ADDIS ABABA UNIVERSITY
COLLEGE OF LAW AND GOVERNANCE, SCHOOL OF GRADUATE STUDIES, SCHOOL OF LAW

THE UNREGULATED STATUS OF CORPORATE GROUPS AND COMPETITION ISSUES IN ETHIOPIA: ABUSE OF MARKET DOMINANCE AND ANTICOMPETITIVE AGREEMENTS

BY

BERIHUN GEZAHEGN

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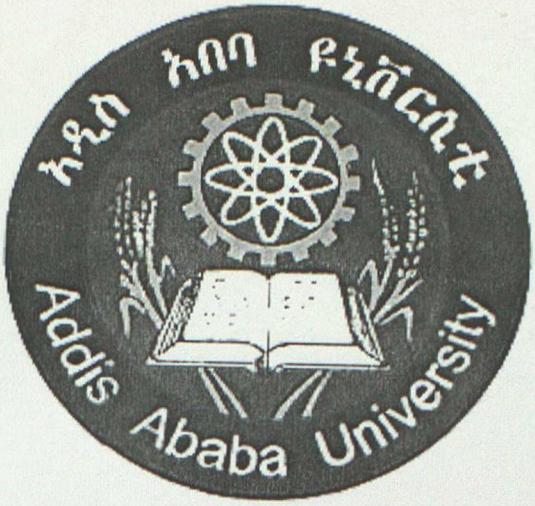

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By:

BERIHUN GEZAHEGN TILAHUN

Advisor:

Mr. Zekarias Kenea (LLB, LLM, Associate prof.)

MARCH, 2014

THE UNREGULATED STATUS OF CORPORATE GROUPS AND COMPETITION ISSUES IN ETHIOPIA: ABUSE OF MARKET DOMINANCE AND ANTICOMPETITIVE AGREEMENTS

A Thesis Submitted In Partial Fulfillment of the Requirements of the LLM Degree (Business Law)

By:

BERIHUN GEZAHEGN TILAHUN

Advisor:

ZEKARIAS KENEA (LLB, LLM, Associate Prof.)

SCHOOL OF LAW

ADDIS ABABA UNIVERSITY, COLLEGE OF LAW AND GOVERNANCE

MARCH, 2014

Declaration

This thesis is my original work, has not been submitted for a degree in any other University and that all materials used have been duly acknowledged.

SIGNATURE OF CONFIRMATION

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Date 07/09/2006

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Date 07/09/2006 EC

Approval Sheet by the Board of Examiners

The unregulated status of Corporate Groups and Competition issues in Ethiopia: Abuse of market dominance and anticompetitive agreements

Submitted to:

Addis Ababa University, College of Law and Governance, School of Law, in partial fulfillment of the requirements of LLM Degree (Business Law)

Submitted By:

Berihun Gezahegn Tilahun

Approved by board of Examiners

Name	**Sign.**
1. Advisor: Mr. Zekarias Kenea (LLB, LLM, Associate Prof.)	
2. Examiner Solomon Abay	
3. Examiner Beneyam Ahmed	

Dedication

This research is dedicated to those who are working hard for the preservation and promotion of one of Ethiopia's ancient language, Geez.

«መኑ፡ ውእቱ፡ ዝንቱ፡ ጠቢብ፡ ከመ፡ እግዚአብሔር»

«ንህነሰ፡ ሥጋውያን፡ንሔሊ፡ሕገ፡ሥጋ፤ ወንገብር፡ግብረ፡ሥጋ፡ ወነሐውር፡በፍኖተ፡ሥጋ።

አንተ፡ባሕቱ፡መሀረነ፡ምግባረ፡መንፈስ፡ወአለብወነ፡ሕገ፡መንፈስ ፡ወምርሐነ፡ለነ፡አንተ፡ፍኖተ፡ መንፈስ።»

«««.... እስመ መምህረ ህግ ይኩን በረከተ....»»»

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I am greatly indebted to Mr. Zekarias Kenea (Associate prof.) for his advising and above all for his fatherhood treatment that makes me stronger and harder in the face of any frustrations.

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ABSTRACT

Although corporate groups (herein after, CGs) are expanding in the present Ethiopian business environment, their legal status particularly in the commercial code remained unregulated. They are now the sources of many legal and practical concerns among the legal actors and legal institutions of the country. Among such concerns, the legal and practical issues in relation to anticompetitive practices under the competitive environment and competition regime of Ethiopia are the major one. Particularly with respect to abuse of market dominance and anticompetitive agreements, these CGs sparked critical legal issues that can be substantiated by practical scenarios. But, on the other hand, the present competition law of Ethiopia doesn't recognize these CGs and remained within the spirit of the traditional corporate law mentality.

Thus, this study is interested in the examination, discussion and evaluation of the interplay of these CGs and Ethiopian competition law from legal and practical stand point. Its major objective is to explore and unveil the competition dimension of these CGs with particular emphasis on the rules of abuse of market dominance and anticompetitive agreements.

While this study focuses on major CGs of Ethiopia for its general discussion EFFORT and MIDROC CGs are used as examples of the practical situation on the ground. The study employs purposive sampling and observation, interview and library research techniques to collect its data which it will critically discusses, review, evaluate, analyze and interpreted to produce the output.

Accordingly, this study concludes that CGs, despite their negative effect on the market competition via their acts of abuse of dominance and anticompetitive agreement, they remained unregulated under the competition law of Ethiopia. As a result this study calls for proper and timely legal and policy reform in the form of having special laws governing these CGs.

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LIST OF ACRONYMS

- AACCSA..... Addis Ababa Chamber of Commerce and Sectoraal Association
- COMESA .....Common Market for Eastern and Southern Africa
- CGs .....Corporate Groups
- SEUA .....Enterprise or Single Economic Unit Approach
- EPDRF .....Ethiopian People's Democratic Revolutionary Front
- ECC .....European Competition Commission
- ECCSA .....Ethiopian Chamber of Commerce and Sectoral Association
- ECGs .....Ethiopian Corporate Groups
- EU .....European Union
- EC .....European Community
- ECJ .....European Court of Justice
- MIDROC .....Mohammed International Development Research and Organization Companies
- MNCs .....Multinational Corporations/Companies
- PLC .....Private Limited Company
- SEA .....Separate Entity Approach
- SEU .....Single Economic Unit
- SSPIN .....Small But Significant Price Increase for Non-transitory period
- FDRE .....The Federal Democratic Republic of Ethiopia
- DG .....The Director General of the Ethiopian Trade Practice and Consumer Protection Authority.
- EFFORT .....The Endowment Fund for the Rehabilitation of Tigray

- TFEU .....Treaty for the Functioning of European Union
- MoT .....The Ethiopian Ministry of Trade
- TPP .....The Ethiopian Trade Practice and Consumer Protection Proclamation no.329/2003.
- TNCs .....Transnational Corporations/Companies
- US/USA .....United States of America
- WTO .....World Trade Organization

INTRODUCTION

For any country that claims to have a legal system to govern matters in its territory, nothing is more embarrassing than to have institutions without proper regulation. Nothing is more painful than to see such institutions acting in defiant of any laws and using the advantage of absence of the law for their benefit. The most amazing part of these institutions is when they pretend to have legality and present themselves to the general public as if they are blessed by the law in the way they are.

This is the least one could be say to express the present feature of Corporate groups in Ethiopia. Among others, the legal and practical interplay of these corporate groups with the existing Ethiopian competition law is the major interest of this researcher.

Accordingly, this researcher, while fully aware of his capacity and challenges he might face, determined to make a genuine attempt to unveil the competition dimension of these business Networking's in general and in relation to anticompetitive agreements and abuse of market dominance in particular.

Hence, this study is organized in to six chapters the details of which are expressed under section 1.9 of Chapter One of this study. So, the reader is advised to visit this section to see the organizational structure of this study.

Finally, it is the very interest of this researcher to give prior notice to the readers that they should read this research in the light of, inter alia, the capacity and limitations of the researcher that can gloom on the comprehensiveness and conclusiveness of this research.

CHAPTER ONE

1.1 INTRODUCTION OR BACKGROUND OF THE STUDY

The use of company groupings, also so-called, corporate groups (herein after, CGs), to conduct commercial activities has already become the mores of contemporary business.[1] These CGs bearing different names like holding companies, associates, affiliates, brother-sister companies, business groups, controlled companies, and parent-subsidiary companies virtually engage in entire economic activities.[2] They are now one of the preferable forms of business organizations expanding both at the international and national business arenas. In this regard, Phillip Blumberg, the leading author on CGs, said that "CGs of enormous size with complex multi-tiered corporate structures dominate the national and world economy".[3] They can confine their economic activities within a single state territory or they can cross borders, particularly in the present global economic order, in the form of Multinational Companies (MNCs) or Transnational Companies (TNCs).[4]

In nut shell, single corporate entity is no longer the only model of doing business. Rather; CGs today represent the main corporate reality of big companies in most of the developed and developing countries.

These CGs, however, in spite of the fact that they are the widely diversified form of today's commercial engagement and also significant for both national and international economy; they are not easily companionable with the contemporary corporate laws. i.e., they have compatibility problems with the existing single corporate entity oriented laws both at the international and national level.

Hence, in the contemporary legal discourse, despite their being poorly explored legal institutions, they are becoming the source of many concerns, issues and debates among scholars, academicians, judges, executives and business communities.

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[1] Harris Jason and Hargovan Anil, "corporate groups: the intersection between corporate and tax law", Commissioner of Taxation v BHP Billiton Finance Ltd, SYDNEY LAW REVIEW, VOL 32, 2010, P. 723; Blumberg Phillip, "Limited Liability and Corporate Groups" (1986) 11 Journal of Corporation Law, p.21-30 and Blumberg Phillip, "the Multinational Challenge to Corporation Law (1993), Oxford University Press, p. 317-40.

[2] See Companies & Securities Advisory Committee Corporate Groups Final Report May 2000, available at http://www.asic.gov.au visited on July 4, 2013.

[3] Blumberg Phillip, "the Multinational Challenge to Corporation Law", as cited above at note 1.

[4] Ibid.

The major source of the problem is the fact that the traditional corporate laws and theories are meant for single corporate entity and not for CGs. CGs, on the other hand, have a very complex structure, organization, and management system that manifest concentration of control and/or ownership, lost of corporate autonomy or independence.[5] This situation, therefore, raised nexus and multiple issues against the traditional principles of corporate autonomy and limited liability.

Accordingly, among those issues, the first one is the issue of recognizing CGs as "one" or as "many" given their intricate relation.[6] This issue is the question of making the existing corporate legislations compatible with CGs through interpretation or the need to have separate and specific laws focusing on CGs. Thus, it bears massive challenge to the regulatory approach to be taken toward CGs. i.e., a choice between separate entity approach (here after, SEA) and single economic unit/enterprise approach (here after, SEUA).[7] For example; in case of tax administration, states are facing rampant tax evasions and avoidance by CGs chiefly through cunning transfer pricing and intra-group transactions within these CGs.[8]

The second major issue, nexus with the above, is; the issue of liability, which is, by far, the most contentious issue sparked in relation to CGs.[9] This issue is originated from the above blurring line of corporate independence between companies in the group that bears ultimate effect on the principles of corporate limited liability. The very complex structure and networking of control and ownership by the CGs carries reasonable questions concerning attribution of rights and duties. As rightly noted by Phillip Blumberg, when legal issues involving any of the affiliated companies arise, courts are often called upon to determine whether to attribute the rights, or to impose the duties of, one affiliated company on another affiliate of the group in order to achieve

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[5] Blumberg Phillip, "Limited Liability and Corporate Groups", as cited above at note 1, p. 50-52.

[6] This is the dilemmatic choice the two regulatory choices toward the regulation of CGs which properly dealt under chapter two of this study.

[7] Ibid.

[8] See Eric J. Bartelsmana, Roel M.W.J. Beetsmab, Why pay more? Corporate tax avoidance through transfer pricing in OECD countries, ESI, Department of Economics, Free University of Amsterdam, De Boelelaan 1005, 1081 HV Amsterdam, The Netherlands; and see also FREEDMAN JUDITH, LOOMER GEOFFREY AND JOHNVELLA Corporate Tax Risk and Tax Avoidance: New Approaches, (2009), THOMSON REUTERS (LEGAL) LIMITED AND CONTRIBUTORs, 74-116.

[9] Blumberg Phillip, "The Transformation of Modern Corporation Law: The law of corporate groups", (2005) 37 Connecticut Law Review, p. 405-557, 605, 608. See also Brad B. Erens, and et al, "BANKRUPT SUBSIDIARIES: THE CHALLENGES TO THE PARENT OF LEGAL SEPARATION", BANKRUPTCY DEVELOPMENTS JOURNAL, Vol. 25, 2008, p.68-146.

the objectives of the law in the area in dispute.[10] This is particularly true for transactions made between one of the companies and third parties that puts the latter's interest at stake especially when the former went bankrupt. Furthermore, when one of the companies in the group violates laws such as tax laws, environmental laws, Competition Laws, and financial laws, the issue of attributing liability to the group remained excruciating task. To this effect, courts are now tangling with a new paradigm of piercing corporate group veil or with the regulatory choices of SEA and SEUA. [11]

Thirdly, the very complex structure, organization and management of CGs is also the source of governance and transparency issues particularly in case of cross boarder CGs.[12] For example, in the current globalized economic circle, MNCs and TNCs are repeatedly associated with major environmental damage, and poor handling of labor rights and human rights.[13] In addition, these cross border CGs, obviously, are also the source of tensions among state laws triggering the troublesome issue of private international law.

However, despite these and other concerns and legal issues surrounding CGs, they are not adequately treated and explored[14]. Literatures dealing with these CGs and their legal ramifications is very scarce both at national and national scholarly writings.

Therefore; while discussing all those possible issues in a single paper is obviously difficult, this study is interested in and designed to discuss issues in relation to the interplay of Ethiopian CGs (here after, ECGs) vis-à-vis the current Ethiopian Competition Law. This is because; though not they are not at similar scale of expansion with other countries, CGs are widely existed in the Ethiopian business environment bearing similar issues like in any other jurisdictions.

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[10] Ibid.

[11] Ibid.

[12] Report of the Reflection Group on the future of EU Company Law, Brussels, 5 April 2011, European Commission Internal Market and Services, p.59-70

[13] Mandate of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, CORPORATE LAW PROJECT OVERARCHING TRENDS AND OBSERVATIONS, July 2010, p.3-43.

[14] This is rightly stated by Tom Haden, as "Company lawyers still write and talk as if the single independent company, with its shareholders, directors and employees, was the norm. In reality, the individual company ceased to be the most significant form of organization in the 1920s and 1930s. The commercial worlds now dominated both nationally and internationally by complex groups of companies", see Antunes Engrácia José, the Law of Corporate Groups in Portugal, WORKING PAPER SERIES NO. 84, 05/ 2008, Institute for Law and Finance; see also Inside Corporate Groups", p. 271.

1.2 STATEMENT OF THE PROBLEM

Since the advent of 1991 Ethiopia, unlike the command market system of the previous regime, embarked on free market policy within which competition is the only principle of the market system. In consequence, the Ethiopian government based on its competition policy; enacted Competition Laws in different times so as to meet the objective of the free market system.

Hence, the current Trade Practice and Consumer Protection Proclamation No. 685/2010 (herein after, the law/Proclamation) deals with different subject matters among which anticompetitive practices are the major ones. These anticompetitive practices, as per Art 2 (18) of the law, are businesspersons' practices that are designed for or with the effect of disrupting or restricting competition in the market. Among such anticompetitive practices; abuse of market dominance and anticompetitive agreement (both horizontal and vertical agreements) are the major ones. These two major anticompetitive practices are provided with principles and exceptions which are applicable to any businessperson engaging in commercial activities in the country.

On the other hand, like in any other states, ECGs are now the widely diversified form of business organizations in Ethiopia. In this regard, research conducted by International Growth center depicted that ECGs are among the leading business entities in the major economic sectors of the country. For example; among the widely known ECGs, MIDROC, EFFORT, DH GEDA, East Africa holding, Equatorial business group, Dire industrial group, Kangaro group, and AHADU group are the few to list. These CGs engaged virtually in all major economic sectors of the country. Most importantly, the majority of ECGs are family owned (except, EFFORT), vertically integrated or conglomerates engaging in range of economic sectors, and centrally administered.

Consequently, these CGs like in any other jurisdictions, are susceptible for issues in relation to Competition Law. Particularly, given their commercial engagement in cluster and vertically integrated form; there are critical legal and practical concerns and issues with respect to the rules of abuse of market dominance and anticompetitive agreements under the Proclamation.

As a result, the exploration and investigation of the legal and practical issues of ECGs vis-à-vis the Ethiopian rules of abuse of market dominance and anticompetitive agreements is the central of problem of this study.

1.3 OBJECTIVE OF THE STUDY

Given the above stated problem, this study seeks to investigate the interplay between ECGs and Ethiopian Competition Law with particular emphasis on abuse of market dominance and anticompetitive agreements. This general objective is with the view of depicting the present picture of ECGs vis-à-vis Ethiopian Competition Law and to indicate the possible legal direction for the regulation of these CGs within the sphere of the Competition Law.

Bearing this general objective in mind, this study will have the following specific objectives.

- Discussing the general theoretical and legal aspects of CGs at the international level.
- Discussing the general theoretical, legal and jurisprudential aspects of Competition Law.
- Discussing the contemporary legal issues and arguments in relation to the understanding, regulation and liability of CGs within the framework of the general Competition Law.
- Describing the existing legal and practical issues of CGs with respect to the notion of abuse of market dominance and anticompetitive agreements at the international level.
- Uncovering the nature of major ECGs with respect to their mode of creation, structure, organization, and management system.
- Examining the legal and practical status of ECGs particularly from the Ethiopian Commercial Code perspective.
- Discussing the possible concerns and issues revolving around ECGs vis-à-vis the competitive business environment of Ethiopia.
- Discussing the general rules of Ethiopian Competition Law with particular emphasis on the rules of abuse of market dominance and anticompetitive agreements.
- Examining the general legal issues of Competition Law vis-à-vis CGs within the context of ECGs and Ethiopian Competition Law.
- Evaluating ECGs in the light of the general issues and legal rules of abuse of market dominance.
- Evaluating the legal implication of ECGs on the rules of anticompetitive agreements. This will include the investigation of the legal and practical position toward the regulation of ECGs and their liability under the Competition Law.

- Investigating some practical situations with respect to the legal issues resonating around ECGs vis-à-vis Ethiopian rules of abuse of market dominance and anticompetitive agreements.
- Recommending appropriate solutions and way outs to solve the problems and issues that exist in the interplay of ECGs and Ethiopian Competition law in general and with respect to the abuse of market dominance and anticompetitive agreements in particular.

1.4 RESEARCH QUESTIONS

In order to address the problem identified and the objectives stated above; this study will endeavor in answering some fundamental question. The central question of this study is; what are the possible legal and practical issues relating to the interplay of ECGs with the rules of abuse of market dominance and anticompetitive agreements under the Ethiopian competition law?

While this is the core question of this study some specific and relevant questions also will be raised and treated so as to comprehensively address the problem of this study. These are;

- What are the theoretical and legal underpinnings that explain CGs in general?
- What is the theoretical, legal and jurisprudential explanation of Competition Law?
- What is the conceptual and legal understanding of the notion of abuse of market dominance and anticompetitive agreements?
- What is the international experience on the regulation of CGs under Competition Law?
- What is the feature of ECGs particularly with regard to their mode of creation, structural organization and management system?
- What are the critical legal issues that could be raised against ECGs with respect to the rules of abuse of market dominance under the current Ethiopian Competition Law?
- What are the critical legal issues that could be raised against ECGs with respect to anticompetitive agreements under the Ethiopian Competition Law?
- What is the position of our legal system in general and our Competition Law in particular on the regulatory approaches toward ECGs?
- In the light of the rules of abuse of market dominance and anticompetitive agreements under Ethiopian Competition Law, what is the practical status of ECGs?

- What should be done to solve the problems that exist in the interplay of ECGs and Ethiopian Competition Law in general and in relation to the notion of abuse of market dominance and anticompetitive agreements?

1.5 JUSTIFICATION OR SIGNIFICANCE OF THE STUDY

As indicated in the introduction, though CGs are the widely diversified form of business organizations both at the international and national business arena, they lack proper legal attention specifically by the Ethiopian legal system. They are also one of the most unexplored areas in the legal scholars and academician's writings. In Ethiopia, though there are few upcoming concerns by graduating students, ECGs largely remained unknown to the Ethiopian legal system and to the literature pool of Ethiopian legal research. As such, this study is very significant, among others, for the following reasons.

- As CGs are posing so many validity and relevance questions to the traditional corporate laws and theories; this study, apart from contributing to the literature pool of CGs, will trigger curiosity by the legal scholars and academicians for further research on the area. In other words, it will serve as a motivational ground for those who want to investigate and explore the legal, economical, and socio-political features and implications of CGs both at the international and national level. This will in turn facilitate the effort to unveil the veil of ignorance with respect to CGs in general and ECGs in particular.
- Our legal system and institutions are oblivious to the effect ECGs may have on the business environment. This is obviously for the reason that there are inadequacies in the effort to know them. Thus, this study will help policy makers and legislators to be aware of ECG's peculiar feature and their legal and practical impact on the competitive environment. Principally, the study will enable policy makers and legislators to have better understanding of CGs so as to make proper legal and policy reform.
- The awareness obtained from this study will also facilitate better preparation in all appropriate means toward the giant foreign CGs (MNCs and TNCs) that will pour in the event of Ethiopia's accession to WTO.
- Furthermore, this study will also make our judges active specifically in their legal analysis concerning the peculiar features and issues surrounding CGs in general and

ECGs in particular. This will in turn increases the modernity and righteousness of their decisions particularly in cases involving attribution of liability.

- Principally, this study is at the heart of Ethiopian Competition Authority to whom the power to interpret and implement the competition Proclamation is given. This is because; this study will provide a platform of better clarifications as to the general concepts of competition and its interplay with CGs. In addition, this study will also support and facilitate the competition advocacy effort of the Authority toward the regulation of ECGs with respect to the rules of abuse of market dominance and anticompetitive agreements.
- Finally, as there are unheard voices regarding the real predicaments they are in with respect to the anticompetitive acts of major ECGs; this study will help the business community in reflecting those valid and legal concerns within the parameters of the theoretical and legal frameworks of competition policy and law. This will add the support for effective and efficient implementation of the Competition Law in the competitive business environment of Ethiopia.

1.6 METHODOLOGY OF THE STUDY

This study is a combined feature of both doctrinal and non doctrinal legal research. It has employed qualitative approach and embodies a mix nature of descriptive, explorative and evaluative research types. But, it will use both qualitative and quantitative data which are relevant to achieve its objectives and address its research questions.

Concerning its data collection, this study employs purposive sampling with which it identifies the major ECGs for the study. This is for the reason that the study is interested in identifying major ECGs in general and those that are frequently attached to competition issues in particular. To collect the necessary data for the study, interview (for reason of flexibility, unstructured interview has been employed), observation, examination of documents and library research technique has been used to gather the necessary legal and policy documents.

Accordingly, the Ethiopian Ministry of Trade, (MoT), Ministry of industry (MoI), the Ethiopian competition and consumer's protection Authority (here after, Authority), the Ethiopian Chamber of Commerce and Sectoral Association (ECCSA), Addis Ababa Chamber of Commerce and

Sectoral Association (AACCSA), the Ethiopian Revenues and Custom Authority (ERCA), Federal Court judges, legal experts, and the business community are the sources from which data are collected through personal and unstructured interview.

The collected relevant data are critically reviewed, discussed, analyzed and interpreted against the theoretical and legal foundations of Competition Law and the current Ethiopian competition Proclamation within the purview of the research questions and objectives outlined.

1.7 SCOPE AND DELIMITATION OF THE STUDY

Four fundamental points will explain and clarify the scope and limitation of this study. These are the following. Firstly, in its thematic coverage, this study focuses on the competition dimensions of ECGs with a particular emphasis on the legal and practical analysis of abuse of market dominance and anticompetitive agreements. i.e., the study will survey the possible legal and practical issues that circle around these CGs. At this juncture, it is preferable to underscore two vital points. The first one is; this study is trying to address the legal and practical issues of ECGs which are not addressed by previous fellow legal researchers. For example, this study is different from previous LLB and LLM studies such as "lifting the corporate veil in corporate groups under the commercial Code" (Bruk Kefyalew, 2003, LLB), "the need for the regulation of group of companies (parent and subsidiary) in Ethiopia" (Belayneh Ketsela, 2006, LLB), "affiliate companies in Ethiopia: analysis of organization, legal framework and the current practice" (Mehamed Aliye, 2010, LLM), and "The legal and institutional framework governing company groups in Ethiopia and the current practice" (Yitayal Mekonen Ayalew, LLM) that dealt with ECGs. This is because; all of these theses are similar in their basic tenet in that they focus on the problematic nature of ECGs and the available legal frameworks within the 1960 of Ethiopian Commercial Code (herein after, the Code). They tried to dig out problems emanating from the presence of ECGs in the business environment from perspective of the Code. All of them, finally, concluded that CGs in general and ECGs in particular are left unregulated and thus, legal and policy reform is required.

Therefore, though this study uses these researches and also may show little similarity concerning the conceptual, legal and practical discussions of CGs (only from the angle of the Code), its fundamental questions, lines of argument and legal issues are quite different. In short, while they

started and ended their discussion within the boundary of the Code this study starts with the discussion of the unregulated status of ECGs within the Code and ends up with the discussion and analysis of the legal and practical issues of these CGs in within the purview of Ethiopian Competition Law.

Secondly, this study is not striving to determine whether one or more of the ECGs are violating the Competition Law. Rather; it will only investigate and evaluate the competition aspect of these CGs and will not engage in the determination of the status of their actual infringement of the rules of abuse of market dominance and anticompetitive agreements. Obviously, this is beyond the capacity and legal Authority of this study.

In addition, with a view to substantiate the legal and conceptual discussions, some practical situations will also be raised and discussed.

Thirdly, this study will only concern non financial and major ECGs. Apart from capacity constraint reason to cover all forms of CGs in Ethiopia, it is non financial ECGs that are the sources of regulatory concern. In addition, the qualification "major" is given for some ECGs like EFFORT and MIDROC due to public knowledge and manifested acts of such groups that clearly present them to the public as such.

Fourthly, the area of this study will be Addis Ababa and Dire Dawa from where all possible, relevant and necessary data will be collected. This is simply due to financial constraint of the researcher of this study and also due to the accessibility of information concerning the major ECG in the two cities.

1.8 LIMITATION OF THE STUDY

The researcher believes that relentless effort has been made to obtain any of the relevant data necessary to address the objectives and research questions of this study. However, this researcher also genuinely believes that there were different challenges that can shadow on the conclusiveness and comprehensiveness of the outcome of this study.

Among others, the following factors can be cited as major factor that can be expressed as limitation of this study.

Firstly, the researcher faces a financial constraint to address all major ECGs operating within the Ethiopian business environment. As a result, this researcher is forced to confine its study area to places (Addis Ababa and Dire Dawa) where he can get ECGs within his financial capacity. Even among major ECGs operating in the two places, it is impossible to address all of them for same reason. Thus, while general discussions are made for all major ECGs by using the available literatures and reports, EFFORT and MIDROC CGs are taken as example for the particular practical illustration of the issue at hand.

Secondly, lack of relevant literature, judicial and executive experience on the issues at hand particularly in Ethiopia is the principal challenge. Despite some efforts by graduating students to uncover the legal and practical situations surrounding ECGs, neither the executive nor the judicial organ have the direct and specific knowledge and experience on ECGs. As a result, this study obtained only two documents that are directly dealing with ECGs (the one dealing with EFFORT and the other dealing with ECGs in general) and LLB and LLM thesis. To fill this gap, extensive interview has been conducted so as to get the relevant data for the study.

Thirdly, the researcher has faced accessibility challenge to the relevant and qualified information from institutions that are selected as sources of data for this study. These institutions are both governmental and non governmental institutions (mainly the selected ECGs).

The accessibility challenges are due to lack of cooperation, lack of transparency in the information they provide, improper fear to give the required information while they have the capacity to do so, negative suspicions while this researcher provide them confidentiality commitment and time consuming bureaucracies.

Lastly, but not the least, lack of awareness among the selected officials, academicians and legal practitioners is one of the major obstacles to get the necessary, relevant and qualified data for this study. In this regard even those academicians and/or practitioners who are regarded as experienced professionals on the issue at hand do not have the qualified information. As a result, the research has spent weeks and even months to clarify the issue of this study so that these legal experts can posit their opinion on the issue.

Therefore, this researcher sincerely recommends readers to read and understand this study within the purview of these limitations.

1.9 ORGANIZATION OF THE STUDY

This study is organized in to six chapters and they are concisely presented as follow.

The first chapter of this study posits the research design or the road map of the study as stated above. The second chapter provides the legal and conceptual frameworks on the basis of which the very understanding of CGs lies. Accordingly, it deals with, inter alia, the meaning, nature and features of CGs at the international level, theories pertinent to CGs, state experiences, and the existing regulatory choices and arguments thereon. The third chapter totally in delves with the theoretical and legal frameworks of competition policy and law in general and the notion of abuse of market dominance and anticompetitive agreements in particular. In addition, it explores the available regulatory choices toward the Competition Law liability of CGs at the international arena. Against this, it also attempts to examine the current Ethiopian competition Proclamation with particular emphasis on the rules of abuse of market dominance and anticompetitive agreements.

The fourth chapter confines itself with the discussion, exploration, and evaluation of the interplay between ECGs and the Ethiopian Competition Law in general and with the rules of anticompetitive agreement in particular. It focuses on the legal and practical issues in the interplay of these CGs and the rules governing the anticompetitive agreements under the Proclamation. Accordingly, it tries to indicate the major signpost ECGs are posing toward the competition regime by unveiling facts, issues and arguments resonating around the focused points.

The fifth chapter of this study will in delve itself with the discussion of the legal and practical issues surrounding the interplay of ECGs and the rules of abuse of market dominance under the Ethiopian Competition Law. Accordingly, it tries to indicate the major signpost ECGs are posing toward the competition regime by unveiling facts, issues and arguments resonating around the focused points.

Finally, last but not least, chapter six will sum up the discussions made in the preceding five chapters and provides recommendations which are, in the eye of this researcher, are necessary and relevant to the problem and questions stated in this research.

CHAPTER TWO

2. GENERAL OVERVIEW OF CORPORATE GROUPS: THE INTERNATIONAL AND ETHIOPIAN PERSPECTIVES

2.1 DEFINITION, NAMING AND ECONOMIC UNDERPININGS OF CORPORATE GROUPS

Defining corporate entity is an easy task as there are many well ingrained theories and literatures that can provide us with ample of definitions. We can simply define corporate entity as a business firm that have the element of legal personality, corporate autonomy and limited liability.[15] However defining Gs is a difficult task both at national and international arena. This is owing to[16]; (1) the littleness or absence of literature on CGs, (2) corporate law is oblivious to the existence of CGs and they are known, in small extent, by other branches of the law such as tax law, accounting and finance law, Competition Law, labor law, and environmental law[17]; (3) even if attempt is made to know CGs in modern corporate laws, what constitute CGs is strictly domestic law matter and as such disparities are there concerning CGs defining elements, and (4) finally it is owing to the complex organizational structure, paradoxical character of multiplicity and unity, and ever dynamic features of CGs that makes any sort of definitions fragile.

In addition, the naming of CGs by itself presents further challenge to their understanding. For example, terms such as affiliated companies, parent-subsidiary companies, brother-sister

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[15]Ho, Virginia Harper "Theories of Corporate Groups: Corporate Identity Reconceived," Seton Hall Law Review: Vol. 42: Iss. 3, Article 2 (2012), p. 940, Available at: http://erepository.law.shu.edu/shlr/vol42/iss3/2, Accessed on July 17, 2013.

[16] BLUMBERG PHILLIP, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY, (1993), p.337; JANET DINE, THE GOVERNANCE OF CORPORATE GROUPS, (2000). Particularly, in modern times where CGs plays the center role of both domestic and international business and thus swinging the traditional door of corporate law, it is very surprising to see nothing change from corporate law itself and corporate law scholars. In this regard TOM HADEN putted astonishing comment on the reckless position of corporate lawyers. He said "Company lawyers still write and talk as if the single independent company, with its shareholders, directors and employees, was the norm. In reality, the individual company ceased to be the most significant form of organization in the 1920s and 1930s. The commercial world now is dominated both nationally and internationally by complex groups of companies". See José Engrácia Antunes, the Law of Corporate Groups in Portugal, (2008), WORKING PAPER SERIES NO.84, Institute for Law and Finance.

[17] Ibid. Germany, Portugal, Italy, some Eastern European countries, Brazil and Senegal are examples where group law has formally been introduced in company law, although it is unclear how the law is actually applied.

companies, conglomerates, holding companies, business group, combined groups, associates, controlled groups, and the like are being used to designate CGs.[18]

However this doesn't mean that we can't have a definition of CGs at all. Bonbright and Means defined holding company, as "any company... which is in a position to control, or materially to influence, the management of one or more other companies by virtue, in part at least, of its ownership of securities in the other company or companies".[19] Ballantine, also defined parent-subsidiary as a company which controls another as a subsidiary or affiliate by the power to elect its management.[20] Let's add one more definition. The Australian High Court, stated that "the word 'group' is generally applied to a number of companies which are associated by common or interlocking shareholdings, allied to unified control or capacity to control".[21]

The synergy of the above definitions could give us a working definition of CGs as a network of legally separated firms that are integrated through ownership and control.[22] Mind you, the legal existence of corporate groups requires the elements of ownership and control on which the relation of the legally separated firms lies. On this point, the leading scholar on the literatures of CGs, Phillip Blumberg, substantiates this line of definition by noting that ownership and control are the key elements of CGs existence.[23] He continues to state that these two key elements serve two important things. The first one is they clearly distinguish CGs from other sorts of short term alliances or economic cooperation between

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[18] An Australian research team has found that the phrase "corporate groups" is an umbrella used to denote all forms of corporate combinations with two or more legally separated firms. See Companies & Securities Advisory Committee, Corporate Groups Final Report, (May 2000), p. 10. Available at http://www.asic.gov.au accessed on July 4, 2013. The difference between the names, though not sharp distinction, may reflect the difference in degree of autonomy, control, ownership, and the nature of business the group engage in (for example, conglomerates are those CGs operating a range of business activities).

[19] J. C Bon bright, and Means G. C., the Holding Company, (1932), Kelley USA, p. 22.

[20] Budiyanto, Wawan Cucuk, and et al, ADVANCING ENTERPRISE-WIDE INFORMATION SYSTEMS STRATEGY: EXPLORING POWER DIFFERENTIALS IN PARENT – SUBSIDIARY RELATIONSHIP, Swinburne University of Technology, John Street, Hawthorn, Victoria 3122, Australia, p.1-2

[21] Companies & Securities Advisory Committee, as cited above at note 18, p.4. The case in which the court made such definition is Walker Vs Wimborne (ACLR 529 at 532, Australian High Court, 1976) (unpublished).

[22] In general, there is a narrower and broader conception of corporate groups. The broader one includes even lose connections like supply chains and other types of contractual arrangements. The narrower definition takes the criteria of ownership and control where by entities within a group defines their relation in terms of ownership and control. It is this narrower definition which is taken in this study.

[23] Blumberg Phillip, the Corporate Entity in an Era of Multinational Corporations, (1990) 15 DEL. J. CORP. L. 283, p. 345.

firms[24] and secondly the elements are keys for liability attribution to the group in the event of need. In this regard, however, defining what "control" would be the most painstaking task than defining ownership. As indicated before, CGs are more known under other branches of the law than under the corporate law.[25] As a result, it is quite difficult to get bench mark definition of control. Bonbright and Means, again, defined "control or controlling interest" as having the power to determine the policies of a company through the ability to elect all or a majority of the board of directors – including those companies that exercise a material influence over other companies as the result of a significant minority holding.[26] In the common law jurisprudence, control is defined by synergy of different factors like the appointment by the parent corporation of its own officers to the subsidiary's board, the presence of external contracts or other business arrangements that facilitate the shareholder's control, and a general alignment of interests among the corporate entities through which the ultimate parent may exercise control.[27]

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[24] According to the sociologists John Scott and Gerald Davis, CGs are different from other kinds of relations between two or more firms like hierarchical contracting . . . joint operating agreements, or other hybrid forms," including franchisees, distributors, licensees, and other independent contractors "strategic alliances" or joint ventures between two otherwise independent companies where no legal entity is jointly established and owned by the joint ventures. See John Scott, "Corporate Groups and Network Structure", in CORPORATE CONTROL AND ACCOUNTABILITY: CHANGING STRUCTURES AND THE DYNAMICS OF REGULATION, p.291. The point here is that, as the author tells, in areas of law where equity ownership is required, the above mentioned cooperative contractual arrangements are out of the bounds of corporate groups. For example, McDonald's franchisees are not part of the McDonald's corporate group even though the franchisee has licensed rights to the McDonald's trade name, trademarks, and other intellectual property that constitute its brand and even though the franchisee is the face of the company to the public.

[25] Ho, Virginia Harper, as cited above at note 15, p.890. The definition of control is diverse across jurisdiction and regulatory laws. For example, the accounting standard of Australia defines control as the capacity of an entity to dominate decision-making, directly or indirectly, in relation to the financial and operating policies of another entity so as to enable that other entity to operate with it in pursuing the objectives of the controlling entity". See Companies & Securities Advisory Committee, as cited above at note 3, p. 7-8. Also EU's 17th directive on corporate group's taxation used the notion of dominant influence to denote control. The directive indicated that there can be vertical or horizontal control of a company by another company through ownership of majority voting interest, control of the board composition with the right to appoint and dismiss members, or exercising dominant influence through any other means. See EU Seventh Council Directive 83/349/EEC on consolidated accounts, OJ (EC) 1983. Available at http://europa.eu.int/scadplus/leg/en/lvb/l26010.htm , accessed on July 8, 2013.

[26] Echanis Erlinda S., "HOLDING COMPANIES: A STRUCTURE FOR MANAGING DIVERSIFICATION", Philippine Management Review, Vol. 16, 2009, p. 1-12.

[27] ANDERSON HELEN, "PIERCING THE VEIL ON CORPORATE GROUPS IN AUSTRALIA: THE CASE FOR REFORM", Melbourne University Law Review, Vol. 33, 2009, p. 333-336.

Correspondingly, in civil law jurisprudence, functional control by virtue of economic, financial, personnel and administrative integration within the group, as well as the use of a common public persona can be considered as control.[28]

Therefore, in this study a definition of control that shows the absence of corporate autonomy due to actual influence by another corporate entity on the financial, operational, administrative, and/or on business policies and strategies of the controlled company is taken. This is because for liability purpose or to determine the existence of group among corporate entities, the existence of such kind of power relation is very important.

CGs are very beneficial to investors and mostly they are justified on economic grounds.[29] Among such economic justifications, reducing commercial risk, or maximizing potential financial return (this is mostly by diversifying an enterprise's activities into various types of businesses and each being operated by a separate group company), preserving intangible commercial property of existing companies (by acquiring the companies themselves to expand an enterprise or increase market power), attracting capital without forfeiting overall control and lowering the risk of legal liability (by confining high liability risks, including environmental and consumer liability, to particular group companies, with a view to isolating the remaining group assets from this potential liability) are some to cite[30]. In addition, getting competition advantage (preventing or ousting actual or potential competitors from the market), complying with various regulatory requirements (some enterprises may need to maintain separate subsidiaries to satisfy prudential or other statutory requirements), portfolio diversification, and business network extension are also justify CGs.[31]

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[28] Ho, Virginia Harper, as cited above at note 15, p. 889.

[29] By the Coasian theory of firms, CGs can be justified as an alternative to market transaction costs similar to any single corporate entity. See Allen Douglas W., transaction costs, Department of Economics - Simon Fraser University, p.893-923

[30] Companies & Securities Advisory Committee, as cited above at note 18, p.2-4; Budiyanto, Wawan Cucuk, et al as cited above at note 20; Echanis Erlinda S., as cited above at note 26, p. 725; and see also Sommer H. Joseph, "Subsidiary: Doctrine without a Cause?", Fordham L. Rev. 227 (1990), p. 59. Available at: http://ir.lawnet.fordham.edu/flr/vol59/iss2/2, accessed on July 27, 2013.

[31] Ibid.

2.2 MODE OF CREATION, ORGANIZATION, STRUCTURE AND MANAGEMENT OF CORPORATE GROUPS

It is true that CGs are now becoming the model way of doing business in different parts of the world. Internationally, the notable examples of such highly expanded CGs are Multinational Companies (MNCs) and Transnational Companies (TNCs).[32]

The mode of creation, organizational structure and management of such CGs varies according to the nature of the owners. In this regard it is believed that family business is the genesis of many of the present trend of operating business through CGs.[33] For example the world most notable CGs like Toyota, Hitachi, Panasonic, Canon are known for their family origin.[34] Beyond this, there are a number of ways by which CGs might be created. Among many, three of them are well known. The first one is acquisition of new firm through takeover, or purchase of voting interest shares in a given company.[35]Even though it is a matter of state's laws determination, by the international business practice parent-subsidiary or holding company relation exists when there is a majority share holding (partially owned subsidiaries/or wholly owned subsidiaries), and affiliates or associates; on the other hand, exist when the firm has only a minority stake.[36] The second mode of creation is by splitting an existing firm's production lines to separate entities, the so called, organizational growth or expansion, so that a given line of production system will operate

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[32] Blumberg Phillip, as cited above at note 16, p. 8.

[33] ALMEIDA HEITOR V. and WOLFENZON DANIEL, "A Theory of Pyramidal Ownership and Family Business Groups", THE JOURNAL OF FINANCE, VOL. LXI, (2006), NO. 6.

[34] Hamada Kazuki, (ed.), Business Group Management in Japan, Vol. 7, Monden Institute of Management, Japanese Management and International Studies –, Kwansei Gakuin University, Japan, p.1-73. These CGs are known for their enormous number of subsidiaries operating in different parts of the world.

[35] Visit www.investopedia.com, accessed on July 5, 2013.

[36] Ibid. see Lawson Larry (Cincinnati), "Chapter 7 Controlled and Affiliated Service Groups" as reviewed by Jeff Nelson in INTERNAL REVENUE SERVICE TAX EXEMPT AND GOVERNMENT ENTITIES, p. 2-45; see also RUBIN W. JEFFREY "CORPORATE GOVERNANCE SERVING THE BENCH AND BAR SINCE 1888 When and Are Public Parent, Overlapping responsibilities require coordination", NEW YORK LAW JOURNAL, MONDAY, NOVEMBER 20, 2006, p.2. All three of these terms refer to the degree of ownership that a parent company holds in another company. In most cases, the terms affiliate and associate are used synonymously to describe a company whose parent only possesses a minority stake in the ownership of the company. A subsidiary, on the other hand, is a company whose parent is a majority shareholder. In a wholly owned subsidiary the parent company owns 100% of the subsidiary. For example, the Walt Disney Corporation owns about a 40% stake in the History Channel, an 80% stake in ESPN and a 100% interest in the Disney Channel. In this case, the History Channel is an affiliate company, ESPN is a subsidiary and the Disney Channel is a wholly owned subsidiary company.

efficiently and effectively.[37] The third and the last one is through establishment of new entity by an existing firm through the latter's fund.

Concerning the organizational structure of CGs, as indicated before, one of the basic features of CGs is their complex structural organization and management system which is intended, among other things, to create liability firewall. Accordingly, there are different varieties of arrangements such as pyramidal organizational structure where by the parent company will be at the top holding a number of subsidiaries through a chain of ownership down to the bottom of the pyramid.[38] There are also vertical (for instance, several group companies operating at the same level in a production or distribution process) or horizontal structures (group companies operating at different points in that process) whereby CGs are arranged from economic perspectives.[39] In addition, CGs may be organized as conglomerates [40](companies operating in a wide variety of business activities), and in a hierarchical form.

In general, the structural organization of CGs can be pyramidal, hierarchical, multilayered, single layered, vertical, horizontal and or in the form of conglomerates.[41] At this moment, it must be underlined that the structural organization of CGs tells the power relation, how the group is being managed, and also gives us clue as to the degree of autonomy, control and dependent-independent relation within CGs.

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[37] Ibid. see also Mehamed Aliye Waritu, COMPANIES IN ETHIOPIA: ANALYSIS OF ORGANIZATION, LEGAL FRAME WORK AND THE CURRENT PRACTICE ((January, 2010), unpublished, Addis Ababa UNIVERSITY SCHOOL OF GRADUATE STUDIES AFFILIATE), Addis Ababa University, p. 40-45.

[38] The Russian corporate governance manual, Corporate Governance in Groups of Companies, (Chapter 15), p.4-23.

[39] Ibid.

[40] Ibid. conglomerates CGs are made up of a number of different, seemingly unrelated businesses conducting corporate entities. In conglomerate CGs, one company owns a controlling stake in a number of smaller companies, which conduct business separately. Each of a conglomerate's subsidiary businesses runs independently of the other business divisions, but the subsidiaries' management reports to senior management at the parent company. Conglomerates could be in state of parent-subsidiary, associate or affiliate companies. What makes them different from the latter ones is the members of the group engage in entirely different business ventures. This is what being manifested in Ethiopia. See RUBIN W. JEFFREY, as cited above at note 36, P.1-4.

[41] Altomonte Carlo and Rungi Armando, Business Groups as Hierarchies of Firms Determinants of Vertical Integration and Performance, Working Paper series, No. 1554, June 2013, Comp Net The Competitiveness Research Network, European central bank, p. 8-23.

Consequently, there are three notable forms of management systems in CGs. Central management (e.g. in family business groups, pyramidal or hierarchical structured CGs, where the overall business actions and decisions are made by the parent company or head office of the CGs); decentralized or polycentric (e.g. in conglomerates where decisions and actions are made independently by each member corporate); and decentralized but with *defacto* domination by the majority or minority holding company.[42]

In fact it is not easy to indicate the nature of power relation in practice. In most cases courts are called to determine the power relation among CGs so that the veil of the group can be lifted to impose liability in the event of need.[43] In such cases, court's jurisprudence has developed factors for considerations that are mainly connected to the choice of "entity Vs enterprise" approaches and which we will see them in the next part.[44]

2.3 REGULATION OF CORPORATE GROUPS: THEORIES AND APPROACHES

2.3.1 THEORIES OF CORPORATE ENTITIES AND CORPORATE GROUPS

As pointed before, despite the enormous expansion of CGs, the law and the jurisprudence on corporate law remained silent or showed little concern on the development of new concepts and theories on CGs.[45] Much of the attention of corporate law resonate on the

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[42] See Kiel C. Geoffrey, Hendry Kevin and Nicholson J. Gavin, "Corporate Governance Options for the Local Subsidiaries of Multinational Enterprises", INT'L REV. 568 (2006) (surveying various sources of subsidiary control), p.886. See also Chartier J. Brian, Senior Officer Subsidiary Governance, RBC Financial Group, p. 3. Many states proposed a percentage controlling standards to determine controlling threshold. But this control cannot only be by the virtue of "majority share holding". The parent company, for example, though have a minority share interest, it may still be able to control its subsidiaries due to overlapping of directors, operational integrations or other means.

[43] For example, transparent ownership structures are important prerequisites in both the U.S. and EU for business operation through CGs. See The Russian corporate governance manual, as cited above at note 35.. However even such preconditions are imposed through, for example, disclosure of percentage holding, there is Lack of transparency of control and economic interdependence of a group of companies. Complex ownership structures are often used to obscure control relationships between companies, making it virtually impossible to determine when transactions are being conducted in good faith, or when self-dealing, transfer pricing, and similar abuses occur.

[44] See Companies & Securities Advisory Committee, as cited above at note 18, p.23-40.

[45] See Ho, Virginia Harper, as cited above at note 15, p.880-883.Virginia Harper cunningly explained two reasons for this. Firstly, the traditional conception of corporate as a mere aggregation of its constituencies or as amalgamation of contracts yields a little or no interest for internal contractual relation among its constituencies. Since the major aim traditional corporate law is enabling the efficiency of implicit and explicit contracts among the constituencies of the corporate it is not yet necessary for the law to give special concern for the corporate groups. It is private in its nature than public. The concern for corporate conduct falls within public law debate. Meaning setting bounds on corporate conduct is more of the task of other areas of law, such as antitrust, environmental, labor, consumer protection, or tax. The concern for corporate

the final theory is the real entity theory.[51] It states that corporate entity is something more than the sum of its constituencies and thus denotes its separate legal existence from its constituent elements. The implication of this theory to CGs is that the "group" itself has an independent and separate existence from its constituencies. Unlike the aggregate view, the real entity view posits the possibilities for the group or the network itself to bear rights and duties apart from its components.

In general, from the legal point of view it seems that the aggregate view explains the legal structure of CGs in better way than the two theories while, however, from practical side, it is the real entity view that suitably addresses the real situations of the present CGs.

However, it must be noted that while the competing theories can coexist given the different policy reasons behind different laws, the consequence of the choosing one of the theories bears a direct implication on the choice of regulatory approaches. These regulatory approaches are the entity approach and enterprise approach which will be seen in the next part.

2.3.2 REGULATORY APPROCHES: ENTITY Vs ENTERPRISE CHOICE

In contemporary business law environment the regulation of CGs is based on the two approaches (either one of them or combination of them): an entity or separate entity approach (herein after abbreviated as SEA) and enterprise approach or single economic unit approach (herein after abbreviated as SEUA). The selection of one of them is not an easy task. It rather presented as a dilemmatic puzzle game where no sharp decision will be made without consideration of many factors. This is because; the approaches are questions of liability or attribution, a road to a separate or collective liability, and a decision to destroy or preserve the traditional limited liability of a corporate entity. In addition, the choices reflect the calculation of various values or interests at stake and critical valuation of the theories mentioned before.

Accordingly, the SEA fundamentally traces from the aggregate theory and dictates that no matter how the corporate entities are operating in network of group, legal rules should see

[51] Ibid.

application of the doctrine of veil when the liability of CGs is put in to question. As a result, in the absence of developed specific theory for CGs, legal scholars are now trying to extend the classical corporate theories to explain and justify the legal rules and actions on CGs.[46]

The first traditional theory of corporate entity is the concession theory.[47] This theory sees corporate entity as a grant of state (also called grant theory) and chartered by the state.[48] This theory puts public welfare obligation on corporate entities than to pursue their profit need only and any action beyond the given power is considered to be ultra-vires.[49] The logical extension of this theory to CGs is that they have to be chartered by the state which, however, can only works for domestic CGs while it doesn't work for MNCs or TNCs. In addition, it seems that the theory is incompatible with the contemporary liberal economic policies whereby entities are free to pursue their economic objectives. The second theory is an aggregate theory (also called *contractarian* theory) premised on the principle of freedom of contract and sees corporate entity as an aggregate of individual contracts.[50] Thus, the theory believes that a corporate entity existed by the virtue of its constituencies and doesn't have its own legal identity separated from its constituencies.

Thus, according to this theory, CGs can be regarded as an amalgamation of corporate entities and thus, there is no separate identity for the group itself. The theory also dictates that the emphasis should be for the interests of the constituent firms within the group and any legal rules on CGs should promote the economic efficiency of the group. The third and

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groups mainly arises with the issue of corporate power that requires some of regulatory approach from the public law than the private law. See Ho Virginia Harper, as cited above at note 15, p.880-883.

[46] Id, p.901. This analogical extension is mainly for the fact that both "corporate entity" and "corporate groups" considered as "firm" by the Coasian theory of firms, and even if it is admitted that there are some dissimilarities owing to the complex nature of CGs, the traditional elements of corporate entity (legal autonomy, limited liability and director's liability) still works for both.

[47] Foster H. D Nicholas., "Company Law Theory in ComParative Perspective: England and France", the American Journal of ComParative Law, Vol. 48, (Autumn, 2000), No. 4, p.582, published by the American Society of ComParative Law, , URL: http://www.jstor.org/stable/840908 , Accessed: 19/10/2011, 02:30; see also Dejnožka Jan, Corporate Entity, (October 8, 2007), Book Manuscript, p. 3-54.

[48] Harris Ron, "the Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business", (2006), WASH. & LEE L. REV. 1421, 1424.

[49] This theory is rightly stated by Chief Justice Marshall as "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. . . . Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it". See Trustees of Dartmouth College v. Woodward, (518, 636 (4 Wheat.), US Supreme Court, 1819) (unpublished).

[50] Ibid.

them as separate entity.[52] Meaning, CGs are not recognized as having separate legal personhood and as such for any legal purpose, each member company should be seen as separate entity and not as a member of a certain legally recognized business group.

Conversely, the SEUA runs parallel with the real enterprise view and propounds for recognition of the economic integration by the CGs.[53] But, concerning the origin and development of this regulatory approach, there is an argument that it has developed from the European Union practice called, European Economic Interest Grouping (herein after simply, EEIG).[54] Conceptually, this EEIG is both institutional and a legal framework designed by the European Council of Ministers of the European Community of Regulation (EEC). The main purpose of this EEIG, as clearly stated under the regulation's preamble and consequent provisions, is to facilitate cross-frontier cooperation between companies, firms, individual professionals, and other legal bodies that are interested in certain kinds of joint economic activities within the territory of the community.[55] It is simply an association or a consortium kind institution with the aim of promoting the economic interest of its members within the European community. Therefore, this writer argues that the EEIG framework has no any relevant and valid connection with what we are talking as SEUA. Moreover, as per Art 3 of the regulation, EEIG is a non profitable grouping which is completely different from the concept of corporate groups we discussed before. In short, the concept of EEIG has nothing to do with the regulatory approach, SEUA, we are dealing with.

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[52] Ho, Virginia Harper, as cited above at note 15, p.945-951; Companies & Securities Advisory Committee, as cited above at note 4, p.22-23. The aggregate theory and entity approach are functionally equal in a sense that both interested in the constituencies or component of the group than the network and both deny legal recognition for the group as entity.

[53] Ibid. Again here also the real entity theory and enterprise approach are functionally equal in a sense that both gives recognition to the business network created by corporate entities. See also Muchlinski, 'Limited Liability and Multinational Enterprises: A Case for Reform?' *Cambridge Journal of Economics* 34 (2010), p.805-915.

[54] Council Regulation No. 2137/85 on the European Economic Interest Grouping (EEIG), adopted by the council on 25 July 1985, European Communities Commission. In fact, this argument is propounded by Dr. Solom Ababy.

[55] Ibid, see the preamble of the Regulation, among others, which read as: "where as a grouping (meaning the EEIG) differ from a firm or a company principally in its purpose, which is only to facilitate or develop the economic activities of its members; to enable them to improve their own results, whereas by the reason of that ancillary nature, a grouping's activities must be related to the economic activities of its members but not to replace them..." (emphasis added)

Back to our discussion, SEUA gives a considerable legal significance to the CGs and treats them as a unitary economic enterprise functioning to further the interests of the group as a whole, or those of its dominant corporate body.

As one could guess, the two approaches, whenever put for consideration, have their own positive and negative ramifications. For example, while an entity approach is significant in promoting the limited liability so that protects the interests of creditors and the business convenience of the CGs, it is criticized for promoting liability firewall for malicious CGs and for its being susceptible to frauds for example in areas of tax law.[56] Likewise, the SEUA is criticized because it imposes collective liability while destroying limited liability of corporate entity, reduces business convenience and credit extension opportunities for the CGs, risks the interest of creditors, and requires centrally administered CGs for its implementation.[57] However, it is applauded for its promotion of public interest or policy in certain areas of law like environment, labor and Competition Law. In addition, it is regarded as more efficient and effective in areas of the law like tax law where consolidated tax requirement on CGs is better than tax per entity approach.

In sum, as we can see, there are conflicting interests that comes in to the scene from which there is no easy escape for policy makers and legislators. As a result, given the practical need of global business, the nature of the case (whether the case at hand is concerning internal or external relation of the CGs), and the different policy reasons (goals) behind different areas of the law, it is possible to say that there is no universal choice. This is rightly stated by Phillip Blumberg and Reuven Avi-Yonah as they concluded that different areas of law may requires different approaches that best serves their policy reason and objectives.[58] For example, common law and some European courts are usually confronted with the task of finding legal base for liability of CGs. In such hard circumstances,

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[56] Companies & Securities Advisory Committee, Id, P. 23-31.
[57] Ibid.
[58] Blumberg Phillip noted that that "enterprise law is not transcendental. It is applied only in selected areas of the law where it more effectively implements the underlying purposes and objectives of the law. In other respects, entity law continues unaffected" see Ho, Virginia Harper, as cited above at note 15, p. 901. See also Under Section 20(a) of the Securities Exchange Act of US 1934, "[e]very person who, directly or indirectly, controls any person liable" for violations of the securities laws is also subject to liability. Reuven Avi-Yonah also noted that the question is which approach best serves the policy goals of a given area of the law than finding a universal approach to all sorts of cases. See Companies & Securities Advisory Committee, as cited above at note 18, p.23-40.

according to the Australian research team research result, such courts in most cases employ yardsticks such as the degree of economic and organizational integration, the degree of autonomy of a member company under question, the degree of market chain and interaction, and the extent to which the CGs use public images for common persona.[59]

Therefore, this writer argues that when CGs clearly reflects the existence of centralized management system and chained structural organization in a way that a member company within the group has lost its corporate autonomy, it is preferable to follow SEUA. This is because; the goal of attribution is to make decision makers accountable to what they did and have done. In other circumstances, however, flexible choice of the two approaches is necessary in line with the pragmatic need and the underlining policy mark of the law in question.[60]

2.4 CORPORATE GROUPS UNDER DIFFERENT JURISDICTIONS

2.4.1 CORPORATE GROUPS THE EUROPEAN COMMUNITY (EC) LAW AND US LAW

Under the EC jurisdiction there is no comprehensive and special laws meant for the regulation of CGs despite their enormous existence.[61] However, according to Phillip Blumberg, there are series of actions in which the EC, being largely influenced by German model, adopted SEUA in the regulation of corporate groups.[62] These include regulations and decisions affecting banking, services, air and road transport, and restrictive trade practices.[63] They also include a number of

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[59] Companies & Securities Advisory Committee, ibid. The factors of considerations are the following. Economic organization: (Do the subsidiaries have an administrative infrastructure that will enable them to operate independently, or do they depend on a central group organization for essential administrative support services? Do the subsidiaries depend on the group for financing or loan guarantees? Is there interchange or rotation of personnel between group companies and utilization of group-wide personnel programmes? To what extent does the parent make the vital decisions on policy, operations and budget, even though these may not extend to day-to-day control of management?).

[60] This is the striking difference between this study and Mehamed Aliye's study that calls for having a generic regulatory approach for corporate groups. See Mehamed Aliye Waritu, as cited above at note 37, p.28.

[61] An early attempt by Forum Europaeum Konzernrecht in proposing CGs law has failed. The proposal includes, among others, the duty of disclosure; legal recognition of group management under certain safeguard conditions; special investigation in the independent company as well as in the group; mandatory bid; buy-out and withdrawal rights; and, ultimately, liability for wrongful trading. See Prof. Klaus J. Hopt Max Planck, , Modern Company Law Problems: A European Perspective Keynote Speech by Institute for Foreign Private and Private International Law Hamburg, Germany, Company Law Reform in OECD countries A ComParative Outlook of Current Trends", (December 2000), Stockholm, Sweden, P. 5.

[62] Blumberg Phillip, as cited above at note 16, p. 165.

[63] Ibid.

directives on company law, including the seventh directive, which requires consolidated accounts for subsidiaries, including those outside the EC; the proposed ninth directive (Vredeling proposal), which provides for fuller disclosure to workers in the event of plant closings as well as protection of creditors and minority shareholders; and the proposed regulation on a Statute for a European Company.[64] But, unlike in any other legal regimes, the EC has taken a firm SEUA in its competition regulation which we will see in the next chapter of this study.

In the application of enterprise principle, terms like "parent," "subsidiary," "control," "dominant influence," "decisive influence," and "participating interest" play a crucial role in widely diverse areas.[65] Particularly, control, controlling interest and decisive influence are the key in determining SEUA.

The experience from US jurisdiction, on the other hand, tells us that, like the EC experience, again, there is no law designed to govern CGs.[66] Acquisition of stock of a company by another company is strictly prohibited since it is considered as an attempt to control monopoly power of a market.[67] As a result, in majority of US Statutes Company networking through stock holding is not allowed with the exception of New Jersey State that permitted it in 1888, 1889 and in 1893.[68] i.e. there was strict construction and application of the traditional corporate law principles whereby SEA is the overriding principle in the majority of US statutes including property and contract laws.[69] It is only in some circumstances that the doctrine of piercing the corporate veil comes in to the scene.[70]

However, recent jurisprudential experience of American law shows that there is a movement from the universally indiscriminate reliance on SEA to enterprise principle or SEUA.[71] US statutes reflected a response to the development of group of companies in different areas of laws

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[64] Ibid. The Seventh Directive on group accounts applies to parent and subsidiary undertakings. The original proposal defined the group relationship in functional terms as existing "if the dominant undertaking exercises in practice its dominant influence to the effect that all such undertakings are managed on a central and unified basis by the dominant undertaking."40 As noted, this definition went beyond de facto control to require as well its exercise to the point of managing the group components in a unitary manner.
[65] Id, p. 165-166.
[66] RUBIN W. JEFFREY, as cited above at note 36, p.2.
[67] Blumberg Phillip, as cited above at note 16, p. 53.
[68] Id, p. 57.
[69] Id, p. 53.
[70] Id, p. 66.
[71] Id, p. 10.

like the bankruptcy, tort and procedural laws in which enterprise principle (SEUA) is taken to regulate CGs.[72] The new statutes extensively introduced enterprise principles into the statutory regulatory system, thereby bringing the holding company and its affiliated companies under effective public control[73]. In these statutes and administrative laws control or controlling interest has become the key factor for application of enterprise principle.

The US court's ruling also depicts that CGs are increasingly being considered as single economic unit, i.e. by taking the analogical interpretation of single entity, SEUA is being followed because of the principle of duty of fairness and director's liability to shareholders.[74] However, US courts consider CGs as a single enterprise when control is accompanied by financial, operational and administrative integration which is, in fact, the deeply rooted criteria of piercing corporate veil in common law countries.[75]

2.4.2 CORPORATE GROUPS IN SOME EUROPEAN COUTRIES

Comparatively unlike the United States, in which the courts as well as Congress have made major contributions, European acceptance of enterprise principles is largely represented by statutory law. On the judicial level, entity law essentially remains supreme. In addition, the experience of European countries is not identical in the definition of what CGs are and also on the choices of the regulatory approaches.[76]

Therefore, in this study, the experience of German, Portugal, United Kingdom of Britain (UK), and France in the regulation of CGs is selected and treated herein below briefly.

The first experience is taken from the 1965 of German Stock Corporation Act. This Act recognizes three types of CGs: integrated (75% of the shareholders voting at a meeting of a

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[72] Ibid.
[73] Id, p. 60.
[74] Antunes Engrácia José, as cited above at note 16, P. 890-8 95.
[75] Ibid.
[76] Ibid. Concerning the definition of CGs the national definitions are not identical. However, most definitions reflect a common position that "control (by virtue of majority of voting rights, power to nominate the majority of the directors) is the basic element of CGs or parent-subsidiary structure. For example, see the rules of Art 16 of the German Stock Corporations Act ("AktG") of 19565 and see Art/S.736 of the English Companies Act from 1985 ("CA'85") and Art L233-1 of the French Code de Commerce ("CC"). It is presumed in most of the legislations that the parent company exercises control over the subsidiary. See also the definition of parent in terms of "control and ownership" under Seventh Council Directive 83/349/EEC on consolidated accounts, OJ (EC) 1983.

holding company, which owns at least 95% of the shares of a subsidiary), contract group (created by 75% of the shareholders in each of two companies resolving that their companies enter into an enterprise contract, granting to one company (the parent company) the right to direct the other company (the controlled company)), and *defacto* group (a de facto group exists where one company may exercise, whether directly or indirectly, a dominant influence over another company).[77] Concerning the choice of regulatory approaches, the German corporate law preferred the SEA that sees CGs as a separate entity.[78]

The second experience can be taken from Portugal's commercial law which contains four types of CGs but without defining what CGs are. These four types of CGs are group of simple participation (e.g. holding 10% share in another company), group of mutual participation (holding 10% share in each other), group of control like the German one, and companies of "groups"[79]. It is very interesting to see in Portugal's legal system that the regulatory approach toward CGs is not universal rather fitted to each policy considerations of different areas of the law. For example, in tax and accounting laws SEA is adopted while in labor law, banking law and Competition Law, SEUA or enterprise principle is taken".[80]

The third survey of experience presents the UK's legal system and practice concerning the regulation of CGs. Though there is no specific law for CGs, UK courts recognized group structure as one means of doing business and they frequently employ entity approach but tend to pierce the group veil in some circumstances.[81] In this regard, it must be underlined

[77] Companies & Securities Advisory Committee, as cited above at note 18, p.24. The German Law of affiliated companies defines affiliated enterprises as "one or more controlled enterprises together with a third enterprise able to exert control over them" (Art.18 of the AktG, Akti engesetz" of 1965).

[78] Blumberg Phillip, as cited above at note 16, p. 162-163. This is because; while the act or the Konzernrecht does not apply to all groups and only includes public stock corporations or Aktiengesellschaft (A.G.) most subsidiaries are organized as private companies, or Gesellschaft mit beschrankte Haftung (G.m.b.H.), for which the act does not apply.

[79] The Code of Commercial Companies ("Códi go das Sociedades Comerciais", abbreviated as CSC), enacted in 1986, contains a unitary set of rules regulating the relationships between companies, in general , and the groups of companies, in particular . See Art 48 1-508 of the Code.

[80] Antunes, Engrácia José as cited above at note 16, p.2-33.

[81] Companies & Securities Advisory Committee, as cited above at note 4, p. 5. There are also cases of applying enterprise approach like through the requirement of consolidated account for CGs, see Edwards J. R. and Webb K. M., "THE DEVELOPMENT OF GROUP ACCOUNTING IN THE UNITED

here that UK, followed by its common wealth spin-offs, is among most nations that strictly committed to the traditional separate entity principles of corporate law.[82]

However, despite such general rigid adherence to entity principles, UK's jurisprudence shows some variations on judicial and statutory basis. i.e., while the judicial system stick to entity principles enterprise law is adopted in statutory laws like in some isolated areas of company law, tax law, antitrust law and in labour law.[83]

The fourth and the final reflection of experience in this study is taken from the French legal system and practice.

Under French legal system, while entity principle is the rule there are instance where by the French laws adopted enterprise principles for the regulation of CGs. For example, the French Bankruptcy Act imposes liability on the parent company for debt of its subsidiary for certain grounds.[84] These grounds are when the parent company excessively intrude in to the management of the subsidiary and failed to use due care, utilizes the subsidiary as a facade for its own business, and when it disposes the assets of its subsidiary as its own.[85] This is similar with the American experience of piercing corporate veil. In addition, the French commercial law also imposes liability on a parent company under the principle of "*confusion des patrimonies*" which is also similar with the doctrine of piercing corporate veil.[86] This enterprise principle is also manifested in some provisions of French labour law.[87]

KINGDOM", the Accounting Historians Journal, Vol. 11, (Spring 1984), No. 1, Published by: The Academy of Accounting Historians p. 3 1-61.

[82] Blumberg Phillip, as cited above at note 16, P. 154.
[83] Id, P. 155.
[84] Id, P. 163. See also Sections 101 and 180 (formerly 99) of the French Bankruptcy Act.
[85] Ibid.
[86] Id, p. 163-164.
[87] Id, p. 164.

2.5 CORPORATE GROUPS IN THE ETHIOPIAN BUSINESS AND LEGAL ENVIRONMENT

2.5.1 MAJOR CORPORATE GROUPS IN THE ETHIOPIAN BUSINESS ENVIRONMENT

Starting from the period of economic policy change by the FDRE government, the business environment of Ethiopia unleashed private economic actors in the liberal economic atmosphere. In effect the private sector has created, among others, a trend of operating businesses in a cluster model. However, despite the proliferation of numerous ECGs in the country it is quite difficult to get concrete data concerning their number, manner of management and structural organization. This difficulty, apart from expressed in the limitation of this study, is attributed to the virtual absence of academic researches and the resulting lack of adequate literatures concerning ECGs. In addition, with the exception of financial ECGs, which are not within the scope of this study, there is no well organized system and institution responsible for the regular follow up of ECGs.[88]

As a result, to the full knowledge of this study, there are only two major documents that comprehensively dealt with the major ECGs and on which this study has to relay on.

Accordingly, the first comprehensive document was produced by John Sutton and Nebil Kellow in 2010/11, titled as "An Enterprise Map of Ethiopia" that has depicted the leading individual firms and ECGs in major sectors of the country.[89] This document categorizes the private sector of the country in to three classes: the various MIDROC companies and conglomerates, owned by Sheikh Mohammed Al Amoudi; the endowment-owned companies, including those of EFFORT, which are closely allied with ruling party

[88] As observed by this researcher and as per the information from Mr. Deressa, the head of licensing and registration of business firms at the Ministry of Trade, the ministry to whom the power of over-sighting business entities is vested is not exercising its power as envisaged by the commercial Code. The major reason is, as he said, lack of proper and adequate institutional infrastructure and capital that can effectively help the discharge of this duty.

[89] Sutton John and Nebil Kellow, AN ENTERPRISE MAP OF ETHIOPIA, (2010/11/15), International Growth Center, "Ethiopia", International Growth Centre, Published in association with the London Publishing Partnership.

perspectives; and the rest.[90] The second document is produced by the African Power and politics research program in 2011 which is concentrated on and listed the leading endowment funded CGs in the country.[91]

Hence, the major ECGs in Ethiopia includes the MIDROC CGs (owned and chaired by Sheikh Mohammed Hussein Ali Al-Amoudi, an Ethiopian-Saudi national and investor with an investment portfolio spanning many countries and having more than 70 companies in Ethiopia; EFFORT companies consisting more of than 16 companies; other endowment funded CGs like Tiret in Amhara regional state (now is on the way to own 37 companies), Tusma in Oromiya regional state, and Wendo in SNNP regional state; AHADU group having 5 companies; DH GEDA having 7 companies; East African Holdings having more than 9 companies; Brothers flour and Biscuit factory (more than 4 companies); Sunshine Construction (3 companies); Kangaro group consisting more than 8 companies; 3F CGs with more than 11 companies; Dire group consisting more than 2 companies; and from financial sector, the sister companies like Awash International Bank and Awash Insurance, Dashin Bank and Nyala Insurance, United Bank and United Insurance, NIB Bank and NIB Insurance, Abyssinia Bank and Nile Insurance, and Wegagen Bank and Africa Insurance.[92]

Table2.1: Sample Companies within the existing ECGs and their share holders (both legal and natural persons)

No.	Entities in which share is hold		Share holding in percentage by different share holders (legal/natural person)						
		30%	50%	60%	70%	75%	80%	90%	98%
1	National Mining Corporation				SMHA				
2	Kombolcha steel		Sheik Mohammed						

[90] Id, P. 25.

[91] Vaughan Sarah and Mesfin Gebremichael,, Rethinking business and politics in Ethiopia: The role of EFFORT, the Endowment Fund for the Rehabilitation of Tigray, (2011) African Power and politics research report, No.2.

[92] Ibid. see also Sutton John and Nebil Kellow as cited above at note 87 and Mehamed Aliye Waritu, as cited above at note 37. The numbers of companies are updated by the survey of this study. Accordingly the 41 companies of MIDROC expressed by Sutton John and Nebil Kellow are now reached 70, according to the Director General of the Ethiopian competition and consumer protection Authority.

	Products Industry (KOSPI		Hussein Ali Al Amoudi (SMHA)						
3	Huda Real Estate	MIDROC construction PLC			SMHA				
4	Elfora Agro Industry PLC				SMHA				
5	Wanza Furnishing Industry		MIDROC construction PLC						
6	MIDROC Gold Mine PLC			SMHA					
7	Summit engineered plastics PLC			SMHA					
8	Modern Building Industry				SMHA				
9	MIDROC Construction PLC				SMHA				
10	Kangaroo Plastics				Ato Yirga Hayile(Kangaroo group) (YH)				
11	Batu Tannery PLC				YH				
12	Trans Ethiopia					Guna Trading			
13	Moha Soft Drinks Share company					SMHA			
14	Kangaroo shoe					YH			
15	Kangaroo foam					YH			
16	Derba MIDROC Cement						SMHA		

	Factory								
17	Unity University PLC						SMHA		
18	DH Geda G.I. Sheet Factory PLC						Ato Dhuguma Hunde Geda (DH Geda Group(DH)		
19	DH Geda Batrie							DH	
20	DH Geda Trade and Industry Private Limited Company							DH	
21	DH Geda Blanket Factory PLC								DH

Source: Prepared by the researcher from data obtained from Mehamed Aliye and MoT (The Companies Registration file or document kept at the Ministry of Trade (MoT), Reg. No.No./AA/pc/1/0008/88,EIA/pc/01/0069/90,EIA/pc/01/0066/90,MOTI/pc/1/0006/87,EIA/pc/01/0015/88,MOTI/pc/0149/95,EIC/pc/01/0141/99,EIA/pc/01/0003/88,EIA/pc/01/1071/06,020/2/6164/2001,EIE/pc/1/0017/88,Reg.No.AA/pc/9/3007/91,AA/pc/4/01263/94,AA/pc/2/1073/85,AA/pc/7/2467/85).

2.5.2 MODE OF CREATION, ORGANIZATION, STRUCTURE AND MANAGEMENT OF MAJOR CORPORATE GROUPS IN ETHIOPIA

Concerning, the ownership, mode of creation (or be it affiliation), structural organization and management situation of the industrial CGs, which is the focus of this study; they can be summarized as follow.

- At the outset a trade diagnosis conducted by a team of experts revealed that the majority of corporate firms, including the above industrial CGs with the exception

of endowment owned CGs, are family owned or closely owned business entities.[93] For example, MIDROC CGs, AHADU CGs, DH GEDA CGs, East African Holdings, Brothers flour and Biscuit factory CGs, Sunshine Construction CGs and the like can be cited in this regard.

- The major sectors in which they are involved includes mining, construction and construction materials, agro -processing, import-export trade, manufacturing, agriculture, printing and packaging, health sector, transport, and service sectors like consultancy and hotel service. This is with the exception of MIDROC and EFFORT that are engaged in almost all major sectors of the country.[94]

➢ With respect to the mode of creation of the CGs, it has been said that with the exception of Endowment owned companies like EFFORT, all of the indicated CGs originated from family ownership and still they are. As a result, it would be wrong to cite dominant share holding as a mode of affiliation in ECGs which is the feature of other country's CGs.[95] Rather, the most noticeable form of corporate networking in Ethiopia are common management (team or individuals), cross management, new establishment and acquisition or purchase of new firm.[96]

➢ The majority of the ECGs, chiefly EFFORT and MIDROC companies, are structurally organized in the form of PLCs, engaging in entirely different business activities (called, conglomerates), and vertically integrated (with the exception of some horizontally structured companies).[97]

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[93] Booz, Allen and Hamilton, Ethiopian commercial law and institutional reform and trade diagnosis, United State Agency for international development, (2007), p.19. EFFORT (Endowment fund for the rehabilitation of Tigray) is not a personal business to any trader rather it is owned by "ENDOWMENT" funded by TPLF.

[94] See TIRET THE MIDROC Ethiopia Group corporate magazine October 2012, Free Copy, special edition, attribute to October 2012 Free Copy Special Edition Prime Minister Ato Meles Zenawi, P.4; see also Vaughan Sarah and Mesfin Gebremichael, as cited above at note 89, p. 1, 28-29, 37, 47, and 54

[95] This is the second point of difference between this study and the study conducted by Mehamod Aliye. The latter cited dominant shareholding as mode of affiliation for CGs in Ethiopia. The argument of this study is it is their being family origin that yield such status with the exception of financial groups. ECGs are not similar with other country's CGs in which we can find dominant shareholding as a mode of parent subsidiary networking. See Mehamed Aliye Waritu, as cited above at note 37, p. 40-46.

[96] For example the major investment components of MIDROC and EFFORT are acquired by privatization process. See John Sutton and Nebil Kellow as cited above at note 87, p.25-28.

[97]The African power and politics program research has exposed that effort owned companies are highly integrated both vertically and horizontally pertinent to the achievement of its objective. See Vaughan Sarah and Mesfin Gebremichael, as cited above at note 89, p. 138. The case of MIDROC and other

- And lastly, but not the least, it seems easy to guess as to what would be the feature of management system in the mentioned ECGs. It is highly connected with their being family based and thus most of them reflect a highly centralized or power centric and in some CGs pyramidal management with some operational autonomy for the member company managers. For example, this is the case of AHADU CGs (where Solomon Wendemneh and his wife are acting as a managing director and deputy managing director of the companies), DH GEDA (DH GEDA Trade and Industry serves as a corporate office in managing the companies and the owner's children are key management players), and in East Africa holding CGs (Mulugeta Gebremedhin manages the company on behalf of the founder and managing director of the company. The HQ of the company serves as a corporate office for all subsidiaries).[98]

However, let's see the two major ECG's, EFFORT and MIDROC, management situation in brief.

In case of EFFORT, pursuant to its objective, mission and vision, the overall governance is made by a council of 55-75 made up of representatives appointed from Tigray regional and local governments, and other associations[99],. Then there is a board consisting of 9-12 members which is accountable to the council and which in turn control the so called, group managers. The African power and politics research result concludes that "The firm (member of EFFORT) has operational autonomy, where the general manager makes higher-level decisions. However, for major capital investments, adding or dropping product lines and other strategic issues, decisions are made at board level in the presence of the CEO of EFFORT".[100] For the facilitation of these centralized administration and accountable

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mentioned CGs is also similarly treated as vertical integration by Sutton John and Nebil Kellow, Id, p. 26 and 31.

[98] Sutton John and Nebil Kellow, Id, p. 15-22.

[99] Vaughan Sara and Mesfin Gebremichael, as cited above at note 89, p. 10, 12, 37-38.

[100] Sutton John and Nebil Kellow as cited above at note 87, p. 47 several of the individuals who constitute the top leadership of EFFORT are represented in the 5-person Executive Committee of the TPLF, alongside the leader of the government. Thus, any serious difference of view between the Office of the Prime Minister and the EFFORT Board, for instance, would strike at the heart of party cohesion. Most sources interviewed consider that, whatever formal legal differentiation there may be between EFFORT

system, the EFFORT head office (which was in Addis Ababa but now transferred to Mekelle), serve as the center of EFFORT companies nerves system.[101]

With regard to MIDROC CGs, the companies under the investment group are classified into categories of MIDROC Ethiopia investment group, MIDROC Group Companies, and MIDROC Ethiopia Technology group. The CEO of each company has operational and financial autonomy while it remained his/her duty to consult the owner on major strategic decisions and actions.[102] However, uniquely, among the technology group of companies, 16 of them are managed by one person, Dr. Arega Yirdaw. The integration between the companies of MIDROC is very high as depicted by the corporate magazine of the group where, among others, they have annual general meetings of general managers, financial heads and the like with view of synergizing the companies under the group.[103]

2.6 THE LEGAL AND PRACTICAL STATUS OF CORPORATE GROUPS IN ETHIOPIA

In the previous section of discussion we have seen that CGs are already become the main modality of doing business in Ethiopia. They have reached even to the point where one cannot ignore them when the need to count the widely diversified business entities arises.

However, despite such paramount practical presence their legal status in the present Ethiopian legal system in general and under the Ethiopian Commercial Code (here in after, the Code) in particular remained unexplored.[104] An attempt has been made by some law students to uncover the interplay of ECGs and Code and virtually all of them concluded

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and the ruling party, politically unsanctioned commercial strategy on the part of the endowment-owned companies would be unthinkable. This is a good instance of strong rent centralization.

[101] Interview with w/ro Zewide Kahsay, head of finance department, EFFORT liaison office, Addis Ababa, Bolle road, Mega BLG. As she said the office is tasking with the coordination of the companies under the power of the highest deciding organ of EFFORT, the Council.

[102] Sutton John and Nebil Kellow, as cited above at note 87, P. 22-28. The researchers noted that due to the absence of a holding company law in the country, the CEO has become a legal partner in each company under the technology group, with full Authority to assign general managers to each company.

[103] TIRET THE MIDROC Ethiopia Group corporate magazine, as cited above at note 92.

[104] The Commercial Code of the Empire of Ethiopia, Proclamation No. 166/1960, Negarit Gazeta, Year 19, No. 3, Addis Ababa, 5th May 1960.

that CGs are left unregulated.[105] The reason for such unregulated status, as expressed by the academicians in varying degree, is due to the absence of or inadequacy of pertinent rules required regulating existing CGs.

This study, before sharing these conclusions, surveyed relevant provision within the Code to check whether this assertion is valid and viable.

Accordingly, whether the Code really, from the outset, recognized or at least envisaged the present CGs is the primary question to be answered for any attempt to find proper legal rules within the Code.

The careful examination of provisions like Art 344 (that deals with the rules of joint holding), Art 370 (dealing with persons not competent for being auditors), Art 379 (rules of auditing the accounts of holding company), and Art 384 (investigation of holding and subsidiary companies by MoT) clearly depict that the Code has already envisaged CGs. In addition, 360(1), Art 451 (rules on consolidated account) and other provisions like Art 356, and 556 of the Code give further clue as to the implied recognition of CGs by the Code.

Coincided with this recognition, it is also vital to see that the Code, consistent with its traditional corporate law principles, adopted entity principle or SEA in the regulation of the CGs it has envisaged. Meaning, as a principle, the Code employs SEA as can be seen from the majority of the provisions that are fashioned for single corporate entity. However, there are also instance by which the Code adopted enterprise principles or SEUA as in the case of, for example, Art 451 and 384.

Yet, the problem arises when one asks the adequacy and relevancy of such provisions in regulating the contemporary ECGs. This is, at least, for the reason that while the existing ECGs, as noted before, appeared in the form of PLCs the stated provisions are meant for the regulation of share companies. i.e., all mentioned provisions that imply the recognition of CGs by Code are rules designed to regulate share companies rather than PLCs which is

[105] Among others, it includes "lifting the corporate veil in corporate groups under the commercial Code" (Bruk Kefyalew, 2003, LLB), "the need for the regulation of group of companies (parent and subsidiary) in Ethiopia" (Belayneh Ketsela, 2006, LLB), "affiliate companies in Ethiopia: analysis of organization, legal framework and the current practice" (Mehamed Aliye, 2010, LLM), and "The legal and institutional framework governing company groups in Ethiopia and the current practice" (Yitayal Mekonen Ayalew, LLM).

the main feature of ECGs. In addition, they do not regulate the basic aspects of CGs in same manner we saw before.

As a result, this study concludes that, strictly speaking and particularly in the light of the practical feature of present ECGs, it is possible to say that we do not have laws regulating CGs in Ethiopia.[106]

Furthermore; it is also very pitiful to have nothing changed on the present national effort to revise the Code with a view to modernize it. Despite comment made by the team of experts that technically revised the new draft Code to have for further study and concern on CGs, the new draft Code takes the silence of the preexisting Code concerning the modern regulation of Ethiopian CGs.[107]

The practice is also the reflection of the existing Ethiopian single entity corporate law although it might have some discerning point. Accordingly, the information from the Ethiopian Revenue and Custom Authority reveals that existing CGs, for tax purpose, are treated not as a group but as a separate entity.[108] Meaning, from the tax law stand point, the approach is SEA though the Authority follows SEUA for auditing purpose. In addition, as noted by Mr. Desta Tesfaw, there may be "collective liability" for the CGs in the event of

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[106] See Winiship P. (Editor and Translator), Background Document of Ethiopian Commercial Code of 1960.(, Faculty of Law, Haile Selassie I University, Artistic Printers Addis Ababa Ethiopia, Addis Ababa, Ethiopia, 1974), the general document with focus on part I, p. V-23. In this regard, there are two points of view concerning the drafters of the Code. While one of the views sees the absence of such kind of provisions from the Code as "intentional" act of the drafters considering it as unnecessary at the time, the other view suggests "a legislative overlooking". The latter view believes that the scattered but very few provisions within the Code concerning some aspects of CGs in the country indicate the intention of the legislature to regulate CGs in the Code. However, as professor Escarra noted, it seems that the silence toward CGs within the Code is intentional considering it as un-timing at least given the then economic condition.

[107] RECOMMENDATIONS AND POSITION PAPER OF THE BUSINESS COMMUNITY ON THE REVISION OF THE COMMERCIAL CODE OF ETHIOPIA, (JULY 2008), Prepared by A TEAM OF FOURTEEN NATIONAL EXPERTS, Addis Ababa Chamber of Commerce & Sectoral Associations, Private Sector Development (PSD)Hub, Supported by Sida, Hosted by AACCSA, comment on Part II, No. 1, p. 20 and No. 29..

[108] Interview conducted with Mr. Birhanu Sisay, tax payer's education and support team coordinator of the Ethiopian Revenues and Custom Authority, on August 19, 2013. The interviewee opined that, had it not been for the federalism structure of the constitution which may make any unitary form of tax collection unconstitutional, a consolidated tax approach might be efficient for CGs. The unconstitutionality possibly could come from the fact that CGs are operating in both Federal and Regional states territory for which the constitution has made tax jurisdiction and demarcations. See the Federal Democratic Republic of Ethiopia (FDRE) constitution of the 1991, Art 52, 55, 62, 96 and 97.

criminal offences concerning tax which indicate the possibility for SEUA approach toward ECGs.[109]

Apart from this, the survey conducted by this study shows that ECGs are not known by most of relevant governmental institutions including the Ethiopian MoT, MoI and even the Ethiopian courts[110]. i.e., in these institutions, CGs are not known by their group personality and therefore, each and every member company in the group is considered to have its own separate personality distinct from the group. But, there are also institutions such as the Ethiopian Chamber of Commerce and Sectoral Association (ECCSA) and Addis Ababa Chamber of Commerce and Sectoral Association (AACCSA) that deals with these CGs in a manner that shows their recognition to these CGs. For example, according to the head of the legal department of ECCSA, the office may call these CGs for different purposes through their notable delegates or representatives.[111] As he said, this kind of official relation implies that, ECGs are already known by the ECCSA and AACCSA though they are poorly dealt by exiting Ethiopian laws.

In general, it is possible to say that CGs in the Ethiopian legal system remained unregulated or poorly regulated, if any at all. In addition, even recent relevant laws of the country don not have any meaningful legal provisions for CGs which makes the road to regulate them far from being reached.

[109] Interview with Mr. Desta Tesfaw, the criminal prosecution department of the Authority, August 17, 2013.
[110] Interview with Mr. Sintayehu Zeleke, judge in the Federal High Court, BPR and Commercial bench, August 17, 2013.
[111] Interview with Mr. Chelem setegn, Head of legal department of ECCSA, September 20, 2013.

CHAPTER THREE

3. COMPETITION LAW AND POLICY VIS-À-VIS CORPORATE GROUPS: THE INTERNATIONAL PERSPECTIVES

3.1 GENERAL OVERVIEW OF COMPETITION LAW AND POLICY

3.1.1 DEFINITION, GOALS/OBJECTIVES, RATIONALE AND SIGNIFICANCE OF COMPETITION LAW AND POLICY

To recall, the previous chapter has discussed the conceptual and legal aspects of CGs which is mainly intended to depict what CGs look like both at national and international level. Since the major theme of this study is to explore the interplay of CGs and competition issues, this chapter is, accordingly, devoted to the discussion of Competition Law and policy from the international perspective. As a prelude, due to their preeminence over other jurisdictions on the development of Competition Law and policy, this study has used the legal and jurisprudential material of US and EU's jurisdiction in its general and particular conceptual discussion. i.e., the US antitrust legislation and the rules of competition under the Treaty Establishing the European Community (EC) or the present Treaty on the Functioning of European Union (TFEU) will be consumed.[112]

Accordingly, from the outset, it is understandable that words/phrases such as "competition", "competition policy", "Competition Law (antitrust law in the US)", "competitive market", and "competitiveness", inter alia, are familiar in a political economy in which market mechanism is the rule. i.e., it is unimaginable to conceive of competition in a situation where market forces are not allowed to operate freely. Consequently, competition, in the context of free market economy, can be defined as a rivalry between sellers of goods and/or services (simply, firms now on) for the patronage of customers or buyers so as to achieve specified business objectives.[113]

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[112] See the former EUROPEAN UNION CONSOLIDATED VERSIONS OF THE TREATY ON EUROPEAN UNION AND OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY TITLE VI, COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS, CHAPTER 1: RULES ON COMPETITION, (2006), Official Journal of the European Union, (focusing on Art 81 and 82), and the present CONSOLIDATED VERSION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION TITLE VII COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS CHAPTER 1 RULES ON COMPETITION, (2010), Official Journal of the European Union, focusing on Art 101 (replacing Art 81of EC) and Art 102 (replacing Art 82 of EC).

[113] This definition is the synergy of definitions obtained from Directorate-General for Competition, "glossary terms used in EU Competition Law, Antitrust and control of concentrations", (July 2002), Brussels, P.10; Dr. Solomon Abay (PhD), Competition and consumer protection, (November 2011, Addis Ababa university-School of graduate

Competition Law and policy, on the other hand, are tools or instruments of preserving, protecting, controlling and shaping of sound and fair market competition.[114] However, it must be noted that although the two words are used interchangeably, they are different. While competition policy connotes a wide range of government policies, laws, measures and actions which have implications or effect on competition and competitiveness, Competition Law represents the specific legislations and rules designed to implement competition policy.[115] In other words, competition policy is a wider and multiple aspect of competition than Competition Law which is the specific legal aspect of competition in market.

After such brief explanation, one may ask why we need competition, competition policy and Competition Laws.

The international practice tells us that there are varieties of reasons or justifications for the growing need of competition in a given economic system. Among others, the following can be considered as the basic justifications for designing competition in a given political economy.[116]

- The strong and growing criticism on the ability of state led economy and negative perception that it is the most undemocratic, unfair and inefficient system in allocation of resources;
- The overwhelming global interest in transforming from administrative to competition and regulatory state exemplified by industrialized states causing reform motive toward free market economy in many part of the world; and

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studies, LL.M. program), (lecture note, unpublished), p.3; Dr. S CHAKRAVARTHY, The Need And Rationale For And The Objectives Of Competition Policy And Competition Law, p. 14.

[114] Ibid.

[115] The relation between competition, Competition Law and competition policy can be summarized as; competition is a set of both while Competition Law is a subset of the broader competition policy. See Paasman R. Berend., Multilateral rules on competition policy: an overview of the debate, (December 1999), International Trade Unit Division of Trade and Development Finance, Santiago, Chile, p. 19-22; Becker Florian, "THE CASE OF EXPORT CARTEL EXEMPTIONS: BETWEEN COMPETITION AND PROTECTIONISM", Journal of Competition Law and Economics, p.2; see also a definition by Clark john, Phillips Bernard and Hewitt Garry in The World Bank and Organization for Economic Development (OECD), "A Framework for the Design and Implementation of Competition Law and Policy", (1999), D.C. and Organization for the economic cooperation and development (OECD), Paris, P. 141; Huffman Max, Competition Law and Consumer Protection, P. 1; and Dr. S CHAKRAVARTHY, as cited above at note 111, p.4.

[116] See CHAKRAVARTHY, as cited above at note 111, p.3; Dr. Solomon Abay; as cited above at note 111, P. 3; Dr. Solomon Abay, theories and principles of economic law, (2012-2013), Addis Ababa School of graduate studies, (LLM module for Business law), (unpublished), P. 1.

- The growing acceptance that competition helps decentralization of decision making which is the core idea of democratic system, are the key interests that necessitated the invention and design of competition and competition policy.

In addition, in line with its legal nature, correction of market failure or imperfection, control of market abuses and shaping of business culture is cited as the main rationale for Competition Law.[117]

These justifications for need of competition and Competition Law definitely bear two things. One is; as to the very objective of the Competition Law and the other is as to the significance of competition. Meaning, they can give us a clue as to what could be the objectives of competition policy and law while at the same time they can show us how significant competition is in a given market economy.

Consequently, there are commonly known objectives of Competition Law and policy. However, it must be noted that the statements of the objectives varies across jurisdictions.[118] There are also experience of classifying the objectives as primary and secondary (supplementary or related objectives), and economic and non economic.[119] This trend of classification has raised an immense tension concerning the prioritization and harmonization of multiple objectives in the design and implementation of Competition Law which we will see shortly.

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[117] Ibid.

[118] This difference is given the variance, among others, on the rationale behind the recognition of competition in each jurisdiction, the policy perspectives and political dimension of Competition Law in every jurisdiction. For example, in some countries, such as Canada and New Zealand, the primary objective of the competition legislation is to maintain and encourage competition, with emphasis being placed on the promotion of economic efficiency. In other jurisdictions, such as the United Kingdom, emphasis is placed on "public interest" – a broader concept than that of competition alone. In the United States the enforcement of Competition Laws has increasingly focused on consumer welfare and economic efficiency. In the European Union, priority is given to economic or market integration and prevention of dominance by large firms. In Germany, as in several other member States of the European Union, preserving or ensuring freedom of individual action and economic freedom is viewed as being important among the objectives of Competition Law policy. In several developing countries, the spectrum of different objectives of Competition Law can be observed. For example, in Colombia, which is a small open economy, emphasis is placed on economic efficiency. In Indonesia and the Russian Federation, the law includes concerns regarding fairness, diffusion of economic power and safeguarding small and medium-sized enterprises. See Khemani Shyam R., UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT APPLICATION OF COMPETITION LAW: EXEMPTIONS AND EXCEPTIONS, (2002), UNCTAD/DITC/CLP/Misc.25, UNITED NATIONS, New York and Geneva, P.8; see also Fox M. Eleanor, US and EU Competition Law: a comparison,"p.339-354.

However, keeping in mind what has been said, the survey of different jurisdictions reveals that the objective/s of Competition Law and policy, inter alia, includes the following.[120].

- Prevention of restrictive business practices and abuse of economic power of firm/s;
- Promotion of efficiency, consumer protection and enhancement of consumer welfare;
- Maintenance of the competitive process or of free competition, guarantying of freedom of trade, access to market and openness of the market for traders;
- Improving market access by reducing entry barriers through deregulation, privatization, tariff reduction, or removal of quotas and licenses;
- The prevention of wealth transfer from consumers to producers;
- The protection of personal autonomy, equality and liberty;
- The protection of free market and democracy against Marxism and totalitarianism;
- Elimination of governmental policies that lesson competition, the protection of small business; and
- The protection of workers and even the protection of environment.[121]

Finally, economists and legal scholars generally agree that, competition is significant in many aspects. Among them, promoting efficiency, encouraging innovation, punishing laggards, facilitating better governance, ensuring availability of goods in abundance with acceptable quality at affordable price, enhancing international performance, and increasing employment opportunities are the few to mention.[122]. In addition, it lays the groundwork for higher standard of living, provides for institutional change around the world by modifying the effect of existing institutions, and also serves as an effective substitute for bankrupt systems. It also helps to create an enabling environment for entrepreneurial development which is vital for vibrant economy,

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[119] Ibid.

[120] Ibid, Dr. Solomon Abay, as cited above at note 111, P.13; The World Bank and OECD, as cited above at note 113, p. 2-3; Crampton S.Paul and Facey A. Brain, "revisiting regulation and deregulation through the lens of competition policy, getting the balance right", Kluwer law review, 2002, international, Netherlands, p.28; BJ Rodger, and MacCulloch, COMPETITION LAW AND POLICY IN THE EC AND UK, (2nd ed., 2001), Cavendish Publishing Limited Cavendish Publishing Limited, the Glass House, Wharton Street, London WC1X 9PX, United Kingdom, p. 12-14.

[121] Ibid.

[122] Dr. Kuoppamäki Petri, EU Competition Law (February 2013, University of Helsinki, lecture note) (unpublished), p. 2-10; The World Bank and OECD, as cited above at note 113, p. 22; and chapter seven, p. 133-145; Crampton S. Paul and Facey A. Brain, id, p. 27; and Dr. S CHAKRAVARTHY, as cited above at note 111, p. 4.

and promotes good governance in the corporate sector as well as in government by diminishing the opportunities for rent seeking and corruption.[123]

3.1.2 SCOPE OF AND TENSIONS IN THE DESIGN OF COMPETITION LAW AND POLICY

Regarding the scope of Competition Law and policy, again it is reasonable to tell the existence of peculiarity between the two though they are similar in their goals or objectives.

Hence, competition policy, as pointed before, covers a broad aspect of government policies and measures that directly or indirectly affects competition and competitiveness in the market.[124] As we saw, it is more of political aspect of competition and for that reason it is wider in its scope than the more specific Competition Law. For example competition policy is concerned with industrial policy, privatization and regulation, financial and fiscal policy, trade policy (including tariff and non tariff restrictions, subsidies, antidumping actions), labor policy, environmental policy, and policies concerning health care and financial market.[125]

The scope of Competition Law, on the other hand, is very narrower than competition policy and covers structural and behavioral aspect of firms in the market[126]. While the structural component deals with merger, monopolization and market power concentration or domination, the behavioral or conduct component covers anticompetitive practices such as anticompetitive agreements, unilateral conducts, and abuse of dominant position.

In short, though the scope of Competition Law differs across jurisdictions, the usual areas of Competition Law are anticompetitive agreement (both horizontal and vertical), anticompetitive merger, abuse of market dominance, and anticompetitive unilateral acts like attack on good will, hoarding, refusal to deal and the like.[127]

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[123] Ibid.
[124] Dr. S CHAKRAVARTHY, id, p. 13.
[125] Ibid.
[126] Sometimes it is also said that Competition Law covers consumer protection and unfair trade practices. The World Bank and OECD, as cited above at note 113; Dr. Solomon Abay, as cited above at note 111, p. 97; see also Mehta S. Pradeep, competition policy in developing countries: an Asian Pacific perspective, consumer unity and trust society (CUTS) center for international trade, economics and environment, Jaipur, India, P. 81-84.
[127] Ibid.

At this moment, the reader must note that the discussions we made on the definition, objectives, significance and scope of Competition Law and policy are not without critical arguments. Meaning, there are lot of questions and tensions calling for attention in the design and implementation of Competition Law and policy so as to prevent inconsistencies, unpredictability or uncertainties. Particularly, the objectives, scope of application and implementation of Competition Law are the key areas that trigger critical arguments on the choices of principles, approaches and measurements. Just to make a brief account, the main tensions in the design and implementation of Competition Law and policy are:

- Multiple Vs single objectives, economic Vs non-economic, or efficiency Vs public interest objectives: - this is a choice for multiple objectives of Competition Law and policy including economic and non economic aspects under the umbrella of public interest on the one hand, and single economic objective with sole focus on efficiency on the other hand[128].
- General Vs Sectoral application: - a choice for the scope of Competition Law resonating on whether to apply it to all economic activities of both public and private enterprises on the one hand and to exempt or totally exclude certain economic activities mainly state owned enterprise and or public service enterprises on the other hand.[129]
- Legal Vs economic (per se prohibition Vs rule of reason):- a choice of approach whether to adopt an outright prohibition or case by case or rule of reason approach for anticompetitive practices so as to achieve the objectives of Competition Law.

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[128] In general policies related to trade, tariff, quotas, subsidy, antidumping actions, domestic content regulation, and export restraints; industrial policy, regional development policy, intellectual property policy, privatization and regulatory reform, science and technology, investment and tax policies, license for trades and professions; environmental, health care, telecommunications, cultural industries, financial markets, small and medium scale industry protection, and agricultural supports affect competition policy in the name of public policy. See The World Bank and OECD, as cited above at note 113, P. 8.

[129] In this regard the EU best practice advice and the UNCTAD model of competition rules (Art I) recommend that Competition Law should be applied to all sectors of economic activities to guarantee fairness, equality and non discrimination under the law. See Khemani Shyam, R., as cited above at note 116, P. 4-5; and UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, THE UNITED NATIONS SET OF PRINCIPLES AND RULES ON COMPETITION", the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, (2000), UNITED NATIONS, Geneva, TD/RBP/CONF/10/Rev.2. ((I) Scope. The law applies to persons and firms (both private and state-owned), but not to acts of the State itself.)

- Consumer policy Vs competition policy and law: - an issue of integration and harmonization of "consumers interest" on the one hand and "competitors interest" (producers, firms or sellers) on the other hand.[130]
- Competition policy Vs other governmental policies/sectoral regulations: - this is an issue of prioritization, integration, coordination or harmonization between other governmental policies and competition policies.[131] For example, should Competition Law be prioritized over other governmental policies in the event of conflict?
- Specific issues: - there are also specific and seemingly never ending arguments on choices of approaches, measurements and assessments. For example, how should dominant position be assessed or measured? Should it be qualitative or quantitative? How is the case of merger, agreement or unilateral actions? Shall we adopt rule of per se or rule of reason?
- Cost plus benefit approach: - there are cases when anticompetitive practices are allowed on the reason that their benefit is greater than their cost (exceptions). But, it remains to be questionable as to how the notion of "outweighing benefit" to be measured and how large the benefit should be. Also what should be the ground for such defenses? Should it be public interest or efficiency or consumer welfare?

In fact, despite such countless arguments on the choice of proper approaches, principles, objectives and scope of Competition Law and policy, there is a general consensus that; the objective of competition policy is to protect competition both from the government and the private actors and the protection of competitive environment is not for the sake of "competition or competitors", it is rather to serve other objectives.[132] However, this doesn't mean that there are

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[130] Competition policy comprises "the set of policies and laws which ensure that competition in the marketplace is not restricted in such a way as to reduce economic welfare". Whereas consumer policy "consists of preventing sellers from increasing sales by lying about their products or by engaging in unfair practices such as unilateral breach of contract or unauthorized billing". In addition, it is interested in preventing duress and undue sales pressure; information problems pre-purchase and undue surprises post-purchase. See Vickers J., Economics for Consumer Policy, (2004), 125th proceedings of the British Academy, p. 289: see also Florian Becker, as cited above at note 111, P. 2.

[131] There is a critical difference between sectoral regulation and Competition Law. While Competition Law assumes markets generally work well and thus leaves operational decisions for firms, regulation assume that direct or indirect intervention is necessary for prevention or market failure. See Crampton S. P. and Facey B.A., as cited above at note 118, p. 32; see also PAPADOPOULOS ST IS S. ANE, THE INTERNATIONAL DIMENSION OF EU COMPETITION LAW AND POLICY, published in the United States of America by Cambridge University Press, New York, p. 25-28.

[132] The World Bank and OECD, as cited above at note 111, P. 1-4; and Dr. Solomon Abay as cited above 111, P. 3.

hard and fast or a black-white ways out. Rather, it is admittedly, an issue of dilemmatic choice and of chameleon nature owing to the specific country need. As a result, as Dr. Solomon rightly said and to which this study gives support, empirical and contextual considerations, policy determinations and country specific situations will determine the proper choice in the design and implementation of Competition Law and policy.

3.1.3 ENFORCEMENT OF COMPETITION LAW AND POLICY

It is a plain knowledge that the mere existence of competition policy and law in a country is not enough in achieving the intended objectives. Rather, next to competition statutes, adjudication and enforcement body is necessary with a function of identifying pro-competitive from anticompetitive practices (cost plus benefit approach), and thus applying of the proper sanction to grant the necessary remedies. In principle, the enforcement of competition policy and law is required to be structured in to competition Authority, the sanctions (civil, administrative and criminal), and the legal protection mechanism (internal complaint mechanism, judicial review, arbitration and review by peripheral institutions like Ombudsman) components.[133] In addition, the competition Authority is required to be autonomous or independent of any political influence and must be free from budgetary control of government, and also its proceeding should be transparent, accountable and responsible.[134]

The competition Authority, even if it is not easy as such[135], once it has identified that an act is anticompetitive and selected the purpose it needs to attain through its sanctions (including deterring future anticompetitive conduct, restoring opportunities for competition, compensating victims, and simply putting an end to the unlawful conduct), then it will proceed to sanctioning and giving of proper remedies. In this regard, the OECD report noted that there are three categories of sanctions and remedies: structural, behavioral and monetary.[136]

While the structural remedies may require firms to sever links from assets they hold with a view to eliminate market power while creating or invigorating competitors, the behavioral remedies

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[133] Dr. Solomon Abay, as cited above at note 114, p. 4.
[134] Dr. S CHAKRAVARTHY, as cited above at note 111, P. 13.
[135] Id, p. 5. Usually and in most countries, Competition Authority has surveillance over anti-competitive activities and conduct indulged in private parties including companies, firms, producers and suppliers of goods and services. Government enterprises and departments are generally excluded from such surveillance.
[136] Organization for Economic Co-operation and Development (OECD), "Remedies and Sanctions for Abuse of Market Dominance" policy brief, P. 1-6.

may oblige a firm either to do or not to do something. Finally, the monetary sanctions, including fines, damages, and the disgorgement of profits, have the advantage of being relatively easy to understand and administer.

3.2 ANTICOMPETITIVE PRACTICES AND COMPETITION LAW: ABUSE OF MARKET DOMINANT POSITION AND ANTICOMPETITIVE AGREEMENTS

As we noted before, the major interest of Competition Law is the prevention of anticompetitive practices. These anticompetitive practices (also called restrictive trade/business behavior, conduct, or acts) are different from pro-competitive acts by their nature, object, intent or effect of impeding or distorting competition. These anticompetitive practices include abuse of market dominant position, anticompetitive agreements (collusive agreements), anticompetitive merger, acquisition and takeovers, and anticompetitive unilateral acts.

In line with the focus and objectives of this study, the following discussions are devoted to the conceptual frameworks of abuse of market dominant position and anticompetitive agreements.

3.2.1 ABUSE OF MARKET DOMINANT POSITION: DEFINITION, LEGAL CONCEPT, ASSESSMENT AND MEASUREMENT

3.2.1.1 DEFINITION AND LEGAL CONCEPT OF DOMINANT AND ABUSE OF MARKET DOMINANT POSITION

Market dominant position (herein after, dominant position) is a blend of legal and economic concepts that expresses the legal and economic status of a firm or firms together in a given assumed competitive market. Virtually, there are similar elements that define dominant position in different jurisdictions. For example, the European Court of Justice (herein after, ECJ) defined dominant position as "[A] *position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers*".[137] The UNCTAD model of competition rules also defined dominant position as "... *a situation where an*

[137] See United Brands v Commission, (Case C- 27/76, ECJ, E.C.R 207, 1978), P.18. See also Østerud Eirik, EU Competition Law – Abuse of Dominance (Article 102 TFEU), p.23.

enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services".[138]

Consequently, we can infer that a dominant position is a situation where a firm or firms hold or possess a position of economic strength or higher market power in a given market. In other words, it is a market concentration resulting from, among others, merger, acquisition, and government influence such as in state owned enterprise. For clear understanding of its concept, let's briefly see the basic assumptions and elements of its definition.[139]

Firstly, dominant position can only be imagined in a competitive environment whereby we can assess and measure the market power of the firm under question in relative manner. Secondly, it can be exercised by an individual firm or together with other firms. Thirdly, this competitive environment should be in a relevant market, which we will deal with shortly. Fourthly, the firm under question must have the ability or the power to control, or affect competitors, buyers/suppliers and ultimately of consumers. Fifthly, this power or ability is to raise profitable price above competitive level or behave or act independently of market forces. The sixth and final point is the mere existence or holding, possessing or having dominant position is not illegal rather it is the use or usually its abuse that concerns Competition Law.

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[138]See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT MODEL LAW ON COMPETITION, UNCTAD Series on Issues in Competition Law and Policy, Substantive Possible Elements for a Competition Law, commentaries and alternative approaches in existing legislations, (2007), UNITED NATIONS, New York and Geneva, chapter II, Art I (b).

[139] Paasman R., Berend as cited above at note 113, P. 294-317; G.R.Bhatia, Addl (Director General Competition Commission of India), ABUSE OF DOMINANCE IN FACT AND IN LAW, (unpublished), P. 1-14; The office of fair trade act, understanding Competition Law, Competition Law guideline, UK, P. 14. See also Federico Etro, U.C.S.C., "The EU Approach to Abuse of Dominance", (February 2006), department of Economics, ECG and Intertic, Milan, P. 1-23; Glossary terms used in EU Competition Law, as cited above at note 111, p.3; The World Bank and OECD, as cited above at note 113, P. 6; Some economists try to make distinction between market power and dominance. From an economists' perspective market power is the ability to price at levels that secure abnormal profit. Abnormal profit is generally determined with reference to an industry competitive benchmark. From a legal perspective there is greater ambiguity, for example US antitrust distinguishes between monopoly power and market power whereby market power refers to "the ability to raise prices above those that would be charged in a competitive market and monopoly power as "the power to control prices or exclude competition. They said Market power is economic concept which is a matter of degree. It also connotes the ability to restrict output and thus raise prices over the level that would prevail in a competitive market, without existing rivals or new entrants in due time taking away the customers. Dominant position is the ability to behave to an appreciable extent independently while market power is the ability to raise prices. In some cases market power does not entail dominance. See A. Hillman Smith-Vindelyn, "Market power, competition policy and developing economies Divergent conditions within African and Caribbean economies", the University of Northampton, Northampton, UK", Journal of Economic Studies, Vol. 34, (2007), No. 2, p. 120-135, Emerald Group Publishing Limited, 0144-3585 and Østerud Eirik, as cited above at note 135, P. 25-43; and MONTI GIORGIO, EC Competition Law, (2007), Cambridge University Press, The Edinburgh Building, Cambridge CB2 8RU, UK, P. 124-300.

Therefore, no matter how a firm is dominant, influential or strong in the relevant market there is no infringement of Competition Law. It is not anticompetitive by itself. Rather, it is the abuse (the use or exercise) of such position to the detriment of the competitive environment that triggers the concern of Competition Law.

Consequently, abuse of dominant position can simply be defined as the misuse, improper exercise or dangerous situation of dominant position. It is anticompetitive practice or behavior of a dominant firm that engages in abusive conducts affecting existing or new competitors, customers, consumers and the general public at large. Clearly, such acts abuse of dominant position is a dangerous to free, open access to market and alternative qualified and efficient choices to the consumer.

3.2.1.2 ASSESSMENT AND MEASUREMENT OF ABUSE OF DOMINANT POSITION: MAJOR STEPS AND APPROACHES

The determination, i.e., the assessment and measurement of abuse of dominant position is more of economics than a legal concept and it involves three major steps.[140]

The first step is the identification of relevant market which involves in the painstaking process of identifying the market context within which the dominant firm is operating.[141] This identification is vital in that it helps us to make boundaries of competing firms and competitive environment. It has two components: product market and geographic market. The question of to what extent a given product or geographic market is in the relevant market is mostly determined by consumer's preference.[142]

Accordingly, a product to which consumers switch as a result of small but significant price increase for non transitory period (SSPIN) of a product by the firm in question is regarded as a

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[140] The World Bank and OECD, as cited above at note 113, chapter II, P. 70-71; Rodger, BJ and MacCulloch, as cited above at note 118, P. 80-84; Østerud Eirik, as cited above at note 135, P. 20; Addl G.R.Bhatia, id, p. 19.

[141] Ibid.

[142] Ibid, P. 10-13. There are two ways of defining relevant market: just to determine which product is "alike or substitutory product". These are from demand side and from supply or seller side. But, international practice tells us that the demand side is the best approach whereby the extent to which customers switch to another product or supply market defines relevant market for the case at hand. However, it must be noted that the range of substitutability of products could be affected by the number of utilities fetched by the buyers from the product. Example, a buyer who can only use a product for only one purpose may easily switch to another product than the one who use it for two or more purposes.

product in same relevant product market.[143] For full identification of product market, this process repeats itself until there is no next product market to which buyers/consumers can switch to as a response to SSPIN by the incumbent firm. However, to be in same product market goods need not to be perfect substitute for each other, rather it is consumer's preference that matters.

Likewise, a relevant geographic market is a supply or market location to which customers or buyers switch to as a result of SSPIN in one supply location.[144] Again for the purpose of clear boundary of geographic market, this process repeats itself until there is no next place or supply location to which consumers switch as a reaction to SSPIN by one location.

The second step is the ascertainment of the existence of dominant position. By far it is most important and contentious step in the determination of abuse of dominant position. This is because; determination of "dominant position" requires a thorough calculation of the economic and legal status of a firm in the relevant market that in turn calls for consideration of so many intricate factors. Practically, there are two possible ways of assessment and measurement of dominant position. These are the qualitative and quantitative measurements.

The quantitative measurement is a figurative expression of how the firm is significant in the market and usually it is expressed through market share.[145] This market share is in turn measured by money value (value of sale like for heterogeneous products), units of sale (for homogeneous product), units of production, and capacity index like production capacity, or size of reserve and the like.[146] On this aspect, the general international assumption is; the greater the share of a firm the more likely to have a dominant position. However, it is admitted that it is nearly impossible to set threshold of "market share" in figurative way though it is also impossible to allege the abuse of dominant position for a firm with less than 35 % market share.[147] For example, presumption of dominance is made on the basis of percentage of market share in different jurisdiction such as Brazil - 20%; Canada - 60%; Denmark - 40%; Germany - 50%; Israel -

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[143] Ibid. But the question remained how large " small but significant price rise?" state differ in their approach such as in US and Canada, 5% increase is regarded as a threshold of buyer to switch to another product. See also Eirik Østerud, as cited above at note 135.
[144] Ibid.
[145] The World Bank and OECD, as cited above at note 113, P. 140-149; and Rodger, BJ and MacCulloch, as cited above at note 118, P. 87-99.
[146] The World Bank and OECD, id, p.14.
[147] Ibid.

50%; Poland - 40%; Norway - 60%; Russia - 65%; South Africa - 45%; U.K. - 40%; USA – 70 and EU-45%.[148]

The qualitative measurement, on the other hand, does not confine itself to the numerical measurement of dominant position. It assumes that market share is one of the many factors constituting dominant position. As a result, it takes in to account factors such as market share of the enterprise, size and resources of the enterprise, size and importance of competitors, commercial advantage over competitors, service network, dependence of consumers, dominant position as a result of statute or government company, barriers (entry, expansion or growth and exit barriers), countervailing buying power, market structure, contribution to economic development, price elasticity of demand, behavioral factors and profitability measurement.[149] For example, this approach is being followed in most of the developed competition regimes including Belgium, Cyprus, Finland, France, India, Ireland, Italy, Japan, Mexico, Netherlands, Spain, Sweden, Switzerland, and Turkey.[150]

In addition, recent research has exposed that out of 50 surveyed countries, 28 of them employ qualitative approach while the rest follows quantitative approach.[151] In the research most developing countries including Latin Americans employ qualitative approach using capacity indicators of a firm as yardstick for assessment of dominant position.[152]

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[148] Addl. G.R.Bhatia, as cited above at note 137, P. 17. Particularly EU has developed a court precedent as to the presumption of dominance. For example, presumption of dominance will be made when market shares > 50 % over time; (AKZO Chemie BV v. Commission, (Case 62/86, ECJ, E.C.R. I-3359, 1991), Para. 60), market shares > 70-80 % clear indication of dominance; (Hilti v Commission, (Case T-30/89, ECJ , Para. 92), market shares > 40% requires thorough economic analysis; and market shares < 40 % generally considered to be indicative of a firm not holding a dominant position.

[149] The World Bank and OECD, as cited above at note 113, P. 140-149; and Rodger, BJ and MacCulloch, as cited above at note 118, P. 87-99.

[150] G.R.Bhatia, Addl, as cited above at note 137, P. 17-18.

[151] Fikremarkos Merso, Imeru Tamirat Yigezu, and et al, "Review of the Legal and Institutional Framework for Market Competition in Ethiopia", a proposal to: Private Sector Development (PSD) Hub of the Addis Ababa Chamber of Commerce and Sectoral Associations (AACCSA), (February 2009), Produced and distributed by the Addis Ababa Chamber of Commerce and Sectoral Associations with financial support from the Swedish Agency for International Development Cooperation, Sida, Private Sector Development (Hub), Addis Ababa Chamber of Commerce and Sectoral Associations (AACCSA), p.20.

[152] The World Bank and OECD, as cited above at note 113, P. 14. In this regard, capacity is being used for manufacturing industries. The calculation of capacity is the end result of many factors implying how the firm is actually powerful in the relevant market. For example in same manner when a firm with large current sale but declining reserve of volume of sale shouldn't be considered as significant for the present, the same holds true for a firm which have large sale current value but with deteriorating capital stock. Meaning it shouldn't be regarded as a

However, notwithstanding such discrepancy in approach among states, it is generally agreed that (i) though it is one of the significant factor, market share alone cannot be evidence of dominant position, (ii) qualitative approach, given the importance of potential competition and given the difference about what is needed to ensure competition on industry characteristics, is the appropriate approach., and (iii) however, in case of difficulty of measurement, quantitative approach using market share is a relief [153]

The third and the final step is determination of the existence of abuse of dominant position. i.e., determination of whether the acts conducted by the dominant firm constitute an abuse under the Competition Law which we will discuss under the next sub section.

To sum, mathematically, abuse of dominant position = relevant market (product or geographic) + dominant position (market strength or market power + the ability to maintain such market power/which is the work of many factors we stated above) + abuse (misuse or improper or illegal exercise) of one's dominant position.

3.2.1.3 ACTS OF ABUSE OF DOMINANCE, AND APPLICABLE EXCEPTIONS AND EXEMPTIONS

As indicated above, once the competition Authority of a given competition regime determined that a firm has exercised or used or using its dominant position, then it will proceed to the examination of two critical questions. These are whether such exercise constitutes illegal acts (within the meaning of anticompetitive acts provided before), and whether the acts are exempted or provided with exceptions under the Competition Law.

Hence, in most jurisdictions acts of abuse of dominant position are generally classified as exploitive and exclusionary acts and sometimes as exploitive, exclusionary and

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significant with a firm with same level of sale volume but with advanced technological capacity. Similarly a new firm with highly advanced technological equipments but with few or small sale volume should be considered significant that what is depicted by its volume of sale. The mystery of this line of calculation is that competition analysis is always forward looking

[153] Ibid. ECJ stated in, Hoffmann-LaRoche & Co. AVG. Vs Commission, (Case 85/76, ECJ, E.C.R. 461, 1979), that «The existence of a dominant position may derive from several factors which, when taken taken separately, are not necessarily determinative. But, among these factors, a highly important one is the existence of very high market shares» (Para. 39).

discriminatory.[154] The exploitive acts are much more related to the power of firm in using the disadvantageous status of competitors, buyers or consumers and includes reducing output, charging high prices (excessive prices) for customers, paying low prices for suppliers, price and related discrimination between customers, tie-ins,(a sale of product on a condition that another product should be bought (the tied product), unfair competition, and quite life (with no competition and thus not being forced to use technology and ultimately no progress, called X-inefficiency).[155]

The exclusionary acts, on the other hand, related to acts intended to or with the effect of excluding, weakening, or removing of existing and potential competitors. They are, among others, vertical restraints (refusal to deal or supply, exclusive dealing etc), creating or strengthening barriers, predatory pricing (selling below average variable cost), export ban, price discrimination (discounts, loyalty rebates etc), tying and bundling, and margin squeezing.[156]

However, whatever the form the acts might take, it is not the case that all such acts are condemnable by the Competition Law. This is owing to the existence of exemption and exceptions. Meaning, states in line with their economic context, tend to provide rules of exemption and exceptions for a certain economic activities or even economic sectors. Although the two are seldom used synonymously, technically speaking, exemption and exception are different. Exemption is a total preclusion, prevention or general exclusion of certain economic activity or sector from the ambit of Competition Law while exception is special permission not to be subject to the specific rules of Competition Law on the basis of justifications.[157] i.e. exemption is broader than exceptions which are allowed only on specific permitted grounds such as efficiency and outweighing benefit defenses.[158]

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[154] The World Bank and OECD, as cited above at note 113, p. 72-75; Max Huffman, as cited above at note 113, P. 10; see also Art 102 of TFEU (EX 82 EC); Rodger, BJ and MacCulloch, as cited above at note 118, p. 94-97;

[155] Ibid.

[156] Ibid. Nabarro Sher Brian, Abuse of dominance in the EU: the evolving law and practice, (2010), PLC Cross-border Competition Handbook, practical Law Company Publisher, p. 4-9. In this paper it is expressed that the dominant firm may erect barriers through raising wages for workers so that new entrants are incapable of paying it initially, (particularly capital intensive industries use this technique to oust smaller but labor intensive competitors), lobbying for health, labor, environment and safety standards so as increase establishment costs for new entrants.

[157] Khemani Shyam R., as cited above at note 116, P. 1-5.

[158] Ibid. p.17. There is a general trend that agriculture, cooperatives, infrastructure industries, intellectual property right and performing rights, small scale and medium sized firms, labor rights, financial service, media, and self regulation of professional service are areas of exemptions or exclusions.

Accordingly, acts of abuse of dominant position have been provided with exemptions and exception in different jurisdictions. For example, in UK's competition act an undertaking entrusted with general economic service or with character of a revenue-producing monopoly, insofar as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to the undertaking, an act to comply with a legal requirement or necessary to avoid conflict with international obligations and the conduct is the subject of an order by the Secretary of State, or which is necessary for compelling reasons of public policy are exempted or provided with exceptions.[159] In EU, to win exceptions particularly for exclusionary acts based on efficiency grounds, there should be no net harm to consumers and also four cumulative criteria must be met.[160] These are: the efficiencies are the result of the exclusionary conduct; there is no less anti-competitive conduct that could achieve the same results; the efficiencies outweigh the negative effects of the exclusionary conduct; the conduct does not lead to the elimination of all or most of the competition in the market.[161] This is because; EU's Competition Law on abuse of dominance is usually associated with excessive pricing or with exclusionary practices such as predatory pricing, rebates, tying or bundling, exclusive dealing or refusal to supply. However, if the conduct strengthens or maintains a (near) monopoly, the defense is normally unavailable. In addition, refusal to supply by a dominant firm under EU should be objectively justified and commercial interest of the undertaking is not a ground for the refusal.[162] Under EU's competition rules, refusal is in violation of Art 102 of TFEU when (a) refusal to supply is used to damage or deter a competitor; (b) where there is a refusal to grant a license of intellectual property rights; or (c) where there is a refusal to supply new competitors and 'essential facilities'[163]. In US, on the other hand, regulated sectors by government may only be exempted from ambit of Competition

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[159] United Kingdom (UK's) Competition Act 1998 and the Enterprise Act 2002. See also the Office of Fair Trade act, as cited above at note 137, P. 4-5.

[160] In some jurisdictions, however, efficiency cannot be a defense if the abusive act is inherently unfair. In this regard efficiency is envisaged in its economic view of production, dynamic and allocative efficiencies. See VELJANOVSKI G. CENTO, ECONOMIC PRINCIPLES OF LAW, (2007), Cambridge University Press, The Edinburgh Building, Cambridge CB2 8RU, UK, , chapter two, p. 19-58.

[161] Eirik Østerud, as cited above at note 135, p. 2-8.

[162] Rodger, BJ and MacCulloch, as cited above at note 118, P. 97-99. Generally speaking Competition Law doesn't impose the duty to cooperate on firms. The right to deal should be granted only in case when essential facilities are blocked and the granting of the access outweighs the cost of blocking by the dominant firm. However, objective grounds such as the low credit worthiness of the firm can be used as a ground for refusal to s supply to that firm.

[163] Ibid.

Law when they are subjected to 'clearly articulated and affirmatively expressed state policy and are actively supervised by the state".[164]

Thus, it is only after such thorough examination and clarification that the competition Authority of a given state will proceed to sanctions and remedies.[165]

In sum, consistent with what have been said on the discussion of the general overview of Competition Law and policy, states tend to provide exemptions and exceptions on different grounds such as efficiency, public interest and other outweighing benefits. In addition, as Dr. Solomon pointed out, maintenance or promotion of exports, promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, and to prevent the decline in an industry and economic stability of an industry can serve as grounds of exemptions and exception.[166]

3.2.2 ANTICOMPETITIVE AGREEMENTS AND COMPETITION LAW

3.2.2.1 DEFINITION AND NATURE OF ANTICOMPETITIVE AGREEMENTS

Anticompetitive agreements, as we stated before, are one of the major concerns of Competition Law and against which it works for to prevent the distortion of competition. The phrase anticompetitive agreement is a combination of two legal terms under Competition Law: agreement and anticompetitive.

The term "agreement" is misleading as it tends to imply "agreement of similar nature" as one lawyer knows in corporate law. Rather, under Competition Law, it represents any simple understanding, common sense or common stance between competing firms irrespective of the fact that it is formal or informal, legally binding or not, written or oral, implicit or explicit.[167]

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[164] The World Bank and OECD, as cited above at note 113, P. 80.

[165] Ibid, p. 80-84. Generally, courts make sanction and provide remedies for acts of abuse of dominance which include Injunction order (an order to cease the existing practice/behavior often accompanied with fine), imposition of fine for the infringement, Fines and imprisonment on individuals in the event of criminal intent, order to repay undue profits, divestment or division/restructuring a firm or firms (very relevant for cases involving CGs). In order to make actions such as in the case of price discrimination between customers informal settlement, mostly as an exception and as an alternative to length court proceedings, Award for damages can be made.

[166] Dr. Solomon, as cited above at note 114, p. 31.

[167] The World Bank and OECD, as cited above at note, 113, P 19; Rodger, BJ and MacCulloch, as cited above at note 118, P. 129-131; ECC's Decision (86/398/EEC), OJ L230/1, 1986; [1988] 4 CMLR 347. Upheld, on appeal, in

Substantiating this line of interpretation, ECJ, in one of its notable decisions stressed that "... an unsigned 'gentlemen's agreement' fell within the prohibition".[168] In this regard, the court also stressed that an agreement even can be inferred from an individual's undertaking's action which are clearly indicating that they are for the benefit of another undertaking.[169] So, it is not vital that we are able to or failed to identify the existence of a particular 'agreement' so long as it is demonstrable that there is some form of collusion, falling within concerted practice or coordinated activities of firms.[170]

This agreement can be made between competing firms (horizontal agreement) and non-competing but with supply or distribution chained firms (vertical agreements) which we will see them in the next discussion.

At this moment, the issue that comes in to the scene is; what makes an agreement a condemnable as "anticompetitive agreement? What factors turn anticompetitive agreement to pro-competitive one?

Fundamentally, as we put before, it is the nature, object, intent or effect of an agreement and policy matters (in the form of exemptions and exceptions) that demarcates between pro-competitive and anticompetitive agreements. In addition, as we saw, the per se prohibition (that automatically prohibit a certain form of agreement initially) and rule of reason (case by case analysis of the effect of agreement and then providing of justification as defense) approaches to regulation of agreements in different states will also determine the anticompetitive nature of a given agreement or concerted practice.

State practice particularly of US experience shows that courts raise specific questions like; is the restraint (made by the agreement) inherently restrict output or raises prices? Is it naked or related to some pro-competitive activities of the companies? Will the restraint facilitate or create market power? Is the restraint agreement necessary to achieve the stated pro-competitive activities?

Hercules NV v Commission, (Case T-7/89, ECJ, ECR II-1711, 1991-1992) and see also Commission v Anic Partecipazioni SPA (Case C-49/920, ECJ, ECR I-4125, 1999).

[168]Ibid. See also ECJ's decision on ACF Chemifarma v Commission (Quinine).

[169]Ibid.

[170]Ibid. Usually, agreements, concerted practices and decisions of associations, as putted under Art 101 of TFEU, seem to be different. But, they show a considerable overlapping specially concerted practice which can be defined as a form of co-ordination between undertakings which, without having reached a stage where agreement properly so called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition.

Aren't there other less anticompetitive means to serve the intended objectives? (The rule of last resort) And, do the pro-competitive act out weighs its anticompetitive effect? (Cost plus benefit approach), are crucial to identify anticompetitive agreements from pro-competitive ones.[171]

3.2.2.2 THE TWO TYPES OF ANTICOMPETITIVE AGREEMENTS: VERTICAL AND HORIZONTAL AGREEMENT

Basically, agreements under Competition Law are classified as horizontal and vertical agreements. Horizontal agreements are agreements concluded between or among competing firms. i.e. it is an agreement between firms of same level of production such as between producers, distributors or between sellers of same goods and services[172]. For example, agreements for price fixing, output reduction, bid rigging, market allocation or division, collusive tendering, boycotts (sometimes called, naked restraint, hard core agreements or cartel or restrictive agreements) and agreements such as merger, acquisition, and specialization (also called soft core agreements) are regarded as horizontal agreements[173]. In most cases horizontal agreements (mainly the hard core ones) are subject to the rule of per se prohibition like in US and Australia while in EU and UK rule of reason is applied.[174]

Conversely, vertical agreements, also called vertical restraints, are agreements between firms at different level of production or distribution chain or between non-competing firms in the market relating to the conditions under which the goods may be produced, purchased, distributed, soled or resold.[175] Unlike horizontal agreements, vertical agreements have strong efficiency rationale and are not presumed to have harmful effect. To this effect, they are not per se void. They are rather subjected to the rule of reason or case by case analysis of their benefit and cost such as in

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[171] The World Bank and OECD, as cited above at note, 113, P 20.

[172] Id, p. 17-20; Sundararajan Preethi, AN ANALYTICAL STUDY OF NATURE AND TYPES OF VERTICAL ANTI-COMPETITIVE AGREEMENTS, , National Law University, Jodhpur, P. 20-21; McFetridge G. Donald, Horizontal Agreements as Reviewable Practices, Department of Economics, Carleton University, Ottawa, Canada, p.23;

[173] Ibid. see also Rodger, BJ and MacCulloch, as cited above at note 118, P. 2. Cartel is a general term given for anticompetitive horizontal agreement (for those that are naked restraints) with a view to reduce output and raise prices through price fixing, bid rigging, customer or supplier allocation, territorial allocation for market share, output restriction.

[174] The World Bank and OECD, as cited above at note 113, p. 20.

[175] Sundararajan Preethi, as cited above at note 170, P. 1-2; 20-22; Colino Marco Sandra, Vertical Agreements and Competition Law A ComParative Study of the EU and US Regimes, (2010), OXFORD AND PORTLAND, OREGON, Hart Publishing c/o International Specialized Book Services, 920 NE 58th Avenue, Suite 300, Portland, OR 97213-3786, USA, p. 1-5, 18-20, 22-24. See also Dr. Solomon, as cited above at note 114, p. 33-38.

US, India and EU[176]. Agreements such as exclusive dealings (includes exclusive supply and exclusive distribution), single branding, resale price maintenance, tie-in agreements (tie-up credits, tie-up sales, etc), territorial restrictions, franchising, selective distribution (location or customer selection), and joint ventures are within vertical restraint or agreement.[177]

However, in spite of their difference concerning the approach they call, both agreements, if found anticompetitive, could have great repercussions on the stable, free and open competitive environment. Particularly, they will cause market foreclosure (e.g. by raising and strengthening barriers), reduction of inter-brand competition (particularly territorial and customer allocations), the creation and facilitation of both explicit and tacit collusion to the detriment of market forces, reduction of intra brand competition between distributers of the same brand (through exclusive dealings), and the creation of obstacles to market integration.[178]

3.2.2.3 DETERMINATIONS, EXEMPTIONS AND EXCEPTIONS OF ANTICOMPETITIVE AGREEMENTS

The determination of what sorts of agreements, among the two types, constitute a flagrant offense or offense by effect is, as we saw, the function of per se Vs rule of reason approaches. In addition, it is also the result of the examination of particular points that help us to differentiate pro-competitive from anticompetitive agreement which we discussed before.[179] So, in the same way we discussed acts of abuse of dominance, once it is determined that a certain agreement is anticompetitive, then the next appropriate question and examination would be whether such agreement is exempted or provided with exceptions under Competition Law.

Accordingly, as part of general Vs sectoral application issue, as we saw, there is a general trend by different competition regimes in providing for general immunity for certain economic activities or sectors, which is called exemptions or exclusions. For example, the European competition Commission (here in after abbreviated as ECC) has developed the notion of block

[176] Sundararajan Preethi, id, p. 15-16. The most important efficiency reasons are to "solve a 'free-rider' problem, to "open up or enter new markets, the "certification free-rider issue, the so-called "hold-up problem", the "specific hold-up problem that may arise in the case of transfer of substantial knowhow", economies of scale in distribution, capital market imperfections, uniformity and quality standardization.

[177] Ibid.

[178] Ibid.

[179] The World Bank, as cited above at note 113, P 20. In addition the relevant market, the market position of the companies, the effect or potential effect of the agreement, and the relationship between alleged pro-competitive activities and the restraint/causal relation determines what agreements are anticompetitive.

exemptions and individual exceptions pertinent to Art 101(3) of TFEU (EX 81 (3) of EC treaty).[180] The block exemptions that have been granted cover most of vertical agreements such as research and development, motor vehicle distribution and technology transfer, cooperatives, patent and know-how licensing (e.g. in franchising), and specialization agreements. The individual exceptions, on the other hand, are allowed only when an anticompetitive agreement improves the production or distribution of goods or promotes technical or economic progress, allow consumers a fair share of benefits, does not impose restrictions on firms that are not indispensable to the attainment of the above-listed objectives; or does not eliminate competitions in the substantial part of the product market.

Beyond this, state experiences show that, the main justifications for exemptions and exceptions of anticompetitive agreements are, among others, (i) balancing unequal economic or bargaining power (collective bargaining, agriculture, fishery, dairy and forestry, small and medium sized firms, purchasing or buying groups); (ii) addressing information and transaction costs, and "collective action" problems (development of standards, collection of statistical data and credit information, intellectual property rights, and learned professions); (iii) reduction of risks and uncertainties (insurance, investment brokerage and banking service, and (iv) Special sector and interest group demands.[181]

So, coincided with this general trend, sectors or economic activities such as labour, agriculture and transportation, financial services, energy, telecommunications (including postal services) and media/publishing are provided with exemptions under different competition jurisdiction.[182]
To recap, agreements, both vertical[183] and horizontal, though anticompetitive, can be relieved from the harsh sanctions of Competition Law for justifications such as efficiency[184], consumer benefit, and the particular determination of state policy for public interest reasons.

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[180]THE CONSOLIDATED VERSION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION, as cited above at note 110, Art 101 (3). See also the ECC's Reg (2790/1999/EC), OJ L336/21, 1999; [2000] 4 CMLR 398. See, also, the Guidelines on Vertical Restraints, OJ C291/1, 2000; [2000] 5 CMLR 1074, Commission Reg (2658/2000/EC), OJ L304/3, 2000, Commission Reg (2659/2000/EC), OJ L304/7, 2000, Commission Reg (1475/95), OJ L145/25, 1995, Commission Reg (240/96), OJ L31/2, 1996//Berend R. Paasman, as cite above at note 2, p. 19; R.Shyam Khemani, as cited above at note 116, p. 19; Rodger, BJ and MacCulloch, as cited above at note 118, p. 145-150;

[181] R.Shyam Khemani, id, p. 20-33. Under this document, you can see the different state's experience on how they extend their exemption and exceptions to vertical and horizontal agreements. Under international practice, crisis cartels and export cartels are also exempted from Competition Law rules as long as there is a faire share of benefit to consumers and no substantial harm to competition.

[182] Id, p. 17.

3.2.3 CORPORATE GROUPS AND COMPETITION LAW: IMPLICATIONS ON ANTICOMPETITIVE PRACTICES

3.2.3.1 DEFINITION AND LIABILITY OF CORPORATE GROUPS UNDER COMPETITION LAW: ENTITY VS ENTERPRISE APPROACH

The emergence of CGs, as noted, has brought a massive challenge to virtually all legal regimes that are fashioned by single corporate mentality. Owing to their complexity and paradox of multiplicity and unity, CGs have created hard legal issues and practical difficulties, among others, to the Competition Law and its jurisprudential thinking. The enforcement of Competition Law has become more and more contentious when it is CGs that involved in the infringement of its rules.

As a result, one must understand that issues that may be raised in the enforcement of Competition Law on a single corporate entity may not be similar in the case of CGs. The international jurisprudential and legal experience chiefly of the EU and US shows that there are three basic legal issues in the interplay of CGs and Competition Law. These are; issues in relation to the very understanding of CGs in the Competition Law (their legal place), regulatory approaches and issues in connection to the liability of CGs for infringement of competition rules.[185]

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[183] An argument was also put forward before the European forum that vertical agreements could not be anti-competitive as they do not restrict competition because enterprises at different stages of production could not be competitors. It was held in the Consten-Grundig case that the possible application of article 81 to a sole distributorship contract cannot be excluded merely because the grantor and the concessionaire are not competitors inter se and not on a footing of equality. Competition may be distorted not only by agreements which limit it as between the parties, but also by agreements which prevent or restrict the competition which might take place between one of them and third parties. For this purpose, it is irrelevant whether the parties to the agreement are or are not on a footing of equality as regards their position and function in the economy. The ECJ and the ECC consistently ruled that "the prohibition under Art 81 of EC" protects both inter-brand (between same products but with different brand) and intra-brand (same product and brand but between distributors or retailers) competition. See Commission Decision (64/556/EEC), OJ 2545/64, 1964; [1964] CMLR 489 and ECJ's decision on Consten-Grundig case, Consten and Grunding Vs Commission, (Case 161/2545, ECJ, 1964).

[184] The World Bank and OECD, as cited above at note 111, p. 25-26. Agreement or merger between small firms to efficiently and effectively compete with large firms; agreement for exclusive territoriality of branded product to prevent inefficient intra brand competition; agreement on product standards that may increase the size of the market; joint venture agreement for introduction of new product that won't be introduced had competition is there; agreement for taking advantage of economies of scale; agreement for specialization of production of items between competitors; and the like are considered pro-competitive restriction of competition. Examples of such exceptions are in Italy, US, Australia, and EU.

[185] Candidate number: 562, EU Antitrust Fines and the Single Economic Entity, (2012, unpublished), Universitetet i Oslo Det juridiske fakultet, , p.1-47; Mickonytė Aistė, Joint Liability of Parent Companies in the European Union

Accordingly, the very understanding of CGs within the purview of Competition Law is the first of the three issues in our discussion of the interplay of CGs and Competition Law. In this regard, it is noted that virtually a similar term has been used in most jurisdictions principally in US and EU to denote the subjects of Competition Law. Both the US antitrust law and EU Competition Law have employed the word "undertaking" to represent business entity/entities that fall within the scope of their respective Competition Law.[186] So, in the jurisprudence of these and other jurisdictions that have used similar term, it is the interpretation of the term "undertaking" that determines the very understanding and place of CGs in the Competition Law.

Hence, the ECJ and the ECC interpreted the word "undertaking" under the EU Competition Law (Art 101 and 102 of TFEU) as a word "designating a single economic unit" for the purpose of the community's Competition Law.[187] For example, ECJ in Hofner case defined undertaking as "'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed".[188] Furthermore, with particular connection to CGs, ECJ in its land mark case, AKZO Nobel case, clearly stated that "an undertaking must be construed as a single economic unit which might comprise legally distinct persons".[189] In addition, the general court in *Enichem Anic* case also listed out the elements of undertaking as 1) an economic entity 2) comprised of personal and physical elements (staff and assets) that is 3) pursuing a single economic goal and is 4) capable of contribution to the infringement.[190] So, it is this line of interpretation that suitably gives place for CGs in Competition Law and in its jurisprudences. This very understanding is also adopted in most jurisdictions including in US

Competition Law, (2012, Master's Programme in European Business Law, Master thesis), FACULTY OF LAW, Lund University), (unpublished), p. 1-82; ISLENTYEVA E., like father like son –The parental liability under the EU Competition Law today , p. 99-115.

[186] See the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 and Art 101 and 102 of TFEU or Art 81 and 82 of EC.

[187] ISLENTYEVA E., as cited above at note 183, p.100; ODUDU OKEOGHENE "The Meaning of Undertaking within 81 EC, p. 212-213; Rodger, BJ and MacCulloch , as cited above at note 118, p.79-80; and see also ECJ case, Höfner and Elsner v Macrotron (Case 41/90, ECJ), Para. 21; Commission Vs Hydrotherm, (Case 170/83, ECJ, ECR 1984), Para 11). See also joined Cases Dansk Rørindustriand Others v Commission, (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02, ECJ, ECR I-5425, 2005), Para112; Cassa diRisparmio di Firenze and Others, (Case C-222/04, ECJ, ECR I-289[2006]), Para107; and P FENIN v Commission (C-205/03, ECJ, ECR I-6295, [2006]), Para 25.

[188] See ECJ Case, Hofner and Elser, (C-41/90, ECJ, ECR I-1979, [1991]), Para. 21.

[189] See Akzo Nobel and Others v Commission, ECJ, Para 56.

[190] Enichem Anic SpA v Commission of the European Communities, (Case T-6/89, ECJ, 17 December 1991), Para. 235.

courts, Portugal, German, UK, and Japan competition jurisprudences.[191] Therefore, the international practice clearly depicted that CGs are recognized in the completion law within the meaning of the term "undertaking".

At this moment, one may ask; why this line of interpretation is taken?

From the very onset, the term undertaking is regarded as an economic term coined by professionals and scholars in economics.[192] As a result, it is likely that its meaning within the Competition Law will be influenced by the views and concepts of economics. In addition, Competition Law itself is also considered as the few areas of law that is largely dominated and shaped by economic concepts. Consequently, it is possible to say that the interpretation of undertaking overrides the formality of legal personality. However, it must be noted that though undertaking is defined as such, for its enforcement purpose, Competition Law still follows legal personality not the abstraction of undertaking as interpreted above.[193]

The second major issue is; given such understanding and placement of CGs in the Competition Law, what is the appropriate regulatory approach to deal with CGs in a given Competition Law?

Concerning this; as clearly discussed in chapter two, there are two approaches: the SEA and SEUA.

In the context of Competition Law, the task of selecting either of the two regulatory approaches is highly linked with the very definition of CGs in the Competition Law. i.e., the first issue we discussed above has a definitive effect on this second issue. It must also be remembered that the issue of regulatory approach determines how CGs should be treated for the purpose of Competition Law which in turn have a direct effect on the liability of CGs.

Accordingly, as noted in chapter two, SEUA is increasingly being used in the regulation of CGs in most jurisdictions including in US, EU, UK, Portugal, German and Japan corporate and

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[191] See OECD-KOREA Regional Centre for Competition in Seoul, A Comparative Study on Competition Law Enforcement in Asia: Japan, Singapore, Chinese Taipei, Indonesia, Korea, (Dec. 2007), p.1-247;

[192] Mickonytė Aistė, as cited above at note 183, p.26. See also McChesney, 'Legal and Economic Concepts of Collusion: American Antitrust versus European Competition Law', 3rd Annual Research Symposium on Antitrust Economics and Competition Policy (24–25 Sep. 2010), p. 31–33.

[193] See Enichem Anic SpA v Commission of the European Communities, (case T-6/89, ECJ, 17 December 1991), Para. 235.

Competition Laws.[194] For example, in the EU, ECJ and ECC firmly and consistently expressed that legally distinct companies may be considered as one undertaking for the purposes of the community's Competition Law when they are not independent from each other.[195] This argument is based on the doctrine of economic unit and it is increasingly becoming acceptable approach in the regulation of CGs including in US courts.[196] In this regard, the Advocate General (AG) of the ECC, Kokott, attempts to posit the very rationale of this approach in her opinion in the Akzo Nobel case. She said, "The ever increasing complexity of the organizational structure of economic operators can lead to a situation in which an undertaking is made up of more than one company and the natural or legal person actually responsible for a cartel offence is not or not solely the person who appears to outsiders to be the cartel participant".[197] In addition, Mestmäcker, in support of this rationale, said, "The freedom of enterprise of the servient company is reduced to nothing by the "unified control" of the group and by the incorporation of the subsidiary into the economic scheme of the parent company. Affiliation to the group deprives the subsidiary company of the ability to act according to an economic scheme of its own. The "given conditions" of such a subsidiary's operation are prescribed not by the market but by the instructions of the principal company."[198] He continues, "in this case, the relationship between parent and subsidiary was used to show that a cartel could not be formed between parent and subsidiary, as they must be considered to be governed by the same leading group".[199]

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[194] BLUMBERG PHILLIP, as cited above at note 16, p. 167. See also OECD-KOREA Regional Centre for Competition in Seoul, as cited above at note 189, p. 18-39.

[195] BLUMBERG PHILLIP, Id. For example, with respect to fine on parent company, ECC expressed why SEUA is necessary. It stated that, when increasing a fine with a deterrence factor, based on the relatively small proportion a subsidiary's turnover represented of the total turnover attributable to its parent company. The Commission argued in *Hydrogen peroxide* that this was justified. Otherwise, so the Commission reasoned, a very large company involved in one or several cartels could escape from high fines by creating small subsidiaries with little turnover to engage them in illegal practices. See Case COMP/F/C.38.620, *Hydrogen Peroxide and Perborate*, summary published in OJ L 353, 13 Dec.2006, 54–59, Para. 465 of the full decision, http://ec.europa.eu/competition/antitrust/cases/dec_docs/38620/38620_380_4.pdf . See also ECJ decision on *Total and Elf Aquitaine* Vs ECC, (CaseT-190/06, ECJ, 14 Jul. 2011), Paras 224–225.

[196] ISLENTYEVA E, as cited above at note 183, p. 102-103.

[197] See Akzo Nobel and Others v Commission, (ECJ, ECR II-00184, [2009]), Paragraph 56. See also Walters Van Bael, Ivon, Competition Law of the European Community, (2010), Kluwer Law and Business, p. 27.

[198] See the opinion of Mr Advocate-General Roemer in the ECC decision in Mausegatt v Haute autorité, Case C-13/60.

[199] Ibid.

The US experience also shows that since 1983, the US Supreme Court and other states courts started to accept and follow the SEUA toward CGs.[200] In this regard; it is the fierce criticism by professor Areeda on the SEA that triggered the concern for the new doctrine of economic unit in US courts.[201] He said "SEA is a "mischievous" doctrine as merely serving to "confuse litigants and courts and to lengthen and complicate antitrust litigation," all the while distracting judicial attention away from an antitrust analysis of suspect conduct."[202] In addition, J. Matthew Schmtten, in his writing, also argued that "the separate entity approach should be retired and be replaced by modern and pragmatic approach and this is; the doctrine of single economic unit or single entity."[203]

Thus, in nut shell, the judicial and jurisprudential experience of different jurisdiction chiefly of the EU and US indicates that SEUA is taken as an appropriate choice in regulating CGs vis-a-vis Competition Law. But, the question is; what are the factors that should be taken in to account to consider two or more companies as "single economic unit"?

The survey of different jurisdiction including the EU and US indicates that, in the context of Competition Law, SEUA is applied by taking in to account factors such as ownership, holding of controlling right or interest, and the degree of organizational, legal and economic link between the companies in question.[204] In this regard, ECJ in Knauf Gips appeal case stated that "the existence of an economic unit may be inferred from a body of consistent evidence, even if some of that evidence, taken in isolation, is insufficient to establish the existence of such unit."[205]

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[200] Before 1983, it is SEA that dominated the US court's decision on CGs. The cases were Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 772–73 (1984), United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947), and Copperweld Corp. v. Independence Tube Corp,467 U.S. 752 (1984).

[201] SCHMITTEN MATTHEW J., Ant-trust's Single-Entity Doctrine: A Formalistic Approach for a Formalistic Rule, p.94-144

[202] Ibid.

[203] Id, p. 144.

[204] See Montesa, Aitor og Givaja, Angel., When Parents Pay for their Children's Wrongs: Attribution of Liability for EC Antitrust Infringements in Parent-Subsidiary Scenario, World Competition,(2006), p.29-166, http://www.hooghoogh.com/Files/Articles/23436446.pdf Last visited 23.04.12; Jones Alison, and Brenda Sufrin, EU Competition Law, (4th ed., 2011), Oxford, p. 17-1115; Whish Richard, Competition Law, (6th ed., 2009), Oxford; Bourke James, Parental Liability for Cartel Infringements, (November 2009), GCP: The Antitrust Chronicle; Bottemann, Yves and Laura Atlee, An update on parent liability for antitrust violations of subsidiaries, EU Competition Briefing, (December 2009), Steptoe & Johnson,. http://www.steptoe.com/f-290.html accessed on 23.04.13; C.S Kerse and N. Khan, EC Antitrust Procedure, (5th ed.,) Sweet and Maxwell, London 2005; Wils, Wouter P.J., Optimal Antitrust fines: Theory and practice, World Competition Vol 29, June 2006, No 2, Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=883102 accessed on 23.09.13.

[205] Ibid. see also ECJ's decision on case, Knauf Gips KG v Commission (C-407/08, ECJ, ECR 00000, 2010).

Therefore, it must be unlined that the existence of ownership and control, and the overall relationship between companies are the key factors that determine the single economic unit status of companies in question.

As a concluding remark, the following basic points can be inferred from the above discussion that can facilitate better understanding of what SEUA is and how it can be determined.

1. The SEUA is a question of fact involving an interpretation of the real nature of relationship between companies in question.
2. The SEUA is coined from an economic doctrine and not from a legal doctrine. Therefore; it is largely influenced by economic concepts and views. In this regard, it must be remembered that this approach is not evolved from what we call EEIG, as we noted in chapter two of this study. Basically SEUA is a concept arise within the context of regulating CGs vis-à-vis competition law while the European framework of EEIG is dealing with any form of cooperative association designed to promote the economic interest of its members. So, as we briefly discussed in chapter two, EEIG doesn't concern about corporate groups and consequently of their regulation.
3. The SEUA is not a universally agreed approach. Rather; it is the most arguable approach but increasingly becoming acceptable and appropriate approach toward CGs.
4. As noted in chapter two, SEUA has its own merits and demerits. Apart from that, SEUA is very significant in that while it helps CGs to cooperate freely without being illegal under Competition Law it at the same time prevent them from escaping their liability that otherwise be the case in SEA.[206] However, there also risks associated with this approach. In this regard, a number of authors noted the application of an economic term to a legal proceeding by itself clashes with established principles of penalty.[207] This is because; it is non-legal entity which is the focus of attribution of liability for the breach of legal obligations.

The third and final issue in the interplay of CGs with Competition Law is the issue of liability. In this issue, critical questions such as in the case of infringement of the competition rule by Member Company, how is the liability of such CGs to be seen? Is it individual (personal) or

[206] Jones Alison, and Brenda Sufrin, as cited above at note 202.
[207] Ibid.

group (co-responsibility) liability? Is this liability a strict liability (a liability by the *ipso facto* membership to the group) or a fault based liability (liability based on evidence of involvement in the infringement)? What is the direction of the attribution of liability? Is it unidirectional (liability imputed only from subsidiary to parent) or dual directional so that liabilities can pour from the parent to subsidiary?

Hence, under EU competition jurisprudence, there are three major steps in imposing liability on CGs.[208] In the first step, the ECC establishes the specific act that violated the regulation (anticompetitive practice).[209] In this regard the entity's employees or agents may violate the competition rule for which the entity will be made answerable. Secondly, the ECC will determine in which group this violating entity is a member and, thus, makes the group accountable or answerable for the violation as "a single economic unity" or single entity.[210] Thirdly and finally, ECC will determine which entity or entities in the groups will be directly answerable to the infringement of the law which may be imposed jointly or jointly and severally.[211] In this regard, EU's jurisprudence shows that lack of independence by the infringing company due to the instruction and/or decisive control by the parent company, and the existence of knowledge on the part of the parent company as to the illegal act of its subsidiary are the key ground of liability.[212]

In sum, in the EU competition framework, coincided with its firm stance on SEUA, there is a joint, and joint and several or collective responsibility for parent-subsidiary companies for infringement of competition rules.[213] However, there is a differential treatment based on the extent of ownership and or control. For example, in case of wholly owned (including substantially owned) subsidiaries, there is a refutable presumption of decisive control or

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[208] See ISLENTYEVA E, as cited above at note 183, p. 100. See also ECJ's decision in cases joined Cases *Musique diffusion française e.a. v Commission*, (100/80 to 103/80, ECJ, ECR 1825, [1983]), Para 97; H*FB and others v Commission,* (Case T-9/99, ECJ, ECR II-1487, [2002]) Para 275; Brugg Rohrsysteme v Commission, (Case T-15/99, ECJ, ECR II-1613, [2002]), Para 58; *Tokai Carbon v Commission,* (Case T-236/01, ECJ, ECR p.II-1181 [2004]), Para277.

[209] Ibid.

[210] Ibid.

[211] Ibid.

[212] Id, p. 112-115.

[213]SCHMITTEN MATTHEW J., as cited above at note 199, p.94-144; ISLENTYEVA, id, p.100-105; Mickonytė Aistė, as cited above at note 183, p. 6-82;

influence.[214] This decisive influence or control is defined by ECJ in Clearstream Banking vs. Commission case as "a situation where the subsidiary "*carried out, in all material aspects, the instructions given to it by the parent company.*"[215] The taking of this presumption is justified by ECJ as "...the circumstance that this subsidiary company has its own legal personality does not suffice to exclude the possibility that its conduct might be attributed to the parent company. This is true in those cases particularly where the subsidiary company does not determine its market behavior autonomously but in essentials follows directives of the parent company."[216] For example, when it is proven that the parent company gave instructions to a subsidiary participating in the cartel or knew about the illegal conduct (without intervening), the parent company will be considered itself as a direct participant in the cartel infringement and thus directly and independently liable.[217]

However, this narrow construction of decisive influence is now widened to the extent that any legal, organizational and economic linkage will suffice to make the presumption.

Against this presumption of decisive influence, defenses like the subsidiary acted independently, acted against the instruction of the parent company, and only financial interest is hold may be raised.[218] But, in the practice of ECC and ECJ, only special circumstances that shows the parent company didn't exercised its control at the relevant period of time can successfully defend the presumption of decisive control.[219]

This being for wholly (nearly wholly) owned companies, for CGs like sister-brother and other forms, the extent of coordination and knowledge is taken as a ground for co-responsibility.[220] For example, in one of ECJ's case, the shareholders of the parent company and the other entities of

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[214] ECJ in the Akzo decision held that: "there is a rebuttable liability presumption of parent companies for their subsidiary's cartel offences in the case of a 100% shareholding", for in such a case "the parent company does in fact exercise a decisive influence over the conduct of its subsidiary". See Case T-175/05 Akzo Nobel NV and others v. Commission (ECJ, ECR II-00184, [2009]), Para 111.

[215] See ECJ's decision in Clearstream Banking AG e.a. v Commission, (Case T-301/04, ECJ), Para 198.

[216] See Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communiti, (Case 6-72, ECJ,) Para 15.

[217] ISLENTYEVA E, as cited above at note 183, p. 102-103.

[218] Id, p.104-115. See also Richard Burnley, "Article: Group Liability for Antitrust Infringements: Responsibility and Accountability", World Competition Journal, Volume 33 December 2010, Issue 4, p.596-609; Wenner Frederique and Barlington Van Bertus, European Court of Justice confirms Commission's approach on parental liability, DG COMP Competition Policy Newsletter, 1/2010, p.23.

[219] ISLENTYEVA E, as cited above at note 183, p. 107.

[220] Id, p. 107-118.

the group are the same, having 21 individuals from the same family; the two managing shareholders of the parent company are also those of all the other companies on the basis of a family that contract provides for the single management and direction of the companies in the group.[221] So, the court underlined that there is a visible co-ordination between the companies which bears co-responsibility.

However, it must be noted here that, in practice; while the liability can be imputed to Grand/parent Company (like in case of pyramidal CGs) there is no imputation of parent's liability to the subsidiary.[222] i.e., the line of liability attribution is unidirectional and only flows from the subsidiary or controlled company to the parent or Controller Company.

Comparatively, under the US antitrust act, CGs (particularly parent companies) are liable only when there is a direct involvement in the violation of the rules or when the presumption of corporate separateness is lost due to sham separation in CGs[223]. And this is functionally equivalent with the EU's presumption of decisive influence we discussed above.

In general, the international practice mainly of the jurisprudential and judicial experience of the EU and US shows that; CGs, for Competition Law purpose, are increasingly being considered as single economic unit. In addition, they are regulated through SEUA, and thus, liable to any infringement of the Competition Law jointly and/or jointly and severally depending on the facts of the case.

3.2.3.2 CORPORATE GROUPS AND THEIR IMPLICATIONS ON THE NOTION OF ABUSE OF MARKET DOMINANCE AND ANTICOMPETITIVE AGREEMENTS

We have discussed that the one of the fundamental issues in the interplay of CGs and Competition Law is the issue of regulatory approach: a choice between SEA and SEUA. This regulatory approach, as depicted above, directly impacts the liability of CGs. For example, it determines, inter alia, whether CGs can be held liable for infringing the rules of anticompetitive

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[221] Ibid. See also ECJ's decision on Viho Europe v Commission (Case C-73/95, ECJ, 1996), Para16. In this case the court decided that parker and its fully own subsidiaries form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market, but carry out the instructions issued to them by the parent company controlling them.»)

[222] Candidate number 562, as cited above at note 183, p. 101.

[223] ISLENTYEVA E., as cited above at note 183, p. 102-103.

agreements. Perhaps, this is the critical point where one needs to give a close attention in order to have a clear understanding of the implications of CGs on the rules of anticompetitive agreements and abuse of market dominance.

Accordingly, by the SEA, as indicated in chapter two and in the above discussion, each and every entity in a given CG is considered as a legally separate, distinct and autonomous legal person. By this approach, the companies in the group are not to be seen as a group but as legally, functionally and operationally separated corporate entities. As such, Competition Law will definitely be applied to these CGs in same manner it applies to any other single corporate entity. This is to mean that, particularly, the rules of anticompetitive agreements and abuse of market dominance will apply to each entity in the CG as if they are operating separately.[224] In this regard, it must be cleared that the relation between the companies in the group will be treated as illegal if it falls within the purview of vertical or horizontal agreements.[225] This specifically means that, the cooperation and integration between the companies is illegal in so far as it fulfills the legal elements of horizontal and/or vertical agreements we discussed before. In addition, the rules of abuse of dominance will also show no sign of change due to the existence of groupings. The assessment and determination of abuse of market dominance, as discussed before, will continue to apply to each entity in the group irrespective of the group status. As an example, the Swiss and Ethiopian Competition Laws have adopted this approach.

In sum, SEA propounds individual liability than group liability. This approach makes no difference on the rules of anticompetitive agreement and abuse of dominance vis-à-vis CGs. Unless by way of "piercing or lifting the group corporate veil; which we noted in chapter two, there will be no leak out of liability for the rest of members of the group. i.e., the liability for the infringement of Competition Law will remain the problem of a company that directly violated the law save circumstances that requires the piercing of the corporate group veil.

Conversely, the choice of SEUA brings different scenario particularly in relation to anticompetitive agreement. In this regard, the practice of EU shows that the doctrine of single economic unit is very crucial to determine whether an undertaking has violated Art 101 of TFEU as there can be no illegal cooperation between companies when these companies are found to be

[224] J. MATTHEW SCHMITTEN, as cited above at note 199, p. 115.
[225] Ibid.

part of the same economic entity.[226] This is clearly stated by the ECC in the IJsselcentrale case: "*It is true that article 81 is not concerned with agreements between undertakings belonging to the same group of companies, and having the status of parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market...*"[227]. In addition, ECJ specifically noted that "... for the purpose of anticompetitive agreement under the law (Art 101 of TFEU), a single firm cannot agree with itself".[228]

Therefore, as far as anticompetitive agreements are concerned, by SEUA, the cooperation, integration and/or any form of relation between the companies in the CGs is not illegal. As noted above, the rules of anticompetitive agreements come when one or more member of the group involved in such agreements with companies outside the group.

However, with respect to abuse of market dominance, SEUA dictates that the acts of abuse of dominance by one of the entities would be attributable to others.[229] Meaning, as far as the liability grounds we discussed before ascertained, the infringement of the rules of abuse of dominance will entail co-responsibility to the group. This is because; the SEUA is a general approach which applies for all aspects of Competition Law with reference to CGs. And as such, the co-responsibility of CGs for the violation of the rules of abuse of dominance is not an exception.

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[226] Jones Alison, and Brenda Sufrin, as cited above at note 202, p. 137.

[227] ECC decision of 16 January 1991, IV32.732, IJsselcentrale and others, Para, 23. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1991:028:0032:0046:EN:PDF accessed on 23.04.12

[228] The court noted that, in Competition Law, the term 'undertaking' must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question, even if in law that economic unit consists of several persons, natural or legal. See ECJ's decision in Shell International Chemical Company v Commission, (Case T-11/89, ECJ, ECR II-757, 1992), Para 311 and Viho Europe BV v Commission, (Case C-73/95 P, ECJ, ECR I-5457, 1996), Para50. Similarly see Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 760 (1984) (noting that unilateral by a single firm acting independently is "not proscribed" by § 1); Judd E. Stone & Joshua Wright, Antitrust Formalism is Dead! Long Live Antitrust Formalism! Some Implications of American Needle v. NFL, 2010 CATO SUP. CT. REV. 369, 373 (2010). Stone and Wright go further and suggest that "under this antiquated formalistic conception of Section 1, a single firm could as easily constitute a cartel as multiple firms. See also J. MATTHEW SCHMITTEN, as cited above at note 199, p. 96.

[229] In the European Competition Law there is another idea, called collective dominance. This collective dominance is to be exercised by a group of legally independent firms but with common marketing policy. However, it doesn't apply to CGs because, for the purpose of "collective dominance, it requires the existence of legally independent and autonomous firms, economically linked and forming common market policy in the relevant market. See Addl Bhatia G.R,, as cited above at note 137, p. 16-17; Østerud Eirik, as cited above at note 135, p.4. see also ECJ's decision in Hoffmann-La Roche v. Commission.(Case 85/76, ECJ, ECR 461, 1979), Para 21.

To sum up, though the selection of one of the two approaches remained a policy matter to be left for every state; as Phillip Blumberg noted, the SEUA is of more of an economic approach and appropriate expression of contemporary CGs vis-à-vis Competition Law.

As a result, this study also argues that, SEUA is better way to serve the very interest and purpose of Competition Law than the SEA. This is because; among others, SEUA clearly reflects the contemporary realities of CGs and compared to SEA; it is a modern approach which is increasingly becoming acceptable in majority of Competition Law jurisdictions including in the EU and US administrative and judicial practices.

CHAPTER FOUR

CORPORATE GROUPS AND ANTICOMPETITIVE AGREEMENTS: ANALYSIS OF THE LEGAL AND PRACTICAL ISSUES IN ETHIOPIA

4.1 GENERAL OVERVIEW OF ETHIOPIAN COMPETITION POLICY AND LAW: PROCLAMATION NO. 685/2010 IN FOCUS

4.1.1 MAJOR POLICY REASONS/RATIONALE AND HISTORICAL DEVELOPMENTS OF ETHIOPIAN COMPETITION POLICY AND LAW

History tells that the Ethiopian economic policy and market landscape has been changed since the advent of democratic government in 1991.[230] The EPDRF government, by overthrowing the communist *Derg* regime, shifted the path of the country's economic policy from command economy to market economy.[231] This revolutionary shift is accompanied by structural adjustment programs of stabilization, liberalization and privatization, primarily focusing on deregulating the markets and re-instating private actors into the modern economic sector.[232] This economic reform process, as part of key industrial development strategies, also recognizes the importance of market competition, the need to regulate market in case of market failures, and the design and implementation of policies that can enhance and facilitate private sector competitiveness.[233]

In addition to such policy interest and reasons expressed in the industrial development strategy document, the obligation owed by Ethiopia to the common market for east and southern Africa, (COMESA) has certainly triggered the enactment of the first trade practice and consumer protection Proclamation no.329 in 2003 which latter was replaced by Proclamation no. 685/2010 (herein after, the Proclamation or 685/2010).[234] The European Competition Law and

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[230] Kibre Moges, Policy-induced Barriers to Competition in Ethiopia, (2008), CUTS International, Jaipur, India, Printed by: Jaipur Printers P. Ltd., Jaipur, p. 1-4.

[231] Ibid.

[232] Ethiopia's adjustment policies continued for more than four years, under a Structural Adjustment Facility (1993-1996) and Enhanced Structural Adjustment Facility (1996-1999). See Fikremarkos Merso, Imeru Tamirat Yigezu, and et al, as cited above at note 149, p.50.

[233] The Federal Democratic Republic of Ethiopia Industrial Development Strategy document, 2002, p. 1-24.

[234] The Trade Practice and Consumer Protection Proclamation of Ethiopia, No. 685/201, Federal Negarit Gazzet, Addis Ababa, No. 49, August, 2010. Membership in the Common Market entails, inter alia, the enactment of domestic antitrust legislation or the application of the regional Treaty rules to domestic competition matters. See COMESA COMPETITION REGULATIONS, December 2004, Art 5.

jurisprudence was the main material source of the Proclamation and remarkably influenced its legal provisions.[235]

As indicated by the preamble of the Proclamation, the major rationale for Ethiopian Competition is;

- To ensure that commercial activities are in accordance with free market economy,
- To build system for competitive market,
- To protect the business community and consumer from anticompetitive practice and unfair trade practices,
- To prevent the proliferation of unsafe good and services,
- To ensure that consumers get goods or service equal to they paid, and
- To determine the power and function of an organ responsible for the implementation of the law.

The rationale expressed, however, is criticized for a number of reasons. For example, it uses the overboard terminology "trade practice" than the more clear words of "competition" or unfair competition"; direct reference to 'competition" or "economic efficiency" is absent unlike in the previous Proclamation; it shows more inclination to consumers' interest, and contains unrelated matters like "to determine the power and function of an organ..." which should not be the rationale of any purported Competition Law.[236]

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[235] There is comparable similarity with the EU's Competition Law, for example, in use of terminologies like "abuse of dominance" than "anti-monopoly" which is prevalent in US antitrust law. See Sherman Antitrust Act, 15 U.S.C. §§ 1-7, available at http://www.law.cornell.edu/usCode/text/15/chapter-1, accessed on 17, 01, 2014. There is also virtual similarity on the rules and legal elements defining "anticompetitive agreement" and "abuse of dominance", as can be seen from Art 5-14 of 685/2010 and Art 81 and 82 of EC treaty. See Hailegabriel G. Feyissa, "EUROPEAN INFLUENCE ON ETHIOPIAN ANTITRUST REGIME: A Comparative and Functional Analysis of Some Problems", MIZAN LAW REVIEW Vol. 3 2009, No.2, p. 272-274, and 276.

[236] The Proclamation 685/2010 is invariably criticized by different legal and economic scholars as to the defects it embodied particularly of its failure to mention "economic efficiency" or market competition as its one of divine reasons. Above all, the law presented itself as cocktail of disarrayed objectives that can only be dealt through different specialized laws. See Fikremarkos Merso, Imeru Tamirat Yigezu, and et al, as cited above at note 149, p.60; Kibre Moges, as cited above at note 228, p.16. Dr. Solomon Abay, Competition Law and Consumer Protection (2), the Legal and Institutional Framework on Competition and Consumer Protection in Ethiopia", (2010, class lecture note, school of graduate, Addis Ababa University, LLM program) (unpublished), p.9.

4.1.2 MAJOR OBJECTIVES AND SCOPE OF ETHIOPIAN COMPETITION LAW AND POLICY

Apart from the grand and general objective of Competition Law we saw under the previous chapter, it is natural to have contextual consideration of various socio-economic and political set up of every state in their respective competition regimes. Accordingly, as per Art 3 of the Proclamation, the main objectives of the current Ethiopian Competition Law are; protecting consumers rights and benefits, ensuring the suitableness of the supply of goods and services to human health and safety and installing a system of follow up are the main objective of the Proclamation. In addition, ensuring that manufacturers, importers, service dispensers and persons engaged in commercial activities in general carry on their activities in a responsible way, preventing and eliminating trade practices that damage the interests and goodwill of businesspersons, and accelerating economic development are also stated as the objectives of the Proclamation.

In the light of the conceptual frameworks discussed in the previous chapter, the Proclamation again is subject to criticism for some problems. For example, similar with previous Proclamation, the objective of 685/2010 is not meant for pure competition issues and it thus ventures in to divergent issues that should only appear at policy level, contain arguably unrelated issues of "protecting good will of business person", again failed to state economic efficiency as its main objectives, and above all it is much more concerned with the interest and rights of consumers which is the ultimate goal of the law as expressed under Art 3(1) of the Proclamation.[237] Concerning this; data collected through interview revealed that the Ethiopian Trade Practice and Consumer Protection Authority is dealing with issues such as environmental

[237] The repeated absence of any direct reference to "economic efficiency" and "market competition" in both statements of rationale and objective of the Proclamation is devastating in the condition that the law is highly influenced by EU's competition regime and it was clearly provided in the preamble of COMESA's competition regulation. See COMESA competition regulation preamble which reads "recognizing that anti-competitive practices may constitute an obstacle to the achievement of economic growth, trade liberalization and economic efficiency in the COMESA member States. However, we can infer efficiency goals from other statements like the reference to 'establish a system that is conducive for the promotion of competitive market' in the preamble (as indirect recognition of promoting market competition as an objective) and also from the legal fact that efficiency set as a ground for exception of anticompetitive practices." See also Fikremarkos Merso, Imeru Tamirat Yigezu, and et al, as cited above at note 149, p.62, 66; Kibre Moges, as cited above at note 228, p. 16 and Dr. Solomon Abay, as cited above at note 114, p.9.

issues though in coordinated way with the responsible organ.[238] However, this researcher of this study feels that the co-existence of such multiple grand objectives would be very hard and cumbersome for the effective and efficient implementation of the Proclamation. In addition, given the present infant stage of the Authority in all respects, it is preferable to have focused objectives which are mainly of competition issues though this may be arguable.[239]

With respect to the scope of 685/2010, in principle, it applies to all persons conducting commercial activities within the territory of Ethiopia (Art 4(1)) and even thematically extends to those commercial activities conducted outside Ethiopia if they have effect in the Ethiopian territory (Art 3(2)), the so-called effect doctrine. In other words, the principle, among others, is telling us that irrespective of the fact that the business is conducted by public or private enterprise it will apply invariably.[240]

Yet, as usual, the principle is not without exception and thus Art 4(3) of the Proclamation which states that the sovereign act of the state (excluding public enterprises); basic utilities; basic goods and services subject to the decision of the Council of Ministers to regulate price; and collective agreements applying to employer and employee relationships are not within the ambit of the Proclamation. In this regard, in view of the conceptual land mark we saw, it would be proper to say these sectors and economic activities are exempted rather than provided with exception as to be seen later on.

This study appreciates the generality of the Proclamation for all persons including public enterprises and by this; the Proclamation is crystal clear as to its position on the general Vs special application issue we discussed in chapter three.[241]

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[238] An interview conducted with the Director General of Ethiopian Trade Practice and Consumer protection Authority, Mr. Merkebu Zeleke and some of the legal experts of the Authority, on November 5, 2013.

[239] Ibid. It is very important to note here that the new draft Proclamation also has nothing to change on this aspect.

[240] This overriding scope of application even goes to any Sectoral laws or regulations and other laws which are inconsistent with the Proclamation, as per Art 57 of 685/2010.

[241] Some legal experts however argue that exempting the range of sectors and activities from the application of the law would significantly curtail its application. See Fikremarkos Merso, Imeru Tamirat Yigezu, and et al, as cited above at note 149, p. 67-68.

4.1.3 ENFORCEMENT MECHANISMS OF ETHIOPIAN COMPETITION POLICY AND LAW

Concerning the enforcement mechanism of Ethiopian Competition Law, like any other competition regimes, the Proclamation provide for institutions and procedures with the view to ensure effective and efficient implementation of the law. Part four of 685/2010 (Arts 31-40) deal with, among others, the establishment, independence, organization, power and functions of the institutions entrusted with the implementation of the law. In this regard 685/2010 is more robust enough than 329/2003 in clearly establishing an autonomous[242] institution called, the Ethiopian Trade Practice and Consumer Protection Authority (here after the Authority) and in demarcating the investigative and adjudicatory powers and functions between the Authority and the Ministry of Trade (here in after, MoT). This tells that, the Authority is not one of the departments of MoT as it used to be. In addition, the investigative power is given to MoT while the adjudicatory power is reserved for the Authority than conferring both on the Authority as envisaged under 329/2003.[243] The Authority is organized in and away that it would have a Director General (here after, DG) and the necessary judges and staff power of the DG.

At this juncture, two point are worthy of brief discussion. Firstly, Even if 685/2010 is applauded for creating a legally autonomous and enforcing institution, the real independence status of the Authority is on fire. As the legal rules of 685/2010 speak, among others, it is the minister of MoT that nominates the DG; it is the Prime Minister who will appoint the DG and the judges. The judges are supervised by the DG, and, quite amazingly the Authority is accountable to the MoT that is empowered with investigation and institution of cases before the Authority.[244] Therefore, given such paradoxes, it is not difficulty to guess how independence of the Authority is on fire.

Secondly, it seems that the Authority is standing in defiance of the majestic power of courts thanks to the adjudicatory empowerment of the law. In fact there are arguments in favour of such

[242] When we say autonomy in its fuller term, it includes structural/institutional, operational and budgetary components where by the institution is free from any undue interference, save check and balancing through accountability system, of any institution whether it is government or private in any manner and in what so ever. See Fikremarkos Merso, Imeru Tamirat Yigezu, and et al, id, p. 28-29.

[243] Among the powers of the Commission listed in the Proclamation are; investigating complaints by aggrieved parties (15/1/a), compel witnesses to testify at hearings (b), and give decisions on complaints (g) of 329/2003.

[244] Same opinion is expressed by Dr. Solomon, see Dr. Solomon Abay, as cited at note 196, p.40-44, and some of the legal experts interviewed to this research.

empowerment by different legal experts owing to, among others, the special nature of competition cases which require expert knowledge and the time consuming nature of court decisions if the Authority were to take cases before ordinary courts. The DG of the Authority, Ato Merkebu (here after simply, DG) opined that the Authority has already established one civil bench and is now considering instituting appellate tribunal to prevent the going on appeal of cases to the Federal High Court. He said, since the nature of the cases requires experts, particularly of economists; the Authority is determined to strength both first instance and appellate adjudicatory power over competition cases rather than sending them to ordinary courts.[245]

In fact, in the international practice, competition authorities are usually confined to tasks such as studying trends of market competition, investigating breaches of the law and prosecuting cases of breaches, while either a separate quasi-judicial organ, either within the Authority or an independent one, or a specialized or ordinary bench within the judiciary is entrusted with the task of adjudicating competition cases.[246] Nevertheless, this study, given the questionable autonomous status of the Authority, and of the independence of its judges owing to their being under the order of the DG, it is appropriate to see option for ordinary courts but with special benches. Moreover, for the sake of preventing arbitrariness and also to preserve the principle of natural justice (*nemo judex in re sua*), this study strongly recommends the treatment of the cases by ordinary courts but with specialized benches. In addition, it seem an outdated argument to raise time factor as a reason not to go to ordinary courts since now-a-days particularly at the Federal High Court level we have specialized and BPR benches with fast track and summary procedures.[247]

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[245] The Authority is also very much interested in reviewing its own decision which is completely opposed by this writer for the reason that it challenges the established judicial system of reviewing decisions. In addition, according to the DG of the Authority, the recent draft Proclamation gives criminal prosecution power for the Authority which may, again, blur the required of quality and standard lines between the civil and criminal investigation process.

[246] Fikremarkos Merso, Imeru Tamirat Yigezu, and et al, as cited above at note 149, p. 82-83. In this study, it is expressed that the World Bank-OECD Model law recommends a "self-contained" separate judicial system for competition cases, while the UNCTAD Model recommends that the competition Authority should have the power to impose or at least recommend sanctions. The International Competition Network (ICN), on the other hand, has favored "structures of decision-making in which the investigative and adjudicative processes are strictly separated" over "systems in which the exercise of these functions is conflated" on the basis of their potential to pass muster at judicial review and the risk of constitutional challenge.

[247] The researcher personally observed the existence of such kinds of benches for cases like negotiable instruments and also expressed by the only appointed judge, Sintayehu Zeleke when they replied to the interview questions of this research.

4.2 ANTICOMPETITIVE ACTS UNDER THE ETHIOPIAN COMPETITION LAW: ANTICOMPETITIVE AGREEMENTS

Art 2(18) of 685/2010 has made an attempt to define what anticompetitive acts are. The provision defines them as "those acts that limit the competitive capacity of a business person". However, in the light of the conceptual framework we saw in the previous chapter, the definition is defective, at least for two basic reasons. Firstly, it wrongly connote that anticompetitive are viewed only from the angle of competitors or business person. Secondly, the listed acts that limit the competitive capacity of business persons are again defective for two reasons. Firstly, the listed anticompetitive acts are unnecessary and will only serve confusion while it would have been better and possible to represent them by the usual categories of anticompetitive acts. Secondly, it seems the law is telling us that the acts enumerated there are different from the four categories of anticompetitive practices while they are in fact acts emanating from the latter in one way or another.[248]

However, despite such confusion in Art 2 (18), Part Two of the Proclamation affirms that abuse of dominant position, anticompetitive agreements, anticompetitive merger, acquisition or takeover, and unfair trade practices are the main anticompetitive practices recognized in the proclamation.[249]

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[248] For example, in most cases predatory pricing is an act of exclusionary abuse of dominance, refusal to supply is exclusionary, exploitive or discriminatory abuse of dominant position, and tie-in sales are exploitive abuse of dominant position. See World Bank and OECD, as cited above at note 113, p. 72-75; Max Hufman, as cited above at note 113, p.10; Art 82 of EU's competition act; Rodger, BJ and MacCulloch, as cited above at note1186, p. 94-97)

[249] In this regard it is worth to mention here that the legal provisions for merger or takeovers and vertical agreement were not a part of the earlier proclamation, 329/2003. See Fikremarkos Merso, Imeru Tamirat Yigezu, and et al, as cited above at note 149, p. 69, 72-75.

4.2.1 ANTICOMPETITIVE AGREEMENTS

4.2.1.1 HORIZONTAL AND VERTICAL AGREEMENTS

The rules specifically dealing with anticompetitive agreements under the current Competition Law extends from Art 11 to 14. Art 11 says "Agreement or concerted practice or a decision by an association is prohibited if it has the object or effect of preventing, restricting or distorting competition". From this, we can infer at least three things. Firstly, three things are prohibited: agreement (irrespective of its form, Art 12 (1)), concerted practice (Art 12 (2) which was absent in the earlier Proclamation) and decision by an association.[250] Secondly, unlike the earlier Proclamation, this provision is very clear on the issue of rule of reason Vs per se prohibition approaches. As a principle, it seems that all sorts of agreements, concerted practices or decision of associations are subject of rule of reason approach. And thirdly, the agreements, concerted practices and the decision of associations can only be prohibited when they have the object/the intent/, and or effect of preventing, restricting or distorting competition and this is within the conventional tenet of Competition Law.

Continuing our discussion, it is important to have a close look at the definition of agreement/s and concerted practices under Art 12 of the Proclamation. Agreements are defined as any kind of "mutual understanding between business persons" or contract irrespective of its form (be it oral or written) and even irrespective of its legal enforceability (whether it is enforceable before court of law is immaterial). This kind of definition is virtually similar with definitions of most jurisdictions particularly of the European Competition Law, as noted under chapter three. According to Art 13, this agreement/s can be either horizontal or vertical. In addition, it is also

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[250]This is in similar state of legal stand with COMESA's competition regulation Art 16 which says "the following shall be prohibited as incompatible with the Common Market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which: (a) may affect trade between Member States; and (b) have as their object or effect the prevention, restriction or distortion of competition within the Common Market". In addition the provision is also similar with its European counterpart. The text of Art.101 of TFEU (EX 81 (1) of the EC) reads: The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts

very important to appreciate the recognition of vertical agreements under the current Proclamation after a long journey of scholars' criticism of previous absence.

Hence, per Art 13 (1), though a definition is absent, those horizontal agreements that are regarded as naked restraints, or hard core agreements, are subject to the rule of per se prohibition. Meaning, agreements with the intent/object or effect of directly or indirectly fixing prices; collusive tendering; allocating customers; or marketing territories or production or sale by quota, are per se prohibited horizontal agreements. Very interestingly, this per se prohibition is also extended to those vertical agreements which have the object or effect of setting minimum retail price, as per Art 12 (2).

But, one may ask here; what if the agreement is expressed neither in written nor in oral form and it is manifested through coordinated acts of individual firms? The possible answer under Art 12 (2) is it will definitely fall in to the category of concerted practices. As can be read from the provision, concerted practices are any act/s of business person that presents a unified or cooperative kind of activities within the business environment that are meant for substituting individual acts.

4.2.1.2 EXCEPTIONS FOR ANTICOMPETITIVE AGREEMENTS

The Proclamation, in line with its principle of rule of reason approach, as depicted under Art 11, provided for exceptions for both anticompetitive agreements. By these exceptions the law has recognized the general jurisprudential fact that not all sorts of agreements are detrimental and thus, there are pro-competitive acts which are worth redeeming. In addition, the law also showed its use of cost plus benefits approach in dealing with anticompetitive agreements and thereby provided outweighing benefits as a defense for anticompetitive agreements.

Thus, Art 14 states that any businessperson accused of anticompetitive agreements may relieve him of such allegation by showing that the pro-competitive gain of the anticompetitive agreements outweighs their costs. i.e., the benefit of the anticompetitive agreements much greater than the injury they may bring to the competitors, consumers or to the general public. Such outweighing benefit can be expressed, among others, in terms of technological and efficiency advantage (for example, this is the case when, as noted before in chapter three, the agreement in question improves method of productions, distributions, or introduces new product

that would not be introduced had competition is there. In addition, when the agreement in question facilitates research and development, it is usually regarded as an exception to the rule).

These pro-competitive restrictions put on competition in the proclamation are open ended and they are similar with the individual exceptions provided under Art 101 (3) of EU's Competition Law. In addition, it is very important to note here that "efficiency" is provided as an exception for anticompetitive agreements though it is absent in the rationale of the Proclamation.

In sum, despite some gaps and problems[251], the Proclamation is more or less in harmony with the mainstream of Competition Law concerning the principles, approaches, prohibition and exceptions of anticompetitive agreements.

4.3 ETHIOPIAN CORPORATE GROUPS AND ANTICOMPETITIVE AGREEMENTS: THE LEGAL AND PRACTICAL ISSUES

4.3.1 THE LEGAL PLACE OF ETHIOPIAN CORPORATE GROUPS IN THE ETHIOPIAN COMPETITION REGIME

The primary legal problem one may face with respect to the interplay of CGs and the Ethiopian Competition Law is their legitimacy in the proclamation. This problem presents a hard task of finding a legal for the CGs in the Proclamation. This task, in turn, requires, in its entirety, the interpretation of legal technical expressions/terms employed by the Proclamation which can validly provide place for the CGs. As a result, this study will examine the technical terms used by Proclamation in order to check whether ECGs recognized by the Proclamation. The technical terms which raise the concern for such interpretation in the Proclamation are the term "business person", "acting together with others" and "decision by association".

Accordingly, as per Art 2 (5) of 685/2010, the term "business person" in the Proclamation is used to express any legal or natural person engaging in Commercial activities defined by the Commercial Code and who may be subject to the rules of the Proclamation. It is comparable and functionally equal with the EU's and COMESA's competition regulation terminology of

[251] Compared to Art 16 of COMESA and Art 81 of EU's Competition Law, Art 11 of the Proclamation, unless taken to mean for business person, is very unclear as to whose association it is talking. The former two provisions precisely say "associations of undertakings". In addition, the Proclamation depicted how the legislative body is reluctant to fully recognize vertical agreement by only providing single provision for it which only talks about setting of minimum retail price while there are more to state about.

'undertaking/s". Thus, the first hard task in finding place for CGs in the Proclamation is to understand how this "business person" is envisaged. This is because; as we saw in chapter two and three, since specialized law on CGs is absent in most jurisdictions, it is the interpretation of the word "undertaking" that determines the place of CGs in Competition Law particularly in the EU's competition regime.

Accordingly, the definition of Art 2(5) directs us to the recognized legal or natural person under the Commercial Code of Ethiopia. But, the question is; can we stretch this provision to CGs in a way that consider them as "single economic entity or economic unit?

As indicated in chapter two and three of this study, the term "undertaking" is interpreted to mean "an economic unit" irrespective of the existence of legally separated entities in the unit. However, though EU's competition regime is the major source of the Proclamation, it seems that the term 'businessperson' cannot be interpreted in similar manner with EU's comparable term of "undertaking". This is because; the DG on whom the ultimate interpreting power of the Authority is vested, expressed that existing CGs have no peculiar place in the Proclamation. He said that, the rules of the Proclamation including the interpretation of 'businessperson" is envisaged for legally separated entities but not for entities in group fashion. [252] Supporting this line of interpretation, the judge of Federal High Court Lideta Commercial and BPR bench said, "since CGs are not recognized within our laws there can be no stretched interpretation of existing legal provision that are meant for single corporate entity"[253]. He also added that if, for example, they initiated cases by their group name or be sued as such, amendment of pleading will be ordered so as to have specific legal person.

So, though this line of interpretation is valid in the current Ethiopian legal system, this researcher sees nothing wrong in interpreting the term for CGs. This is because; given the fact that these CGs are acting as single entity with nominal separation, it may not be plausible to stick to SEA. In addition, such continued singular interpretation could provide ample opportunity to escape from corporate liability under the guise of limited liability which will effectively crush corporate law justice.

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[252] He further said, meaning, so long as an entity has fulfilled the requirement of TIN No, capital, address and capacity to engage in commercial activity, it will subject to the rules of the Proclamation.

[253] Interview with Mr. Sintaye Zeleke, judge, Federal High Court, Lideta BPR and Commercial Bench, August, 2013.

The second and the final attempt to find a place for CGs in the Proclamation is the terms used in Art 5, 6, 11, and 13 (1(a)) of the Proclamation. The terms are, "acting together with others" and 'decision by an association". The former term is used in relation to abuse of dominance. Incidentally, it is worth to see that Art 17 of COMESA uses the term "interconnected companies" instead of "acting together with others". In addition, Art 17(2) of the same instrument clearly defined interconnected companies as "any two companies shall be treated as interconnected companies if one of them is a subsidiary or associate of the other, or both of them are subsidiaries of the same parent company". Furthermore, it has high accuracy in saying "associations of undertakings", as per Art 16 than the imprecise expression of "decision by association", as under Art 11 and 13 (1(a)) of Ethiopian Proclamation. In relation to CGs, Art 19 (2) of COMESA states; "... this paragraph shall not apply where undertakings are dealing with each other in the context of a common entity wherein they are under common control or where they are otherwise not able to act independently of each other". So, similar with the stance of ECC and ECJ, COMESA recognizes CGs and made it crystal clear that they are treated as "single economic unit".

Coming to our law, however, despite its being influenced by the two regimes and even for stronger reason came to life as a result of the obligation owed to COMESA, it remained defective and vague in these terms. This researcher understands the two terms as functionally equivalent with COMESA's terms we saw and as such they should have convey similar massage in their interpretation. Nonetheless, Even if one takes this line of thinking, the strict adherence of the Authority to the traditional corporate law thinking do not allow otherwise. So, it is simply interpreted as legally separated business persons acting to hold market dominance or acting together to abuse their market dominant position.[254] In addition, though the expression "decision by association" can rightly be assumed in state of legally separated business persons, the Proclamation remained silent on CGs. Meaning, unlike COMESA rules, the Proclamation doesn't outlaw anticompetitive agreements for CGs irrespective of the fact that they for a single economic unit.

[254] This interpretation is similar with the European legal practice of "collective dominance" which has nothing to do with CGs. See the office of fair trade act, as cited above at note 134, p. 16-17.

In a nutshell, ECGs do not have a legal place or lack legal personality (group personality) in the current Proclamation. This is even worse than the sketchy recognition given by the Code to the company groupings as discussed in chapter two of this study.

4.3.2 REGULATORY ISSUES AND OVERRIDING POSITIONS

It is already discussed that ECGs while they lack adequate rules under the Code, they are totally unknown by their group personality within the Competition Law of Ethiopia. So, it is true that this absence will definitely raises concerns as to how these CGs should be regulated for the purpose of the Proclamation. i.e., it is likely that these CGs may involve in some acts that may violate the Proclamation. In such event, this study is interested to examine how these CGs might be treated given the fact that they are related in terms of control, ownership and management.

Accordingly, in the line with the international practice on the two regulatory choices we discussed before, the regulatory choices available to the Authority are either the separate entity (SEA) or the single economic unit/enterprise approach (SEUA). Coincided with this regulatory issue, it may not be unwarranted conclusion that the Authority has opted for SEA. This is because; as we discussed, the DG made it clear that the Authority is considering entities in the existing CGs as separate entities despite their group status. However, this, again, doesn't mean that the issue is very easy as such.

Consequently, this researcher has conducted interview with seven legal experts of the Authority to assess their position concerning the appropriate regulatory approach to be followed by the Authority.[255]

Accordingly, among seven of them, four of them strongly argued for SEA by saying that CGs are not recognized by the Proclamation while the remaining three experts argued against this position and opted for SEUA. The latter category described that in as much as these CGs are intertwined through control and ownership causing the loss of their corporate autonomy, they

[255] The interviewees are: Mr. Tewodros Samuel, Yonas Abebe, Getined Ashenafi (head of the legal department), YebegaEshet Akililu, Alembank Yimer, Sulayman Hussen, and Sibihat Kefiyalew. The interview was conducted on September 20, 2013. This interview is conducted for the reason that the Ethiopian Competition Law has borrowed many legal terms from its European counterpart. As such, there is assumed similarity in the meaning of these technical legal terms. In addition, the issue of regulatory choices is not specifically and clearly settled in the European Competition Law and it is the ECC and ECJ that are vested with the interpretation and application of the law. Thus, the word "undertaking" is interpreted in a way that CGs are regulated on group basis under the EU's jurisprudence. As such, this study feels that the functionally equal term of "businessperson" in our Competition Law in similar way calls for "interpretational" issues.

must be considered as SEU. In addition, as stated before, the judge of Federal High Court, Mr. Sitayehu, also rejected the idea of considering them as one unless the doctrine of piercing veil dictates so. In other words, due to absence of recognition for CGs in our laws, he supported the SEA for the regulation of ECGs. In this regard, Professor Tilahun Teshome also stressed that it is not appropriate to stretch laws or provisions meant for single corporate entity for present CGs though the law is obviously defective concerning their regulation.[256]

In general, despite such variety of expert positions, it seems that SEA is the overriding position of the Ethiopian legal system in general and the Authority in particular concerning the regulation of ECGs.

Coincided with this prime position of the Authority, the issue of whether the rules of anticompetitive agreements apply on ECGs is resolved. This is in a sense that, since SEA opted as a regulatory approach toward ECGs, the rule of anticompetitive agreements will not be barred from applications on ECGs as in the case of SEUA. As an example to this approach, the DG expressed that, recently Derba Cement factory is made liable for the Authority's corrective measure for its infringement of the Proclamation through its advertisement and it is not MIDROC, as a group, which was made liable for such violation.

4.3.3 LEGAL AND PRACTICAL ISSUES VIS-À-VIS ANTICOMPETITIVE AGREEMENTS

The legal landscape of the competition regime, as noted, dictates SEA for the regulation of ECGs. As a result, it is the very interest of this study to examine and evaluate the practical situation of the rules of anticompetitive agreements vis-à-vis ECGs. Herein below, it will discuss, examine and evaluate the existing ECGs by taking EFFORT and MIDROC CGs as an example against the legal elements of anticompetitive agreements in the Proclamation.

Accordingly, the first issue is whether there is an "agreement" between the companies constituting existing ECGs within the meaning of Art 12 of the Proclamation.

Just to remind, according to Art 12 of the Proclamation, mutual understandings, written or oral contracts and even operational procedures can be valid evidence for existence of agreement

[256] Interview with Tilahun Teshome, (professor), at Addis Ababa University, School of law, December 23, 2013.

between legally separated businesspersons. Pursuant to this rule, this study has surveyed EFFORT and MIDROC CGs to examine whether they can fit to this definition of agreement.

Table4.1: List of EFFORT and MIDROC Member Companies

EFFORT[257]	Up to 2008, EFFORT owned 12 companies: Mesebo Building Materials (Mesebo Cement), Ezana Mining Almeda Textiles & Garmenting, Addis Pharmaceuticals, Mesfin Industrial Engineering, Trans Ethiopia, Saba Stones, Sheba Tannery, Hiwot Agricultural Mechanization, Sur Construction, Guna Trading and Express Transit Services. On 1 April 2009 EFFORT incorporated the Dejenna Endowment, a similar umbrella grouping of much smaller-scale companies, also established to promote economic development in Tigray. As a result, EFFORT took over a further 11 relatively small companies which the other endowment had established in Tigray in the early 2000s, namely: Abergelle Livestock Development, Alage Forest Development & Utilisation (subsequently divested), Bruh Tesfa Plastic Products, Dimma Beekeeping and Honey Processing (subsequently divested), National Geo-textile Technologies (also Wukro Gabion Factory), Plant Tissue Culture Laboratory (subsequently donated to Mekelle Institute of Technology), Maichew Particleboard Factory, Romanat Flexible Packaging, Golgol Raya Agro Processing (subsequently donated to the zone administration), Selam Flowers (subsequently divested), Abergelle Export Slaughterhouse Factory (subsequently integrated with Abergelle Llivestock Development)
MIDROC[258]	To cite some of the companies, Addis International Catering PLC, Ethio Agri-CEFT PLC, Ethio-Leather Industry (ELICO, Kebire Enterprise, Lame Dairy PLC, Unlimited Packaging PLC, MAMCO Paper Products PLC, Star Soap & Detergent Industries PLC, MIDROC Ethiopia Construction PLC, MIDROC Energy House Electro-Mechanical Services PLC, Sheraton Addis (established in 1998; is a

[257] See Sarah Vaughan and Mesfin Gebremichael, as cited above at note 75, and p.38-39. In addition, see also EFFORT corporate profile", The Endowment Fund for the Rehabilitation of Tigray, 2008.
[258] See John Sutton and Nebil Kellow, as cited above at note 73, p. 50-52. See also TIRET the MIDROC Ethiopia group corporate magazine, as cited above at note 92.

	member of Starwood Hotels & Resorts Worldwide Inc), MOHA Soft Drinks Industry S.C, Pharmacure Pvt. Ltd Co, Mugad Travel PLC, National Mining Corporation PLC, MIDROC Gold Mine PLC, ELFORA Agro-Industries PLC, Wanza Furnishings Industry PLC, Daylight Applied Technologies PLC, Modern Building Industries (MBI) PLC, Huda (residential and office buildings), Addis Gas and Plastics Factory PLC, Trust Protection and Personnel Services PLC, Addis Home Depot PLC, Trans Nation Airways (TNA), Rainbow Exclusive Car Rental and Tour Services PLC, Summit Engineered Plastics PLC, Blue Nile P.P. and Craft Paper Bags Manufacturing, United Auto Maintenance Services PLC, Kombolcha Steel Products Industry (KOSPI) PLC, NOC (national oil Ethiopia), Salam Health care plc, Horizon Addis Tyre, Tousa Steel PLC, Awassa chip wood factory, Wanza furnishings industry PLC, Vission Aluminum manufacturing PLC, Nyala Insurance S.C, Dashin Bank S.C, Bebeka coffee estate, Queen's supermarket PLC, Adago MIDROC trading PLC, Lame diary PLC, and Samara trading.

Source: Prepared by the researcher from data obtained from EFFORT and MIDROC corporate profile

The existence of agreement between these companies under the umbrella of EFFORT and MIDROC is very evident from different sources. For example, the corporate profile of EFFORT clearly describes the mission, vision and core values of the companies as one economic unit in the group.[259] Likewise, the corporate magazine of MIDROC companies, and repeated advertisement of MIDROC group through different media instrument clearly presented the companies as MIDROC group.[260] In addition, data collected through interview revealed that let alone the business community, different government institutions like the Ethiopian Chamber of Commerce and Sectoral Association (ECCSA), Addis Ababa Chamber of Commerce and Sectoral Association (AACCSA), the Ethiopian Custom and Revenue Authority, and even the Competition and Consumer Protection Authority itself are already cognizant of these groupings.[261]Meaning, these institutions are dealing with these CGs through representation except on legal issues requiring the application of SEA.

[259] EFFORT corporate profile magazine, as cited above at note 255, p. 1-2.
[260] TIRET the MIDROC Ethiopia group corporate magazine, as cited above at note 92, p.1-60.
[261] Interview with Mr. Chelem Setegn, Head of the legal department of ECCSA (also expressed the relation of these CGs and AACCSA), as cited above at note 104, and interview with Mr. Birhanu Sisay, as cited above at note 106.

Therefore, the existence of agreement within the meaning of Art 12 of the Proclamation between companies within the EFFORT and MIDROC CGs is not arguable.[262]

The second issue is whether the agreement between these companies is horizontal or vertical agreement within the meaning of the same provision.

Hence, as we recall from chapter two discussions, most of ECGs, with the exception of few, are vertically integrated. As stated before, this is true given their conglomerate nature and being family owned companies.

In relation to EFFORT and MIDROC CGs, instances of horizontal relation among their companies is not that much visible since most of them, like any other ECGs, are vertically integrated or they are just conglomerates. But, as per the information from the public relation (PR) of EFFORT liaison office, Express Transit and Trans-Ethiopia companies are engaging in almost similar competing transportation services.[263] On this aspect, the EFFORT corporate profile also clearly shows the services the two companies delivering though their being competing companies are more of practical than what the corporate profile espouse.[264] So, according to Mr. Michael Tesfaye (PR officer of EFFORT liaison office), it is possible to say that Express Transit and Trans-Ethiopia are in horizontal relation in a sense that they are delivering competing services.

Similarly, among the MIDROC companies, for example, ELFORA and Lame dairy are horizontal companies concerning the production and sale of pasteurized milk.[265] In addition, star soap detergent PLC and MIDROC Energy House Mechanization are also in a horizontal relation regarding the importation and distribution of electric wires.[266] Furthermore, KOSPI and

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[262] Though this study surveyed the two CGs for the purpose of discussion, similar conclusion can be made for other existing CGs given the discussion made in chapter two.

[263] Mr. Michael Tesfaye, public relation officer of EFFORT liaison office, Addis Ababa, Bolle road, Mega BLG, 3rd floor, office No. 17.

[264] EFFORT corporate profile, as cited above at note 255, p.16-17, 30.

[265] Information obtained from companies and registration file of MoT.

[266] Ibid. MIDROC ENERGY HOUSE EIECTROMECHANICAL SERVICES PLC/ የኤሌክትሮ ሜካኒካል ስራ ተቋራጭ፣ ኤሌክትሪክ እና የኤሌትሪክ ሽቦ ተጓዳኞች አስመጭ፣ STAR SOAP DETERGENT INDUSTRIES P L C/ የምግብ ዘይት እና ስብ፣ ሌሎች የፕላስቲክ ምርቶች፣ ሳሙና እና ሌሎች የጽዳት ውሁዶችን መፈብረክ፣ የሳሙና ዲተርጀንትስ መአዛማ ዘይቶች አስመጪ፣ ኤሌክትሪክ እና የኤሌትሪክ ሽቦ ተጓዳኞች አስመጭ፣ ሌሎች ሌላ ቦታ ያልተጠቀሱ የኮንስትራክሽን ማቴሪሎች፣ብረታብረት፣ የቧንቧ (ፒቪሲ ቧንቧን ጨምሮ)እና የማሞቂያ መሳሪያዎችና አቅርቦት አስመጪ፣ የፔትሮ ኬሚካል ውጤቶች/ቫዝሊን ግሪሲሊን የመሳሰሉት/ ውጤቶች አስመጪ፣ ወረቀት እና የወረቀት ውጤቶች አስመጭ፣ ሌሎች ሌላ ቦታ ያልተጠቀሱ ኬሚካል እና የኬሚካል ውጤቶች አስመጭ፣ የኢንዱስትሪ መሳሪያዎችና መገልገያዎች አስመጭ፣

TOUSSA are horizontally related factories since both engage in steel production in different places.[267]

With regard to vertical agreement, it must be recalled that the very rationale of having CGs by itself, as noted in chapter two, is to secure supply chain. i.e., the investor, particularly in the Ethiopian family ownership trend, is very keen in resolving supply constraints for any of business venture he/she engages. So, as indicated in chapter two of this study, this vertical integration is also the main feature of ECGs which can easily be seen by the case of EFFORT and MIDROC CGs.

Concerning EFFORT, information obtained from the liaison office of EFFORT indicates that the majority of the companies within the group are in fact vertically integrated.[268] This integration is with the view to secure supply chain and which, according to W/ro Zewide Kahisay, extends from the raw material source for manufacture of certain product to the point of distribution. In this regard, the most notable companies are SABA Dimensional Stone PLC (SDSPLC), Trans-Ethiopia (TE), Messebo Building Materials Production (MBMP), ALMEDA Textile PLC (ATPLC), and GUNA Trading House PLC (GTHPLC). As an example, the vertical integration between these companies can be depicted as follow.

(1) **SDSPLC** STONES FOR CEMENT **TE** TRANSPORTATION **MBMPLC** PRODUCTION OF CEMENT

TE TRANSPORTATION GTHPLC (final distributing house). In this regard SUR construction PLC is the main purchaser of this product by which it accomplishes its construction projects. For example ALMEDA's textile factory is built by SUR construction PLC.[269]

(2) **TE** COTTON TRANSPORTATION **ALTPLC** COTTON PROCESSING AND TEXTILE PRODUCTION

GTHPLC(final distributing house).

የማሞቂያ ዕቃዎችና ተዛማጅ ምርቶች አስመጭ፣ ሌሎች ሌላ ቦታ ያልተጠቀሱ የኮንስትራክሽን ማቴሪሎች፣ብረታብረት፣ የቢንቢ (ፒቪሲ ቢንቢን ጨምሮ)እና የማሞቂያ መሳሪያዎችና አቅርቦት አስመጪ. See companies and registration files of the companies, MoT.

[267] TIRET MIDROC corporate magazine, as cited above at note 92, p. 29 and 7 respectively.

[268] Interview with the head of finance department, W/ro Zewide Kahisay, EFFORT liaison office, Addis Ababa, Bolle road, Mega BLG. In addition, the corporate profile of EFFORT clearly states which companies are vertically integrated. See EFFORT corporate profile magazine, as cited above at note 255.

[269] See EFFORT corporate magazine, id, p. 19.

Concerning MIDROC CGs, the situation of vertical integration between the companies is very rampant and seems virtually all of the companies are very intricate as such. In fact, MIDROC companies are unique in this regard since they seem to have a well established policy to that effect. In this regard, the General Managers of Ethio-Leather Industries Plc. (ELICO) and Nyala Insurance S.C, at the 15th annual general manager's conference of MIDROC companies held in Adama emphasized the importance of buying the products and services of the Group Companies to ensure synergy of MIDROC companies.[270] So, it seems synergy of the companies in the groups is a matter of corporate policy in the MIDROC CGs.

The following table shows examples of such vertical integration among some of the MIDROC companies.

Table 4.2: Selected MIDROC Companies and their business venture

[270] TIRET MIDROC corporate magazine, as cited above at note 92, p.19.

ADAGO MIDROC TRADING PLC	የስፖርት ዕቃዎችና መገልገያዎች/ የጤና መንከባከቢያና መገልገያዎችን ጨምሮ/ አስመጭ, የቢሮ መሳሪያዎች፣ መገልገያዎች እና መለዋወጫ አስመጭ, ሌሎች ሌላ ቦታ ያልተጠቀሱ ጥጥር፣ፈሳሽ፣ ነዳጅ ጋዞችና ተዛማጅ ምርቶች አስመጭ, የንግድ እንደራሴ, የቤትና የቢሮ ውስጥ የኤሌክትሪክ ዕቃዎች እና መገልገያዎች /የቤትና የቢሮ ውስጥ ኮንዲሽነሮችን ጨምሮ/ አስመጪ, የቤት እቃዎች /ብርድ ልብስ፣አንሶላ፣ፍራሽ እና ትራስ/ አስመጪ, የስኳር አስመጭ, የውጭ አገር ንግድ ረዳት, የብረትና አረብ ብረት አስመጭ, የቤትና የቢሮ ማስዋቢያዎች /መጋረጃ፣ ምንጣፍ ፣የግድግዳ ወረቀት የመሳሰሉት/ አስመጪ, ሌሎች ሌላ ቦታ ያልተጠቀሱ የግብርና ውጤቶች አስመጭ፣ ሎች ያልተገለጹ የቤት ዕቃዎች፣ማስዋቢያዎችና የቤት ውስጥ መገልገያዎች አስመጭ(ባትሪ ድንጋይን ጨምሮ)፣ የስፖርት ዕቃዎችና መገልገያዎች/ የጤና መንከባከቢያና መገልገያዎችን ጨምሮ/ አስመጭ፣ የቤትና የቢሮ ውስጥ ፈርኒቸሮች ሪኩዚት ቦርዶች እና ተገጣጣሚዎች አስመጪ፣ የመድሀኒትና የህክምና መገልገያዎች አስመጭ፣ የስጋና የዶሮ ስጋ፣ የብሮድካስት አገልግሎት ማሰራጫ ወይም መቀበያ ዕቃዎች /ራዲዮ ቴሌቪዥን ድምፅ ማጉያዎች፣የመቅጃና የምስል መቅረጫ መሳሪያዎች፣ዲሽ፣ ዲኮደር የመሳሰሉት / አስመጪ፣ የእንስሳት መድሃኒትና የህክምና መገልገያዎች አስመጪ፣ የወተት ተዋፅኦ እና የአዕዋፍ እንቁላል፣ የመድሀኒትና የህክምና መገልገያዎች አስመጭ፣ የስኳር አስመጭ፣ የቤትና የቢሮ ውስጥ ፈርኒቸሮች ሪኩዚት ቦርዶች እና ተገጣጣሚዎች አስመጪ፣ የቢራ አስመጭ፣ የለስላሳ መጠጦች አስመጭ፣ የተፈበረኩ ብረታብረቶች ከአጠቃላይ የብረታብረት ዕቃዎች ውጭ/የአረብ ብረት ቧንቧ/ አስመጭ፣ የኮስሞቲክስ እና የንጽህና ዕቃዎች አስመጭ፣ የምግብ ዘይት እና ስብ፣ ሌሎች ሌላ ቦታ ያልተጠቀሱ ጥጥር፣ፈሳሽ፣ ነዳጅ ጋዞችና ተዛማጅ ምርቶች አስመጭ፣
ELFORA AGRO INDUSTRY PLC	የአትክልትና ፍራፍሬ ማምረት ችግኝ ማፍላት ከአበባ በስተቀር፣ የቁም እንስሳት ዕርድ፣ ማጣፈጫና ማሽግ የዶሮና የትንንሽ አእዋፋትን ሥጋ ጨምሮ፣ የቀንድ ከብት፣ በጎች፣ፍየሎች፣የጋማ ከብትና የወተት ልማት፣ ጉብ ማነብ፣ የቅባት እህሎች ማልማት፣ እንስሳት ማድለብ፣ ቅቤና ዐይብ መፈብረክ፣ ነት፣ፍራፍሬ፣ ሻይ ሌሎች እንቂ ተክሎች እና ቅመማ ቅመም ማልማት፣ የቀንድ ከብት፣ በጎች፣ፍየሎች፣የጋማ ከብትና የወተት ልማት፣ የተረፈ ምርት ውጤቶችን ማቀናበር ሌጦ፣ አጥንት፣ ወዘተ፣ ዶሮ ማርባት፣ ተዘጋጀና የተጠበቀ ሥጋ መፈብረክ፣ሶሴጅ፣ የብርዕና የአገዳ ሰብሎች እና ሌሎች በሌላ ቦታ ያልተጠቀሱ ሰብሎች ማምረት፣ ትኩስ ወተት ማቀናበር (ፓስተራይዝ፣ ሆሞጂናይዝ፣ ስቴሪላይዝ ማድረግና ቫይታሚን መጨመር)
LAME DAIRY PLC	ትኩስ ወተት ማቀናበር (ፓስተራይዝ፣ ሆሞጂናይዝ፣ ስቴሪላይዝ ማድረግና ቫይታሚን መጨመር),
STAR SOAP DETERGENT INDUSTRIES P L C	የምግብ ዘይት እና ስብ፣ ሌሎች የፐላስቲክ ምርቶች፣ ሳሙና እና ሌሎች የጽዳት ውሁዶችን መፈብረክ፣ የሳሙና ዲተርጀንትስ መአዛማ ዘይቶች አስመጪ፣ ኤሌክትሪክ እና የኤሌትሪክ ሽቦ ተጓዳኞች አስመጭ፣ ሌሎች ሌላ ቦታ ያልተጠቀሱ የኮንስትራክሽን ማቴሪሎች፣ብረታብረት፣ የቧንቧ (ፒቪሲ ቧንቧን ጨምሮ)እና የማሞቂያ መሳሪያዎችና አቅርቦት አስመጪ፣ የፔትሮ ኬሚካል ውጤቶች/ቫዝሊን ግሪሲሊን የመሳሰሉት/ ውጤቶች አስመጪ፣ ወረቀት እና የወረቀት ውጤቶች አስመጭ፣ ሌሎች ሌላ ቦታ ያልተጠቀሱ ኬሚካል እና የኬሚካል ውጤቶች አስመጭ፣ የኢንዱስትሪ መሳሪያዎችና መገልገያዎች አስመጭ፣ የማሞቂያ ዕቃዎችና ተዛማጅ ምርቶች አስመጭ፣ ሌሎች ሌላ ቦታ ያልተጠቀሱ የኮንስትራክሽን ማቴሪሎች፣ብረታብረት፣ የቧንቧ (ፒቪሲ ቧንቧን ጨምሮ)እና የማሞቂያ መሳሪያዎችና አቅርቦት አስመጪ
WANZA FURINSHINGS INDUSTRY PLC	ሌሎች ሌላ ቦታ ያልተጠቀሱ የብረታ ብረት ውጤቶችን መፈብረክ፣ ሌሎች የብረታ ብረት ስትራክቸር ውጤቶችን መፈብረክ ለምሳሌ የብረታ ብረት በሮች፣ መስኮቶችና መግቢያ፣ የቤትና የቢሮ ዕቃዎች መፈበረክ
DAYLIGHT APPLIED TECHNOLOGIES	የቢሮ የሂሳብ ስራና የኮምፒዩቲንግ ማሽኖችን መፈብረክ፣ ሌሎች ያልተገለፀ የህንጻ አንስታሌሽን ስራዎች፣ የኤሌትሪክ አምፖሎች እና የመብራት ዕቃዎች መፈብረክ፣ የቧንቧ ስራዎች፣ ሌሎች ሌላ ቦታ ያልተጠቀሱ ሌሎች የመስታወት መያዣዎችን፣ ከመስታወት የሚመረቱ የማዕድ ቤትና የገበታ ዕቃዎች፣ለላይንስና ላቦራቶሪ አገልግሎት የሚውሉ፣የእጅና የግድግዳ ሰዓት መፈብረክ፣

MODERN BUILDING INDUSTRIES	ቀለም፣ቫርኒሽ እና ተመሳሳይ የቅብ ምርቶች እና የህትመት ቀለምና ማጣበቂያ መፈብረክ፣ ሌሎች ሌላ ቦታ ያልተጠቀሱ ብረታ ብረት ያልሆኑ የማዕድናት ውጤቶችን መፈብረክ፣ የፕላስቲክ ውጤቶች መፈብረክ፣ ከኮንክሪት፣ ከሲሚንቶ እና ከመለሰኛ የሚሰሩ ውጤቶችን መፈብረክ፣ የማጣበቂያ እና የመጫምር ቶች መፈብረክ

Source: Prepared by the researcher from data obtained from the Companies Registration file, ICT department, MoT.

As we can see, vertical integration is manifested, among others, between ELFORA and Lame dairy, between ADAGO and ELFORA, KOSPI, PHARMACURE, MBI, and DAYLIGHT, and STAR soap and detergent PLC with KOSPI, MIDROC construction PLC, and MAMCO PLC.

The third issue is whether this vertical or horizontal relation is anticompetitive agreement within the legal meaning of the Proclamation.

It is true that once there is agreement between legally separated businesspersons and once this agreement asserted as either horizontal or vertical relation, then it is likely that this situation can yield anticompetitive acts. This assertion is very critical in a situation where the contestable market size of Ethiopia is alleged to be very small, less than 50%.[271]

Though this study cannot determine whether the existing ECGs, mainly EFFORT and MIDROC, infringed the rules of anticompetitive agreements in the Proclamation, it will, however, try to present some facts and concerns thereon.

Accordingly, recent research on the existing acts of anticompetitive agreements in Ethiopia, in general, shows that collusive tendering, bid rigging, price fixing, and hoarding are the most acts of anticompetitive agreements.[272] Particular to EFFORT companies, there are continuing allegations that these companies are frequently collude to fix retail prices of construction materials through their vertical integrations.[273] In addition, EFFORT companies controlled the

[271] Dr. Solomon Abay, as cited above at note 196, p.5.

[272] Fikremarkos Merso, Imeru Tamirat Yigezu, and et al, as cited above at note 149, p. 56-59; CUTS Centre for Competition, Investment & Economic Regulation, From the Bottom Up, CUTS, 2007, p. 84; Gasparikova Sonia and Sengupta Rijit, taking the right steps, competition administration in eastern and southern Africa, no. 1/2008, in Capacity Building on Competition Policy in Select Countries of Eastern and Southern Africa), CUTS Centre for Competition, Investment & Economic Regulation (CUTS C-CIER, Department for International Development (DFID), UK and the Norwegian Agency for Development and Cooperation (NORAD), Norway, p. 4-5. See also Sarah Vaughan and Mesfin Gebremichael, as cited above at note 89, p.29. In addition, the Director General also told to this research that the practices such as abuse of dominance, price fixing, and bid rigging are the most notable ones.

[273] The research conducted by African power and politic exposed that there is a constant allegation about the aggressive and unfair competition by EFFORT companies, absence of competitive fairness, exclusive dealing

import and distribution of fertilizer, and most of the companies engage in exclusive supply and distribution dealing which can limit competition in the domestic market.[274] In this aspect, the exclusive dealings (supply or distribution agreements) between Guna Trading House, on the one hand, and Messebo and Almeda textile Plc, on the other hand, is the best example.[275] This exclusive dealing is also the case of MIDROC companies for example between SAMARA trading and ELFORA.[276] Moreover, given their political affiliation with the government particularly of EFFORT, there are also cases where the competitive fairness of the market is distorted by the preferential dealing practice of the government's procurement agency, which is the largest purchaser in the country.[277] Furthermore, in the light of their corporate policy and unified economic operation, territorial allocation is the main feature of EFFORT and MIDROC CGs.[278]

As a final note to the discussion on anticompetitive agreements, we stated that Express Transit and Trans-Ethiopia are horizontally lined companies of EFFORT. However, the newly appointed PR of effort corporate office, just few days before the completion of this chapter, said that they are merged.[279] Mr. Michael also clearly said that the reason for merging the two companies is; since two companies were engaging in similar production line, the corporate office has decided that they should be merged for reason of efficient provision of transport service.

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character and the existence of vertical integration with potential of setting minimum retail price. See Sarah Vaughan and Mesfin Gebremichael, id, p.10, 27, 45-47, and 54. John Sutton and Nebil Kellow in their research expressed that the existence of vertical integration potential of setting retail price and the exclusive dealings, see John Sutton and Nebil Kellow, as cited above at note 87, p 110 and 138. Fikremarkos Merso, Imeru Tamirat Yigezu, Seyoum Yohannes, Yoseph Endeshaw and Tilahun Teshome Retta, expressed the existence of allegation of unfair competition and the control of supply of essential commodities particularly the monopolistic control of construction materials by the EFFORT companies. They have also stated that the private sector and some of the members of SNNP chamber of commerce bitterly expressed their resentment with the unfair competition of party affiliated companies. See Fikremarkos Merso, Imeru Tamirat Yigezu, and et al, as cited above at note 149, p.53-59. Finally, Alemayehu also expressed similar concerns in his writing. See Alemayehu Fentaw, Ethiopian Unfair Competition Law, Centre for Competition Law and Policy, Working Paper CCLP (L) 21, the University of Oxford, p.10-14.

[274] Ibid.

[275] It is already a public knowledge that Guna trading house has exclusive dealing agreement with Almeda since it is repeatedly announced and advertised through different Medias including the Ethiopian Radio and Television broadcasting service organization (ETV). Visit the www.ertagov.com. The exclusive dealing between Guna and Messebo is depicted on the corporate profile of EFFORT. See the EFFORT corporate magazine, as cited above 203.

[276] SAMARA TRADING is Abdella Hussein Ali Al-Amoudi's Establishment, an affiliate Company in Jeddah, ELFORA's exclusive representative and agent in the Middle East, Africa and Asia, and its subcontractor. See TIRET MIDROC corporate magazine, as cited above at note 92, p. 45.

[277] Ibid.

[278] Information from MoT shows that it is unlikely to find two companies of same product or service in similar territorial operation.

[279] According to the head of the legal department of the Authority, Mr. Getinet Ashenafi, the Authority has no knowledge of this Merger at least from the merger documents it inherits from the former empowered organ, MoT.

This researcher, while reasonably assuming the existence of many other acts of anticompetitive agreements to which this study could not reach, has asked the DG that; what is the reaction and experience of the Authority concerning the anticompetitive acts of these CGs.

The first thing that the DG told to this researcher is; there are in fact concerns on overall anticompetitive agreement situations of existing ECGs particularly of EFFORT and MIDROC. But, as the DG said, the Authority has no any formal experience on these concerns. This lack of experience, he continues to state, is mainly due to the infant stage of the Authority that lacks the proper institutional infrastructure with which it can effectively deal with these practical concerns. He also added that, now the Authority is working with these giant CGs particularly with MIDROC CGs that invited the Authority to have awareness on the Proclamation so as to prevent any violation of the competition rules.[280]

However, this researcher, during interview with the DG of the Authority, has come up with the fact that there is an attitude of considering EFFORT companies as public enterprises.[281] This attitude could have ramification on the active regulation of EFFORT companies within the purview of the Proclamation. This is because, as per Art 4(4) of the Proclamation, being public enterprise will effectively enable the Authority to ignore their effect on competitors and confine itself to their effect on consumers.

As a conclusion, ECGs, as exemplified by EFFORT and MIDROC CGs, are the major sources of legal and practical concerns with respect to anticompetitive agreements and in their major part, they are unregulated.

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[280] The DG said that the invitation to have awareness and orientation by the Authority from the MIDROC Company came mainly because of the fear they are contradicting the Proclamation unknowingly and to some extent ipso-facto situation.

[281] This researcher has raised the issue twice to the DG but he argued consistently that the 16 companies of effort are public properties which can be termed as public enterprises from which government could gain its budget sources. But, this position is not in line with legal rules governing public enterprise, as professor Tilahun ardently argued. In addition, it is not even compatible with Art 2(21) of the Proclamation that defines public enterprise as "Public Enterprise" means an enterprise established in accordance with Public Enterprises Proclamation № 25/1992 or a business organization whose shares are totally owned by the federal government or public enterprise established by a regional state.

CHAPTER FIVE

ETHIOPIAN CORPORATE GROUPS AND ABUSE OF MARKET DOMINANANT POSITION: ANALYSIS OF THE LEGAL AND PRACTICAL ISSUES

5.1 THE NOTION OF ABUSE OF DOMINANT POSITION UNDER THE LAW

5.1.1 MEANING OF DOMINANT POSITION AND ABUSE OF DOMINANT POSITION: EXISTENCE AND EXERCISE UNDER THE LAW

The Ethiopian Competition Law provides virtually a similar definition of market dominant position with most of other state's competition regime we saw in chapter three save slight difference. Particularly, as an indication of remarkable influence, Art 7-10 of 685/2010 are on similar footage with their EU's counterpart, Art 101 of TFEU.[282] The Proclamation also rectified major problems of its predecessor Proclamation concerning the principles and assessment of abuse of dominant position.

Accordingly, Art 5 posited the grand principle that no business person can conduct its commercial activities by abusing its dominant position. So, it is crystal clear that, unlike 329/2003, 685/2010 is in line with the conventional tenet of Competition Law in that; it is abuse than holding of dominant position which is prohibited.[283] i.e., it is the exercise than the existence of dominant position which is the concern of the Proclamation. Coincided with this principle, the next appropriate question is; when should we say dominant position is existed and then abused?

Answering these questions; Art 6 provides that presumption of dominance will be entered if the legal elements of this provision are fulfilled. It states "(1)A business person (2) either by himself

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[282] Art.102 of TFEU (Ex 82 of the EC), embodying the European law on abuse of dominance stipulates: Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

[283] Art 11 of 329/2003 seems apparently and literally prohibits the dominance itself or its existence than the abuse. However, as Hailegabriel G. Feyissa rightly stated, the defect in this literal meaning can be healed by contextual interpretation of the whole provisions the result of which; the Proclamation is in fact intending to prohibit the abuse than the mere dominant position of a firm in the relevant market. See Hailegabriel G. Feyissa, as cited above at note 195, p.284.

or acting together with others (3) in a relevant market, is deemed to have a dominant market position, (4) if it has the actual capacity to (i) control prices or (ii) other conditions of commercial negotiations or (iii) eliminate or utterly restrain competition in the relevant market

The underlining elements in the definition of dominant position under 685/2010 is the fact of having the capacity to control competition situations in the defined relevant market. In addition, it is also worth to note that it is the actual capacity than the potential that determines the existence of dominant position in the relevant market.

Although it is abuse of dominant position which is prohibited by the law; it doesn't say anything about its definition beyond expressing it through long list of acts in Art 8. So, putting aside the acts for latter discussion, for the purpose of this chapter's discussion, the definition of abuse of dominance we made in chapter three should be kept in mind.

After that, the next question is; when can we say a dominant position is abused within the meaning of the proclamation? The next section will be devoted to answer this question.

5.1.2 DETERMINATION OF ABUSE OF DOMINANT POSITION: ASSESSMENT AND MEASUREMENT

As we noted in the previous chapter, the process of determining the existence of dominant position and its abuse is a hell job for competition authorities. It involves a cautious and painstaking calculation of economic and legal factors. To that effect, in most Competition Law jurisprudence and jurisdictions, as we saw, prudent Competition Law requires the definition of relevant market and the application of qualitative, quantitative or a combination of them as an approach to assess and measure the existence of dominant position.

When we throw this light on Art 7 of 685/2010, it is in fact, tries to set principles for the assessment of dominant position of a business person. It tries to define relevant market and also attempts to set the methods of assessing dominant position in the defined relevant market.

Hence, in defining relevant market, Art 7 (2) states "the market relevant for the assessment of dominant position is the market that comprises goods or services that actually compete with each other or fungible goods or services that can be replaced by one another". Art 7 (3) also states "the geographic area of this market is the area in which the conditions of competition are

sufficiently homogenous and can be distinguished from the conditions of competition in neighboring areas."

These two provisions are trying to define the two components of relevant market: product and geographic market respectively. Yet, it is not possible to understand from the definition as to which side is preferred. In other words, the Proclamation doesn't determine whether it is consumers' or sellers' preference is envisaged. The provisions are merely stating the nature of the goods or services as a land mark for delimiting relevant market. The nature of the goods or services mentioned particularly for geographic market, under Art 7 (3) lacks scientific parameters.[284] As a result, in view of the workable and acceptable relevant market definition we saw, for all practical purpose of this study, consumer's preference should be call up.

Next, as we recall, assessment of the existence of dominant position comes in to the scene before ascertaining abuse of dominant position. Regarding this, Art 7(1) reads; "A dominant position in a certain market may be assessed by taking in to account the business person's share in the market or his capacity to set barriers against the entry of others into the market or other factors as may be appropriate or a combination of these factors".

The crucial elements employed by the provision to express the method of assessing dominant position under Ethiopian law are; (1) market share, (2) capacity to set barriers, (3) other appropriate factors, and (4) a combination of these factors.

Apparently, it is possible to say that the Proclamation has opted for mixed approach or case-by-case choice of quantitative and qualitative approaches to assessment of dominant position. i.e., while the phrase "other appropriate factors" opened the possibility to use qualitative factors the fourth legal element indicates the possibility of mixed approach. However, the legal elements concerning "market share" and capacity to set barriers remain under heavy scrutiny of this study. This is because; although the positive rule of interpretation dictates the existence of both kinds of approaches, the Authority is not doing anything concerning dominance cases. This researcher observed that, in the Authority, there is strong interest for quantitative approach to assess

[284] The mere fact that the goods or services are actually competing or they are fungible goods or services may not cause consumer's preference reaction to changes. Rather, as we noted under chapter three's discussion; economics is telling us that substitutability is affected by different factors. (from chapter three: See The world bank and OECD, as cited above at note 113, P. 70-71; Rodger, BJ and MacCulloch, as cited above at note 118, P. 80-84; Østerud Eirik, as cited above at note 135, P. 20; Addl Bhatia G.R., as cited above at note 137, p. 19.

dominance and the consideration of market share as a sole factor for the assessment of dominance.[285] That is why the Authority is waiting for the figurative expression of market share by the Council of Minister, as provided under Art 7 (4) of the Proclamation.[286] At this point, it is important to remember two basic things from our conceptual framework of chapter three. Firstly, market share alone is not the appropriate yardstick for assessment of dominance. And Secondly, there are numerous states that are using qualitative approaches and it is only in the event of difficulty that developing countries are recommended to employ quantitative approaches to dominance.[287] As a result, it must be bear in mind that the qualitative approach for the assessment of abuse of market dominance is still relevant and appropriate in different jurisdictions.

The other problem is in relation to the capacity to set barriers against entry of potential firms. The provision and even the whole body of the Proclamation failed to provide a guideline or at least an indicative list of the stated capacity. Apart from reinforcing the possibility of qualitative approach, it remained a deadlock and is left for the Authority's interpretation. In addition, the careful look at the expression reveals that the capacity is only towards setting of entry barriers and doesn't concern the growth or expansion and exit barriers that might be exerted by the dominant firm.

To recap, leaving the problems aside, dominant position under Ethiopian Competition Law is determined by using qualitative, quantitative or a combination of the two approaches with a view to assess and measure a firm's capacity to set barriers against potential entrants, its market share or other appropriate considerations that can ascertain the existence of dominant position.

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[285] The DG and most of the legal experts of the Authority strongly expressed that qualitative approach is difficult, discretionary and might also be arbitrary form of determining market dominance of a firm. Had it not been for such position, they would not have waited for the numerical expression of "market share" by the council of minister. In fact he also said the Authority already contracted with German consultancy, called GIC that works on national qualitative infrastructure for extensive research on quantitative expression of market share in Ethiopia.

[286] The DG told to this study that the Authority is in favor of quantitative approach and is pushing to have the enactment of numerical expression for market share by the council of minister, as per Art 7(4) of the Proclamation. This expression also tells us that, though the DG said there are no initiated cases presented to the Authority, they may decline to see such cases before the realization of Art 7(4). It is also worth to note here that Art 7(4) wrongly connotes the enactment of numerical expression of market dominance than market share which overshadowed the attitude of the Authority and its experts.

[287] See ECJ's decision in Case 85/76, Hoffmann-LaRoche v Commission, as cited above at note 177.

5.1.3 ACTS OF ABUSE OF DOMINANT POSITION, AND PROVIDED EXCEPTIONS AND EXEMPTIONS UNDER THE LAW

As noted before, Art 8 provided us with a long list of acts that should be considered as acts of abuse of dominance. It states as "(1) limiting production, hoarding or diverting or preventing or withholding goods from being sold in regular channels of trade; (2) with the view to restrain or eliminate competition, doing directly or indirectly such harmful acts, aimed at a competitor, as selling at a price below cost of production, causing the escalation of the costs of a competitor, preempt inputs or distribution channels; (3) directly or indirectly imposing unfair selling price or unfair purchase price; (4) contrary to the clearly prevalent trade practice refuse to deal with others on terms the dominant business person customarily or possibly could employ as though the terms are not economically feasible to him; (5) without justifiable economic reasons, denying access by a competitor or a potential competitor to an essential facility controlled by the dominant business person; 6) with a view to restrain or eliminate competition, impose discrimination between customers, in prices and other conditions in the supply and purchase of goods and services; (7) without any justifiable cause and with the view to restrain or eliminate competition:(a) making the supply of particular goods or services dependent on the acceptance of competitive or non competitive goods or services or imposing restrictions on the distribution or manufacture of competing goods or services or making the supply dependent on the purchase of other goods or services having no connection with the goods or services sought by the customer; (b) in connection with the supply of goods or services, imposing such restrictions as where or to whom or in what conditions or quantities or at what prices the goods or services shall be resold or exported".

As the wording "...in particular..." connotes the mentioned acts are meant to serve an indicative list rather than an exhaustive list. In the light of the discussion in chapter three, the acts listed in each sub-provision may be categorized as; (1) exploitive, (2) exclusionary (via predatory pricing, etc), (3) exploitive, (4) exclusionary/exploitive (refusal to deal), (5) exclusionary/exploitive (refusal to supply which seems on the equal footing with the European jurisprudence of permitting it for economic reasons), (6) discriminatory/ example via royalty bate/ and (7 (a)) exploitive/tie-in sale, (b)) exploitive/discriminatory (territorial or customer allocation).

As usual and similar with other jurisdictions, the rule of abuse of dominance is not without exception and exemptions in Ethiopia too. As per Art 9 of the Proclamation, the grounds of exceptions for the abuse of market dominance are; "...in particular, maintenance of quality and safety of goods; leveling with prices or benefits offered by a competitor; and achieving efficiency and competitiveness; shall not be considered as abusing market dominance".

There are three positive things identified by this researcher from this provision. The first one is it is good to see "efficiency" as a ground for exception for abuse of dominance which was absent in its fuller sense from the rationale and objective statements of the Proclamation. This will at least give us some encouragement that there are in fact economic considerations within the law. The second one is that the provision cleared on the existence of rule of reason approach for cases of abuse of dominance. The third and last but not least is the fact that the exceptions will not be provided if the abusing firm doesn't exhaust all other acts which are not anticompetitive to achieve its aim. The phrase "...by ensuring that acts he commits are indispensable and decisive by their nature and cannot be achieved in any other ways..."express the requirement of the last resort.

The problem arises when one sees "exemption" as title under Art 10 of the Proclamation. The provision makes "facilitation of economic activities" as a ground for exemption to any form of abuse of dominance but to be determined by the Council of Minister' regulation. Firstly, it is not clear why the law has posited such exemption for abuse of dominance while exemption in its fuller sense is treated under the exclusionary provision of Art 4. It is also eye catching that the law doesn't provide such 'exemption' rule for anticompetitive agreements. So, is this an exception to exception or an exception to be understood within the purview of Art 4? If it is an additional sectors or economic activities which are envisaged under this provision, why is the law so interested in making such exemption while it didn't for anticompetitive agreements?

Yet, no matter how questionable it is particularly in relation to "competitive fairness" in the context of application of the exemption under the guise of "facilitation of economic development", the Council of Minister is empowered to make such conditional but block exemptions as are provided in under Art 10 of the Proclamation.

5.2 ETHIOPIAN CORPORATE GROUPS AND ABUSE OF MARKET DOMINANCE: LEGAL AND PRACTICAL ISSUES

Like the discussion in previous chapter, this section of this chapter focuses on the discussion of the legal and practical issues resonating on the interplay of ECGs and Ethiopian Competition Law. However, it is devoted to the legal and practical issues in relation to the rules of abuse of market dominance in the Proclamation.

Accordingly, the discussion on the issue of abuse of market dominance vis-à-vis ECGs starts, like in the case of anticompetitive agreements, with the issue of regulatory approach. In other words, regulatory approach is a common issue for both anticompetitive agreements and abuse of dominant position and from which one should starts its discussion vis-à-vis CGs.[288] As a result, the discussion made on the regulatory approaches in chapter four should be kept in mind.

Hence, pursuant to chapter four discussion, since it is SEA which is opted for the regulation of ECGs by the Authority, there will be no group or collective responsibility for any acts of abuse of dominance by Member Company. Unlike in the case of SEUA, the acts of abuse of market dominance will only trace the company that directly violates the relevant provision of the Proclamation.

Next to this, the examination and discussion of the legal elements of abuse of dominance in relation to ECGs in general and EFFORT and MIDROC CGs comes in focus.

In view of that, it must be remembered that the first task is the definition of relevant market. Hence, in this study, to make our discussion very simple, the relevant market of every entity in question is assumed in a manner discussed above. For example, when we talk about MESFIN Industrial Engineering of EFFORT, it must be understood that this study is assuming the market relevant to its products and services.[289] In addition, from practical point of view, defining the relevant market will not face technicality challenge as is the case for SEUA.[290]

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[288] This is because; the issue raises question as to whether we should consider one member company's abuse of market dominance as the group's abuse of market dominance. i.e., it is the issue of group or individual liability for acts of abuse of market dominance.

[289] According to the information obtained from EFFORT liaison office and its corporate profile, MESFINE INDUSTRIAL ENGINERING engages in manufacturing of penstock elements intake and steel liners for

The second task and issue is the assessment of 'market dominance'. Concerning this; the question is whether the Authority has any experience in determining the market dominance status of companies within the ECGs particularly of EFFORT and MIDROC companies.

It is very pitiful that the Authority, as noted before, is not in a position to answer this affirmatively. In other words, according to the DG of the Authority, there is no single practical case concerning 'market dominance' that is brought to the Authority's determination. This is, basically, for two reasons. Firstly, it is due to, as the DG express, absence of any case brought to the Authority for the determination of market dominance of any business entity. And secondly, it is due to the Authority's preference for quantitative assessment of market dominance using market share and the absence of such assessment guidelines pursuant to Art 7(4) of the Proclamation.[291]

Conversely, in the above discussion on the determination of market dominance in our Competition Law, we stated that Art 7 is very clear that; either qualitative, quantitative or a combination of them can be taken for assessment approach. i.e., in order to assess market dominance, as per Art 7 of 685/2010, market share, capacity to set entry barriers, other appropriate factors, and a combination of these can be taken in to account. However, despite these ample options, the Authority seems to be fearful of the chaos that might be rained from application of factors other than the 'figurative' market share expression. As a result, the Authority preferred to wait and see if the Council of Minister could enact such figurative expression as provided under Art 7(4) of 685/2010.

Consequently, the scientific determination of market dominance by ECGs and particularly of the two major CGs remains undetermined till the enactment of the figurative expression by the Council of Ministers.

But, this doesn't mean that, in the present reality of Ethiopian competitive market, there are no practical concerns regarding the market dominance by ECGs mainly by EFFORT and MIDROC CGs. These practical concerns can be illustrated by, inter alia, by the following two major points.

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hydropower stations. In addition, it also gives erection and maintenance services for factories, water works, airports, bridges and pre-engineered building. See EFFORT corporate profile, as cited above at note 255.

[290] In case of SEUA the decision of making other companies liable to the abusive acts made in a relevant market in which they may not be a part of it could raise technicality challenges.

[291] This researcher believes that, this preference of the Authority is the main obstacle for potential request for assessment of 'market dominance" by any interested party.

Firstly, as indicated in chapter three, though not per se illegal, market dominance (concentration) can, for example, limits consumers' choice for whom the Proclamation appear to be more concerned. Pertaining to this, recent research revealed that, though not conclusive, the market for sugar, fertilizer, cement, mineral water and soft drinks are ranked as highly concentrated markets within which most of EFFORT and MIDROC companies plays a dominant role.[292] In addition, while soft drink market is alleged to be oligopoly market between MOHA (member of the MIDROC group) and East Africa Bottling Company, it is expressed that the formal mining sector particularly of the gold mining is also, practically, monopolistic market.[293]

Secondly, as can be recalled from our conceptual framework, market share, though not the only factor, is the main determinant factor for market dominance. This Market share is in turn determined by, as noted before, among others, using capacity indicators of the firm. This capacity criterion can take any factors in to considerations that can show how the firm is capable and significant in the market. For example, technology used in the production or distribution, control of essential resources, the relative weak position of competitors, the capital stock of the firm, the entry and exit barriers in which the firm is operating, the quality of production, the number and quality of machineries or installation employed by the firm and the like can be taken in to account.[294]

In line with this yardstick, there are facts that can, at least, trigger concern as to the greater capacity of the different companies in EFFORT and MIDROC CGs. for example;

- Research revealed that MESSEBO Building Materials Production PLC has 30% market share in the cement market where only 10 cement factories are competing.[295]

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[292]See Vaughan Sarah and Mesfin Gebremichael, as cited above at note 89, p. 28-29; Fikremarkos Merso, Imeru Tamirat Yigezu, and et al, as cited above at note 149, p.48, 56-59; CUTS Centre for Competition, Investment & Economic Regulation, as cited above at note 232, p.85; Sonia Gasparikova and Sengupta Rijit, as cited above at note 270, p.4.

[293] Fikremarkos Merso, Imeru Tamirat Yigezu, and et al, Ibid. The four researchers in the cited document indicated that the freedom of choice of consumers is being restricted as it is evidenced by the impossibility of getting East Africa bottling products in one of giant hotel and member of MIDROC, Sheraton Addis. See also Gebremedhine Birega, "preliminary country paper of Ethiopia on competition regime: capacity building on competition policy in select countries of eastern and southern Africa (7up 3 project)" Ethiopian consumer protection association (AHA ECOPA), p. 10,

[294]The World Bank and OECD, as cited above at note 113, P. 14.

[295] John Sutton and Nebil Kellow, as cited above at note 87, p.141. The ten factories under investigation were Mugher, Messebo, National, Jema, Abyssinia, Derba MIDROC, Debresina, Huan Sang, and Red Fox.

- In addition, though the national rate of getting ISO certificate is very low, the greater proportion of EFFORT companies are managed to get this highest standard ISO certificate.[296] For example, EZANA mining development, MESSEBO building materials production PLC, MESSFIN industrial engineering, and SUR construction PLC are few to mention.
- ALMEDA textile factory is the only biggest and fully vertically integrated textile factory in the country. According to recent ETV report[297], the factory is growing ever bigger than any of the country's textile factories and is becoming like Indonesia's biggest textile factory. In addition, SUR construction PLC and MESFIN Industrial Engineering are also the most eye catching companies in the EFFORT CGs. For example, SUR construction, according to its corporate profile, is a reputed "general contractor-I" (GIC), possess more than 800 construction machineries[298]and plants, by the end of 2008 alone (it is established in 1992) it has completed 22 road projects and 37 various building projects as well as airfield and hydropower projects.[299] Likewise MESIFIN Industrial Engineering is the single biggest trailer manufacturer in the country.[300] Furthermore, Addis pharmaceuticals factory is also the biggest pharmaceutical factory in the country[301], and in Fiscal Year (FY) 2007/08 and 2008/09, Guna was ranked as the number one exporter of oilseeds.[302]
- Most importantly, the endowment-owned enterprises are by far the largest regional taxpayer to the Government, currently providing 60% of its regionally-generated revenues.[303]
- With respect to MIDROC CGs, which has more than 70[304] companies, there are giant companies with practical capacity that can raise concern for market dominant position. For example, Sheraton Addis (a capacity of servicing 1400 delegates with 10 meeting

[296] Vaughan Sarah and Mesfin Gebremichael, as cited above at note 75, p. 33. You can also access this information from the corporate profile magazine of EFFORT, as cited above at note 255.
[297] Mesele G/Hiwot, ETV news, night time, 2: 00 LT, September 21, 2013. To be accessed from www.ertagov.et
[298]According to the information from one former official of Ministry of Trade and Industry (October 28, 2013), this is simply means two times bigger than the average competing construction PLCs in the relevant market.

[299] See the EFFORT corporate profile magazine, as cited above at note 255, p. 18-20.
[300] Id, p.13.
[301] Id.p. 11.
[302] Sutton John and Nebil Kellow, as cited above at note 87, p. 70.
[303] Id, p.12. Though this data is 4 years before this research, one of my friend working in the relevant institution told me that this fact is still persist in so far as Tigray Regional government is concerned.
[304] This number is exposed by DG of the Authority while the officers interviewed in Mechare MIDROC industrial center claimed the companies to be only 40.

room, 239 class rooms, 33 suites, 5 restaurants and 1 big night club), Derba MIDROC (the largest in the country, with a construction cost of USD351 million (USD 151 million is owner's contribution and USD 200 million is loan) sprawling on 123 ha. of land was inaugurated on January 29, 2012), and KOSPI which is the largest steel producing industry in the country[305]. Recently, on April 8, 2012, the Ethiopian Quality Awards Organization (EQAO) has recognized KOSPI, with Honorary Award under the Manufacturing Companies Category. Dr. Admasu Tsegaye, board chairman of the EQAO and president of the Addis Ababa University, on his part said, "Winners of the award were selected for their manifested and outstanding performance in productivity, efficiency and overall execution which met international criteria".[306]

These are among the few facts that can show the existence of concerns regarding the dominant role of EFFORT and MIDROC companies in the relevant domestic market.

The third issue is; whether these CGs involve in acts that can be termed as abuse of dominant position within the meaning of the Proclamation.

In fact, it is not appropriate to treat the issue of abuse of dominance without the proper determination of market dominance in respective relevant market. As noted, there is no experience by the Authority regarding the determination of market dominance.

However, though determining market dominance in the current Ethiopian market remained untouched, there are practical examples that can be regarded as acts of abuse of dominance.

Accordingly, the most noticeable form of abuse of dominance is the case of vertical restraint. This vertical restraint, as we saw, is an exclusionary act of abuse of dominance, and it appears in the form of exclusive dealings such as exclusive supply, exclusive distribution and refusal to deal. In this regard, the exclusive distribution agreement between GUNA Trading House, on the one hand, and MESSEBO and ALMEDA, on the other hand, is the best example from EFFORT companies.[307] Particularly, the exclusive distribution agreement between GUNA and ALMEDA textile factory is very strong as it is repeatedly announced and advertised through different

[305] See TIRET MIDROC corporate magazine, as cited above at note 92, p. 29.
[306] Ibid.
[307] See EFFORT corporate profile magazine as cited above at note 255.

Medias including ETV. The textile products of ALMEDA can only be sold at the distributing centers of GUNA trading house. Meaning, it is very clear that no other distributor can get the right to distribute ALMEDA's textile products.[308]

From MIDROC CGs, similar exclusive supply or distribution is existed like between SAMARA trading PLC and ELFORA in which the former is contracted to distribute ELFORA's products in the Middle East, Asia and Africa.[309] Furthermore, concerning Sheraton Addis International Hotel, research conducted by Fikremarkos Merso, Imeru Tamirat Yigezu, Seyoum Yohannes, Yoseph Endeshaw and Tilahun Teshome Retta indicated that, consumers' choice is restricted as they can't get East Africa Bottling products even if they need it.[310] This act of limiting the choices of consumers', as we saw, is one of the exploitive acts of abuse of dominance.

In addition, there are instances of creating or strengthening barriers toward other competing companies. In this regard, as noted, the Proclamation doesn't say anything concerning the possibility of dominant firm's acts of creating or strengthening growth/expansion and exit barriers. But, this is not in line with the conventional tenet of Competition Law at the international arena. As a result, this study, as a matter of argument, takes barriers to include entry, growth or expansion and exit barriers.

Keeping this in mind, it is very assumable, given their political affiliation, how EFFORT and MIDROC CGs can create or strength barriers against other competing companies. In this regard, Professor Tilahun Teshom expresses his concern as to the actual and potential power of these CGs. Particularly, he said that recently there was a case in which urban land is taken from Yetebaberut Oil Company and given to NOC, a member of MIDROC. This is, he continued, a clear indication of how MIDROC CGs is big enough to manipulate the legal decision in its favor. This case, for example, can be cited as one instance of growth or expansion barriers by the CG.

This researcher asked the DG concerning the position of the Authority on the rampant exclusive dealings being conducted by these CGs. Replying to the question, he said that though the current Proclamation doesn't clearly indicated as to the legal status of exclusive dealings, it is not acceptable way of commercial dealings. And as such, he continued, given its limiting impact on

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[308] In this regard, two sellers of textile products in MERKATO told me that ALMEDA manager do not want to distribute their product other than GUNA trading house.

[309] See TIRET MIDROC corporate magazine, as cited above at note 92, p. 25.

[310] Fikremarkos Merso, Imeru Tamirat Yigezu, et al, as cited above at note 149, p. This researcher personally conducted observation to and it is true that there is no East Africa Bottling's product in Sheraton Addis.

intra brand competition which in turn affects consumer's access to multiple choices, exclusive dealing may be regulated in the future Competition Law of Ethiopia.[311]

As a final note, Art 10 of 685/2010 read as "the Council of Ministers may specify by regulation, those trade activities which shall be exempted from the application of the foregoing provisions of this Chapter, when it deems such activities are vital in facilitating economic development". This researcher wants to bring to readers' attention that the application of this provision will be problematic. This is because; firstly, the special interest of the Proclamation in providing separate provision of exemption for acts of abuse of dominance while it didn't for anticompetitive agreements is unknown. Secondly, the qualification of economic activities as vital for "facilitation of economic development" is vague and lacks guidelines as to what sorts of activities could be classified as vital and facilitators of economic development. In fact, some legal scholars tend to argue that the phrase "facilitation of economic development" (which is comparable with the phrase "significant impact on development" in 329/2003) dictates the application of the exemption for priority areas identified by the government.[312] However, this researcher argues that the phrase "facilitation of economic development" could not be restricted to the prioritized areas of the government. Rather; since it implies the capacity of a given economic activity to facilitate the economic development of the country, it can be applied to any form of economic activities depending on its facilitating role. In addition, given the fact that it is the Council of Ministers that determines which activity is facilitating the economic development of the country, the politically affiliated position of EFFORT and MIDROC CGs creates further concern. Depicting this political affiliation, a research by Africa power and politics, for example, states the following: "It seems clear that the links between organizations with strong connections to EPRDF and the government in the supply and distribution of fertilizer in the 1990s went well beyond a normal pattern of commercial synergies. Fertilizer in Tigray, for instance, was for some time imported and distributed by Guna, transported by TransEthiopia, on roads constructed by Sur, under an extension programme organized by REST, on credit provided by the Dedebit

[311] Though the DG is optimistic in the future regulation of exclusive dealings by the Ethiopian Competition law, the new draft law is still similar with the current Proclamation. i.e., it says nothing concerning exclusive dealings.

[312] See Fikremarkos Merso, Imeru Tamirat Yigezu, et al, as cited above at note 113, p. 67-68. The writers noted that, if, in the absence of any guidelines, it is to be applied to priority areas identified by the Government, these may include agriculture and all exporting enterprises, specifically leather, textile, coffee, floriculture, meat processing, and other sectors identified as priority areas by the Industrial Development Strategy.

Savings and Credit Institution (DESCI), through Farmers' Associations and Co-operatives, with a payment guarantee from REST and/or the regional government."[313] As such, it is highly likely that EFFORT and MIDROC Company's activities can easily enjoy the exemption from any acts of abuse of dominance under the guise of "facilitation of economic development".[314] This will likely to raise valid concern over the competitive fairness that supposed to be maintained in the domestic competitive market of Ethiopia.

To conclude, this chapter can say two things. Firstly, the legal provisions of abuse of market dominance in the Proclamation are not set in motion by the Authority. Secondly, there are practical situations, chiefly, connected to EFFORT and MIDROC CGs that can validly raise concerns relating to domestic market dominance and acts of abuse of such market dominance.

[313] Vaughan Sarah and Mesfin Gebremichael, as cited above at note 89, P. 47.

[314] In fact as research indicates there is a series of particularly interesting instances where the business strategies adopted by EFFORT-owned companies have explicitly facilitated economic objectives other than that of enhancing market competition: in contributing to the non-marketization of the fertilizer sector in the 1990s; and in prioritizing youth co-operatives as exclusive agents for cement distribution, amongst other examples. In both of these instances, critics have complained about monopolistic practice. Whilst both cases have shaped the generation and allocation of strategic rents (arguably in favor of profiting co-operatives, the state, and peasant farmers) in centralized and socio-politically valuable ways, in neither case has the mid- to long-term maximization of profits accruing to EFFORT-owned companies provided the rationale. Id, p. 49-54.

CHAPTER SIX:

CONCLUSION AND RECOMMENDATION

CONCLUSION

- CGs, internationally, are viewed as the most complex form of business structure with the paradox of multiplicity and unity. In this regard, the fictitious/concession or grant/ theory, the aggregate or *contractarian* theory and the real entity view are the most traditional corporate law theories that are being used to explain CGs. However, among the theories, while the aggregate (*contractarian*) theory express the legal structure of CGs the real entity view expresses the real situation of CGs.
- Though they are the sources of many legal and practical concerns, it is only few jurisdictions that have specific laws to regulate CGs. For example; states like Germany, Portugal, Italy, Brail and some Eastern European countries have special laws for CGs.
- The survey of the international corporate law practices show that there are two major regulatory approaches: separate entity (SEA) and single economic or enterprise (SEUA) approaches. However, it is SEUA which is increasingly becoming acceptable by most jurisdictions including in US, EU, Germany, Portugal, UK, Australia and New Zealand.
- In Ethiopia, corporate grouping is already become the contemporary fashion of doing businesses. The basic characteristic features of ECGs are; they are family owned (with the exception of the endowment owned CGs) and most of them structured in the form of PLCs. In addition, they are conglomerates, vertically integrated and to some extent horizontally chained, and centrally managed or have interlocked control and ownership structure by which the networking is preserved. In this regard, this writer observed that the position of EFFORT and MIDROC CGs is overwhelming compared to other ECGs. These two major ECGs engage in virtually all economic activities/sectors of the country.
- The interplay of CGs and Competition Law at the international level is one of the sources of a growing concern and debate among legal and economic scholars particularly in the EU and US jurisprudence. The debates and arguments basically revolve around the issues of the legal place of CGs (their very understanding) in the competition law, the

appropriate regulatory approaches, and the nature and format of the liability of these CGs to the Competition Law.

- The lesson drawn from the experience of states regulation of CGs under their competition regime depict that the debate on the choices of SEA and SEUA still persist. However, as indicated before, it is SEUA which is becoming acceptable in competition/antitrust legislations of most jurisdictions including in US (by court's practices), EU (mainly lead ECC and ECJ), Portugal, Australia and New Zealand.
- The Ethiopian Competition Law, unlike its sources (the EU and COMESA competition regulation), doesn't recognize CGs at all. Hence, the very legal place of the CGs within the meaning of the proclamation, the regulatory approach (the choice between SEA and SEUA), and the nature and format for the liability of the CGs are the basic general issues one may face in the interplay of ECGs and Ethiopian Competition law. In addition, pursuant to the very objective of this study, there are specific critical legal and practical issues in relation to the rules of abuse of market dominance and anticompetitive agreements in the competition law.
- The analysis of the structural organization and operation of existing ECGs against the legal elements of the rules of anticompetitive agreements and abuse of market dominance shows that ECGs (as illustrated by EFFORT and MIDROC CGs) fulfills the elements.
- Though the international experience of different states competition law indicates that CGs are increasingly being considered as one economic unit and thus regulated through the SEUA, the Ethiopian competition law takes SEA to regulate existing ECGs.

RECOMMENDATION

Given the unregulated status of ECGs in general and given the actual and potential anticompetitive impacts of these groups, as the finding indicates, this writer would like to recommend the following critical points.

Formulating regulatory framework: policy and legal reform

As this study touches up on the general legal status of existing ECGs and the findings shows that the latter are unregulated, this writer would like to call for appropriate attention through the necessary policy formulation and legal reforms. This is particularly directed to the Ethiopian

legislature and policy makers who are empowered to make legal and policy reforms. This policy and legal reform must be with the view to have special laws to regulate existing and potential CGs. This special law must be comprehensive, concrete, relevant and flexible based on the objectives of the law in question.

How to regulate ECGs vis-à-vis Ethiopian competition law? The nature of the framework

As the above finding indicates, the competition regimes of most jurisdictions particularly of the US and EU shows CGs are being considered as one economic unit despite their separate legal status. As discussed in chapter two and three of this study this approach (SEUA) is only for the purpose of imposing liability with regard to competition law infringements. However, taking this single economic unit directly in to the Ethiopian competition regime may not be appropriate given the peculiar feature of ECGs as we discussed. Therefore, this writer recommends that the existing and potential ECGs should be regulated through parent-subsidiary legal framework. While this is for liability purpose, for enforcement purpose companies in the groups should be treated as separate companies. In order to have appropriate legal and policy reform, this writer also recommends extensive research to be conducted on CGs in general and on the peculiar feature of ECGs in particular which would guarantee the viability of the reform to be introduced and the law to be enacted. For this purpose, for example, a team of national experts from all relevant professions may be established to conduct this comprehensive research.

How to prevent the existing anticompetitive practices of ECGs: the task of the Authority

The finding shows that existing ECGs are involving in a sort of anticompetitive agreements and acts of abuse of dominance both legally and practically. On the other hand, though this writer, as a matter of his argument, opts for SEAU, it is SEA which is recognized and legally accepted approach in the present proclamation. As such, as we noted in the previous chapters, given their complex structural, organizational and management system, it is natural that ECGs can easily evade liability under the proclamation.

Consequently, this writer recommends for the Authority the need to take active application of the doctrine of piercing CG's veil in tandem with SEA. This is because, on the other hand, it is not legal to apply the SEUA in the condition that it is only SEA which is recognized and accepted in

our legal system including in the Ethiopian competition law. On the other hand, as we indicated before, SEA is defective since it cannot successfully impose liability on the real infringers of the proclamation. As a result, this writer fills that, till we do have laws shaped by the SEUA, it is preferable to actively apply the doctrine piercing corporate veil in order to take effective legal action against ECGs that involve in the anticompetitive practices.

In this regard, piercing the corporate veil is a legal process of looking behind the company framework (or behind the company's separate personality) to make the members liable, particularly in the context of CGs. It is an act of dislodging the mask of the corporate within which the shareholder/members or directors are making themselves hidden. It is applied when a corporation/firm is an alter ego or instrument of another company and when the interest of equity and public policy is put on risk. The existence of a network of invisible hands in the existing ECGs would make the application of this doctrine in very important since it will fill the gaps that may be created by the application of SEA.

The application of this doctrine in tandem with SEA is possible given the judicial power of the Authority within which the doctrine won't be new and difficult.

In addition to this legal measure, this writer also feels that the Authority which is at its infant stage is needed to be equipped with the necessary human and material resources so as to effectively and efficiently discharge its duty toward the implementation of the proclamation. In relation to the CGs, the Authority need to give the proper and timely attention and should also have active stance so that it will be vigilant enough in detecting the violation of the rules of anticompetitive practices by the CGs. In this regard, the Authority is expected to initiate, facilitate and support researches concerning the competition law and CGs. Furthermore, it is vital for the Authority to engage in extensive competition advocacy campaign so that it can, at least, eradicate instances of violating the rules of anticompetitive practices by the existing CGs.

What other stakeholders should do?

Apart from the above recommendations, this writer also calls for proper attention of stakeholders and responsible institutions in the implementation of the competition law.

In this regard, since the Authority is not doing anything regarding abuse of market dominance, the Council of Minister, as empowered by Art 7 (4) of the proclamation, need to legislate the figurative expression of market share. This is because, the Authority is very interested in quantitative assessment of dominance through market share and it is due to this, among others, that it failed to regulate ECGs vis-à-vis the rules of abuse of market dominance.

The council of minister in order to enact such regulation, this writer recommends, it is necessary to share the experience of states that are using quantitative measurements and which are indicated in this research. In addition, as the DG said the Authority has already contracted with German consultancy group in order to comprehensively study the factors for market share analysis in Ethiopia. As such, the output of this ongoing research would be very vital input for the council's task of enacting figurative expression of market share as a threshold of market dominance.

The MoT is also required to be active of its investigative role so as to detect the anticompetitive practices of existing ECGs so that the Authority will effectively and efficiently discharge its duties.

In addition, all relevant academicians are also required to explore and dig more on CGs so that their research out puts may serve as platform of better understanding which would in turn facilitate the taking of appropriate legal and policy measures towards CGs. The business community also has a vital role to play as it may actively engage in the detection and prevention of any distortions of the competitive environment by CGs. This is because, apart from the Authority's effort, external support from the section of the society that makes informed decision and provides qualified information to the Authority is vital.

BIBLOGRAPHY

1. BOOKS

- Allen Douglas W., Transaction costs, department of Economics - Simon Fraser University.
- BJ Rodger, and MacCulloch, COMPETITION LAW and POLICY IN THE EC and UK, (2nd ed., 2001), Cavendish Publishing Limited Cavendish Publishing Limited, the Glass House, Wharton Street, London WC1X 9PX, United Kingdom.
- Blumberg Phillip, The Corporate Entity in an Era of Multinational Corporations, (1990) 15 DEL. J. CORP. L. 283.
- BLUMBERG PHILLIP, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY, (1993).
- Booz, Allen and Hamilton, Ethiopian commercial law and institutional reform and trade diagnosis", United State Agency for international development, (2007)
- Budiyanto, Wawan Cucuk, and et al, ADVANCING ENTERPRISE-WIDE INFORMATION SYSTEMS STRATEGY: EXPLORING POWER DIFFERENTIALS IN PARENT – SUBSIDIARY RELATIONSHIP, Swinburne University of Technology, John Street, Hawthorn, Victoria 3122, Australia.
- Colino Marco Sandra, Vertical Agreements and Competition Law A Comparative Study of the EU and US Regimes, (2010), OXFORD AND PORTLAND, OREGON, Hart Publishing c/o International Specialized Book Services, 920 NE 58th Avenue, Suite 300, Portland, OR 97213-3786, USA.
- CUTS Centre for Competition, Investment & Economic Regulation, From the Bottom Up, (2007), CUTS Centre for Competition, Investment & Economic Regulation (CUTS C-CIER, Department for International Development (DFID), UK and the Norwegian Agency for Development and Cooperation (NORAD), Norway.
- Dejnožka Jan, Corporate Entity, (October 8, 2007), Book Manuscript.
- Directorate-General for Competition, "glossary terms used in EU competition law, Antitrust and control of concentrations", (July 2002), Brussels.
- Echanis Erlinda S., "HOLDING COMPANIES: A STRUCTURE FOR MANAGING DIVERSIFICATION", Philippine Management Review, Vol. 16, 2009.

- Federico Etro, U.C.S.C., "The EU Approach to Abuse of Dominance", (February 2006), department of Economics, ECG and Intertic, Milan.
- Fikremarkos Merso, Imeru Tamirat Yigezu, and et al, "Review of the Legal and Institutional Framework for market competition in Ethiopia", a proposal to: Private Sector Development (PSD) Hub of the Addis Ababa Chamber of Commerce and Sectoral Associations (AACCSA), (February 2009), Produced and distributed by the Addis Ababa Chamber of Commerce and Sectoral Associations with financial support from the Swedish Agency for International Development Cooperation, Sida, Private Sector Development (Hub), Addis Ababa Chamber of Commerce and Sectoral Associations (AACCSA).
- Fox M. Eleanor, US and EU competition law: a comparison.
- Gasparikova Sonia and Sengupta Rijit, taking the right steps, competition administration in eastern and southern Africa, no. 1/2008, in Capacity Building on Competition Policy in Select Countries of Eastern and Southern Africa), and environment, Jaipur, India.
- Gebremedhine Birega, "preliminary country paper of Ethiopia on competition regime: capacity building on competition policy in select countries of eastern and southern Africa (7up 3 project)" Ethiopian consumer protection association (AHA ECOPA).
- Hamada Kazuki, (ed.), Business Group Management in Japan, Vol. 7, Monden Institute of Management, Japanese Management and International Studies –, Kwansei Gakuin University, Japan.
- Huffman Max, Competition Law and Consumer Protection.
- ISLENTYEVA E., like father like son –The parental liability under the EU Competition law today.
- Khemani Shyam R., UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT APPLICATION OF COMPETITION LAW: EXEMPTIONS AND EXCEPTIONS, (2002), UNCTAD/DITC/CLP/Misc.25, UNITED NATIONS, New York and Geneva.
- Klaus J. Hopt Max Planck, , Modern Company Law Problems: A European Perspective Keynote Speech by Institute for Foreign Private and Private

International Law Hamburg, Germany, Company Law Reform in OECD countries A Comparative Outlook of Current Trends", (December 2000), Stockholm, Sweden.

- JANET DINE, THE GOVERNANCE OF CORPORATE GROUPS, (2000).
- J. C Bon bright, and Means G. C., the Holding Company, (1932), Kelley USA, p. 22.
- John Scott, "Corporate Groups and Network Structure", in CORPORATE CONTROL AND ACCOUNTABILITY: CHANGING STRUCTURES AND THE DYNAMICS OF REGULATION.
- José Engrácia Antunes, the Law of Corporate Groups in Portugal, (2008), WORKING PAPER SERIES NO.84, Institute for Law and Finance.
- Lawson Larry (Cincinnati), "Chapter 7 Controlled and Affiliated Service Groups" as reviewed by Jeff Nelson in "INTERNAL REVENUE SERVICE TAX EXEMPT AND GOVERNMENT ENTITIES.
- Mehta S. Pradeep, competition policy in developing countries: an Asian Pacific perspective, consumer unity and trust society (CUTS) center for international trade, economics.
- McFetridge G. Donald, Horizontal Agreements as Reviewable Practices, department of Economics, Carleton University, Ottawa, Canada.
- Moges, Kibre, Policy-induced Barriers to Competition in Ethiopia, (2008), CUTS International, Jaipur, India, Printed by: Jaipur Printers P. Ltd., Jaipur, 302 001.
- MONTI GIORGIO, EC Competition Law, (2007), Cambridge University Press, the Edinburgh Building, Cambridge CB2 8RU, UK.
- Nabarro Sher Brian, Abuse of dominance in the EU: the evolving law and practice, (2010), PLC Cross-border Competition Handbook, practical Law Company Publisher.
- ODUDU OKEOGHENE "The Meaning of Undertaking within 81 EC.
- Organization for Economic Co-operation and Development (OECD), "Remedies and Sanctions for Abuse of Market Dominance" policy brief.
- Østerud Eirik, EU Competition Law – Abuse of Dominance (Article 102 TFEU).
- Paasman R. Berend., Multilateral rules on competition policy: an overview of the debate, (December 1999), International Trade Unit Division of Trade and Development Finance, Santiago, Chile.

- PAPADOPOULOS ST IS S. ANE, THE INTERNATIONAL DIMENSION OF EU COMPETITION LAW AND POLICY, published in the United States of America by Cambridge University Press, New York.
- RECOMMENDATIONS AND POSITION PAPER OF THE BUSINESS COMMUNITY ON THE REVISION OF THE COMMERCIAL CODE OF ETHIOPIA, (JULY 2008), Prepared by A TEAM OF FOURTEEN NATIONAL EXPERTS, Addis Ababa Chamber of Commerce & Sectoral Associations, Private Sector Development (PSD)Hub, Supported by Sida, Hosted by AACCSA.
- SCHMITTEN MATTHEW J., Under Antitrust Single-Entity Doctrine: A Formalistic Approach for a Formalistic Rule, Columbia Journal of Law and Social Problems.
- Sundararajan Preethi, AN ANALYTICAL STUDY OF NATURE AND TYPES OF VERTICAL ANTI-COMPETITIVE AGREEMENTS, National Law University, Jodhpur.
- Sutton John and Nebil Kellow, AN ENTERPRISE MAP OF ETHIOPIA, (2010/11/15), International Growth Center, "Ethiopia", International Growth Centre, Published in association with the London Publishing Partnership.
- UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT MODEL LAW ON COMPETITION, UNCTAD Series on Issues in Competition Law and Policy, Substantive Possible Elements for a competition law, commentaries and alternative approaches in existing legislations, (2007), UNITED NATIONS, New York and Geneva.
- Vaughan Sarah and Mesfin Gebremichael, Rethinking business and politics in Ethiopia: The role of EFFORT, the Endowment Fund for the Rehabilitation of Tigray, (2011) African Power and politics research report, No.2.
- VELJANOVSKI G. CENTO, ECONOMIC PRINCIPLES OF LAW, (2007), Cambridge University Press, the Edinburgh Building, Cambridge CB2 8RU, UK.
- The World Bank and Organization for Economic Development (OECD), "A Framework for the Design and Implementation of Competition Law and Policy", (1999), D.C. and Organization for the economic cooperation and development (OECD), Paris.
- UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, THE UNITED NATIONS SET OF PRINCIPLES AND RULES ON COMPETITION", the

Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, (2000), UNITED NATIONS, Geneva, TD/RBP/CONF/10/Rev.2.

- Winiship P. (Editor and Translator), Background Document of Ethiopian Commercial Code of 1960.(, Faculty of Law, Haile Selassie I University, Artistic Printers Addis Ababa Ethiopia, Addis Ababa, Ethiopia, 1974).

2. JOURNALS

- A.Hillman Smith-Vindelyn, "Market power, competition policy and developing economies Divergent conditions within African and Caribbean economies", the University of Northampton, Northampton, UK", Journal of Economic Studies, Vol. 34, (2007), No. 2, p. 120-135, Emerald Group Publishing Limited, 0144-3585.
- Alemayehu Fentaw, Ethiopian Unfair Competition Law, Centre for Competition Law and Policy, Working Paper CCLP (L) 21, the University of Oxford.
- ALMEIDA HEITOR V. and WOLFENZON DANIEL, "A Theory of Pyramidal Ownership and Family Business Groups", THE JOURNAL OF FINANCE, VOL. LXI, (2006), NO. 6.
- ANDERSON HELEN, "PIERCING THE VEIL ON CORPORATE GROUPS IN AUSTRALIA: THE CASE FOR REFORM", Melbourne University Law Review, Vol. 33, 2009.
- Becker Florian, "THE CASE OF EXPORT CARTEL EXEMPTIONS: BETWEEN COMPETITION AND PROTECTIONISM", Journal of Competition Law and Economics.
- Crampton S.Paul and Facey A. Brain, "revisiting regulation and deregulation through the lens of competition policy, getting the balance right", Kluwer law review, 2002, international, Netherlands.
- Edwards J. R. and Webb K. M., "the development of group accounting in the united kingdom", the accounting journal, Vol. 11, (spring 1984), No. 1, published by the academy of accounting Historians.
- Foster H. D Nicholas., "Company Law Theory in Comparative Perspective: England and France", the American Journal of Comparative Law, Vol. 48, (autumn, 2000), No. 4, published by the American Society of Comparative Law.

- Hailegabriel G. Feyissa, "EUROPEAN INFLUENCE ON ETHIOPIAN ANTITRUST REGIME: A Comparative and Functional Analysis of Some Problems", MIZAN LAW REVIEW Vol. 3 2009, No.2.
- Harris Ron, "the Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business", (2006), WASH. & LEE L. REV.
- Ho, Virginia Harper "Theories of Corporate Groups: Corporate Identity Reconceived," Seton Hall Law Review: Vol. 42: Iss. 3, Article 2 (2012), p. 940, Available at: http://erepository.law.shu.edu/shlr/vol42/iss3/2, Accessed on July 17, 2013.
- Kiel C. Geoffrey, Hendry Kevin and Nicholson J. Gavin, "Corporate Governance Options for the Local Subsidiaries of Multinational Enterprises", INT'L REV. 568 (2006) (surveying various sources of subsidiary control).
- RUBIN W. JEFFREY "CORPORATE GOVERNANCE SERVING THE BENCH AND BAR SINCE 1888 When and Are Public Parent, Overlapping responsibilities require coordination", NEW YORK LAW JOURNAL, MONDAY, NOVEMBER 20, 2006.
- Sommer H. Joseph, "Subsidiary: Doctrine without a Cause?" Fordham L. Rev. 227 (1990), p. 59. Available at: http://ir.lawnet.fordham.edu/flr/vol59/iss2/2, visited on July 27, 2013.

3. LEGISLATIONS/codes, regulations, proclamations, directives etc/

- CONSOLIDATED VERSIONS OF THE TREATY ON EUROPEAN UNION AND OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY TITLE VI, COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS, CHAPTER 1: RULES ON COMPETITION, (2006), Official Journal of the European Union.
- CONSOLIDATED VERSION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION TITLE VII COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS CHAPTER 1 RULES ON COMPETITION, (2010), Official Journal of the European Union.

- EU Seventh Council Directive 83/349/EEC on consolidated accounts, OJ (EC) 1983. Available at http://europa.eu.int/scadplus/leg/en/lvb/l26010.htm, visited on July 8, 2013.
- European Commission Reg (2790/1999/EC), OJ L336/21, 1999; [2000] 4 CMLR 398. See, also, the Guidelines on Vertical Restraints, OJ C291/1, 2000; [2000] 5 CMLR 1074, Commission Reg (2658/2000/EC), OJ L304/3, 2000, Commission Reg (2659/2000/EC), OJ L304/7, 2000, Commission Reg (1475/95), OJ L145/25, 1995, Commission Reg (240/96), OJ L31/2, 1996
- The Commercial Code of the Empire of Ethiopia, Proclamation No. 166/1960, Negarit Gazeta, Year 19, No. 3, Addis Ababa, 5th May 1960.
- The English Companies Act of the 1985 ("CA'85").
- The Federal Democratic Republic of Ethiopia (FDRE) constitution of the 1991.
- The French Code de Commerce ("CC")/ the French commercial code.
- The German Stock Corporation Act 1965 (Aktiengesetz).
- The Trade Practice and Consumer Protection proclamation of Ethiopia, No. 685/201, Federal Negarit Gazzet, Addis Ababa, No. 49, August, 2010. COMESA COMPETITION REGULATIONS, December 2004.
- United Kingdom (UK's) Competition Act 1998 and the Enterprise Act 2002.
- U.S. antitrust law Code Chapter 1 - MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE, Legal information institute, available at http://www.law.cornell.edu/uscode/text/15/chapter-1, accessed on 17, 01, 2014.

4. CASES/ ECJ and European Competition Commission (ECC) decisions/

- ECJ decision in AKZO Chemie BV v. Commission, (Case 62/86, ECJ, E.C.R. I-3359, 1991).
- ECJ decision in Commission v Anic Partecipazioni SpA (Case C-49/920, ECJ, ECR I-4125, 1999).
- ECJ's decision in Consten-Grundig case, Consten and Grunding Vs Commission, (Case 161/2545, ECJ, 1964).
- ECJ's decision in Hercules NV v Commission, (Case T-7/89, ECJ, ECR II-1711, 1991-1992),
- ECJ's decision in Hilti v Commission, (Case T-30/89, ECJ)

- ECJ's decision in Hoffmann-LaRoche & Co. AVG. Vs Commission, (Case 85/76, ECJ, E.C.R. 461, 1979),
- ECJ decision in Höfner and Elsner v Macrotron (Case 41/90, ECJ).
- ECJ's decision in Knauf Gips KG v Commission (C-407/08, ECJ, ECR 00000, 2010).
- ECJ's decision in Shell International Chemical Company v Commission, (Case T-11/89, ECJ, ECR II-757, 1992).
- ECJ's decision in Viho Europe BV v Commission, (Case C-73/95 P, ECJ, ECR I-5457, 1996).
- ECJ's decision in Walker Vs Wimborne (ACLR 529 at 532, Australian High Court, 1976).
- ECJ's decision in United Brands v Commission, (Case C- 27/76, ECJ, E.C.R 207, 1978)
- European commission decision in Hercules case, Commission Decision (86/398/EEC), OJ L230/1, 1986; [1988] 4 CMLR 347.
- European commission decision Consten-Grundig case, Commission Decision (64/556/EEC), OJ 2545/64, 1964; [1964] CMLR 489d.
- US Supreme Court decision in Trustees of Dartmouth College v. Woodward, (518, 636 (4 Wheat.), Court, 1819).

5. OTHERS

(REPORTS, UNPUBLISHEDWORKS, MAGAZINES, UNPUBLISHED ORKS, GUIDE LINES AND MANUALS)

- Altomonte Carlo and Rungi Armando, Business Groups as Hierarchies of Firms Determinants of Vertical Integration and Performance, Working Paper series, No. 1554, June 2013, Comp Net The Competitiveness Research Network, European Central Bank.
- Belayneh Ketsela, the need for the regulation of group of companies (parent and subsidiary) in Ethiopia, (2006, LLB thesis), unpublished, Addis Ababa university School of law, Addis Ababa.
- Bruk Kefyalew, lifting the corporate veil in corporate groups under the commercial code, 2003, LLB thesis), Addis Ababa university School of law, Addis Ababa.
- Chartier J. Brian, Senior Officer Subsidiary Governance, RBC Financial Group.

- Companies & Securities Advisory Committee, Corporate Groups Final Report, (May 2000), p. 10. Available at http://www.asic.gov.au visited on July 4, 2013.
- Dr. S CHAKRAVARTHY, the need and rationale for and the objectives of Competition policy and competition Law.
- Dr. Kuoppamäki Petri, EU Competition Law (February 2013, University of Helsinki, lecture note) (unpublished).
- Dr. Solomon Abay (PhD), Competition and consumer protection, (November 2011, Addis Ababa university-School of graduate studies, LL.M. program), (lecture note, unpublished).
- Dr. Solomon Abay, Competition Law and Consumer Protection (2), the Legal and Institutional Framework on Competition and Consumer Protection in Ethiopia", (2010, class lecture note, school of graduate, Addis Ababa University, LLM program) (unpublished).
- Dr. Solomon Abay (PhD), theories and principles of economic law, (2012-2013), Addis Ababa School of graduate studies, (LLM module for Business law), (unpublished).
- G.R.Bhatia, Addl (Director General Competition Commission of India), ABUSE OF DOMINANCE IN FACT AND IN LAW, (unpublished).
- Mehamed Aliye Waritu, COMPANIES IN ETHIOPIA: ANALYSIS OF ORGANIZATION, LEGAL FRAME WORK AND THE CURRENT PRACTICE ((January, 2010, LLM thesis in the field of Business law), unpublished, Addis Ababa university school of graduate studies, Addis Ababa.
- Mickonytė Aistė, Joint Liability of Parent Companies in the European Union Competition Law, (2012, Master thesis, Henrik Norinder, Master´s Programme in European Business Law, FACULTY OF LAW, Lund University) (unpublished), p. 6-82;
- The Federal Democratic Republic of Ethiopia Industrial Development Strategy document, 2002.
- The office of fair trade act, understanding competition law, competition law guideline, UK.
- The Russian corporate governance manual, Corporate Governance in Groups of Companies, (Chapter 15).

- TIRET THE MIDROC Ethiopia Group corporate magazine October 2012, Free Copy, special edition, attribute to October 2012 Free Copy Special Edition Prime Minister Ato Meles Zenawi.
- Vickers J., Economics for Consumer Policy, (2004), 125th proceedings of the British Academy.
- Yitayal Mekonen Ayalew, The legal and institutional framework governing company groups in Ethiopia and the current practice, (LLM thesis in the field of Business law), unpublished, Addis Ababa university school of graduate, Addis Ababa.

6. WEB SOURCES/general and specific web pages/

General web pages

- www.abyssinialaw.com
- www.ethiopianlegalbrief.com
- www.http://gen.lib.rus.ec/
- www.books.google.com
- www.bookfi.org

Specific web pages

- www.investopedia.com, accessed on July 5, 2013.
- http://www.jstor.org/stable/840908 , accessed: 19/10/2011, 02:30
- http://erepository.law.shu.edu/shlr/vol42/iss3/2, accessed on July 17, 2013.
- http://ir.lawnet.fordham.edu/flr/vol59/iss2/2, accessed on July 27, 2013
- http://europa.eu.int/scadplus/leg/en/lvb/l26010.htm , accessed on July 8, 2013.
- http://www.law.cornell.edu/uscode/text/15/chapter-1, accessed on 17, 01, 2014.
- http://www.asic.gov.au accessed on July 4, 2013.

7. INTRVIEWEES

- Interview with Mr. Chelem setegn, Head of the legal department of ECCSA, September 20, 2013.
- Interview with Mr. Desta Tesfaw, legal expert of the criminal prosecution department of the Ethiopian Revenues and Custom Authority, August 17, 2013.
- Interview with Mr. Birhanu Sisay, tax payer's education and support team coordinator of the Ethiopian Revenues and Custom Authority, on August 19, 2013.

- An interview Mr. Merkebu Zeleke, the Director General of Ethiopian trade practice and consumer protection Authority, November 5, 2013.
- Interview with Mr. Michael Tesfaye, public relation officer of EFFORT liaison office, Addis Ababa, Bolle road, Mega BLG, 3rd floor, office No. 17.
- Interview with Mr. Sintayehu Zeleke, judge in the Federal High Court, BPR and Commercial bench, August 17, 2013.
- The interview with Mr. Tewodros Samuel, Yonas Abebe, Getined Ashenafi (head of the legal department), YebegaEshet Akililu, Alembank Yimer, Sulayman Hussen, and Sibihat Kefiyalew, legal experts in the legal department of the Ethiopian trade practice and consumer protection authority, September 20, 2013.
- Interview with Tilahun Teshome, professor of law, Addis Ababa University.
- Interview with W/ro Zewide Kahsay, head of finance department, EFFORT liaison office, Addis Ababa, Bolle road, Mega BLG.

8. DATA SOURCE INSTITUTIONS/ PUBLIC AND PRIVATE/

1. ADDIS ABABA CHAMBER OF COMMERCE AND SECTORAL ASSOCIATION.
2. EFFORT CORPORATE LIASION OFFICE, ADDIS ABABA.
3. MIDROC CORPORATE GROUP INDUSTRY ZONE, ADDIS ABABA, MEKANISA, MECHARE AREA.
4. THE ETHIOPIAN CHAMBER OF COMMERCE AND SECTORAL ASSOCIATION.
5. THE ETHIOPIAN FEDERAL HIGH COURT, LIDETA BENCH, ADDIS ABABA.
6. THE ETHIOPIAN FEDERAL HIGH COURT, DIRE DAWA.
7. THE ETHIOPIAN FEDERAL SUPREM COURT, ADDIS ABABA.
8. THE ETHIOPIAN TRADE PRACTICE AND CONSUMER PROTECTION AUTHORITY
9. THE ETHIOPIAN MINISTRY OF INDUSTTRY.
10. THE ETHIOPIAN REVENUES AND CUSTOM AUTHORITY.
11. THE ETHIOPIAN MINISTRY OF TRADE.