MERGER OF PUBLIC ENTRPRISES VIS-À-VIS TRADE AND CONSUMERS' PROTECTION IN ETHIOPIA: ANALYSIS OF REGULATORY AND SUPERVISORY ASPECTS

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Acronyms

Art. - Article

CBB- Construction and Business Bank (Ethiopia)

CBE- Commercial Bank of Ethiopia

CMA- Competition and Market Authority (UK)

COM.C - Commercial Code (Ethiopia)

COMs - Council of Ministers (Ethiopia)

DOJ- Department of Justice (USA)

FTC- Federal Trade Commission (USA)

MOT-Ministry of Trade (Ethiopia)

NBE - National Bank of Ethiopia

OECD- Organization for Economic Co-operation and Development

PAEA-Postal Accountability and Enhancement Act (USA)

PEP- Public Enterprise Proclamation Number 25/1992 (Ethiopia)

PFISA- Public Financial Institutions Supervisory Agency (Ethiopia)

TCCPA-Trade Competition and Consumer Protection Authority (Ethiopia)

TCCPP- Trade Competition & Consumers Protection proclamation Number 813/2013(Ethiopia)

USPS- United States Postal Service (USA)

Abstract

In contemporary word of business merger is one devise design by business organization to earn more profit in a given business sector. Such act of the market participant in some instance may negatively affect the economy of state creating dominant position in the economic sector. To avoid this unnecessary act of business entities different countries design a mechanism of approval of merger by competition authority and determine the governance under the competition law. Other than the merger case of private/ordinary business organizations there may be State-owned enterprises merger case. Such public enterprise may endanger the economy using government's fiscal and legislative power. Because of their nature and potential different government ensure merger regulation and general application of competition law on public enterprises. In Ethiopia public enterprises are formed, merged or dissolved by the decision of the Council of Ministers. The COMs reaches on final decision of merger upon the merger proposal of the Ministry of Public Enterprises or respective supervisory organ of the public enterprises. From the general experience of most jurisdictions when we come to the Ethiopian competition law and practice, though the current Trade Competition and Consumer Protection Proclamation envisage the merger regulation provisions, it is not clear as to the application of such law on public enterprise. There is no clear exemption of the law on the public enterprises. Pertaining to the TCCPP the TCCPA is the enforcer of the merger provisions of the law. Apart from the general application of the TCCPP, there is special governance of merger in relation to merger of banks or insurance company, which requires the merger approval of the National Bank of Ethiopia. Both the Insurance and Banking Business proclamation requires the written merger approval of the NBE. This also creates the conflicting power between the TCCPA and NBE over the merger cases which involves banks and Insurance service providers. Therefore the paper triers to show the legal and practical problems existed in merger regulation of business entities in particular public enterprises in light of the current TCCPP.

Key words: merger, public enterprises, trade competition, competitive neutrality, consumer protection

CHAPTER ONE
INTRODUCTION

1.1 Background

The day-to-day transaction of persons‟ activity is governed by the major laws of contract, good faith, customs and principles allied to contract. The producer of a given product or the provider of a given service on one hand and the consumer on the other make their business deal specifically subject to laws of sale. The manufacturers and market actors are expected to act honestly in the interest of consumers and they may either intentionally or negligently supply defective and unsafe products in to the market, which may affect the consumer and the society at large.[1] Sometimes or most of the time the consumer is not in the position to abort such adverse effect of the products or services in a given transaction. In order to avoid this negative aspect, on behalf of the consumer, different governments design different mechanisms, like in developed countries less regulatory intervention while in developing countries, an interventionist approach is followed because of the existence of high level of market failure. [2] The need to have competition law and legal framework is to protect consumers or businesses and to ensure that no one producer can take advantage of its dominant position in the market place.[3]

In the Ethiopian legal regime beyond the prescribed legal provision regarding law of sales[4], extra contractual liability of manufacturer of good[5], also criminally intentionally manufactured goods which contain injurious or damaged ingredients[6] , there has been no separate legal regime until the promulgation of Trade Practice Proclamation in 2003.[7] Also in 2010[8] and 2013[9] Ethiopian law maker enact two Proclamations on Trade Practice and Consumer Protection, according to which the latest one repealed the previous two Proclamations.

In relation to trade competition market players or business persons have design at different arrangements to survive in the market and to be profitable. They devised different avenues to do

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[1] Dessalegn Adera, *The Legal and Institutional Framework for Consumer Protection in Ethiopia*, LLM thesis, Addis Ababa University, Law school, June 2011, P.1

[2] CUTS, *Competition Policy and Consumer Policy*, CUTS Discussion paper series No1, India, May, 2003. Lack of adequate information, low level of education, existence of infant or /and noncompetitive market and existence of gross consumer abuses are among the characteristic features of developing countries which affect consumer choice or rights , *as quoted by* , Tessema Elias, *Gaps and Challenges in the Enforcement Framework for Consumer Protection in Ethiopia,* MIZAN LAW REVIEW, 2015, Vol. 9, No.1 2015. PP 84-107,at P. 84

[3] Ewan Macintyre, *Business Law*, 2010, Fifth Edition, P.775

[4] Civil Code of the Empire of Ethiopia of 1960, *Negarit Gazeta*, Proclamation No. 165, 19th year, No.2, Article 2266 and the following [hereinafter Civil Code]

[5] *Id*, Article 2085

[6] The Criminal Code of the Federal Democratic Republic of Ethiopia 2004, *Federal Negarit Gazeta*, Proclamation No.414/2004, 10th Year, Article 527 [hereinafter, Criminal Code]

[7] Trade Practice Proclamation No. 329/2003, *Federal Negarit Gazeta*, 9th year, No.49

[8] Trade Practice and Consumer Protection Proclamation No.685/2010, *Federal Negarit Gazeta*, 16th year, No. 49 [Hereinafter, Trade Practice and Consumer Protection Proclamation]

[9] Trade Competition and Consumers Protection Proclamation No. 813/2013, *Federal Negarit Gazeta*, 20th year, No. 28 [here in after Trade Competition and Consumers Protection Proclamation (TCCPP)]

this like injecting capital, selling equities, reinvesting their profits, opening different branch offices, acquiring other firms or merging with other entities.[10] From among the arrangement merger is the one which is the concern of this paper. Merger is a device for combination of two or more corporations in to one corporate entity, in which the resulting corporation takes over the assets and liability, and at least one of the corporations in the transaction ceases to exist.[11] Merger helps business entities to expand their capacity and increase their efficiency in the market competition. [12] In Ethiopian law, concerning merger the Commercial Code uses the term "Amalgamation" and sets out the general procedural requirements and the right of those persons or creditors who may have interest or may be affected by the amalgamation.[13]

1.2 Statement of the Problem

Merger under the current Trade Competition and Consumers Protection proclamation number 813/2013 (hereinafter, "TCCPP") is discussed under subsection two of the Proclamation, in Article 9 and the following. Among the powers vested on the Trade Competition and Consumer Protection Authority (hereinafter, "The Authority") one of them is to approve the merger agreement or arrangement pursuant to Article 11 of the Proclamation. As clearly pointed out under Article 9(2) of the Proclamation, without the approval of the Authority any merger agreement or arrangement has no effect. In order to gain such approval any business person who proposes for merger agreement or arrangement, should submit an application to the Authority [14] and the Authority investigates the existence of possible adverse effect of the proposed merger on trade competition.[15] In the course of the investigation the Authority may a) require the parties of the proposed merger to submit additional information or documents within a specified period of time[16] b) invite by a notice published on a newspaper having a wide circulation, any business person who is likely to be affected by the proposed merger, if any within fifteen days of the publication of the notice.[17] Passing through the investigation process the Authority may pass any of the following decision; a) approve the merger if the Authority found that the merger does not

[10] Getnet Yawekal and Michael Teshome, The Curious Case of Construction and Business Bank, *Abyssinia law*, available at www.abyssiniyalaw.com/blog-posts/item/1661-the-curious-case-of-construction-business-bank,[Last accessed on march 24, 2016].
[11] John E. Moyae, *The Law of Business Organization,* fourth edition, west publishing company, 1994, P. 586
[12] Neeraj Tiwari, *„Merger under the Regime of Competition Law: A Comparative Study of Indian Legal Framework with EC and UK'*, Bond Law Review, Vol 23 No 1 (2011), 117-141, as cited in, Hussein Ahmed Tura, *Working Paper on Ethiopian Merger Regulation*, available at www.law.ox.ac.uk/sites/files/oxlaw/ethiopian_merger_regulation.pdf [Last accessed on march 25, 2016]. [Hereinafter Hussein, *Ethiopian Merger Regulation*]
[13] Commercial Code of the Empire of Ethiopia, *Negarit Gazeta*, Extraordinary Issue 3 of 1960, Article 549 and the following [here in after Commercial Code (COM.C)]
[14] TCCPP, Article 10(1).
[15] *Id*, Article 10(2)
[16] *Id*, Article 10(3)(a)
[17] *Id*, Article 10(3)(b)

bring any adverse effect on trade competition [18] b) prohibit the merger if the Authority has found that it will bring significant effect on the trade competition [19] and c) approve the merger setting some conditions.[20] Therefore, based on such result, if the merger arrangement or agreement is approved the concerned government Authority requires the result of the merger be registered in Commercial Register.

Beyond the merger of private business entities to be amalgamated or merged, we can think of those public enterprises. In Ethiopia public enterprises are established according to Public Enterprise Proclamation Number 25/1992 (hereinafter "PEP"), which gives the power to the Council of Ministers (herein after "COMs") to establish them.[21] They are established as clearly pointed out in the preamble of the proclamation, „„… *if it is necessary to create an organizational structure whereby they can enjoy management autonomy and thus enable them to be efficient, productive and profitable as well as to strengthen their capability to operate by competing with private enterprise*.‟‟[22] This shows that they are one of the market actors, in one way or another they have a role to play in trade competition. The same Proclamation provides that power to determine the amalgamation of public enterprise is given to the COMs. [23] To specific sector merger regulation we can think of the merger of banks in which, without the prior written approval of the National Bank of Ethiopia (NBE), no bank shall merge with or take over the banking business of another bank.[24] Also in the insurance business merger governance the NBE‟s prior written approval is necessary.[25] The banks or insurers may be private owned or state owned enterprises. Such provisions of the banking and Insurance business Proclamations further indicates that the beyond the criteria of merging of business entities, the law seems requires the parties to pass through the NBE‟s requirements of merger. Generally under the TCCPP‟s regime for any type of merger if the Authority does not give the approval of the merger according to Art.12 of the TCCPP, the Ministry of Trade (hereinafter "MOT") does not undertake the commercial registration for the new merged business entity.[26]

[18] *Id*, Article 11(1)(a)
[19] *Id*, Article 11(1)(b)
[20] *Id*, Article 11(1) (c)
[21] Public Enterprise Proclamation No. 25/1992, *Negarit Gazeta* of The Transitional Government of Ethiopia, 51st year, No.21, Art. 47(1) (a) [here in after, Public Enterprise Proclamation (PEP)]
[22] *Id*, Preamble 2nd paragraph
[23] *Id*, Article47 (1) (d)
[24] Banking Business Proclamation No. 592/2008, *Federal Negarit Gazeta*, 14th Year No.57, Art. 3(3)(c) and (d) [Hereinafter, Banking Business Proclamation]
[25] Insurance Business Proclamation No.746/2012, *Federal Negarit Gazeta*, 18th year, No. 57, Art.3(3)(c) [hereinafter, Insurance Business Proclamation]
[26] Commercial Registration and Business Licensing Proclamation No.980/2016, *Federal Negarit Gazeta*, 22nd Year No.101, Article 10(1), Article 6(3) and 7(1) [Herein after, Commercial Registration and licensing Proclamation]

1.3 Research Questions

Considering the above mentioned laws or provisions; it seems that the decision of merger of two or more public enterprise passed by COMs is to be approved by the Authority. But taking in to account the two Proclamations (TCCPP and PEP) and other relevant laws the researcher aspires to address the following unclear aspects or problems of the law with regard to the issue of merger in respect of the Authority‟s regulatory and supervisory power. The researcher would attempt to answer the following research questions:

1. Under the current TCCPP, there is no clear indication of the proclamation on application over public enterprises, which are established in accordance with PEP. One would therefore ask: are the provisions of TCCPP with regard to merger, applicable to public enterprises? The researcher will examine this question against the principle of competitive neutrality in the current global competition and consumer protection governance. Which means under anti-trust laws what should the governance of state owned enterprises look like?

2. Considering that COMs, the highest executive organ making government decisions, and that may be reversed by a single Authority /body, which is accountable to MOT; would it be correct to think that the Authority to prohibit the COMs‟ decisions of merger of the public enterprises?

3. In the case of merger of public enterprises, should the Authority grant or deny approval of merger of public enterprises before the COMs passes its resolution for the merger of the public enterprises?

4. How should the Authority balance between the principles and policies enshrined in TCCPP and objectives in the PEP that aim at having efficient, productive and profitable organizations?

5. Explore the existence of any successive or previous laws, and practical procedures which address the issue of merger of business entities in general and public enterprise in particular in light of the TCCPP.

1.4 The Scope of the Study

Regarding the provisions of merger under the TCCPP as central, the researcher tries to examine the legal frame of merger under Ethiopian law. The applicability of the provisions to public enterprises established by the COMs shall also be examined. In relation of merger of banks and insurers which are public enterprises, this thesis will overview the merger of banks and insurance companies in light of the Banking and Insurance Business proclamation. Furthermore the research examines and clarifies the legal procedures regarding merger of those public enterprises. Beyond the law the research will able examine the practical aspect of merger

regulation of public enterprises, in light of Trade Competition and Consumers‟ protection law goals.

1.5 Objectives of the Study

Following the promulgation of TCCPP in 2013, there is no research work done so far with regard to merger of business entities in light of the proclamation. The major objective of the study is to exhaustively examine or analyze the legal framework of merger, specifically the merger of those public enterprises in respect of analysis of supervisory and regulatory power of the Authority.

1.6 Significance of the Study

It is hoped that the study will induce clear understanding of the issue of merger with respect to the TCCPP and will also help other researchers in further examining the issues of merger. It creates awareness in the business community for entrepreneurs that intend to undertake merger and the legal procedures they have to follow. It would also help the law making organ and regulatory bodies to evaluate or modify the existing laws and procedures of merger. Especially the Authority empowered to organize or amalgamate public enterprises, may use this study, if the study recommends that, the Authority should initiate or design new law in order to comply with trade competition and consumer protection law.

1.7 Research Method

The study has been designed by using qualitative method. This is because it is the most suitable way for addressing the research questions of this study. Qualitative in that it will devote on the reasons, justifications or logical arguments on legal provisions and decided court cases (if any).

For the purpose of this study, I will use primary and secondary sources. From the primary source, I will use the TCCPP and other relevant and related laws allied to merger. Related laws among other are, PEP, Commercial Registration and Business Licensing Proclamation, COM.C, etc… Interviews and reports will be part of the primary source. At least a minimum of two interviews is undertaken at each of those stakeholders who involved in the merger of public pubic enterprises. This means under the context and scope of the research the interview is involves the TCCPA, Ministry of Public Enterprises, Council of Ministers and NBE. Books, journals, unpublished materials, articles, newspapers, bulletins, and cyber sources are used as a secondary source.

1.8 Limitation of the Study

After the Promulgation of the current TCCPP in 2013, there has been no advanced research work conduct on it. As a result the researcher will face lack of studies/ papers and further secondary sources. Also with respect to primary sources there may be lack of detailed and diversified laws designed to regulate the merger regime. There may also difficulties to arrange meeting and interview some officials at the stakeholder‟s government office in the accordance with the time frame work of the research.

CHAPTER TWO

GENERAL BACKGROUND ON MERGER, TRADE COMPETITION AND PUBLIC ENTERPRISES

Introduction

In this chapter major concept related with merger, trade competition and the nature public enterprises is discussed. The first section of the chapter is devoted to the definition and distinct features of merger. Question like what is merger and what make it different from acquisition? will be assumed. Following this, major types of merger, will be discussed. The effect of merger on the trade competition is also examined in this chapter. What are the major principles allied to consumer protection and trade competition? How can we create a smooth, efficient and competitive market in a given country through competition or anti-trust laws? What are public enterprises or otherwise known as state owned enterprises? What are the major differences between such entities and ordinary private business organizations? are going to be talked. Also allied to contemporary anti-trust laws, the principles of competitive neutrality will be overviewed in this chapter. Based on their experience or enriched legal and institutional frameworks on merger the researcher selected the USA, UK and Republic of South Africa, to show the general application of their competition law to state owned companies.[27] The regulation of merger and specifically the merger of state owned enterprises and requirement allied thereto in the selected three States; rules and exceptions in their competition laws, mentioning their practical case, will also dealt with in the chapter.

2.1 Definition and Distinct features of Merger

A merger in a company sense can be defined as the combination of two or more companies into one new company or corporation.[28] The concept of merger, most of the time occurs with the phrase of "merger and acquisition" and defined as, a deliberate transfer of control and ownership of a business organized in one or more corporations.[29] But there is a difference between the two.

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[27] The researcher selected such countries as a model is because enriched experience in the area the Ethiopian TCCPA cited them as source while drafting the current and previous competition laws. Available at https://chilot.me/business-diectory/trade-practice-consumer-protection-authority [Last accessed on March 25, 2016]

[28] Professor Alexander Roberts, Dr William Wallace and Dr Peter Moles, *Mergers and Acquisitions*, Edinburgh Business School, Heriot-Watt University Edinburgh, Published in Great Britain in 2003, 2010, P.2[herein after, Roberts et al, *Mergers and Acquisitions*]

[29] John C. Coates IV, *Mergers, Acquisitions and Restructuring: Types, Regulation, and Patterns of Practice* (Harvard John M. Olin Discussion Paper Series Discussion Paper No. 781, July 2014, Oxford Handbook on Corporate Law and Governance, forthcoming), P. 2, available at http://nrs.harvard.edu/urn-3:HUL.InstRepos:20213003 [accessed on March 27, 2017 7:39:46 AM EDT] [herein after, John C. Coates IV, *Mergers, Acquisitions and Restructuring*]

In case of merger, the outcome would be a merger of the two companies to form a new larger whole.[30] Whereas in acquisition, one company might be totally absorbed and cease to exist as a separate entity, becomes wholly owned by another company.[31] In a merger there is usually a process of negotiation involved between the two companies prior to the combination taking place, whereas in an acquisition the negotiation process does not necessarily take place.[32] In both merger and acquisition transactions there are two parties; the acquirer or the buyer on one hand and the target on the other.[33] Generally, the merger and acquisition transaction may be undertaken in the form of asset purchase to control the ownership or stock purchase in which the buyer can purchase all of the stock and thus control of the corporation.[34] Mergers are the most straightforward and by operation of law result in the transfer of assets of one corporation to another, without the need to specify or purchase individual assets.[35]

There are different reasons to have the merger of one company with another, among others: strategic rationale, management failure rationale, financial necessity rationale, political rationale, etc… can be mentioned.[36] The benefits includes increased economies of scale, increased market share, enhanced efficient resource allocations, expanded larger asset base, increased reputation or added name recognition, and instantly adopted expert talent lacking.[37] The merger or acquisition transaction is undertaken in consideration of that which can upgrade and optimize the capital structure of companies with a transfer of ownership and property rights.[38]

2.2 Types of Merger

Depending on the economic function, the purpose of business transaction and relationship between the merging companies; we can mention different types of merger; conglomerate merger, horizontal merger, vertical merger, market extension merger, and product extension merger.[39] But the prominent and widely recognized are the first three types of mergers, which, the author of this paper will explore. A product extension merger takes place between two business organizations that deal in products that are related to each other and operate in the same market, which allows the merging companies to group together their products and get access to a

[30] Roberts et al, *Mergers and Acquisitions*, P 3
[31] *Id*
[32] *Id*
[33] John C. Coates IV, *Mergers, Acquisitions and Restructuring*, P.3
[34] *Id*
[35] *Id*
[36] Roberts et al, *Mergers and Acquisitions*, P.4 and 5
[37] B. S. Chui, *A Risk Management Model for Merger and Acquisition*, Sage International Group Limited, Hong Kong, International Journal of Engineering Business Management, Vol. 3, No. 2 (2011) 37-44, P.37 [herein after, Chui, *A Risk Management Model for Merger and Acquisition*]
[38] *Id*
[39] Minority Business Development Agency (MBDA), US Department of Commerce, *5 Types of Company Mergers*, available at http://www.mbda.gov/blogger/mergers-and-acquisitions/5-types-company-mergers [accessed on April 13, 2017] [Herein after MBDA, *5 Types of Company Mergers*]

bigger set of consumers.[40] Similarly a market extension merger takes place between two companies that deal in the same products but in separate markets.[41]

Conglomerate mergers occur where the merging companies were operating in different sectors and industries.[42] Conglomerate merger is formed when corporations which are neither competitors nor potential or actual customers or suppliers of each other form merger.[43]

Horizontal merger occurs where two companies engaged in essentially the same product or service merge to improve their combined value.[44] Horizontal mergers are common in industries with fewer firms, as competition tends to be higher and the synergies and potential gains in market share are much greater for merging firms in such an industry.[45] Vertical merger on the other hand, is vertical integration in which the process of manufacturers merging with suppliers or retailers.[46] It is designed and become applicable in order to reduce the risk associated with suppliers that produce different goods or services for one specific finished product.[47]

2.3 Effect of Merger on Trade Competition

Merger regulation is substantively important because of the long-term impact that these combinations, the most powerful and permanent form of inter-firm cooperation, may have on the structure of markets.[48] Mergers are likely to be particularly important and to embody the most potentially serious implications for competition, in an economy going through significant structural change.[49] The competition authorities in economies undergoing significant structural change must be most alert to the potential anticompetitive consequences of mergers.[50] If a positive merger-specific impact on efficiency is found, the negative effect on competition has to be assessed against the positive impact on efficiency, with the possibility that the latter may outweigh the former, resulting in the possible approval of an anticompetitive merger.[51] A central postulate is that the pre-merger and the post-merger situations are represented with different scenarios market structures, with the merged entity being treated as a single player in the post-merger situation.[52] Whatever the outcome of the competition analysis and, if necessary, the

[40] *Id*
[41] *Id*
[42] Roberts et al, *Mergers and Acquisitions*, P.10
[43] MBDA, *5 Types of Company Mergers*
[44] Roberts et al, Mergers and Acquisitions, P.10
[45] MBDA, *5 Types of Company Mergers*
[46] Roberts et al, Mergers and Acquisitions, P.8
[47] *Id*
[48] David Lewis, *Enforcing Competition Rules in South Africa*, Thieves at the Dinner Table, International Development Research Centre, 2013, P.71 [Herein after, Lewis, *Enforcing Competition Rules in South Africa*]
[49] *Id*
[50] *Id*
[51] *Id*, P.75
[52] Giuseppe DE FEO, *Efficiency Gains And Mergers*, CORE DISCUSSION PAPER 2008/5, International Association for Research and Teaching, January 2008, P.1, available at

efficiency analysis, the decision-maker is required to examine the impact of the transaction on public interest grounds.[53] Among other things, the merger should take into account that it is to consumers‟ advantage and does not form an obstacle to competition.[54] The Public interest considerations are independent of those based on competition and efficiency, and they are equally important, due to which merger that raises no competition policy concerns may still be barred because of other public interest considerations.[55]

2.4 Notion of Consumer Protection and Trade Competition

An effective competition policy has a central role in attempting to ensure the proper functioning of markets.[56] There are different policy makers‟ choices based upon assessments of the economic structures in their jurisdiction and the role that competition should play in them.[57] In different jurisdictions government policies give rise to tensions regarding the formulation of their own priority assigned to competition law policy vis-à-vis the Government‟s other economic policies and objectives.[58]

Both consumer and trade competition laws are derived from the competition and consumer protection policies. The ultimate goal of both competition and consumer policies is to enhance consumer well-being, by ensuring that markets function effectively and to correct market failures, approach these goals from different perspectives.[59] Competition policy addresses the supply side of the market and aims at ensuring that consumers have adequate and affordable choices, while consumer policy tackles demand-side issues and aims to ensure that consumers

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https://pdfs.semanticscholar.org/8b42/693503c257077b7427f26f0e7d840abd4f4e.pdf [Accessed on 23/05/2017] [Herein after, DE FEO, *Efficiency Gains And Mergers*]

[53] Lewis, *Enforcing Competition Rules in South Africa*, P.76

[54] Lars-Hendrik Röller, et al , *Efficiency Gains From Mergers*, Published by Edward Elgar (UK) in January 2006, P.1, available at http://ec.europa.eu/dgs/competition/economist/efficiency_gains.pdf [Accessed on 13/04/2017] [Herein after, Röller, et al , *Efficiency Gains From Mergers*]

[55] OECD, *Competition Law and Policy in South Africa*, OECD Peer Review, 2003, P. 34 available at https://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf [Accessed on 17/04/2017] [Herein after, OECD, *Competition Law and Policy in South Africa*]

[56] Cosmo Graham, *The EnterpriseAct 2002 and Competition Law*, The Modern Law Review Limited 2004, , Published by Blackwell Publishing, 9600 Garsington Road, Oxford OX4 2DQ, UK and 350 Main Street, Malden, MA 02148, USA, PP.273-288, P.273 [Herein after Graham, *The EnterpriseAct 2002 and Competition Law*]

[57] John J. Parisi, *Cooperation Among Competition Authorities in Merger Regulation*, Cornell International Law Journal Vol. 43, 2010, available at http://www.lawschool.cornell.edu/research/ILJ/upload/Parisi.pdf [accessed on 09/09/2017] PP. 55- 72, P.56 [Herein after, Parisi, *Cooperation Among Competition Authorities in Merger Regulation*]

[58] R.Shyam Khemani, *Application of Competition Law: Exemptions and Exceptions*, United Nations Conference on Trade and Development, United Nations New York and Geneva, 2002, UNCTAD/DITC/CLP/Misc.25, available at http://unctad.org/en/Docs/ditcclpmisc25_en.pdf [accessed on 02/08/2017], P.9 [herein after, Khemani, *Application of Competition Law*]

[59] United Nations Conference on Trade and Development, *The benefit of competition policy for consumers*, intergovernmental Group of Experts on Competition Law and Policy Fourteenth session, Geneva, 8–10 July 2014, P.2 [herein after, UNCTAD, *The benefit of competition policy for consumers*]

can exercise their choices effectively.[60] The traditional view is that competition policy deals with the supply side of the market while consumer policy addresses the demand side. However, there is increasing recognition that the two policies should be coordinated to facilitate a whole-market approach and that competition and consumer authorities should share information and coordinate enforcement and advocacy measures.[61]

The Competition law aims to promote healthy competition via banning anti-competitive agreements between firms, such as agreements to fix prices or to carve up markets, and by making it illegal for businesses to abuse a dominant market position.[62] Competition law enforcement benefits consumers through detecting and sanctioning anti-competitive practices, including cartels, the abuse of market power, uncontrolled mergers and bid-rigging in public procurement.[63] Competition law is conceived as regulation of the marketplace to ensure that private conduct does not suppress free trade and competition.[64] Competition serves to optimize consumers‟ interests and consumer protection regulation denotes a body of law designed to protect a consumer‟s interests at the level of the individual transaction.[65]

In order to ensure the effectiveness of the two segments of laws states in different countries follow variable enforcement mechanisms for each law either of the combination of the two, separate each other or hybrid of the two. Some systems opt to have an enforcement mechanism that encompasses both trade competition and consumer protection in one agency whereas others differentiate them and assign different organs.[66]

2.5 Public Enterprises and Competition Law

Public enterprises and also referred to as state-owned enterprises (SOEs), government-owned corporations, government business enterprises, public sector undertakings, and parastatals, are government owned or controlled.[67] They generate the bulk of their revenues from selling goods

[60] *Ibid*
[61] *Id,* P.9
[62] Office of Fair Trading, *A quick guide to competition and consumer protection laws that affect your business*, Published by the Office of Fair Trading, Crown copyright 2007, Edition 10/08, P.4, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284428/oft911.pdf [accessed on 16 December, 2017] [herein after OFT, *A quick guide to competition and consumer protection laws that affect your business*]
[63] UNCTAD, *The benefit of competition policy for consumers,* P.3
[64] Max Huffman, *Competition Law and Consumer Protection*, P.1 available at https://www.biicl.org/files/4553_the_integration_of_competition_law_and_consumer_protection.pdf [accessed on 16 December, 2017[herein after Max , *Competition Law and Consumer Protection*]
[65] *Ibid*
[66] *Id*, P.11
[67] World Bank, *Corporate Governance of State-Owned Enterprises*: A Toolkit DOI: 10.1596/978-1-4648-0222-5, Washington, DC, World Bank License, Creative Commons Attribution CC BY 3.0 IGO, 2014, P.26 [herein after World Bank, *Corporate Governance of State-Owned Enterprises*]

and services on commercial base, even though they may be required to pursue specific policy goals or public service objectives at the same time.[68] In private businesses the major goal is attaining profit as much as possible. Public enterprises have public purposes to achieve such as employment, public service, access, fair distribution, economic development, and other elements of aspects of public interest.[69] This does not mean that public enterprises are totally formed to undertake manufacturing, distribution, service rendering or other economic and related activities with a view to sell goods and services.[70]

The form or control, structure, composition, functions, and ownership of government in these SOEs differs across jurisdictions.[71] Furthermore in some states, state-owned or semi-state-owned companies do not differ greatly from private companies in their status or in the "nature of their activities".[72] In some jurisdictions SOEs are established as statutory corporations having their own legislative act or other distinct formation instrument, while in some others may be non-corporatized entities, the form of SOEs or government departments, which fall under an SOE or public enterprise law.[73] For their character compared with private business entities, ownership test, public purpose test, the field of activity test, the concept of investment and return, the concept of marketing and the commercial accounts, may be employed to differentiate them from private business persons.[74]

Regarding the level or share of ownership of governments in these SOEs, the ownership should be limited to direct ownership by the state, the government, or local authorities.[75] Also some argue that to say a given entity is a public enterprise, the government should at least 50 percent or more shareholder in the organization.[76] Beyond the ownership test such enterprises are controlled and managed by the government which is one yardstick to differentiate them from private entities.[77] Governments set authorities which are empowered to appoint board members,

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[68] World Bank, *Corporate Governance of State-Owned Enterprises,*P.26
[69] Tewodros Meheret, *The Concept and Characteristics of Public Enterprises in Ethiopia: An Overview*, Mizan Law Review, Vol. 8, No.2, 2014, PP 333- 370, at P.346 [herein after, Tewodros Meheret, *The Concept and Characteristics of Public Enterprises in Ethiopia*]
[70] *Id*, P. 347
[71] Alexander Radygin , Yury Simachev, and Revold Entov ,*The State-Owned Company: "State Failure" or "Market Failure"?*, Russian Journal of Economics,2015, Vol.1, PP.55–80, P.58, available at http://ac.els-cdn.com/S2405473915000021/1-s2.0-S2405473915000021-main.pdf?_tid=4bd3ddd4-7cc8-11e7-ac55-00000aab0f27&acdnat=1502258716_79b85c42cb26df958dfecaf2812a3726 [accessed on 09/08/2017] [herein after, Radygin *et al*, *The State-Owned Company: "State Failure" or "Market Failure"?*]
[72] *Ibid*
[73] World Bank, *Corporate Governance of State-Owned Enterprises*, P.27
[74] Tewodros Meheret, *The Concept and Characteristics of Public Enterprises in Ethiopia*, P. 342
[75] *Id*, P. 345
[76] *Id*
[77] *Id*, P. 347

and the latter delegates their power to top management in which the run the day to day activities of the businesses of the enterprises.[78]

When we come to their "public purpose" test, SOEs are typically instructed to pursue goals other than profit maximization.[79] They are established with a variety of public policy goals in mind, such as, building basic physical infrastructure; providing essential services such as finance, water, and electricity; generating revenue for the treasury; achieving self-sufficiency in the production of basic goods and services; controlling natural resources; addressing market failures; curbing oligopolistic behavior; and promoting social objectives such as employment generation, regional development, and benefits for economically and socially disadvantaged groups.[80] This is the main difference from private entities having that public enterprises usually presuppose the attainment of some public policy goals.[81] On the other hand such enterprises involve in daily business activities like private business entities, obeying the rule of the market and registering in the commercial registration.[82]

Many SOEs now rank among the world‟s largest companies, the world‟s largest investors, and the world‟s largest capital market players in which the SOEs in strategic industries are increasingly viewed as tools for accelerated development and global expansion.[83] SOEs play an important economic role, irrespective of geographic region or degree of economic development, they are especially prominent in sectors of the economy that provide critical services for businesses and consumers and that contribute directly to economic growth and poverty reduction.[84] On the other hand SOEs can also impede competitiveness and growth: in many countries, SOEs continue to crowd out or stifle the private sector, while lack of competitive markets or a level playing field creates inefficiencies and limits the expansion of the private sector.[85] The experience of state-owned companies in many countries demonstrates that their top managers, more often than not, strive to achieve by employing a variety of methods for the realization of profit or better income.[86]

Companies owned by the government take advantage of their privileges, exploit their monopoly position, and place technical-organizational, administrative, and other barriers in the way of access to a particular branch of the economy.[87] They receive privileged access to profitable

[78] *Id*
[79] David E.M. Sappington and J. Gregory Sidak, *Competition Law for State-Owned Enterprises*, 2002, P.2
[80] World Bank, *Corporate Governance of State-Owned Enterprises*, P.2
[81] Tewodros Meheret, *The Concept and Characteristics of Public Enterprises in Ethiopia*, P. 346
[82] *Id*, P. 348
[83] World Bank, *Corporate Governance of State-Owned Enterprises,* P.3
[84] *Id*, P.4
[85] *Id,* P.11
[86] Radygin *et al*, *The State-Owned Company: "State Failure" or "Market Failure"?*, P.62
[87] *Id,* P.55

economic operations, transport infrastructure, and they establish special relationships with the tax authorities and others.[88]

2.6 Principle of Competitive Neutrality

Competitive neutrality occurs where no entity operating in an economic market is subject to undue competitive advantages or disadvantages.[89] Competitive neutrality requires that governments should not use their legislative or fiscal powers to advantage their own businesses over the private sector.[90] Competitive neutrality aims to promote efficient competition by minimizing competitive advantages government business activities may enjoy over their private sector competitors simply because they are government owned.[91]

Under best practice or effective system of competition law, it should be a general law of general application; that is, the law should apply to all sectors and to all economic agents in an economy engaged in the commercial production and supply of goods and services.[92] Irrespective of the type of ownership (private or state ownership), competition law should be applicable to the subjects if they participate in daily practice of commerce. When states or state-controlled entities operate in the marketplace as commercial operators, their activities are not immune from merger enforcement. The legal and regulatory framework for state owned enterprises should ensure a level-playing field in markets where state-owned enterprises and privates sector companies compete in order to avoid market distortions.[93] The SOEs should be on the same legal footing as the private sector to make them more commercially oriented and competitive. The reason is based on the conviction that entities engaged in the same or similar lines of activity should be subject to the same set of legal principles and standards to ensure fairness, equality and nondiscriminatory treatment under the law.[94] The economic reasons relate to the interdependent nature of economic activities conducted in different markets, in which one market can affect prices and outputs in other markets either because one good or service is an input in the production of other goods and/or services, or because the goods and services are substitutes or complements to each other.[95] Yet, SOEs are often exempt from certain laws, such as competition

[88] *Id*, P.62
[89] Organization for Economic Co-operation and Development (OECD), *Competitive Neutrality*; National practices, OECD 2012, available at https://www.oecd.org/daf/ca/50250966.pdf [accessed on 08/08/2017], P.10 [herein after, OECD, *Competitive Neutrality*]
[90] Antonio Capobianco and Hans Christiansen, *Competitive neutrality and State-Owned Enterprises: Challenges and policy options*, Organization for Economic Co-operation and Development (OECD) (2011), OECD Corporate Governance Working Papers, No.1, P.5 available at www.oecd.org/daf/corporateaffairs/wp [accessed on 02/08/2017], [herein after, Capobianco and Christiansen, *Competitive neutrality and State-Owned Enterprises*]
[91] *Id*, P.11
[92] Khemani, *Application of Competition Law*, P.5
[93] Capobianco and Christiansen, *Competitive neutrality and State-Owned Enterprises*, P.5
[94] Khemani, *Application of Competition Law,* P.5
[95] *Ibid*

and bankruptcy laws, and that exemption creates market distortions and reduces management accountability.[96]

The overall goal of competition law is to avoid the behavior of "restrict output", "charge higher prices" and "earn greater profits" of commercial actors, which take in to account fair consuming and utilization of goods and services of consumers.[97] Another implication of extending competition rules to SOEs is that these enterprises are subject to sectorial regulators which impose fair treatment of all competitors.[98]

Despite their role as regulators the governments may, in fact, restrict competition through granting SOEs various benefits not offered to private firms. While in some areas this preferential treatment will be direct and obvious, there may also be indirect preferential treatment through other means.[99] Preferential treatment by the state, in the form of loose regulatory regimes containing exemptions from antitrust regulations, favorable tax treatment, more lax corporate governance requirements compared to private firms, and preferences to SOEs in public procurement, monopolies and advantages of incumbency of SOEs may be mentioned.[100] Governments may sometimes make a conscious decision to depart from competitive neutrality in their SOE sectors, on condition to maintaining the public service obligations, SOEs as a tool for industrial policy, and in order to protect fiscal revenues of the government.[101]

In one way or another, not subjecting commercial actors to competition law through exemption or exception, will have consequences direct and indirect as well as adverse effects on the economic system as a whole.[102] Under the umbrella of competition law, the issue of merger and acquisition is raised in relation of competitive neutrality. In most OECD countries merger control rules are ownership neutral and equally apply to private as well as state-controlled investors.[103] The purpose of merger control is to identify and investigate competition-related concerns arising from merger and acquisitions activities.[104] Merger control also investigates an event that qualifies as a concentration, that this event is likely to limit effective competition in the market and that there is a link between the remedies and the likely anticompetitive effects of the proposed transaction.[105]

[96] World Bank, *Corporate Governance of State-Owned Enterprises,* P.36
[97] Khemani, *Application of Competition Law,* P.6
[98] World Bank, *Corporate Governance of State-Owned Enterprises,* P.37
[99] Capobianco and Christiansen, *Competitive neutrality and State-Owned Enterprises,* P.4
[100] World Bank, *Corporate Governance of State-Owned Enterprises,* P.37
[101] Capobianco and Christiansen, *Competitive neutrality and State-Owned Enterprises,* P.8
[102] Khemani, *Application of Competition Law,* P.7
[103] Capobianco and Christiansen, *Competitive neutrality and State-Owned Enterprises*, P.23
[104] *Ibid*
[105] *Id*, P.25

In most countries, SOEs or private businesses are subject to the coverage of competition law, though there may be partial exemptions that protect some types of public sector businesses or some aspects of their business activities.[106]

2.7 Regulation of Merger of Public Enterprises in Light of Trade Competition under Major Jurisdictions

Considering the advance experience jurisprudence on competition law, specifically merger regulation, the writer took the following jurisdictions as a model. In each jurisdiction, among others, the writer will overview the general competition and consumer protection law that are allied to merger, which the supervisory and regulatory bodies are, the applicability of the their anti-trust law to SOEs and how merger approval is processed will be examined.

2.7.1 United States of America

In USA, for the implementation of the anti-trust law there are two national competition authorities –the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC), who share competence to enforce the chief US anti-merger mandate, Section 7 of the Clayton Act.[107] The Clayton Act is the principal Federal substantive law governing mergers, acquisitions, and joint ventures.[108] Section seven of the act begins with transactions that are supposed to file a notification of merger: listing of areas and amount of money that are subject to such notification, which may be revised taking in to account the specific fiscal year.[109] The notification step requires basic information about the business operations of the merging parties and, perhaps most significantly, obliges the parties to submit all documents that discuss plans for the merger.[110] The act list out about twelve exempted transactions, to which the section is not applicable, among which are; acquisitions of goods or realty transferred in the ordinary course of business, transfers to or from a Federal agency or a State or political subdivision thereof, transactions specifically exempted from the antitrust laws by Federal statute, etc. can mentioned as instances.[111] In order to take the proper implementation of the section, the law

[106] *Id*, P.26
[107] William E. Kovacic, *Merger Control Procedures and Institutions: A Comparison of the EU and US Practice*, George Washington University Law School, GW Law Faculty Publications & Other Works, Robert Schuman Centre for Advanced Studies Research Paper No. 2014/20, 2014 P.9, available at http://scholarship.law.gwu.edu/faculty_publications [herein after, Kovacic , Merger Control Procedures and Institutions]
[108] CLAYTON ACT, 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53 (Oct. 15, 1914, ch. 323, § 1, 38 Stat. 730; Pub. L. 94–435, title III, § 305(b), Sept. 30, 1976, 90 Stat. 1397; Pub. L. 107–273, div. C, title IV, § 14102(c)(2)(A), Nov. 2, 2002, 116 Stat. 1921.) [herein after, The Clayton Act]
[109] The Clayton Act, Section 7 a(1) and (2)
[110] Kovacic, Merger Control Procedures and Institutions, P. 26
[111] The Clayton Act, Section 7 (C)

empowers the Antitrust Division of the DOJ and FTC to define, clarify or prescribe the terms and exemptions under the law.[112]

If the transactions are subject to the section, the parties should file or notify either of the institutions, within thirty days which is considered as waiting period.[113] The act provides for possible situations in which the period is extended to require the submission of additional information or documentary material relevant to the proposed acquisition, from a person required to file notification with respect to such acquisition.[114] After the notification process the agencies will determine whether or not the information or documentary material has been substantially complied by the parties. [115]

A United States district court may order compliance, may grant other equitable relief, or may extend the waiting period specified, if any person, or any officer, director, partner, agent, or employee thereof, fails substantially to comply with the notification requirement or any request for the submission of additional information or documentary material within the waiting period.[116] To block a proposed merger, the federal agency handling the case (either the DOJ or the FTC) must obtain an injunction from a federal court.[117] Despite the fact that the U.S. agencies lack the power to prohibit transactions on their own, the enactment of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR) Act greatly increased the role of the agencies in U.S. merger policy.[118]This means judicial intervention is necessary to halt a transaction. In both agencies there are two groups of professional: attorneys and economists.[119]

Sectorial regulators often have independent authority, typically under a public interest standard, to review the competitive effects of mergers.[120] For instance, State Public Utility Commission plays a similar role in reviewing energy and telecommunications transactions.[121] Merger review by sectorial regulators usually takes place concurrently with proceedings before the DOJ or the FTC.[122] The law confers no rights on third parties to have access to the file, nor do third parties have standing to sue to challenge a decision by DOJ or the FTC not to challenge a merger.[123] The law creates notification obligations for parties undertaking mergers above certain size

[112] *Id*, Section 7 (d)(1) and (2)
[113] *Id*, Section 7 (b)(1)(B)
[114] *Id*, Section 7 (e)
[115] *Id*, Section 7 (e)(B)(II)
[116] *Id*, Section 7 (g) (2)
[117] Kovacic, Merger Control Procedures and Institutions, P.10
[118] Mark Leddy, et al*, Transatlantic Merger Control: The Courts and the Agencies*, Cornell International Law Journal Vol. 43, 2010, PP. 26-54, P.28 [herein after Mark Leddy et al, *Transatlantic Merger Control*]
[119] Kovacic, Merger Control Procedures and Institutions, P.11
[120] *Id*, P.15
[121] *Ibid*
[122] *Ibid*
[123] Kovacic, Merger Control Procedures and Institutions, P.17

thresholds and imposed mandatory waiting periods to allow DOJ and the FTC to decide whether to go to federal court to seek preliminary injunctions to block anticompetitive deals.[124]

The two agencies engage in intense and sometimes protracted struggles through the clearance process to determine which body will review a deal, and the parties sometimes opt to file to the two agencies for notification of merger.[125] Practically the two agencies develop somehow division of the sectors. FTC has reviewed all mergers involving pharmaceutical companies for a period reaching back over several decades and similarly, DOJ has reviewed all mergers involving mining, such as coal production.[126] The federal authorities have 30 days to decide whether to commence a second-phase inquiry.[127] In the second stage US agencies also supplement documents with extensive investigational interviews with company officials and third parties.[128] Neither DOJ nor the FTC has power to issue prohibition decisions, and only federal courts can enjoin mergers which the agencies believe to be anticompetitive.[129]

An increasing emphasis is now placed on the evaluation of market conditions beyond market concentration, that affect the likelihood that a proposed merger will result in adverse competitive effect.[130] The Act used the „substantial lessening of competition" standard to prohibit mergers and acquisition reasonably likely to produce significant anticompetitive effects.[131]

In the USA the SOEs at federal level mentioned as "federal government corporation" which are the agency of the federal government, established by Congress to perform a public purpose, which provides a market-oriented product or service and is intended to produce revenue that meets or approximates its expenditures.[132] As a general rule, agencies and instrumentalities of the U.S. government (e.g. National Science Foundation, Small Business Administration) are not subject to liability under the federal antitrust laws, even when engaging in commercial activities.[133] The application of the general competition law to the SOEs is a controversial issue. The act beyond the above mentioned exempted transactions is not clear as to its application to

[124] *Id*, P. 24
[125] *Ibid*
[126] *Ibid*
[127] *Id* , P. 26
[128] *Ibid*
[129] *Id*, P. 28
[130] Roscoe B. Starek III and Stephen Stockum, *What Makes Mergers Anticompetitive?: "Unilateral Effects" Analysis Under the 1992 Merger Guidelines*, Antitrust Law Journal, Vol. 63, No. 3, American Bar Association (Spring 1995), available at http://www.jstor.org/stable/40843302 [accessed on 22/02/2016], pp. 801-821, P.801 [herein after, Starek III and Stockum, *What Makes Mergers Anticompetitive?*]
[131]Organization for Economic Co-operation and Development (OECD), Directorate for Financial and Enterprise Affairs Competition Committee, *Roundtable on the Standard for Merger Review; with a Particular Emphasis on Country Experience with the Change of Merger Review Standard from the Dominance Test to the SLC/SIEC Test*, Working Party No. 3 on Co-operation and Enforcement, United States, DAF/COMP/WP3/WD(2009)5, 20 October-2009, P.2 [herein after, OECD, *Roundtable on the Standard for Merger Review*]
[132] OECD, *Roundtable on the Standard for Merger Review*, P.4
[133] IB Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 252a (3rd ed. 2006), *as cited in,* OECD, *Roundtable on the Standard for Merger Review*, P.5

the SOEs. But the Supreme Court found that the Sherman Act did not apply to the post office in *United States Postal Service (USPS) v. Flamingo Industries* case.[134] Among the claims that Flamingo made was that the USPS sought to create a monopoly in mail sack production, and that it could do so in large part because of its monopoly in the postal reserve sector.[135] The Supreme Court decided the case in favor of the USPS mentioning that the establishment of the USPS by statute was "an independent establishment of the executive branch of the Government of the United States.[136] But since 2007, to ensure competitive neutrality, the congress enactments the Postal Accountability and Enhancement Act (herein after PAEA) explicitly allowed the application of anti-trust law to the USPS.[137] This Act reverses the Supreme Court"s decision which insulates the USPS from the application of the anti-trust law on it. The PAEA clearly provided the USPS shall not be immune under any doctrine of sovereign immunity from suit in Federal court by any person for any violation of Federal law and shall be considered to be a person, as defined in subsection (a) of the first section of the Clayton Act for the purposes of antitrust laws.[138] Beyond this the PAEA imposed a duty on the USPS not to establish any rule or regulation (including any standard) the effect of which is to preclude competition or establish the terms of competition unless the Postal Service demonstrates that the regulation does not create an unfair competitive advantage for itself or any entity funded (in whole or in part) by the Postal Service.[139] This shows the circumstance under US jurisprudence the SOEs are subject to competition law and principles allied to the law.

2.7.2 United Kingdom

The United Kingdom became the second jurisdiction after the United States to possess a fully-fledged merger control regime in the field of competition law.[140] The legislative framework for the UK regime is established by the Competition Act 1998 and the Enterprise Act 2002, as amended by the Enterprise and Regulatory Reform Act 2013.[141] The amendment Act of 2013 creates the Competition and Market Authority (CMA), merging and abolishing the preexisting

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[134] U.S. Postal Service v. Flamingo Industries (USA, Ltd), The Supreme Court of United States of America, February 25, 2004, 540 U.S. 736, [herein after *USPS v. Flamingo case*]

[135] D. Daniel Sokol, *Competition Policy and Comparative Corporate Governance of State-Owned Enterprises*, 2009 BYU L. Rev.1713 (2009) Available at: http://digitalcommons.law.byu.edu/lawreview/vol2009/iss6/12 ,P.1786 [herein after Sokol, *Competition Policy and Comparative Corporate Governance of SOEs*]

[136] *USPS v. Flamingo case*

[137] Postal Accountability and Enhancement Act, Public Law 109–435, 109th Congress, Dec. 20, 2006 [herein after PAEA Act]

[138] *Id*, Section 404

[139] *Id*, Section 403

[140] Andrew Scott, *The Evolution of Competition Law and Policy in the United Kingdom*, LSE Law, Society and Economy Working Papers 9/2009, London School of Economics and Political Science, Law Department, Electronic copy available at: http://ssrn.com/abstract=1344807 [accessed on March 14, 2017], P. 11 [herein after Scott, *The Evolution of Competition Law and Policy in UK*]

[141] Competition Act 1998, C41, 9th November, 1998 [herein after the Competition Act of 1998], Enterprise Act 2002, C40, 7th November 2002 [herein after Enterprise Act of 2002], as amended by the Enterprise and Regulatory Reform Act 2013, C24, 25th April 2013, [herein after Enterprise and Regulatory Reform Act of 2013]

Office of Fair Trading (OFT) and Competition Commission (CC).[142] The amendment act therefore set an institutional framework up only on the CMA, which transfers the powers and responsibilities from OFT and CC to it.[143] The CMA is accountable to Secretary of State. Beyond the CMA the Act assigns distinct roles in relation to merger control to the Secretary of State and certain sectorial regulators.[144]

Under the UK regime a merger must meet all three of the following criteria to constitute a relevant merger situation for the purposes of the Act. The first is that the two or more enterprises (broadly speaking, business activities of any kind) must cease to be distinct, or there must be arrangements in progress or in contemplation which, if carried into effect, will lead to enterprises ceasing to be distinct. [145] The second requirement is that the UK turnover associated with the enterprise which is being acquired exceeds £70 million (known as „the turnover test") or the enterprises which cease to be distinct supply or acquire goods or services of any description and, after the merger, together supply or acquire at least 25% of all those particular goods or services of that kind supplied in the UK or in a substantial part of it.[146] The last and the third criteria is that the merger must not yet have taken place, or it must have taken place not more than four months before the day the reference is made.[147]

The Act is applicable to all enterprises, irrespective of who owned the enterprises, only taking in to account the elements of merger situations. This means it is includes the public enterprises. In UK public enterprises were active in both competitive and monopoly markets prior to the beginning of the reform program in 1979.[148] Among the enterprises UK government owned are the British Airways, British Steel, Cable and Wireless (C&W), Rolls Royce, British Telecommunication etc… may be mentioned.[149] The UK has adopted the competitive neutrality principle in different instances, among others in relation to public procurement practices and ensuring corporate governance measures in relation to state owned enterprises may be cited as instances.[150]

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[142] Enterprise and Regulatory Reform Act of 2013

[143] *Id*, Schedule 4 and 5

[144] Competition and Merger Authority*, Mergers: Guidance on the CMA's jurisdiction and procedure*, January 2014 CMA2, Crown Copy right, 2014, available at www.gov.uk/cma. [accessed on September 19, 2017], P.6 [herein after CMA, *Mergers: Guidance on the CMA's jurisdiction and procedure*]

[145] United Kingdom, Enterprise Act of 2002

[146] CMA, *Mergers: Guidance on the CMA's jurisdiction and procedure,* P.16

[147] Enterprise Act of 2002, Section 22

[148] Shelley Thornton, *Reforming Public Enterprises: U.K; case studies*, 1998, OECD, P.1, available at http://www.oecd.org/gov/budgeting/1901726.pdf [accessed on December 16, 2017] [herein after Shelley Thornton, *Reforming Public Enterprises: U.K; case studies*]

[149] *Id*, P.1 and 2

[150] Office of Fair Trading, *Competition in Mixed Markets: Ensuring Competitive Neutrality*, a working paper, July 2010, OFT1242, P.6 [herein after OFT, *Competition in Mixed Markets*]

The merger notification system in the UK to the CMA is voluntary basis, regardless of whether or not the CMA would have jurisdiction to review the merger.[151] The fact that a merger has not been voluntarily notified to the CMA does not mean that the CMA will not review it. There is a possibility of merger review initiated by the CMA itself where it believes it may have jurisdiction.[152]

The merger investigation process mainly encompasses two phases; phase one and phase two processes. In the first phase the initial contact between parties and CMA starts and the pre-notification discussions are undertaken.[153] At this stage, the CMA case team discusses transaction with merger parties, including relevant jurisdictional issues and the nature and scope of information which the case team considers the merger parties will need to provide in their voluntary notification.[154] Under the Act, there is no requirement to notify mergers to the CMA, regardless of whether or not the CMA would have jurisdiction to review the merger.[155] The fact that a merger has not been notified does not negatively affect the CMA‟s substantive evaluation of the competitive effects of a merger. The UK merger regime contemplates the possibility of merger review initiated by the CMA itself where it believes it may have jurisdiction.[156] The CMA gathers its information and evidences from different sources including from third parties, most often customers and competitors of the merger parties.[157] At Phase two, the Inquiry Group is then required to base its decisions on the balance of probabilities.[158] After passing of different stages of this phase the CMA will make final decision on the merger case and publish its decision.

The Secretary of State may take into account those cases relating to: national and public security newspaper and other media mergers, and the stability of the UK financial system.[159] The UK system encompasses specific sectorial merger regulation of enterprises that involved in the area of water and sewerage, energy, rail, airports and aviation, financial services and health sector. The water and sewerage sector merger is governed by the Water Industry Act 1991(as amended by the Water Act 2014) and the CMA must request the Water Services Regulation Authority to provide its assessment of the impact of the merger on its ability to regulate the water sector through comparisons, as well as how any adverse impact weighs against the potential customer

[151] CMA, *Mergers: Guidance on the CMA's jurisdiction and procedure*, P.42
[152] *Ibid*
[153] *Id,* P.38
[154] *Ibid*
[155] *Id*, P.41
[156] *Id*, P.42
[157] *Id*, P.43
[158] CMA, *Mergers: Guidance on the CMA's jurisdiction and procedure,* P.13
[159] Enterprise Act of 2002, Section 42 and 58

benefits flowing from the merger.[160]Similarly in the sector of energy Ofgem (the UK Electricity and Gas Sector regulatory body), in railways the Office of Rail Regulation, in airports and aviation industry the Civil Aviation Authority, in healthcare the National Health Service, take their part in the consultation with the CMA, while the CMA decides the proposed merger cases in each economic sector.[161]

2.7.3 Republic of South Africa

The regulation of merger in the Republic of South Africa (RSA), fall under the umbrella of the Competition Act No.89 of 1998 (herein after "the Act". The Act is amended at different times [162] and clearly determines the applications and exemptions of the law. Section 3 of the Act provides that the Act applies to all economic activity within or having an effect within the RSA, except; collective bargaining, a collective agreement, concerted conduct designed to achieve a non-commercial socio-economic objective, and an industry or sector of an industry that is subject to the jurisdiction of another regulatory authority. As amended in 2000, the Competition Act now provides that if another regulatory scheme applies to competition matters, concurrent jurisdiction with the Competition Act is presumed.[163] The Act, after dealing with Prohibited practices under Chapter 2, in Chapter 3 regulates the issue of merger.

Chapter 3 of the act was amended by section 6 of the Competition Second Amendment Act of 2000. Chapter 3 starts with Section 11 providing thresholds and categories of mergers. The Minister of Trade and Industry with the consultation with Competition Commission will determine a lower and a higher threshold of combined annual turnover or a lower and a higher threshold of combination of turnover and assets in the Republic.[164] Based on the provided threshold limit the Act classifies merger in to three; a small merger, an intermediate merger and a large merger.[165] The Act defines merger as, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.[166] Further, the law gives detail explanations in respect of the elements of the definition like, the manner of controlling and when we can say that a person controls a firm.

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[160] International Comparative Legal Studies, *United Kingdom Merger Control 2017*, Published on 15/11/2016, available at https://iclg.com/ [accessed on 16 December 2017], [herein after ICLS, *United Kingdom Merger Control 2017]*

[161] *Ibid*

[162] Different provisions of the Act is amended by the following Acts: Competition Amendment Act, No 35 of 1999 (Date of commencement 1 September 1999), Competition Amendment Act, No. 15 of 2000 (Date of commencement 1 September 2000), Competition Second Amendment Act, No. 39 of 2000 (Date of commencement 1 February 2001)

[163] OECD, *Competition Law and Policy in South Africa*, P.51

[164] Competition Act No.89, 1998,Republic of South Africa, Government Gazette, October 30/1998, VoL.400, No.19412, Section 11(1) [Herein after, The Competition Act of RSA]

[165] *Id*, Section 11(5)

[166] *Id*, Section 12(1)(a)

The Competition Commission and Competition Tribunal determine whether or not the merger is likely to substantially prevent or lessen competition by assessing different factors.[167] Generally, a party to a small merger is not required to notify the Competition Commission, unless the Commission requires it to do so.[168] The Act allows that a party to a small merger may voluntarily notify the Competition Commission at any time.[169] After notification is submitted to the Commission, the Commission should pass a decision within twenty business days with the result options; approving the merger, approving the merger subject to any conditions, prohibiting implementation of the merger, if it has not been implemented, declaring the merger to be prohibited.[170] In case of intermediate or large merger proceedings the merger parties must notify the Competition Commission of that merger in the prescribed manner and form.[171] The Act provides similar time and option results by the Competition Commission for small merger procedure. But the only difference in large merger is large mergers are investigated by the Commission, which then makes a recommendation to the Tribunal and also the Commission has forty working days for its investigation. After any type of merger is approved, there is also a procedure for revocation of the merger under specified grounds.[172]

In terms of its institutional setup, the RSA‟s competition regime encompasses the Competition Commission, the Competition Tribunal and Competition Appeal Court. The Commission is entrusted with the general power of enforcing the competition law.[173] It also has the mandate to authorize, with or without conditions, prohibit or refer merger issues.[174] The Competition Tribunal has both primary and appellate functions as specified in the Act.[175] The Tribunal, in case of large merger cases will pass the ultimate decision on the fate of the merger up on receiving recommendation from the Competition Commission, when the concerned parties applied to the Commission initially.[176]In terms of appellate mandates the Tribunal hears appeals from, or reviews any decision of, the Competition Commission that may, in terms of the Act, be referred to it.[177] The Competition Appellate Court serves as one Appeal Avenue concerning the issues of competition and review any decision of the Tribunal concerning legal error and jurisdiction.[178] The Competition Appellate Court hears and decides cases in panels of three judges, although a single judge may decide interlocutory or procedural matters.[179]

[167] *Id*, Section 12A (1)
[168] *Id*, Section 13(1)(a)
[169] *Id*, Section 13(2)
[170] *Id*, Section 13(5)
[171] *Id*, Section 13 A(1)
[172] *Id*, Section 15
[173] *Id*, Section 21(1)
[174] *Id*, Section 21(1)(e)
[175] *Id*, Section 26 and the following
[176] *Id*, Section 14A
[177] *Id*, Section 27(1)(C)
[178] *Id*, Section 37
[179] *Id*, Section 36(2)

Beyond the above mentioned exemption under the Act, there is no exemption that the Act is not applicable to the state itself and enterprises owned by the state.[180] The Act clearly provides that the law binds the state.[181] This means all entire requirements provided under the Act for merger and competition law generally are applicable to the SOEs as well as private entities.

[180] OECD, *Competition Law and Policy in South Africa*, P.52
[181] The Competition Act of RSA, Section 81

CHAPTER THREE

THE LEGAL FRAMEWORK ON MERGER, PUBLIC ENTERPRISES, CONSUMERS' PROTECTION AND TRADE COMPETITION IN ETHIOPIA

Introduction

Under this chapter the nature of public enterprises, specifically the merger of state owned enterprises under the umbrella of competition law in Ethiopia will be the main area of the discussion. The chapter tries to focus on what the legal framework that regulates merger of public enterprise looks like. The first section is devoted to overview the general legal conditions or governance of merger under Ethiopian law. The chapter would explore the question: is there any situation were the law tries govern merger beyond the scope of competition law? The second section is dedicated to overview of the regulation of merger under the realm of consumer protection and trade competition law. The legal requirement of merger, its procedural aspects, the power of the Authority that enforces the law, the monitoring and enforcement aspects are also considered under this section. The third section deals with the nature, status and characteristics of public enterprises under the Ethiopian legal frame work. It would consider how such enterprises are established, restructured, and dissolved. Finally, the fourth section tries to interconnect the concept of merger and public enterprises under the current consumer protection and trade competition law.

3.1 General Legal Framework on Merger under the Ethiopian Law

The Ethiopian Commercial Code deals with merger with under a slightly different name of "amalgamation". Under Book II, Title VIII with the caption "Conversation and Amalgamation", specifically is starting from Art.549 and the following are the governing provisions of the Code.[182] The COM.C rather than giving the definition of the term "amalgamation" opted to show the forms of amalgamation by stating; two or more firms may amalgamate, either by taking over or by the formation of a new firm.[183] This means that it may take either an acquisition or merger form to acquire a new legal personality. The Code does not embrace detail provisions about merger procedures. Rather, it focuses on some conditions that should be taken in to account and the various stakeholders that may be affected by the merger/ amalgamation. The two circumstances that the law tries to envisage are the right of creditors and debenture holders of the firms proposing merger.[184] Beyond this, the Code discusses the need of publication of notice of

[182] COM.C
[183] *Id*, Art.549(1)
[184] *Id*, Art.552 and 553

amalgamation and that the notice should be deposited in the Commercial Registry for the modification or alteration the merger or amalgamation entails.[185] Also this is imposed as a duty under the current Commercial Registration and Licensing Proclamation, as it provides any alteration or amendment on commercial organization and registration shall be registered with the registering office within sixty days after its authentication by a notary.[186] Among other things, merger falls under the realm of any alteration or amendment of a business organization.

The above mentioned merger related provisions are applicable to business organizations recognized by the Commercial Code. When we explore sector-specific regulation of merger, we find additional requirements or a strict regulatory regime. In case of banking business, without the prior written approval of the National Bank of Ethiopia (NBE), no bank shall merge with or take over the banking business of another bank.[187] The same is true in case of insurance business in which the NBE‟s prior written approval is required when insurance company merger with or takeover the business of another insurer.[188]

3.2 Legal Framework of Merger under the Trade Competition and Consumer Protection Law under the Ethiopian Law

Under the TCCPP part two of the Proclamation is devoted to merger regulation and prohibition of anticompetitive trade practices. After dealing with abuse of market dominance, anti-competitive agreements, concerted practices and decisions, and unfair competition under section one part two of the Proclamation, section two contains provisions to regulate merger.

3.2.1 Legal Requirements for Merger

Section two of part two of the TCCPP commences by proclaiming the prohibition of merger agreement or arrangement which causes or likely to cause a significant adverse effect on trade competition.[189] The Proclamation provides two general situations that are considered as merger: 1) when two or more independent business entities amalgamate or when such organizations pool the whole or part of their resources for the purpose of carrying on a certain commercial activity and 2) when one business entities directly acquires shares, securities of another business entity or takes control of the management of the business of another person or group of persons through

[185] *Id*, Art.551, 224 and 108
[186] Commercial Registration and Licensing Proclamation, Art.10(1)
[187] Banking Business Proclamation, Art.3(3)(c) and (d)
[188] Insurance Business Proclamation, Art.3(3)(c)
[189] TCCPP, Art. 9(1)

purchase or other means.[190] The merger directive, which is issued by the Authority, also defines merger as defined in the TCCPP, by make reference of to the same.[191]

The authority in order to ensure the proper implementation of the merger governance prescribed three types of mergers and laid down definition for each type of merger under the merger directive.[192] The directive categorizes merger based on the involvement of the merging entities in the economic sector, as horizontal merger, vertical merger and conglomerate merger.[193] Horizontal merger is defined under the directive as, merging of business entities which are or to be considered as competitors found in the same geographical and market transaction level.[194] Whereas vertical merger is the integration of one merging business person with another one, in which the merging parties are found in the process or chain of production of a given product / provision of a service.[195] The third type of merger, conglomerate merger is expressed as the amalgamation of business entities which does not fall under the either of the above mentioned types of merger.[196] This means that the merging parties are in different economic fields or sectors.

Based on the cumulative amount of the capital or yearly transaction of the merging parties, the Authority‟s directive divided type of mergers in to three categories; lower merger, average merger and higher merger. If the amount of capital or yearly transaction is under thirty million Birr, it falls in to the category of lower merger.[197] If it is between thirty million Birr and three hundred million Birr it is considered as average merger.[198] The merger is said to be "higher" if the amount of the capital or yearly transaction of the merging parties is greater than three hundred million Birr.[199]

3.2.2 Procedural Aspects of Merger

Once any business entity plans to undertake merger as mentioned above, the TCCPP imposes a duty on such business person to give notice to the Authority by disclosing the details of the proposed merger.[200] The merger Directive prescribes the details of how such notification shall be made. The merging parties or through their legal representative should submit notification of

[190] *Id*, Art.9(3)(a) and (b)
[191] Trade Competition and Consumers Protection Authority, *Merger Directive*, Number [not provided], October 2008E.C, Amharic Version, Art.8 [herein after, *Merger Directive*, TCCPA]
[192] *Id*, Art.9
[193] *Ibid*
[194] *Id*, Art.9(1)
[195] *Ibid*
[196] *Ibid*
[197] *Id*, Art.20
[198] *Ibid*
[199] *Ibid*
[200] TCCPP, Art.10 (1)

merger to the Authority in a written form.[201] The Directive allows the medium of communication for the notification of the merger via fax, electronic mail, and post as well as through physical landing in of the application.[202] Also the merger Directive requires that the "Amharic" language should be the sole language of communication to the Authority for the application process.[203]

After having received an application the Authority will investigate the possible adverse effect of the proposed merger on trade competition[204] For the purpose of the investigation the Authority may require the parties to submit additional information or document within a specified period of time, and also may invite by a notice published in a newspaper any business person who is likely to be affected by the proposal merger, to submit its written objections, if any, within fifteen days from the date of publication of the notice.[205] After such procedures the Authority may finally reach at either of the following three decisions: approval, rejection or approval with some conditions. The Authority approves the merger, if it is of the opinion that the merger is not likely to have any significant adverse effect on trade competition.[206] But its decisions will be negative if the Authority considered that it will create adverse effect on market competition.[207] The Authority may reach at the third option of decision, if it is of the opinion that the likely significant adverse effect of the merger on trade competition can be eliminated by complying with the conditions attached thereto.[208]

After merger approval is secured from the Authority, the concerned government office will require the presentation of the approval for registering the merger in the commercial register.[209] The acquired of the approval does not mean that such approval is not revocable. The TCCPP set out the possible circumstances in which the Authority will reverse its decision. If the approval was obtained based on the presentation of false or fraudulent evidence and the conditions on the basis of which the approval was obtained are not fulfilled, there may be grounds for revocation of the merger approval.[210]

3.2.3 The Power of Trade Competition and Consumers' Protection Authority

Generally, the Authority is empowered by the TCCPP with general enforcement of the law and governance of consumer protection and trade competition aspects. The Authority is established by the TCCPP as an autonomous federal government body having its own legal personality,

[201] *Merger Directive*, TCCPA, Art.11
[202] *Id*, Art.12(1)
[203] *Id*, Art.12(2)
[204] TCCPP, Art.10 (2)
[205] *Id*, Art.10 (3)(a) and (b)
[206] *Id*, Art. 11(1)(a)
[207] *Id*, Art. 11(1)(b)
[208] *Id*, Art. 11(1)(c)
[209] *Id*, Art. 12
[210] *Id*, Art. 13(1)(a) and (b)

which is accountable to the Ministry of Trade.[211] The organizational structure of the Authority is such that it comprises of the Director General, Deputy Director Generals, Judges, investigation officers, prosecutors and other necessary staff.[212] The investigation and prosecution power that were given to the Authority by the TCCPP, are now transferred to the Federal Police Commission[213] and to the Federal Attorney General[214] respectively. The powers and duties of the Authority are enumerated under the TCCPP, and all are aimed at ensuring consumer protection while involving in the market, and to create fair and competitive market in the economy.[215]

Under the Merger Directive the Authority‟s organizational structure relating to merger is composed of the Director General, Deputy Director General of the sector, and the Merger Director.[216] It is the powers of the Director General to control, direct, supervise and decide the proposed merger, up on the recommendation of the Deputy General of the sector.[217] The Merger Director undertakes the activities in which whether the merging parties are complying with the documentary and information requirements, to carry out overview research and pass its recommendation to the Deputy Director General of the sector.[218]

As regards to the implementation of the merger regulation, the Authority is delegated as a sole supervisory organ.[219] As mentioned in the above section, the application process, investigation and approval of the merger of business entities fall under the power of the Authority. This means the notification process is submitted to the Authority disclosing the details of the proposed merger, and based on such notification; the Authority will check the adverse effect of the proposed merger on the consumer and trade competition. The Authority will commence the investigation or the overview research upon the fulfillment or submission of all required and necessary information by the merging parties.[220] Finally the Authority will reach at either of the three decision options on the fate of the proposed merger as mentioned above in the previous section. The Authority‟s decision of merger is mandatory to effect the registration of the merged business entities in the commercial registration.[221] Also the Authority has the power to revoke its previous decision of approved merger on the basis of the grounds provided for.

[211] *Id*, Art. 27(1) and (2)
[212] *Id*, Art. 28
[213] Federal Attorney General Establishment Proclamation No. 943/2016 , *Federal Negarit Gazeta*, 22nd Year No.62, 2nd May, 2016, Art.22(7) [herein after, Federal Attorney General Establishment Proclamation]
[214] *Id*, Art.22(6)
[215] TCCPP, Art. 30
[216] *Merger Directive*, TCCPA, Art. 5, 6 and 7
[217] *Id*, Art. 5
[218] *Id*, Art. 7
[219] TCCPP, Art. 30(3)
[220] *Merger Directive*, TCCPA, Art.25(1) and (2)
[221] TCCPP, Art. 12

3.2.4 Appeal Procedure

Once the prohibition or revocation of merger decision is passed by the Authority, the next option left for merging business persons is to appeal to the Federal Trade Competition and Consumer Protection Appellate Tribunal (herein after, Federal Appellate Tribunal).[222] The merging parties shall submit their appeal to the Federal Appellate Tribunal within thirty days after the decision of the Authority.[223] The Federal Appellate Tribunal may, up on examining an appeal submitted to it, may confirm, reverse or vary the decision or remand the case, with necessary instructions, to the Authority.[224] The decision of Federal Appellate Tribunal is final and provided that a party that claims the existence of mistake on question of law, may submit a petition to the Federal Supreme Court within thirty days from the date of the decision.[225]

3.2.5 Monitoring and Enforcement Mechanism

Different jurisdictions follow different approaches to ensure market competition on hand and consumer‟s welfare protection on the other. Ethiopia adopted a model in which a single specialized agency undertakes the investigation (this power is transferred to the Ethiopian Federal Police)[226], enforcement and adjudicative activities.[227]

The TCCPP put different mechanisms for proper implementation of the law. Pertaining to merger the Proclamation provides that if any business person who participates in a merger violates provisions of Articles 9 to 13 of the proclamation, s/he shall be punished with a fine from 5% up to 10% of his annual turnover.[228] The direct or indirect participation of a person other than a business person in this offence shall be punished with a fine from Birr 10,000(ten thousand) to Birr 100,000(one hundred thousand).[229]

As mentioned above, the law makes available the situation of revocation of its previous merger decision if the merger decision was based on false or mistake information or made without following the necessary procedural requirements of the law. After the revocation of such decision the Authority has the duty inform the relevant or concerned authorities about its revoked decision and follow its implementation.[230]

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[222] *Id*, Art. 33(2)(a)
[223] *Id*, Art. 39(1) and *Merger Directive*, TCCPA, Art.33
[224] *Id*, Art. 33(3)
[225] *Id*, Art. 39(2)
[226] Federal Attorney General Establishment Proclamation, Art.22(7)
[227] Kibre Moges Belete, *The Sate of Competition and The Competition Regime of Ethiopia: Potential Gaps and Enforcement Challenges*, Organization for Social Science Research in Eastern and South Africa(OSSREA), Ethiopia, 2015, P.203 [Herein after Kibre, *The Sate of Competition and The Competition Regime of Ethiopia*]
[228] TCCPP, Art. 42(4)
[229] *Id*, Art. 42(5)
[230] *Merger Directive*, TCCPA, Art.38

3.3 Public Enterprises in the Ethiopian Legal Regime

Public Enterprises in Ethiopia incorporated making reference to the Public Enterprise Proclamation of 1992[231]. Such enterprises are established by the government with goal to enable them to be efficient, productive and profitable as well as to strengthen their capacity to operate by competing with private enterprises.[232] The Public Enterprise Proclamation gives meaning to such enterprises as wholly state owned enterprises that are established pursuant to the proclamation to carry on for gain manufacturing, distribution, service rendering or other economic and related activities.[233] The first element is their ownership, in which they are totally owned by the government, without consideration of joint ownership concept. Under the Federal structure, Federal Public Enterprises are enterprises established in accordance with the relevant law or a business organization whose shares are totally owned by the Federal Government.[234] This is an indication of the existence of public enterprises owned by regional states. The law also envisages as a second element in the definition of the term "public enterprises", of being established according to the aforementioned Proclamation.[235] Every Public Enterprise is established by regulation issued by Council of Ministers, in reference to the proclamation.[236] Their amalgamation and division is decided by the Council of Ministers, which is effected through promulgation of the Regulation for each public enterprise.[237] The third and the last limb of the definition of the term express their involvement or purpose. They are established to carry out activity of commercial nature, which make them similar with private business entities.

Public enterprises based on their scope of activities are accountable to a certain executive organ. The Public Enterprise Proclamation provides for a supervising authority, which is designated by the Council of Ministers to protect the ownership rights of the State.[238] The powers and duties given to a Supervising Authority of Public Enterprises by Proclamation No. 25 /1992 and with respect to public enterprises and shares to be privatized, the powers and duties given to the Privatization Board by Proclamation No. 412/2004[239] are now given to the Ministry of Public Enterprises.[240]

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[231] Public Enterprise Proclamation (PEP)
[232] *Id*, Preamble
[233] *Id*, Art.2(1)
[234] Commercial Registration and licensing Proclamation, Art.2(27)
[235] PEP, Art.6(2)
[236] *Id*, Art.5 and Art.47(1)(a)
[237] *Id*, Art.35 and Art.47(1)(d)
[238] *Id*, Art.2(2)
[239] Privatization and Public Enterprises Supervising Authority Establishment Proclamation No. 412/2004, *Federal Negarit Gazeta*, 10th Year No.57
[240] Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 916/2015, *Federal Negarit Gazeta*, 22nd Year No.12, Art.31(2) [here in after, Powers and Duties of the Executive Organs Proclamation]

Under Proclamation No. 916/2015 Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation, as one executive body, the Ministry of Public Enterprises takes the responsibility in supervising public enterprises.[241] Generally the Ministry of Public Enterprises has the power and duties to oversee and assist the corporate management and financial performance of the public enterprises accountable to another supervising authority and also to itself. [242] Among the enumerated powers and duties of the Ministry of Public Enterprises, that is directly accountable to it, the Ministry submits proposals to the government on their dissolution, amalgamation, or division or sale; and issues a directive to make the process transparent.[243] This means the Ministry provides its proposal to the Council of Ministers to determine their fate or to alter their personality. Also the Proclamation empowers the Ministry to issue a directive in what manner/situation such modification may be made.[244]

Sometimes, the supervising authority of enterprises may be delegated to a sector specific Ministry office or executive agency rather to the Ministry of Public Enterprises. For instance the Ethiopian Airlines Group is under the supervision of the Ministry of Transport[245], which is established by the composition of the Ethiopian Airlines Enterprises and the Ethiopian Airports Enterprise. The Ethiopian Information and Communication Technology Development Agency is the supervising authority of the Information Technology Park Corporation.[246] The Chemical Industry Corporation is supervised by the Ministry of Industry.[247] Generally and most of the time the supervisory of public enterprises is given to the Ministry of Public Enterprises[248], in some circumstances such power is given to specific ministry the public enterprise falls with the technical or sectorial responsibility of a given ministry.

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[241] *Id*, Art.31
[242] *Id*, Art.31 (1)(a) and (b)
[243] *Id*, Art.31 (1)(b)(9)
[244] Powers and Duties of the Executive Organs Proclamation, Art.31 (1)(b)(9)
[245] Ethiopian Airlines Group Establishment Council of Ministers Regulation 406/2017*, Federal Negarit Gazeta*, 23rd Year, No.68, Art.4 [herein after, Ethiopian Airlines Group Establishment Regulation]
[246] Information Technology Park Corporation Council of Ministers Regulation No. 177/2010, *Federal Negarit Gazeta*, 16th Year, No.24, Art. 3
[247] Chemical Industry Corporation Establishment Council of Ministers Regulation No. 280/2012, *Federal Negarit Gazeta*, 19th Year No.23, Addis Ababa, 8th January, 2013, Art.3
[248]List of some Public Enterprises accountable to the Ministry of Public Enterprises:
Ethiopian Rail Ways Corporation, Ethiopian Shipping and Logistics Services Enterprise, Shebelle Transport Share Company, Birhanena Selam Printing Enterprise, Ethiopian Tourist Trading Enterprise, Ethiopian Sugar Corporation, Ethiopian Chemical Industries Corporation, Agricultural Business Corporation, Caustic Soda Share Company, Awash Melkasa Aluminum Sulfate and Sulfuric Acid Share Company, Admamitulu Pesticide Processing Share Company, Ethiopian Pulp and Paper Share Company, Awassa Agricultural Development Enterprise, National Alcohol and Liquor Factory, Assala Malt Factory, Ethiopian Construction Design and Supervision Works Corporation, Ethiopian Mineral, Petroleum and Bio-fuel Corporation, Building Materials Supply Enterprise, Ethiopian Construction Works Corporation, etc….

3.4 Law on Merger of Public Enterprises with Trade Competition and Consumer Protection Law

As mentioned before up on the recommendation of the Ministry of Public Enterprises, the merger/ acquisition of a given public enterprise is determined by it (i.e accountable to it), which is submitted for final decision to the Council of Ministers. Also the concerned government body other than Ministry of Public Enterprises, as supervising authority may submit its proposal of merger to the COMs. The highest executive organ of the government will determine their fate on their ownership or any structural change. The current law on Consumers and Trade Competition is applicable to any business person, which means to any person who professionally and for gain carries on any of the activities specified under Article 5 of COM.C or who dispenses services, or who carries on those commercial activities designated as such by law.[249] The law does not clearly mention those public enterprises to be included under the governance of the current law of Consumers and Trade Competition. But the law that is promulgated before the enactment of the current law, the Trade Practice and Consumers‟ Protection Proclamation No 685/2010, clearly exempted the application of the law against basic utilities[250], and other specific sectors in which will be determined by the regulation of COMs. The current law avoids possible exception under the basic utilities concept, for unknown reason. This creates great ambiguity as to govern the merger case of public enterprise under the supervision of the Competition Authority.[251]

Following its coming to power in 1991, the Ethiopian People‟s Revolutionary Democratic Front (EPRDF) adopted the concept of economic liberalization which includes privatization of a number of state owned enterprises among others.[252] Reducing the government‟s role in business, encouraging private sector development, promoting competition, economic efficiency, and growth, correcting market failures, providing goods and services which the market may not provide, avoiding price and quality abuses, protecting consumers, and integrating the Ethiopian economy with the global economy are the major reform tasks which the government is undertaking or implementing.[253] Under the current government public enterprise was launched requiring these enterprises to operate on a competitive basis in a free market setting competing with private firms, which consequential

[249] TCCPP, Art. 2(5)
[250] Trade Practice and Consumer Protection Proclamation, Art.4(3)(b)
[251] Elias N. Stebek, Deliverables and Pledges under Ethiopian Trade Competition Law: The Need for Private Sector Empowerment and Enablement, *Mizan Law Review*, September 2017, Vol. 11, No.1, PP 32-63, at P.45 [Herein after Elias, Deliverables and Pledges under Ethiopian Trade Competition Law]
[252] Kibre, *The Sate of Competition and The Competition Regime of Ethiopia,*P.24
[253] Solomon Abay, „Designing the Regulatory Roles of Government in Business: The Lessons From Theory, International Practice And Ethiopia‟s Policy Path‟ *Journal of Ethiopian Law*, Vol XXIII No 2 (Dec 2009), 119, *as cited in,* Hussein, *Ethiopian Merger Regulation,* P.3

policy shift reduced the part played by public enterprises in the economy and eliminated the special privilege accorded to them.[254]

Though in relation to the competitive neutrality principle there is no clear policy or law that allows the application of the competition law over state owned enterprises, the above mentioned general economic policies and reform actions tend to show the application of competition law over state owned enterprises. This means public enterprises should be treated like private business entities in order to ensure the effective competition law regime in the state; unless such gaps are bound to continue thereby causing a *double standard* in the definition of anti-competitive practices as applied to private economic actors and state owned enterprises.[255] Also the strict interpretation of the definition or nature of the public enterprise tells that they are business person and the definition of „Business Person" under the TCCPP, seems to conclude the application of the TCCPP over public enterprises.

Once competition law regime is deemed applicable to the state owned enterprises, merger provisions also govern the latter. The above mentioned procedural and substance merger requirements should be complied with by public enterprises that seek merger.

[254] Tewodros Meheret, *The Concept and Characteristics of Public Enterprises in Ethiopia*, P. 346
[255] Elias, Deliverables and Pledges under Ethiopian Trade Competition Law, P.45

CHAPTER FOUR

THE PRACTICE OF MERGER OF PUBLIC ENTERPRISES IN ETHIOPIA VIS-À-VIS THE CONSUMERS' PROTECTION AND TRADE COMPETITION LAW REGIME

Introduction

Under this Chapter the practical aspect of merger of public enterprises in Ethiopia is discussed. Questions like: How does each stakeholder undertake the merger of business entities especially that of public enterprises? What is the role of each concerned Authority to effect the merger of public enterprises in the light of and vis-à-vis the goals of the competition law? will be talked. As discussed in the previous chapter the Council of Ministers is the sole decision maker both on the formation and conversation of public enterprises. So, under the first section of the chapter the practice of the COMs on merger of public enterprises will be explored. The recent and major case of merger of public enterprises will also be examined. The next section of the chapter is devoted to the Ministry of Public enterprises" role on merger of such business entities. Questions like: how does the Ministry submit proposals to the government on dissolution, amalgamation, or division of public enterprises? What is the mandate of the Consumer Protection and Trade competition Authority in the process and decision making of the merger public enterprises? What is the real situation on the ground regarding the exercise of its mandate by each authority? will be discussed.

4.1 The Council of Ministers

Recently, in Ethiopia the merger of one public enterprise/s with another one has become a common phenomena. As discussed in the previous chapter the COMs is the sole decision maker in the formation, restructuring or merging of public enterprises. As a decision maker the COMs may pass its decision up on the recommendation or proposal either from supervising authority of a given public enterprise or from Ministry of Public Enterprises.

The actual scenario on the ground is that the COMs or the Prime Minister"s office takes the initiation and orders the relevant supervisory organ or Ministry of Public Enterprises in the restructure or merger of public enterprises.[256] The merger of public enterprises may take place either in the form of abolishing existing two or more public enterprises and forming new one or one public enterprise acquiring ownership of the other public enterprise in the form

[256] Interview with Ato Solomon Emiru , Director of Legal Drafting and Opinion Directorate, Prime Minister Office, on *the practical aspect of merger of Public Enterprises:* January 04, 2018 [herein after, Ato Solomon Emiru, *the practical aspect of merger of Public Enterprises*]

acquisition.[257] If the merger falls in the first option each public enterprise‟s establishment Regulation is repealed and a new Regulation is promulgated for the new public enterprise.[258] In case of the second option the acquired public enterprise‟s Regulation is repealed and the acquirer‟s Regulation is amended.[259] Most of the time in the course of merger of public enterprise the COMs takes in to account or requires the asset and liability of the merged public enterprises‟ be properly audited and a settled financial report.[260] Up to this time there is no mechanism the COMs examines the merger process of the public enterprises in the interest of the trade competition and consumers‟ welfare.[261] The COMs does not require TCCPA‟s willingness or suggestion in the decision making process of the merger of public enterprises.[262]

In relation to the governance of banking sector the NBE is the supervisory and regulatory organ in the banking business and also in merger approval process of banks as mentioned in the previous chapter. The NBE conducts some kind discussion with the TCCPA about on how to solve conflicting power between, the merger mandate regarding the banking business on the one hand and on the other hand the TCCPA‟s merger approval power under the TCCPP regime.[263] As the NBE is expert in the area and regulates the financial sector effectively by ensuring that both the legal and institutional frameworks are in place, the Authority itself reaches a consensus with NBE to regulate the banking sector merger by the NBE.[264] The reason is based on fact that the competition law‟s major goal is to avoid abuse of dominance in the market or to protect the consumer, and specifically in the banking sector to protect the cash depositors and policy holder in the insurance sector. In order to ensure this the NBE is in a better position than the Authority.[265] The NBE‟s various directives in the area of capital requirement, share acquisition restriction, board members‟ selection requirements, liquidity requirement, number of branches requirements, etc… helps it to ensure the protection of depositors‟ and insurance policy holders‟ interests and also trade competition in the financial sector.[266] The only gap that can be raised in

[257] *Ibid*
[258] *Ibid*
[259] *Ibid*
[260] *Ibid*
[261] *Ibid*
[262] *Ibid*
[263] Interview with Ato Mesfin Getachew , Chief Legal Expert of Legal Affairs Directorate, National Bank of Ethiopia, on *the practical aspect of merger of banks: the case of CBE and CBB*, December 13, 2017 [herein after, Mefin , *the practical aspect of merger of banks: the case of CBE and CBB*]
[264] *Ibid*
[265] Interview with Ato Ephrem Baraki, Acting senior Legal Expert of Legal Affairs Directorate, National Bank of Ethiopia, on *the practical aspect of merger of banks: the case of CBE and CBB*, December 13, 2017 [herein after, Ephrem , *the practical aspect of merger of banks: the case of CBE and CBB*]
[266] *Ibid*

relation to the merger decision power of NBE is that there is no appeal procedure in case where the merging parties are dissatisfied with the decision of the NBE.[267]

Though some sources suggest that in relation to the merger case of the Construction and Business Bank (CBB) and the Commercial Bank of Ethiopia (CBE), the decision to merge was made by the Public Financial Institutions Supervisory Agency (PFISA),[268] the NBE was involved in the approval of merger of the two public enterprise banks.[269] The Objectives of the PFISA is to help financial public enterprises become efficient, competitive and modern with a view to enabling them serve as instruments in implementing Government development policies.[270] A committee composed of representatives from the two banks, the NBE, PFISA and government officials was formed and after a long time discussion the decision to merge the two banks came to picture.[271] This means there was no independent decision made by the NBE. Finally the COMs decided to amalgamate CBB with CBE through takeover of the CBE by enacting a regulation Council of Ministers Regulation No. 348/2016 to that effect.[272]The regulation stated that the rights and obligation of the CBB is transferred to CBE and repealed CBB"s establishment COMs Regulation No.203/1994.[273]

The COMs recently decide on the merger of the Ethiopian Airlines and the Ethiopian Airports Enterprise to form the Ethiopian Airlines Group with total Authorized capital of one hundred billion Birr of which Birr thirty one billion two hundred sixteen million six hundred thirty two thousand six hundred ninety two Birr is paid up in cash and in kind.[274] In merger of the Ethiopian Airlines and the Ethiopian Airports Enterprise, some sources revealed that the merger intention is came from the Ethiopian Airlines which was presented by the Ministry of Transport to COMs.[275]

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[267] *Ibid*

[268] Dawit Taye and Asrat Seyoum, Beyond the „"Merger", *The Reporter*, September 06, 2016, available on http://archiveenglish.thereporterethiopia.com/content/beyond-%E2%80%9Cmerger%E2%80%9D , [accessed date February 12, 2017 [herein after Dawit and Asrat, Beyond the Merger]

[269] Interview with Ato Gobena Worana , Deputy Director of Banking Supervision Directorate, National Bank of Ethiopia, on *the practical aspect of merger of banks: the case of CBE and CBB*, December 11, 2017 [herein after, Gobena , *the practical aspect of merger of banks: the case of CBE and CBB*]

[270] Financial Public Enterprises Agency Establishment Council of Ministers Regulation 98/2004*, Federal Negarit Gazeta*, 10th Year No.31, Art.5 [herein after, Financial Public Enterprises Agency Establishment Regulation]

[271] Gobena , *the practical aspect of merger of banks: the case of CBE and CBB*

[272] Commercial Bank of Ethiopia"s Takeover of the Construction Business Bank Share Company Council of Ministers Regulation No. 348/2016*, Federal Negarit Gazeta*, 22nd Year No.55, 7th April, 2016, Art.5 [herein after, CBE"s Takeover of the CBB Share Company Regulation]

[273] *Ibid*, Art.3 and 4

[274] Ethiopian Airlines Group Establishment Regulation, Art.7

[275] Kaleyesus Bekele, Council of Ministers endorse Ethiopian, Airports Enterprise merger, *The Reporter*, 22 July 2017, available on https://www.thereporterethiopia.com/content/council-ministers-endorse-ethiopian-airports-enterprise-merger [accessed date December 01, 2017 [herein after Kaleyesus, Council of Ministers endorse Ethiopian, Airports Enterprise merger]

4.2 Ministry of Public Enterprises

As mentioned in the previous chapter, one of the powers conferred to the Ministry of Public Enterprises is to submit proposals to the government on dissolution, amalgamation, or division or sale of public enterprises. This power is given via the Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 916/2015. The Ministry is empowered by the Proclamation to submit a proposal on merger of public enterprises that are under it or that are answerable to it. The Ministry is established recently, replacing the Privatization and Public Enterprises Supervising Agency‟s power and duties.[276]

After the establishment of the Ministry of Public Enterprises till now practically no merger proposal of submitted to the COMs.[277] This means the Ministry does not make any merger proposal on its own initiative. What is actually done up to this time is up on the decision or direction of the COMs, the Ministry is ordered to undertake the analysis on the merger of public enterprises, and delegate such work to a certain committee and submit its recommendation to the COMs for final decision.[278] Also before the establishment the Ministry the same procedure was followed by the Privatization and Public Enterprises Supervising Agency.[279]

Recently the Ministry is drafting a Directive concerning the restructuring of public enterprises which power is given to the Ministry via the Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation.[280] The draft Directive among other things contains provisions on how to submit proposal, and how to undertake analysis of merger of public enterprises and the effect of such merger on the employees, creditors, trade competition etc… [281] Concerning merger of public enterprises the draft directive does not yet decided how to handle legal issues in relation to merger; either to gain merger approval from the TCCPA and submit the proposal to the COMs or to submit the proposal to COMs simply leaving the blessing of the Authority. [282] The understanding over the application of the law (TCCPP) at the Ministry of Public Enterprises is that, the Ministry‟s should not expect to comply with the merger provisions of the TCCPP.[283] It is the perception at the Ministry that the TCCPA should not intervene in the merger of public enterprises issues, and the Ministry can propose merger to the

[276] Powers and Duties of the Executive Organs Proclamation, Art.41(11)
[277] Interview with W/rt Fikerte Seferahe , Corporate Restructure Senior Expert, Ministry of Public Enterprise, on *the practical situation of merger proposal of the Ministry of Public Enterprise*, December 11, 2017 [herein after, Fikrete, *the practical situation of merger proposal of the Ministry of Public Enterprise*]
[278] *Ibid*
[279] *Ibid*
[280] *Ibid*
[281] *Ibid*
[282] *Ibid*
[283] *Ibid*

COMs without the knowledge and blessing of the Authority.[284] The reason is that the nature of public enterprises is different and should not be governed by the TCCPP that is why the law maker gave special power to the Ministry to propose merger of pubic enterprise.[285] Public enterprises are exempted from the application of the TCCPP on them. Based on this attitude the Ministry does not communicate with the Authority on merger issues even for merger of pertaining to two public enterprises.[286]

4.3 The Practice at the Trade Competition and Consumer Protection Authority

As mentioned in the previous chapter the TCCPA is a stakeholder in the implementation of the TCCPP, especially the provisions of merger under the proclamation. As generally proclaimed under the TCCPP and also under the Merger Directive the merging parties are expected to notify the Authority. It is the duty of the merging parties to notify the Authority and to get approval or conditional approval from the Authority to effect the merger and get registered at the Ministry of Trade. But practically most business organizations do not submit application to the Authority according to the aforementioned laws.[287] This is mainly because of lack of awareness of the business community and even some governmental institution on substantive provisions on merger.[288] They only approach the Authority in some circumstances for which the commercial registration office requires them to bring approval letter from the Authority.[289]

Especially in relation to the merger of the public enterprises, there is no single entity which notifies the Authority about their merger proposal.[290] Though the scope of application of the law clearly indicates the implementation of the law on the public enterprises" merger, until now both the Ministry of Public Enterprise and relevant supervising ministries do not carry out merger notification in accordance with the law.[291] Under the TCCPP there is a possibility of the exemption of some transactions or entities from the application of part two of the Proclamation

[284] Interview with Ato Tesfa Tolla , Director of Legal Affairs Directorate, Ministry of Public Enterprise, on *the practical situation of merger proposal of the Ministry of Public Enterprise*, December 11, 2017 [herein after, Tesfa, *the practical situation of merger proposal of the Ministry of Public Enterprise*]
[285] Tesfa, *the practical situation of merger proposal of the Ministry of Public Enterprise*
[286] Fikrete, *the practical situation of merger proposal of the Ministry of Public Enterprise*
[287] Interview with Ato Nebyou Belete, Director of Merger Control Directorate of Trade Competition and Consumer Protection Authority, on *the practical implementation of TCCPP*, December 8, 2017 [herein after, Nebyou, *the practical implementation of TCCPP*]
[288] Nebyou, *the practical implementation of TCCPP*
[289] *Ibid*
[290] *Ibid*
[291] *Ibid*

which is determined by regulation of the COMs. But such regulation has not yet been enacted. This means there is no issue as to the application of the law on Public enterprises.[292]

When a given public enterprise merges with another one, the merger proposal may be submitted to the COMs in two ways. The first is the submission made by the relevant supervising authority or Ministry, which is not accountable to the Ministry of Public Enterprises. Whereas the second scenario is for those public enterprises whose supervising organ is the Ministry of Public Enterprises, the latter submits its merger proposal to COMs. In both instances, the Ministry of Public Enterprises or the relevant supervising authority does not communicate or receive merger approval from the Authority before they submit their merger proposal of public enterprises to the COMs for final decision. For instance the recent and most curious case of the merger between the Commercial Bank of Ethiopia and the Construction and Business Bank did not pass through the Authority nor seek any blessing from the Authority.[293] But both under the TCCPP and also under Merger Directive every merging party should notify the Authority about such merger, if the amount of the transaction is more than thirty million Birr. According to the TCCPP, failure to do so would result in fine from 5% up to 10% of the annual turnover of the merging parties. But for unknown reason, the Authority does not bring any legal action against such public enterprises which failed to notify the Authority.[294]

[292] *Ibid*
[293] *Ibid*
[294] Interview with Ato Yonas Belete, Legal Expert of Investigation and Directorate of Trade Competition and Consumer Protection Authority, on *the practical implementation of TCCPP*, December 7, 2017

CHAPTER FIVE

CONCLUSION AND RECOMMENDATION

5.1 Conclusion

The contemporary governance principle of competition law or anti-trust law of most countries lies on the competitive neutrality principle. Irrespective the ownership status i.e. whether state owned enterprise or private business entity, the competition law is applicable to all market actors. In order to ensure fair trade competition and consumer protected regime in a given country the government‟s competition law must be applicable to the all participants of the market. And also beyond this the government should not use its fiscal and legislative power to benefit those state owned enterprises, to disadvantage private business entities. This is because of the fact that such privileges ultimately harm the market or economy of the state. The above mentioned experience of the countries‟ shows that, there is no discriminatory treatment between state owned enterprises and private business entities. Especially the competition law is applicable to both types of business entities irrespective of the ownership of the entities.

Under the USA system even though the specific court decision exempted the federal government corporation on the application of the antitrust law over it, the successive enactment the Act show that the competition law is applicable to the state owned enterprises. Under the UK the application of the competition law or the Enterprise Act to all economic actors shows the equal treatment of the Public enterprises. The Republic of South Africa‟s Competition Act in broad manner provided the application and exemption of the law. The Act provided exhaustive lists specific sectors exemption consideration of the economic and social aspect of the country. At the same time in order to enforce effective implementation of the competition law it is applicable to the state itself and enterprises owned by the state. This shows the commitment of the government to create an efficient and competitive economic environment.

In most jurisdictions state-owned enterprises organized with different names and status with view of supporting the economy or supplying of basic goods and services to the community. The Ethiopian state-owned enterprises organized in the name of public enterprises and established, amended or liquidated with the final decision of the COMs through Regulation. Once they are established by the COMs‟ decision, they are subject to different laws of states among others, commercial registration and trade license, tax law, TCCPP, as of any private business entity.

In order to ensure profitability of business organization different mechanism or strategies can be implemented. Among others merger or amalgamation is can be mentioned. In course of implementing the merger depend on the type and amount of merger the end result of the merger may affect the market or the consumer of the good and service in a given specific sector. In case of merger of horizontal and vertical types of merger the possibility of the business entities to

have a dominance effect may increase. If the merged entities have the dominance position in given sector of economy it means that they can easily determine the price, distribution, quality and quantity of a given product or service. One of the mechanisms to avoid this unfair market drive is to enact and implement the merger provisions of the competition law. The authoritative organ of the competition law requires the merging party to submit their merger proposal and gain approval for their merger. In circumstances where the respective organ believes that it will have negative value in the market it will halt the merger process, so that it will have the stabilizing effect of the market or the economy.

In Ethiopia the TCCPA is responsible organ that implement the merger provisions of the TCCPP. Irrespective of the ownership of the business organization and essentiality of the sector till now the Ethiopian TCCPP does not provided any exemption or exclusion of the competition law. The law is applicable for any commercial activities or transactions in goods and services conducted or having effect within the country. This means the public enterprises are subject to the merger provisions of the TCCPP, in case where they are in undertaking amalgamation or acquisition. Therefore as of private business entities the public enterprise thinking of merger should submit merger proposal to the TCCPA. In case were the public enterprises are under the supervision of Ministry of the Public Enterprise, the Ministry should consult and gain merger approval from the TCCPA. And also in circumstance in which a given public supervised by a certain authority, such authoritative organ should do the same with TCCPA.

But practically either of the two bodies, who submit merger recommendation to the COMs, does not gain prior merger approval form the Authority. The supervisory of most public enterprises, which is the Ministry of the Public Enterprise, believes in the non-applicability of the TCCPP, though there is no clear exemption provided under the proclamation or until now there is no enacted Regulation by the COMs. The major problem that lies with these organs is that, they do not have a legal awareness as to the application of the TCCPP over them. For the mere fact that such public enterprises are state owned enterprises, they are not complying with the already existed legal regime.

Practically because of the non-existence of the TCCPA to examine the merger regulation of public enterprises, it is not possible assess to how the TCCPA balance the interest of the COMs to merger the public enterprises on one hand and the effect of the merger on the trade competition and consumer protection on another hand. The COMs before passes its decision of amalgamation of public enterprises or after its decision, practically there is no possible ways the TCCPA to overview the merger proposal and decision of merger of public enterprises by COMs. The TCCPA provides one reason for failure of complying the TCCPP‟s merger provisions is there is no awareness on the existence of the law on the business community and also the government itself.

On the other hand the enforcer of the TCCPP does not take any legal action for such failure of notifying merger and gaining of merger approval from the Authority. The TCCPP clearly provided the fine penalty in percentage equivalent to turnover of the business bodies. But there is no legal reason provided by the Authority for not suing them for violation of the merger provisions of the TCCPP. This means the Authority does not exercise its powers given by the law and ultimately consequence negative effect on the trade competition and consumers‟ welfare.

In relation to financial sector there is special governance of the competition and consumer protection aspect. Among others the Banking Business Proclamation gives power to the NBE to overview and decides the merger case of banks. The same is true in the insurance business. As the TCCPP does not take in to account such power of the NBE it is difficult to entertain the merger case of banks. This is because when the banks plan merger they may be subject to both the TCCPP and Banking Business Proclamation as of plain reading of the laws. The laws are not clear whether such cases are subject to both the TCCPP and the NBE, or either of the two. Under the current situation there is no regulatory mechanism at the TCCPA to govern the special financial sector merger in accordance with the TCCPP and merger directives enacted by the Authority. Whereas the NBE is in the better position than the TCCPA in governance of merger case of banks, through implementing of different directive that can help to protect the interest of the depositor and the trade competition in the sector. But in case of the NBE decision maker on the merger of banks/insurance companies, there is no appeal procedure designed by the NBE, if the parties are dissatisfied by the decision of the NBE.

5.2 Recommendation

Consideration of the current legal and practical enforcement of the TCCPP in Ethiopia, the researcher of this thesis recommends the following:

- Promoting and incorporation of the competitive neutrality principle in the country‟s competition and consumer protection laws or policies. The Ethiopian law should advocate and work more on the enactment of the laws that is equally applicable to the public enterprises, in order to achieve stable economy and consumer protected regime.

- The practical application of the TCCPP on public enterprises must be ensured. Till present as there is no law which exempt the public enterprises in the competition law, each stakeholder should effectively implement their power given by law. The TCCPA should strictly follow the implementation of the TCCPP. The Authority should enforce effectively its power given by the law, in order to achieve the objectives of the law allied to consumer protection and trade competition in the country.

- The TCCPA should work more on awareness creation allied to merger. The TCCPA especially the merger department should create awareness on the merger provisions of the

TCCPP, in order to avoid conventional and wrong perception on the non-applicability the law over public enterprises.

- There should be a mechanism or laws which enable the COMs to require the Ministry of Public Enterprises or any supervisory organ of public enterprises to have the merger approval from the TCCPA while submitting the merger proposal to the COMs. Therefore this helps the COMs to take in to account the interest of trade competition and consumer protection elements, while deciding in the merger of public enterprises.

- The draft Directive on restructuring of public enterprises by the Ministry of Public Enterprises should be design envisaging provisions that encompasses the TCCPA‟s approval of merger of public enterprises while the ministry is submitting its merger proposal to the COMs. The Directive should be enacted in supporting the TCCPP‟s objective/goal and which should not deteriorate the power of the TCCPA over merger.

- The conflict of power between NBE and TCCPA over merger of enterprises should be resolved. The TCCPP should be amended in a way giving exclusive power allied to merger of banks/insurance companies to the NBE. This is because of the fact that the NBE is well organized in terms of both institutional and legal framework, that protect the interest of policy holders and depositors, at the same time creating competitive trade competition in the financial sector.

- In governance of merger of banks/insurance companies the law should design to the NBE to setup institutional appeal mechanism. In case were the NBE prohibited the merger of the financial organizations, there should be some kind of institutional frame work that enable to the parties to appeal and also which supervise or rectify the error and gaps of the NBE.

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- United Nations Conference on Trade and Development, *The benefit of competition policy for consumers*, intergovernmental Group of Experts on Competition Law and Policy Fourteenth session, Geneva, 8–10 July 2014
- World Bank, *Corporate Governance of State-Owned Enterprises*: A Toolkit DOI: 10.1596/978-1-4648-0222-5, Washington, DC, World Bank License, Creative Commons Attribution CC BY 3.0 IGO, 2014, P.26