also prepared by an adhesive type of contract that may create unfairness towards consumers. The NBE seems to be acting as a quasi-judicial organ under article 5.5 (5.5.4.4) of the FCPD. However, this fact is a debatable matter as to how the National Bank can act as a quasi-judicial organ.

For ultimate protection, the NBE also recently enacted the *Establishment and Operation of Ethiopian Deposit Insurance Fund Council of Ministers Regulation No. 482/2021*, with a future institution which aimed to mitigate such risks. To conclude, the nexus of competition and consumer protection law is inevitable and the final aims of competition and consumer laws are to improve the welfare of consumers. Competition law is not enough for consumers' protection, and most nations enacted competition and consumer protection laws in different

¹⁹⁴ Kazuko, (n.9) p.17

¹⁹⁵ Ibid, p.25

¹⁹⁶ Ibid

¹⁹⁷ Ibid p.25

¹⁹⁸ According to article 10(9), 80 % of the interest to consumers, And according to Mr. Solomon the remaining 20 % is given to M-Money operators so that they can use it for the maintenance purposes.

laws¹⁹⁹ and others combined into a single legislation.²⁰⁰ Despite some good protections for consumer rights,²⁰¹ and the option to use the tort laws, Ethiopia does not clearly put as individuals have the right to institute a claim for compensation against financial institutions.²⁰²

C) Mobile Money Service and Data Privacy

The International Convention on Civil and Political Rights at article 17 and the European Convention on Human Rights at article 8 recognized data privacy in a clear manner.²⁰³ As regulations have a big part in improving the transparency and accountability of algorithms, for instance, the EU General Data Protection Regulation requests specific information in respect of the logic behind the algorithm.²⁰⁴ Alongside this regulation the General Data Protection Regulation and the Cyber-security Act 2019/881 (and 526/2013), the free flow of non-personal data 2018/1807, the Open Data Directive 2019/1024, and EU Data Strategy are the noticeable laws in the EU. In data privacy there are common principles namely *lawfulness, fairness, transparency, purpose limitation, data minimization, accuracy, storage limitation, integrity, confidentiality, and accountability*.²⁰⁵ Privacy establishes the basic protections of personal information and processing *Personal Data* usually requires prior *consent* or *explicit consent* of individuals whose data will be processed. *Consent* is especially important when the information is collected in a digital format and can easily be copied and exchanged.²⁰⁶

¹⁹⁹ South Africa, China, India, Brazil, and Botswana

²⁰⁰ Kenya and Tanzania

²⁰¹ Art 20(2,3,), 34, 37 of the TCCPP

²⁰² Solomon (n.148) (2011) p.309

²⁰³ Michael Tugendhat QC Iain Chrtie *The law of Privacy and Media*, (oxford 3rd ed, 2016)

²⁰⁴ Dong He and *et_al* (n.18) p.16

²⁰⁵ UNCTAD, 'Data protection regulations and international data flows: Implications for trade and development' UNCTAD/WEB/DTL/STICT/2016/1/iPub (2016) and Privacy International, 'A Guide for Policy Engagement on Data Protection' (2018)

²⁰⁶ National Open Data Policy of The Government of Ethiopia, 'Draft Consultation on the Recommendations and Working Text' (2018) p.13

Despite some related legislations²⁰⁷ and ratified international HRs instruments,²⁰⁸ Ethiopia does not have a single and comprehensive legal instrument regulating privacy and data protection.²⁰⁹ In other words, the rights and responsibilities of *Data Controllers and Processors*, or *Recipients and Third Parties*, the issues of *Data Subjects*, *Sensitive Personal Data*, *Liability*, and *Compensation* are unknown. There is also no independent national authority for data protection and all these factors will perceptibly impact the MMSs. Moreover, as M-Money products also incorporate Intellectual Property Rights (IPRs), unfortunately Ethiopian law does not cover human rights perceptions towards IPRs.²¹⁰

Article 4(6)(c) of the PIID requires payment issuer's to provide a detailed document on data flow and management, and also the PIID and FCPD requires issuers to have proper technical and institutional measurements to safeguard personal data but does not specify the measurements. The PSOD on the other hand, on article 11 and 12 obliged the data center of DFS companies to be planted in Ethiopia despite that Data Center Service Providers is not growing in Ethiopia. Moreover, article 5.4 of the FCPD listed the necessary requirements for *protection of data, collection, use, and access of data* including with *the treatment of data by third parties*. However, the directives failed to mention regulatory impact assessment and ignored private remedies whenever an infringement is created by data controllers. Furthermore, even with circumstantial possible justifications, the DFS legislations are not specified to cross border transfer data and thus, the draft personal data law is expected to incorporate comprehensive issues on cross border data transfer and all other matters described in the above.

D) Mobile Money service, the State of Cyber Security, and Digital Fraud

According to a survey published by the worldwide cyber security organization, security issues are likely to discourage users from using mobile payment systems.²¹¹ The quest to stay

²⁰⁷ Article 11, 309 and 606 of the Civil Code , *Nega Gaz*, Proclamation No. 162, 19th year No,2 1960, The Federal Tax Administration Proclamation No. 983/2016 Article 66/1 and The Computer Crime Proclamation No. 958/2016, *Federal Neg Gaz*, 22nd year No. 83 July 7th 2016

²⁰⁸ Mainly; UDHR and ICCPR

²⁰⁹ ADIRFC and *et_al*, 'Privacy and personal data protection in Africa: A rights-based survey of legislation in eight countries' Survey (2021) ,p.27

²¹⁰ Biruk Haile , "Human rights Perspectives of Intellectual Property" J Eth Legal Vol. 1. No,1 (2008)

²¹¹ Nolan Murray, (n.37) 17

one step ahead of hackers is never-ending for security developers²¹² For instance, *Malicious codes, phishing (deception), hacking, cyber vandalism, spoofing, denial of service attacks, sniffing*, and other sorts of security and privacy risks to M-banking are among the top nine cyber-attacks.²¹³ According to the FSB, strict schemes, supervision, sharing of information, integration of cyber-securities in the first level of system crafting, and improving digital illiteracy can also reduce possible cyber-attacks and will protect the financial market.²¹⁴

Here again, Ethiopia still lacks a comprehensive cyber security law and a policy itself and the closest legislation proclamation No. 958/2016 on Computer Crime does not say anything about M-Money cyber-attacks as the dispersed cyber security provisions are unlikely to prevent or deter the commission of these crimes. Cyber-attack is now becoming more crucial for the nation and there are no ways the MMS sector will be safe from such acts. The criminal code's provision for cybercrime is a lenient penalty clause, partially outmoded, and does not say anything about MFS cybercrimes. Therefore, the government should take international cooperation seriously, because most cybercrime threats are posed from abroad.²¹⁵ Companies are also poor in preparing before attacks occur and to report after such sustained incidents occurred. The NPSP does not stipulate cyber security matters related with DFS except stipulating a prohibition on traditional fraud and forgery crimes on article 35, however, the PIID under article 13 (2) (o) orders issuers to report any cyber security attacks or loss to NBE.

Digital Fraud: usually, fraudulent activities in the DFS sector can arise from consumers, agents, individuals, or groups. Despite the unknown level of the fraudulent activities in Africa, fraud circumstances for MNOs are high and recently for instance, Uganda's MTN lost US\$3.83 million due to such risks.²¹⁶ The most common fraudulent acts in MFSs are either through voice calls or SMS, so as to scam such as SIM-swap frauds.²¹⁷ There are possible

²¹² Ibid

²¹³ Hatiya Chitanda, Assessment Of Legal And Practical Challenges Affecting Mobile Banking: Case Study Of Tanzania (LLM unpublished thesis, University of Tanzania 2013)p.33

²¹⁴ Milena, (n.79) p.47

²¹⁵ ADIRFC and *et_al*, (n.209) p. 29

²¹⁶ E Kodjo Afanu, (n.1) p.12

²¹⁷ Warren Fitzhenry, 'Visualizing a timeline of mobile money fraud - Cambridge Intelligence' <18 January 2022 Visualizing a timeline of mobile money fraud - Cambridge Intelligence (cambridge-intelligence.com)> (accessed 13 march 2022)

solutions for fighting fraudulent acts in DFS namely; developing inside-controls, improving the ability of agents and consumers, reexamining the requirements on account access and SIM swap.²¹⁸

Ethiopia had legislation on Telecom Fraud, Proclamation No. 761/2012; however, it is outdated to the present technology advancement and does not explicitly incorporate DFS and M-Money fraudulent acts. The NDPS recommends action plans on conducting fraud awareness programs and to impose prohibitions and punishments on those who engage in fraudulent activities. Moreover, two-factor (two-step) verification (authentication) is important to confirm the mobile phone's proper consumer²¹⁹ and in line with this, Telebirr has incorporated this option as part of article 7 (4) PIID, which orders the use of two-factor authentication for transactions more than 1000 birr. As the MMS's E-Contract is prepared by the companies themselves, it is expected that *Error Resolution protection clauses (created by system problems) or unauthorized fund transfer protection clauses* are always intact. However, the FCPD under article 5.1.7 obligates financial service providers to effectively inform such clauses.

E) Mobile Money service, Know Your Customer, Anti-Money Laundering, and Counter-Terrorist Financing

Monitoring E-Money activities has gotten more difficult to follow every single transaction as the number of people who use financial services and innovations are expanding. Transactions can be carried out using anonymous means and as a result, some of the services provided by digital finance platforms may fall outside of the present framework of AML/CTF rules.²²⁰ When the M-Money model attempts to operate cross-border, it can easily realize the obstacles triggered, and the evaluation and controls must rely on multiple authorities working inside different national legal frameworks.²²¹ In international experience, The 1988 Vienna Convention, Palermo Convention, The Financial Action Task Force (FATF), the FATF 40+9 recommendations and its regional groups require countries to evaluate the risk and

²¹⁸ Mercy, W. Buku and Rafe Maze 'Fraud in Mobile Financial Services' CGPA Brief (2017) p.2

²¹⁹ Timothy, (n.25), p. 489

²²⁰ Bedir Berkay Karadogan, (n.10), p.31

²²¹ Louis de Koker, "The 2012 Revised FATF Recommendations: Assessing and Mitigating Mobile Money Integrity Risks within the New Standards Framework" Wash J. Law. Tech. Arts Vol 8 Issue 3, (2013) p.189

susceptibility of new technologies²²² and the 2012 guidelines reinforced the risk-based approach to AML/CTF controls as impulsive rather than discretionary.²²³

Ethiopian AML law has some shortfalls²²⁴ and save to other laws (such as the Disclosure and Registration of Assets Proclamation No. 668/2010 and Article 684 of the Criminal Code of Ethiopia) the Proclamation No. 780/2013 and Financial Anti-Money Laundering and Countering the Financing of Terrorism Compliance Directives Number 01/2014 are more focused on banks as the main actors to apply AML measures.²²⁵ As banks by their own mechanisms to conduct and fight AML/CTF, it is clear that MNOs are not a financial background expertise thus, AML and CTF are expected risks and by nature of these risks, it is also difficult to quantify in terms of a certain product. On the other hand, KYC, up-to-date Customer Due Diligence (CDD), Customer Identification & verification procedures are the most common mechanisms to fight AML/CTF.

In terms of maximum daily account balance, there were three categories by the PIID, however, recently changed to two levels by the PIID amendment directive ONPS/06/2022, thus there are two kinds of consumers in Ethiopian E-Money accounts. However, due to the transaction limits consumers are not able for instance to buy Air Tickets which usually costs more than the daily limit provided by the amended PIID. The PIID under article 15 (3) (c) orders payment issuers to effectively monitor the procedures for AML/CTF. When it comes to CDD, the digital ID or biometrics ID requirements are very important tools for fighting AML/CTF.

Notable acts of AML are; placement, layering and integration.²²⁶ The placement step is when perpetrators remove large amounts of cash from the crime site; often, they do this by going to financial institutions in order to avoid being caught by law enforcement. And, second the money is layered during the layering stage in order to conceal its true source, and at the integration stage, it is returned into the economy while still appearing to be legal by being

²²² Kalkidan Misganaw Jember, “Anti-money laundering law in Ethiopia: Issues of Enforcement with specific Reference to Banks” Mizan. L. R. Vol. 14, No.1(2020) p.21

²²³ Jane (n.137) p.4

²²⁴ Kalkidan Misganaw (n.222) p. 61-62

²²⁵ Ibid

²²⁶ Angela Leong (2007), *The Disruption of International Organized Crime: An Analysis of Legal and Non-Legal Strategies*, p. 33

combined with assets that are lawful. Thus, overall, reporting suspicious acts and record keeping are necessary actions that should be taken by MMS providers for instance when a dormant M-Money accounts for a long time, but begins to perform frequent transactions and M-Money user who sends E-Money for numerous persons but except for salaries or per diems²²⁷ and in some countries central banks encourage companies to incorporate ‘Corporate leniency policies’ to fight AML activities.

F) Other essential matters for Mobile Money entry and operation

Deployment of mass M-Money agent networks: Agent is one of the most **important entry and operation requirements for MMS**. In order to avoid confusions with the legal connotations of the term ‘agent’ as it is used in other industries,²²⁸ agents have interchangeable names such as; outlets, correspondents, retail partners or cash merchants.²²⁹ Agents are not only for cash-in/cash-out purposes, they are able to register new users and have the role to train new consumers on the usage of MMS. Agents are not always physical persons but also the branches of bank/MFI itself,²³⁰ however, MMSs usually depend on agent networks rather than bank/MFIs branches.²³¹ An extended MMS agent’s networks are very important in reaching end users and remote areas²³² and one of the reasons for Kenyan M-Money success is the use of different levels of agents.²³³ In some MMS deployments, there is also a service called ‘over the counter’, in which the agent transact in the name of a consumer who is not able to have an M-Money account²³⁴ and such a user seems also recognized by the PIID article 11(2)(e). Monitoring and support guidelines and agent liquidity management training are inadequate or not available in Ethiopia. During cash-in cash-out services, agents have an essential role in terms of recording and exposing AML and CTF risks²³⁵ and hence

²²⁷ Kalkidan (222) p.81 and 82

²²⁸ GSMA, (n.2) p. 75

²²⁹ Leon Joseph Perlman, ‘legal and regulatory aspects of mobile financial services’ (LL.D, University of South Africa 2012) p. 28

²³⁰ GSMA, (n.2) P.75

²³¹ J. Aron and John Muellbauer (n.16) p.4

²³² Kazuko, (n.9) p.15

²³³ Ogochukwu Monye ‘*Digital Financial Inclusion and Regulation*’(Routledge, Taylor & Francis Group, London and New York) 2022

²³⁴ Ceyla, (n.27) p.36

²³⁵ Art. 11 (3) of the PIID

the NPSP²³⁶ and NBE's directives specify standards that are expected from agents. There is a view on the need to have a separate regulation for MNO-led agents and Bank-led agents with different criteria as it is the case in Mexico. But, most nations do not consider allowing agents to receive foreign currencies. As of July 19, 2022, Telebirr has 89 master agents, more than 73 thousand agents, and 21,000 merchants.²³⁷ Finally, in terms of competition, sharing of agents by market competitors is a critical matter or debatable however, the Use of Agent Directive No. FIS/02/2020 settled this matter as sharing is a duty. And, in Kenya, under case no. ct/005/2020, litigation between Telkom Kenya limited, Airtel networks Kenya limited, and competition authority of Kenya, the court ordered sharing of agents as a duty but with some considerations.²³⁸

Intellectual Property Rights (IPRs) has also made a great contribution to the Digital Economy,²³⁹ inclusive digital innovation, fighting disruptive innovations, digital ownership and 'novelty' are the most critical and important topics in IP and MMSs. IPRs have various participants and ownership of innovations such as the hardware inventors, software authors and data authors. With the 9th goal of the SDG,²⁴⁰ and with the foremost pushing factors of Innovation and technology forces, local economies are now developing and becoming competitive in recent years.²⁴¹ As part of cross-border IPR practices, Telebirr is developed by the Chinese company called Huawei. However, as IP rights dictate, institutionally created IPRs/products are expected to balance themselves with local knowledge and inclusive innovation, the debate begins from "is Telebirr an Ethiopian innovation?" and "what is the current role of Huawei to Telebirr" and conversely, the Telebirr higher officials claim the relation with Huawei, is a service level agreement for operation management only.²⁴² In 2018, Safaricom launched access to *M-PESA* for visually impaired inhabitants through the DOT braille watch²⁴³ and Telebirr also has some digital solutions, but it requires a

²³⁶ Art. 10 of the NPSP

²³⁷ Team Shega, (n.6)

²³⁸ Kenyalaw.org <Competition Tribunal 005 of 2020 - Kenya Law> accessed on 22 June 2022

²³⁹ African Union, (n.132) p.25

²⁴⁰ Ibid

²⁴¹ Ibid

²⁴² Interview (n.30)

²⁴³ Business Today, '15 Interesting Things You Didn't Know About M-PESA' <June 13, 2022 15 Interesting Things You Didn't Know About M-PESA (businesstoday.co.ke) > (accessed on July 15, 2022)

smartphone.²⁴⁴ In the international platforms, recently, the Global Financial Innovation Network was formed to assist financial innovations in the interests of consumers. Ethiopian Competition law on the other hand, failed to incorporate abuse of IPRs such as abuse of monopolies related with acquisition of patents, technology transfer and cooperative arrangements among innovators.²⁴⁵ Even so, NBE's directives and the amendment proclamation for NPS cited inclusive innovation as one of their main goals under their preambles.

Tax is another important matter to discuss and according to the GSMA, the overall impact of M-Mobile taxes on the entire tax system has not been thoroughly examined or is unknown.²⁴⁶ However, the NDPS put a recommendation on tax incentives for electronic transactions²⁴⁷ while silent on how to treat the taxation on imported mobile devices and also on the need to have a different tax treatment for big and small MMS providers.

The traditional Contract law and E-Contact is also a major issue towards MMS. As solutions are digital, but not all engagement is always virtual, the rules of evidence under the electronic payment systems and the traditional rules of evidence are significantly different.²⁴⁸ The NPSP came with allowing the admissibility of e-signatures and electronic data as evidence and by this, legal impediments are eliminated and transactions made in payment systems are acceptable.²⁴⁹ PIID are obligated to make and share terms and conditions of any product to consumers and the fate of dormant M-Money accounts are regulated under article 9 in which different steps are applied by the issuer from sending notification to closing consumer's dormant account. Furthermore, article 5.2.5 of the FCPD provides the basic contents of terms and conditions including with the duty to describe fees and charges. However, it is to observe some critics for instance, Microloans service by Telebirr is given without the consent of the other spouse. In respect to alternatives dispute resolution (ADR) Mechanisms in MMS, the

²⁴⁴ Interview (n.30)

²⁴⁵ Yidnekachew Haile, 'The Legal Gaps In Controlling Abuse Of Market Dominance In Ethiopia – Appraisal Of The Existing Legal Regime' (LL.M Thesis, Addis Ababa University 2020) P 36

²⁴⁶ GSMA, 'The causes and consequences of mobile money taxation' Report, (2020) p.46

²⁴⁷ National Digital Payment Strategy (2021) p 45

²⁴⁸ Gebrehiwot Entehawu, 'The Legal Framework For Electronic Contracts In Ethiopia With Special Emphasis On General Contract Law' (LL M Thesis, Addis Ababa University 2013) p.93

²⁴⁹ Kinfe Yilma and Halefom Hailu, 'The Internet and Regulatory Responses in Ethiopia: Telecoms, Cybercrimes, Privacy, E-commerce, and the New Media' Mizan L.R Vol. 9, No.1, p.142 (2015) P.36

NPSP under article 31 stipulates disputes that occurred between parties who take part in NPS and particularly in civil matters are directed to apply mediation or arbitration and however, there is a stand that consumers have the right to choose adjudication. Also, regardless of the debate for the sameness of mediation and conciliation, Ethiopia does not have a specific mediation law and is not a signatory for the Singapore Mediation Convention. The PIID, under article 4(6) (g), however, requests issuer's to provide dispute resolution and case management mechanisms or systems to the NBE.

Finally, there are other several entry and operational challenges for MMS that potentially impact the competition and to put them in summary; Unfitting business models, Limited funding options and absence of start-up proclamation,²⁵⁰ Digital illiteracy (digital skills and awareness by consumers or even by stakeholders), Inadequate digital and biometrics identification, Sparse utilization of MMSs and mobile-enabled sector-tech (such as insurance,²⁵¹ healthcare, humanitarian aids,²⁵² agriculture²⁵³, energy and education²⁵⁴ services), Poor cross-border payments and foreign remittance practices, Absence of religion (Shari'ah) compliant mobile financing solutions, Poor gender and physically-impaired inclusive DFS responses,²⁵⁵ Geographical concentration (as most DFS and MMS are utilized in Addis Ababa), Poor stage of E-government²⁵⁶ (E-vouchers and E-receipt), Absence of specific E-commerce marketplace regulation and directive, Limited legal and DFS experts (such as on AI, Blockchain, and cyber-security), Scant Virtual Internet Service²⁵⁷, and Data Center Service Providers, Absence of country level data on M-Money demographics split, adoption, access, use and revenue, and Political disputes; are other possible challenges and risks towards entry and operation of MMS and market competition in Ethiopia.

²⁵⁰ However there is an activity to enact start-ups law <(7 Things You Might Want to Know About Ethiopia's Draft Startup Proclamation - Business Info Ethiopia)> (accessed on October, 17 2022)

²⁵¹ *MaTontine* in Senegal

²⁵² M-Birr in Ethiopia

²⁵³ *Pula* in Zambia and Kenya (agricultural Insurance), *Tulaa* in Kenya and *Patasente* in Uganda

²⁵⁴ such as for accessing and paying digital learning courses, tuition fees, teachers' salaries

²⁵⁵ According to the UNSGSA Annual Report for 2021, MMS should encourage the benefit of women.

²⁵⁶ There are some activities such as, one-stop national business portal for e-government services (www.business.gov.et)

²⁵⁷ Despite, some Ethio Telecom Signs Deals with Five VISIP firms – Ethiopian Monitor

CHAPTER FOUR

The Major Practical Challenges on Regulating Competition and MNO-Led Mobile Money Services

Introduction

M-Money's features begin with macro-economic goals and it has a big role on the financial market, and on the monetary policy, for instance; its impact towards inflation, currency volatility²⁵⁸ and calculating M-Money user's fund as to monetary aggregators²⁵⁹ or as broad-money.²⁶⁰ Subject to addressing such macroeconomic matters by other research, the following major competition law subject matters are selected as the foremost current operational issues towards the success of MNO-led, MMSs and competition.

Notably, the core subjects of competition law are; Anti-competitive agreements and decisions Control of monopolistic or market dominance, Mergers and acquisitions, and Advocacy.

4.1 Mobile Money vs. Restrictive/Anti-competitive agreements, concerted practices and decisions

Anti-competitive agreements, concerted practices and decisions or as UNCTAD name it restrictive agreements²⁶¹ are one of the major coverage of competition law. In the USA, in order to demonstrate restraints of trade activities, the appellant should show; a contract, joint action (not unilateral action), unreasonable act of restraints from the relevant market, and an injury by the agreement.²⁶² Consumers or business persons, with clear, direct or implied manners may create an agreement to escape or to make a boundary to the market's competition. The agreements are basically manifested either in horizontal or vertical ways.²⁶³ We can easily imagine that agreements between competitors is not a problem as it can be important to the competition but, potentially prevent or limit competition²⁶⁴ unless the law intervenes.

²⁵⁸ The frequency and extent of changes in a currency's value

²⁵⁹ Cash circulation and cash usage in an economy

²⁶⁰ IMF, (n.69) p.29

²⁶¹ UNCTAD, (n59) p.3

²⁶² Mallor, Barnes, Owers and Langvardt 'Business law', (The McGraw-Hill Companies, Inc 15th ed) (2013) p 1289

²⁶³ Art.7 (3) (c) of the TCCPP

²⁶⁴ Art. 7 (1) (a) of the TCCPP

According to the article 7 of the TCCPP recognition, these intentional or implied acts are found in agreements, restrictive practices and decisions. The prohibited list of agreements in horizontal relationships are *Direct/indirect price fixing agreement or putting any other trading condition, Collusive Tendering* (agreement to win a tender),²⁶⁵ *Market Division* such as dividing territory or consumers²⁶⁶ and some countries also include *Boycotts* and *Output Reduction*. In vertical relationship, in order to protect the small business entities, it is included in the anti-competitive issues and is usually contained within *Setting of Minimum Resale Price*²⁶⁷ as the TCCCP is specified. Here also, as some literature identifies; *Single Branding, Tie-in*,²⁶⁸ *Territorial Restrictions, Reciprocal Dealing*,²⁶⁹ *Quantity Forcing, Franchising, Exclusive dealings*,²⁷⁰ and *Exclusive Distribution*, etc. as vertical relationship agreements.

In USA, in order to label an act as tying agreements, it includes; first, there must be two separate and distinct items, second, the tying product cannot be purchased unless the tied product is also purchased, third, the seller has sufficient market power for the tying product to substantially restrain competition in the tied product market; and fourth a ‘not insubstantial’ amount of commerce in the tied product is affected by the seller’s tying agreements.²⁷¹

Generally, tying and exclusive dealing agreements may be harmful in terms of reducing inter-brand competition by excluding the sellers’ competitors from the opportunity to compete for sales to its customers and these types of agreements are mostly for commodities/goods.²⁷²

²⁶⁵ According OECD, these collusive tendering agreements are suppression, complementary, and rotation a framework for the design and implementation of competition law and policy (worldbank.org) And Cho, Moohyung, and Tim Bütthe. 2020. “From Rule-Taker to Rule-Promoting Regulatory State: South Korea in the Nearly-Global Competition Regime.” Unpublished Manuscript, Duke University and Hochschule für Politik at the Technical University of Munich

²⁶⁶ Art 7 (1)(b) of the TCCPP

²⁶⁷ Art 7 (2) (b) of the TCCPP

²⁶⁸ For example a Fertilizer manufacturer refuses to sell its fertilizing products unless they buy the pesticide product of the company.

²⁶⁹ It is similar in motivation and effects with tying agreements.

²⁷⁰ It is when buyers of a particular product or service purchase exclusively from a particular seller and also agree not to purchase from other sellers. For instance, a candy producer agrees to buy sugar only from one company. However, not all exclusive agreements are unlawful.

²⁷¹ Mallor, Barnes, owers and Langvardt (n.262) p1300-04

²⁷² Ibid

There is a view that tying agreements may be sometimes necessary in order to protect the reputation (goodwill) of the sellers' product line, such as Apple Company's products. And here, Horizontal/Vertical relationship classification is not always in a strict sense as for instance an act of boycott can be both horizontal and vertical. And, tying agreements might be restrictive agreements or abuse of dominance.

In the Ethiopian MMS sector, transaction cost/price is determined by providers subject to NBE's oversight. However, In terms of DFS, near to tie-in agreement/exclusive dealing, the author observed, currently Telebirr is rigorously signing agreements with plenty of governmental and non-governmental entities for instance; with almost all commercial banks, and Authorities work on; tax and custom, immigration service, national lottery, public procurement, airline ticket, traffic management, petroleum supply and so on. These multiple agreements might be necessary actions by Telebirr in order to face the upcoming M-Pesa competition; however, critics are grown from the ecosystem players. In recent times, if taxi drivers need to buy the government subsidiary fuel they need to use Telebirr only and this brings anti-competitive claims by the ecosystem players. And now, any kind of car driver is forced to use Telebirr in order to buy fuel even though after some claims *CBE-Birr* joined the fuel sale arrangement.²⁷³ Furthermore, even if the process for interoperability is given to EthSwitch, TeleBirr is exclusively interoperating its service with 19 commercial banks and financial institutions. The state is now also prepared to pay civil servant's salaries with Telebirr only and thus, with this all instances, Bank-led and FinTech-led MMS providers are now clearly concerned for such Telebirr acts.²⁷⁴

Joint ventures agreements and MMS

Whether joint ventures are part of merger's legislation or not is a disputable topic and at this point, many jurisdictions hold different positions.²⁷⁵ The TCCPP does not use the term joint venture or silent joint ventures are subject to merger regulation or anti-competitive

²⁷³ Reporter. <Go Cashless Or No Fuel: Authority Orders Stations | The Reporter | Latest Ethiopian News Today (thereporterethiopia.com)> accessed 09 April, 2023

²⁷⁴ The Reporter < Mobile Payment Disruption In Ethiopia: Strategies For Traditional Banks, Payment Switches | The Reporter | Latest Ethiopian News Today (thereporterethiopia.com)> accessed May 21, 2023

²⁷⁵ Hussein Ahmed, 'Regulation of Merger under the Ethiopian Competition Law' 26 J Ethiopian L, (2013) p.197

agreements. A writer, Tajebe,²⁷⁶ argued, even if the law failed to clearly stipulate joint venture as merger, as far as the outcome of joint venture will impact the market power, joint venture establishments have to be treated as a merger and thus, such agreements in the Payment System Operators should be governed under the law for mergers. And in fact the TCCPP permits merger of contested institutions if the outcome of the merger will create efficiency in the technology and market competition.²⁷⁷ A significant number of MMS users does not have clear picture or confused by the distinction of the service or the kind of the providers as some MMS applications also perform M-Banking, thus, the NBE is considering illuminating current types of partnership between MMS providers in Ethiopia such as Amole and *Hello-cash* partnership agreements with banks in which the banks are forced to completely own these products or to create their own.²⁷⁸

4.2 Mobile Money vs. Control of monopolistic or market dominant position

Monopoly power is mostly defined for competition law purposes as the power to fix prices or eliminate competitors in specific markets.²⁷⁹ In principle market dominance is not a problem and most laws are not prohibiting it unless it is misused.²⁸⁰ Nevertheless, as one of the major objectives of competition law is to control the misuse of market power and dominant position, there are situations to label it as an anti-competitive practice.²⁸¹

Despite the listed illustrative acts, there is no clear definition for dominance or monopsony found in the TCCPP and the author believes this may greatly give room for confusion and misuses. However, business person by individual capacity or in group is prohibited by the law from engaging directly or indirectly in commercial activities in the market that he/they are dominating²⁸² and as per the law, such persons are considered dominating when they have the capacity to control prices or other conditions of commercial negotiations, eliminate or utterly restrain competition in the relevant market. In other words, when a person

²⁷⁶ Tajebe (n.189) p.235

²⁷⁷ Ibid

²⁷⁸ Interview with Solomon Damtew , NBE, Payment and settlement System Expert at NBE (September 27 2022)

²⁷⁹ Mallor, (n.262) page 1274

²⁸⁰ Kibre, (n.53) p.188

²⁸¹ UNCTAD, (n.59), p.35

²⁸² Art 5(1) of the TCCPP

simultaneously controls competing companies there is potential anti-competitive conduct such as price-fixing or division of markets.

The subsequent matter to this issue is the assessment of the abuse of market power or determining a market share. Usually, to this regard, there are elements inside dominance position as the same as provided in article 6 which are, '*Relevant Market*' and '*Assessment of Dominance*'. Defining a relevant market is important and basically, a relevant market contains the process of identifying the particular product or services provided by a firm in a certain geographical area such as national/regional nature and scope. This fact means dominance in the market will be examined after there is a relevant market.²⁸³ However, it is not easy to understand these terms in the absence of definitions in the Ethiopian competition law and also the law failed to put factors that appraise in defining *relevant product market* and *geographical market* that are necessary for the assessment of market dominance. Geographic market is determined by the usual economic realities such as, in which part of the country to compete with certain products and relevant products on the other hand constituted, when products are reasonably *interchangeable*. Thus, if the relevant product hinders the *substitutability* of products or competition in the geographical market area, it is an abuse of monopoly power.

Thus, once knowing of what relevant market is, according to the TCCPP, the next step is determining the **existence dominant position** of a firm with factors such as its '*market share*', '*capacity to set barriers against the entry*', '*other factors as may be appropriate*' and '*the combination of these factors*' but, still difficult to explain their essence and applicability in the legislation.²⁸⁴

The OECD defined and put market share in terms of number²⁸⁵ and the unilateral conduct working group (UCWG) observed that, most authorities for competition law cannot deny the significance of market share in the assessment of market power on the digital markets in addition to most authorities will not merely depend on market shares.²⁸⁶ They also accept that market shares in digital markets shall be held with caution since digital markets are dynamic

²⁸³ Kibre, (n.53) p. 191

²⁸⁴ Yidnekachew, (n.190) p.48

²⁸⁵ 35% of the market share.

²⁸⁶ International competition network 'report on the results of the ICN survey on dominance/substantial market power in digital market', p.14

and volatile because the market share may not show the exact image of improvement.²⁸⁷ Enabling entry of new players and new approaches are crucial for competition in the market and Zambia acknowledges, the requests from the regulatory organ and the start-up expenses are the substantial barriers to entry.²⁸⁸

The most common forms of abuse are majorly categorized as exploitative and exclusionary.²⁸⁹ Exploitative abuse manifests as, by abusing its market dominance, the company is able to enhance its earnings, which is, if the company is in a step to get the direction of monopolistic power. Whereas, abuse of exclusionary practices aims to drive out or eliminate rivals from the market. Under the TCCPP, acts of abuse of dominance are listed as *Supply Constraints*- art.5(2)(a), *Predatory Pricing* such as selling at lower price- art.5(2)(b), *Excessive Pricing*- art.5(2)(C), *Refusal to Deal*- art.5(2)(d), *Denial of Access*- art.5(2)(e), *Price Discrimination* such as selling with different prices- art.5(1)(f), *Product Tying* such as selling one product or service as a mandatory - art.5(2)(g), *Vertical Restraints* such as, manufacturer imposing on distributor in terms of exclusive dealing and territories or resale price maintenance- art.6(2). However, in some other jurisdictions there is even a legally recognized agreement called ‘Favored Customer Clause’. Thus, despite that most of the acts are listed,²⁹⁰ there is still an argument that some of the provisions are difficult to interpret, for instance, art. 5(2) (e) which obligates the competitor to open facilities to other competitors for economic reasons however, this may discourage competitors by the fact that the parameter of economic reason is not yet set. Furthermore, what includes predatory pricing or selling at lower price is debatable among scholars since it is obvious that consumers mostly preferred lower prices.²⁹¹

In terms of MMS-DFS, as consumers have relationships with one telecom provider on average, MNO/Telecom providers have larger customer bases than retail banks; they have broader client appeal due to their tougher and more advanced marketing strategies, advanced bundled products and reach to the public at large. MNOs can also abuse their dominant position in mobile networks by bundling services such as merging products or services for

²⁸⁷ Ibid

²⁸⁸ Ibid

²⁸⁹ Lexisnexis, ‘Abusing a dominant position’ < Abusing a dominant position—overview - Lexis®PSL, practical guidance f... (lexisnexis.com)> accessed on 22 December, 2022

²⁹⁰ Yared, (n.91) P. 450

²⁹¹ Mallor,(n262) p 1282

sale as a single unit and for instance Telebirr merged recently its MMS and different E-Commerce marketplaces to its Super app. Moreover, the model to determine pricing for USSD and Short Code are in the control of the government and until recently, consumers' were able to pay traffic penalty fines through Awash Bank and Cooperative Bank of Ethiopia MMSs, however, Telebirr took this service and subsequently Ethio-Telecom terminated the services without notifying these banks.²⁹²

Even if consumers will get an advantage from interoperability and access for interconnection, for some significant period, the comprehensive interoperability will not decrease the dominance position of Ethio Telecom and CBE.²⁹³ The Ethiopian government seems to have come up with a competition strategy and resource saving (duplication of infrastructure) as the new operator is must agree to use Ethio Telecom's fiber and towers and for this effect Safaricom is using these infrastructures of Ethio Telecom however, subject to article 41 of communication service proclamation no.1148/2019 as the authority will intervene to such agreements.

4.3 Mobile Money vs. Merger and acquisition

Takeover, merger, and acquisition are often used interchangeably²⁹⁴ including amalgamation. Merger is a combination of two or more firms to create a new entity with a new legal personality.²⁹⁵ Whereas, takeover and acquisition acts are usually when the acquiring firms control more than fifty percent of shares, securities, or assets (ownership) of a business organization. There are several economic reasons and benefits to merge firms and among the major benefits are; advantages of market, production, finance and management, and risk spreading, independence, and overcoming barriers to entry on a market. However, literature identifies, there are possible disadvantages of merger and acquisition; such as high expense, incompatibility, asymmetric information and so on. On the other hand, an important topic in mergers and acquisitions is cross-border merger and acquisitions. Even if merger review is always carried out before firms merge, such cross-border transactions give great prospects as well as complicated agreements, which have multiple difficulties that the acquiring firm is

²⁹² Interview (n.159)

²⁹³ Getnet, (n.41) p 36

²⁹⁴ Jenifer Piesse and *et_al* 'Merger and Acquisition: Definitions, Motives and market responses' Encyclopedia of finance

²⁹⁵ Ibid

expected to face²⁹⁶ and the author could not find any provision, which indicates cross border merger in our law.

There are three types of mergers and according to Hussien,²⁹⁷ These are *Horizontal, Vertical and Conglomerate* mergers. Horizontal Merger is a merger by competitors in the same level of market such as between Telebirr and *M-PESA* whereas; vertical merger is a combination of two entities, which operate for different products but operate in the same line of production chain or supplier-customer relationship. Conglomerate merger is a merger between different entities with different products and no chain of production between the entities. Some literature also includes *Market Extension* and *Product Extension* merger as additional types of merger²⁹⁸ but in the USA; these two types are part of Conglomerate merger.

As the same in determining monopoly power; *relevant market, relevant product* and *relevant geographic market (national/regional)* are also related with inquiring merger as an anti-competitive act.²⁹⁹ In USA, for horizontal merger, usually assessed, the concentration of the market such as decreasing/increasing number of the competitors, and if decreased competition, the dominant position of the merging firm or its outcome to the market share, the prior conduct of the acquiring firm, the nature of the acquired firm such as its failing status, and non-market share factors (such as inquiring if the merger will create barriers to entry), are some of the relevant factors in assessing anticompetitive mergers.³⁰⁰ There is also a view allowing small firms to merge so that they can be competitive against a large firm. However, vertical merger will directly impact or increase *concentration of the market* thus, the issue is rather, with historical and economic factors consideration like economic efficiency, the merger should examine if it is *foreclosing competitors from a share of the relevant market* and also *questioning if the merger will create barriers to entry* on new competitors.³⁰¹ In respect of conglomerate merger; it is either *market extension* mergers or *product extension* mergers. *Market extension* merger is when the acquiring company expands

²⁹⁶ Vincenzo Pisano, 'The Cross-Border Merger and Acquisition Strategy: A Research Perspective' J Iberoamerican Vol.1 Iss:2 (2003) 1-2

²⁹⁷ Merger Directive No. 1, 2016 Art 6, And also, Hussein (n.263)

²⁹⁸ Minority Business Development Agency, '5 Types of Company' Mergers, < 5 Types of Company Mergers | Minority Business Development Agency (mbda.gov) > accessed September 4, 2022)

²⁹⁹ Mallor,(n.262) p 1289

³⁰⁰ Ibid p 1292

³⁰¹ Ibid p 1296

into a new geographic market by buying a company already doing business in the market. *Product extension* mergers on the other hand, the acquiring company varies its operations by buying a company in a new product market.

Most jurisdictions including Ethiopia require approval and notification of merger to the appropriate administrator. Under Art.12 of the TCCPP, for all kinds of mergers, it requires the blessing and approval of the administrator, and the Ministry, which registers the business organization, will provide a commercial registration for the merged business organization. In this regard, the Kenyan Competition Authority has enacted comprehensive rules on merger.³⁰² Most Ethiopian court decisions lack a full-fledged Rule of Reason Analysis; rather they are a quick-look analysis. However, one of the famous merger cases in Ethiopia was *Ambo mineral water* and *Coca Cola* and in this case the TCCPA lost its claim.³⁰³ Either Ethiopia should strictly govern the law on merger or inspire to improve the development of firms or creating competition is argumentative. However, without affecting local competitiveness, the state can craft relaxed merger legislation so that the market will develop and become competitive. The new commercial code under chapter two defines the merger of business organization and³⁰⁴ merger by acquisition and extensively specifies requirements for the merger process including a duty to prove an “economic reason behind requesting a merger”.³⁰⁵

At this point, it is not clear as for public enterprises such as Ethio-telecom’s Telebirr or CBE who own CBE-Birr if they are exempted from the proclamation, thus, it can argue it is unknown by the players and consumers as who will decide for merger issues between MMS providers despite the PIID and PSOD empowered such decisions for the NBE and this overlapping jurisdiction can impact the market competition. Thus if the goals of the TCCPP in other laws is restricted, the scope of Ethiopian competition law will be limited.³⁰⁶ However, despite the absence of a guideline to assess market dominance, the TCCPP administrator has a directive on Merger that prescribes for instance on the level of companies to merge with different amounts of capital and put them as level one, two and three.

³⁰² Consolidated Guidelines on the Substantive Assessment of Mergers Under the Competition Act

³⁰³ Interview (n.97)

³⁰⁴ Art. 565 of the Commercial Code

³⁰⁵ Art. 567 (2) (c) of the Commercial Code

³⁰⁶ Kibre, (n.53) p.213

Finally, advocacy is another encounter for competition law and policy as well and in the international venue, International Competition Network is dedicated to competition advocacy and the OECD has also a recommendation on ‘Competition assessment’ that is to say how competition authorities should assess the competitive effects of state measures.³⁰⁷ Competition law administrators with non-enforcement mechanisms (in this regard) have a duty to counsel the government participation on the effectiveness of upcoming new legislations and regulations; create awareness to business communities and the public as to advantages of competition law and policy. There are some provisions in our competition proclamation for advocacy activities.³⁰⁸

4.3 The Jurisdiction of the NBE, and the Trade Competition and Consumer Protection Authority/Administrator over anti-competitive acts

Despite, the TCCPP authority is dissolved by ‘Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, Proclamation No. 1263/2021 article 106 (2), this law is still silent and creates gap on the fate of the judicial tribunals of the TCCPP. In the area of competition, enforcement is mostly more difficult than enacting laws and generally, there are two approaches in order to enforce competition law, either as with judicial power or administrative agencies’ power. The civil law countries mostly adopted the administrative approach whereas the common law follows the judicial approach.³⁰⁹ With this assertion, there are three institutional structural models of competition authorities and namely, the bifurcated (Separated) judicial model, the bifurcated agency model, and the integrated agency model.³¹⁰ In terms of autonomy, there is a *structural, operational and budgetary autonomy*³¹¹ and speaking about the function of competition administrator; *investigation, prosecution, adjudication, and advocacy* functions are incorporated in competition laws. Mostly, in structural autonomy, competition authorities are often founded as independent organizations with legal personality and detached from any government ministries. Whereas in operational autonomy, the power, and functions of the competition administration includes the arrangement, appointment, terms of period and

³⁰⁷ OECD ‘Recommendation on competition assessment’, (2009)

³⁰⁸ Art 34, 30 (2) (4) of the TCCPP

³⁰⁹ Solomon (PhD), (n.146) p. 258

³¹⁰ Eleanor M. Fox and Michael J. Trebilcock, p.12 <<https://www.oxfordscholarship.com/view>> (accessed June 1) 2022.

³¹¹ Fikremarkos (n.32) p.89

removal of management or staff and are decided by the established law. Thirdly, in budgetary autonomy, competition laws often determine the financing of the competition authority and its relation with the executive organ and legislature.³¹²

In Ethiopia, regardless of either the Ministry of Trade and Regional Integration can enact or not, to one's surprise, the former TCCPPA had no power to enact its own rules and directives of procedures and the TCCPPA had several directorates but the adjudicative benches and appellate tribunal are still in function. In recent years, the power for criminal investigation is given to the Federal Police Commission and prosecution power is transferred to the Federal Attorney General.³¹³ The current practice for criminal jurisdiction shows, acts violating article 5-13 cumulative with 42 are for TCCPPA and acts violating article 22 and 24 cumulative with 43 (6) is jurisdiction for Ministry of Justice³¹⁴ along with Proclamation, No. 943/2016 article 22.

In terms of adjudication, it has the power to a judicial power to entertain allegations in violations of the TCCPP and as per article 35(3), the judges are legally free of interference by any person with regard to cases they adjudicate, and they are legally independent as acts for Administrative³¹⁵, Compensation,³¹⁶ Fines³¹⁷ and Criminal Penalty Measures.³¹⁸

³¹² According to article 44 the administrator budget is from the government and this brings the issue of independence.

³¹³ Federal Attorney General Establishment Proclamation 943/2016 Federal Neg. Gaz 22nd Year No.62 2nd May (2016), Art.22(7) and 22(6)

³¹⁴ Interview (n.97)

³¹⁵ As per art 32 (2), the administrative measurements are ordered to *cease the evident unfair acts, take necessary actions to reinstate the injured party, and a suspension or revocation of license*. However, in terms of the period of limitation, the TCCPP is silent. Furthermore, according to article 38 (2), the administrative penalties or measurements are determined with different factors listed in this provision.

³¹⁶ According to art. 37 (2) and art 32 (2) (b), compensation is one remedy but only with cases instituted by the TCCPP administrator and for cases related with unfair competition.

³¹⁷ According to art. 42, The Fines are 5-10 percent from the annual turnover of business persons and 10-100,000 Birr fines for any person other than business persons such as managerial employees. According to 43, on the other hand, criminal penalties are harsher for not complying with decisions of the adjudications bench and Federal court orders.

³¹⁸ Art 42, 43 of the TCCPP

Though the TCCPP provides that an independent appellate tribunal has been established, it doesn't clearly state to whom it should be accountable and now all kinds of competition benches are now under the ministry of justice (to an executive organ).³¹⁹ At this juncture, currently, the Ministry of Trade and Regional Integration is empowered for some competition issues such as to follow up if export or import goods are traded with the appropriate prices based on Proclamation no 1263/2022 article 22 (1) (g).

In the UNCTAD Model Law, a competition authority is suggested to include a title, qualified personnel of management and staff, and tenure of office.³²⁰ Thus, in connection with regulatory and competition law administration and enforcement, the criminal and tort regimes problems should get a due consideration³²¹ and most importantly the overlapping jurisdiction between TCCPP and NBE laws to govern the ecosystem can potentially impact the MMS and MNO-led competition in Ethiopia. And, in fact it is common to realize overlapping jurisdiction between competition and other authorities of a country as for instance, in 2021, the Executive Order on Promoting Competition in the American Economy acknowledges such problems and ultimately recommends 'cooperation and coordination' among the authorities.

³¹⁹ Interview (n.97)

³²⁰ UNCTAD, (n.238) p.7

³²¹ Solomon(PhD), (n.146) p. 379

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1. Conclusion

The path to create a cashless society and financial inclusion are the major driving factors behind the adoption of M-Mobile Service. However, digital financial markets particularly MMS have presented potential challenges for competition law and policy frameworks in recent years and anti-competitive agreements, monopolistic positions could hurt the MMS and the digital marketplaces. Although some countries' competition law frameworks are good to address the issues brought on by digitalization, most authorities have been striving to develop the knowledge and abilities necessary to apply well-established principles in dynamic and fast-changing markets such as the MMS.

The goal of DFS legislation should be to foster creative and competitive markets as well as informed and secure consumer use of digital platforms. Simultaneously, the regulatory approach and restrictions should be reasonable in order to prevent restraining innovation and ensuring a level playing field. Despite the fact that different measures may be used by jurisdictions depending on their unique circumstances, regulatory collaboration and exchange is the most effective way to address the shared problems brought on by increasingly vast digital platforms that transcend national boundaries.

In Ethiopia, with the nation's underprivileged financial inclusion and infrastructure, the conventional brick-and-mortar banking infrastructures are too high-cost to provide the banking sector to the poor, particularly to the countryside. And, MMSs have several entry and operational requirements that directly influence the service and the competition law. And among others, the major are; regulatory approach (entry and operational matters), technology convergence and interoperability, consumer protections, data privacy and state of Cyber security, AML/CTF, digital fraud, agent networks, and digital literacy. These all stated matters have a potential impact for the competition law and policy of any county including Ethiopia and speaking of best practices of MMS, African countries are the foremost examples in the sector for instance Kenya's *M-PESA* is the most successful MNO-led MMS that was founded in 2007.

Similar to what the UNCTAD indicates, anti-competitive agreements, control of monopolistic or market dominance, merger and acquisition, and advocacy are the major scope and coverage of competition law in a given country. The TCCPP has unsettled issues in respect of; competition laws' exemptions and exceptions, absence of essential definitions, the power to enact regulation, absence of guidelines to assess and label market dominance position, independency, and the power and coordination with other executive organs for enforcement.

The second major competition law actor is NBE, particularly with the NPSP, PIID and PSOD laws and NBE has the right to authorize, suspend and revoke MNO-led MMS operators including Telebirr. Concerns are growing as Telebirr is dominating the MMS market and signing agreements with several governmental and public enterprises to expand its services. This triggered a question of competition law matters, particularly, restrictive agreements and market dominance position as stated in this thesis with instances. Therefore, in order to confront the stated problems, the author recommends the following.

5.2 Recommendations

- *Promote competition knowledge and culture as well as forming National Council for competition:* Effective competition enforcement and advocacy require both internal capability and external assistance. Through capacity building, it is possible to strengthen internal knowledge and rely on reliable foundations for both fundamental and conventional ideas. Having a comprehensive and separate policy for the financial sector which also clearly incorporates competition policy, forming a national council for competition, employing experts in DFS competitiveness and taking changes to the institutional design (reinstating the dissolved TCCPPA) into consideration are the most important steps that can support these efforts. Parallel to this, outreach programs designed to convey the advantages of competition to various stakeholders, including the business community, the government, the media, and the general public, can strengthen by visiting external experiences in which ultimately, women and youths are benefited from the service.
- *Amending the TCCPP or drafting specific legislation for digital competition:* Such initiatives might increase the efficiency of administration and enforcement and in certain countries, local competition laws have been changed to better reflect the digital era and measure market power more precisely, identify anti-competitive agreements more quickly, or to better catch pertinent mergers and gather and manage enormous amounts of holistic competition data. Thus the amended or the new law is expected to include such as ‘definition for Digital Market’, concepts of ‘Platform Neutrality’ and the acts done through different Electronic Communication Services.
- *The need to have a clear jurisdiction and cooperation between NBE and TCCPPA.* As already indicated, comprehensive competition policy is needed to address competitive challenges in MMS and digital financial markets. Collaboration across disciplines with other national agencies such as consumer protection, privacy, and sector regulators, offers complementary viewpoints. At the same time, collaboration with other competition authorities on a regional and global level can be a priceless asset. In addition to providing useful information, organizations with the same goals can assure the best case allocation while promoting uniformity and goodwill in the judgments. Thus, the NBE and TCCPP should solve for the current overlapping jurisdiction on administering and enforcing competition among MMS providers in Ethiopia. Thus to this effect, the NBE as part of the sectoral regulator, should draft a competition directive for the MMS and DFS sector.

- *The need to have market studies, institutional, and regulatory impact assessments on MMS providers and Telebirr:* Although it requires a lot of time and resources, market studies are an effective tool for understanding important industries. If properly carried out, they allow for more credible, fact-based lobbying and more knowledgeable enforcement. In other circumstances, it is not even essential to invest a sizable amount of resources because thorough market research on a variety of digital subjects have been conducted in recent years by cutting-edge competition authorities and are readily available. And, by the name of financial inclusion or averting future competition with Safaricom, Telebirr impact on the ecosystem should not be disregarded. Also as in some countries, Corporate Social Responsibility legal schemes are also planned to remedy the influence caused by the big companies in the performance of their business, Ethio-Telecom should encourage and partner with small and medium MMS actors to some or another.
- *Finally, the Competition policy and law of Ethiopia should incorporate minimum regional competition standards* to strengthen regional and sub-regional competition as well as to create cooperation between competition authorities or even with countries without competition laws since such acts can cover the failures from joining World Trade Organization markets. And also, Ethiopia needs to be a member state such as the EAC mainly to develop cross border payments and transactions including with the new and incumbent MMS operators along with visiting the advice of business strategies from International Finance Corporation (IFC) and similar international institutions.

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Mr. Desta, Bayisa former CEO for M-Birr

Mr. Efreem Baraki, Chief Legal expert at NBE

Mr. Getnet TCCP-Desk Manager at the Ministry of Trade and Regional Integration

Mr. Getu Zerihun, Payment system oversight and follow up Expert, NBE

Mr. Solomon Damtew , NBE, Payment and settlement System Expert at NBE

Mrs. Yenekal Kidane Senior Expert at TCCP Administrator at Ministry of Trade and Regional Integration

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