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Merger Control Under The Ethiopian Anti-Trust Legal Regime: A Comparative Analysis

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Abstract

Notwithstanding the controversy surrounding the need for merger control in developing countries and its triggering factors, Ethiopia, as a small economy, motivated by some competition and industrial policy considerations, has enforced a merger control system which is at the fore front of the operational concern of its anti-trust regime. This paper argues that, despite a noticeable foreign influence on the regime, the country's merger control legal framework is riddled with numerous deficiencies. These deficiencies need to be addressed promptly for achievement of the very goals of merger control and implementation of effective enforcement require a well-designed set of rules. It will be argued that, the deficiencies, if not properly dealt, could continue to affect certainty of transactions and ease of doing business and result in unnecessary administrative burden on the competition authority. This paper attempts to make a comparative analysis of deficiencies surrounding the legal regime and recommend legal reform.

Keywords: *Competition law, Merger control, Ethiopia, South Africa, Zambia*

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1. Introduction

In recent times, antitrust laws have been adopted in many developing countries, as part of market-oriented reforms during the 1990's, based on the sound economic principle that enforcement of antitrust policy would enhance economic efficiency, improve consumer welfare and spur economic growth.[1] And, in respect of the thematic scope of these laws, merger control tended to attract the attention of most competition policy makers in consideration of the result mergers could lead into in terms of altering an existent market structure[2] and creating or strengthening market power.[3] Nonetheless, some developing countries developed a qualm for merger control believing that the creation of domestic dominant firms would enhance economies of scale and in return help international competitiveness.[4] Ethiopia, as one of small economies, with a view to maintain competitive markets that lead to better outcomes for consumers in addition to preventing future abuses of dominant firms, has adopted a merger control system as an important element of its anti-trust regime since

[1] UNCTAD (2002). Merger Control In Developing Countries: Lesson from the Brazilian Experience. 1 <https://unctad.org/en/Docs/ditcclpmisc24_en.pdf> accessed on October 10, 2019.

[2] Alison, Jones. and Brenda, Sufrin. (2016). *EU Competition Law*, 6th Edition, 108, Oxford University Press.

[3] *Ibid.* 1087

[4] Ratnakar, Adhikari. and Malathy, Knight-John. (2004). What Type of Competition Policy and Law Should a Developing Country Have?. *South Asia Economic Journal*, 5, 6-7.

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2010. Such form of control has tended to come into existence as a result of subsequent internal and external developments that happened in the country's economy in the mid 2000's[5] though there are equally competing view that merger control is deemed to have been motivated by factors external to the state.[6] As it stands, the country, motivated by some competition and industrial policy considerations, has developed a merger control mechanism in its anti-trust law, namely the Trade Competition and Consumers' Proclamation (TCCPP) no. 813/2013. The proclamation has dedicated a relatively wide coverage for merger control by providing substantive and procedural rules dealing with merger review. Despite a noticeable foreign influence on the legal regime, there are still serious shortfalls and lacuna in the country's merger control legislations that are left unaddressed and can negatively impact effective enforcement of the system. This paper therefore attempts to review the major loopholes and deficiencies surrounding the legal regime regulating merger control in the country by way of a comparative analysis. In so doing, the author deemed relevant to consider, as a benchmark, the merger legislations of South Africa (as embodied under the South African Competition Act, 1998 as amended) and Zambia (as embodied under the Zambian Competition and Consumer Protection Act, 2010), which are the most advanced African competition regimes and also highly suitable for comparison given the socioeconomic situation of the country under examination. Accordingly, a brief appreciation of the background to the Ethiopian competition regime and a subsequent perusal of the merger control legal regime will serve as stepping stones to comparative analysis of some of the major deficiencies surrounding the Ethiopian merger control legal regime. The paper concludes with the possible legal reform measures that should be resorted to.

1.1. Brief Review of the Ethiopian Anti- Trust Regime

Regulation of competition is a recent phenomenon in Ethiopia as the economic policy of the country was not based on the ideals of free market before 1991. The key motive for the regulation of competition, which is market failure in a free market, were absent from the outset. Since 2000, as part of the move towards liberalized and free market economy, different restructuring works has been put in place in the country, which can be understood as part of the broad competition policy framework.[7] This mainly includes measures relating to reducing the role of government in business, encouraging private sector development, privatizing national public enterprises, liberalization of foreign trade, promulgation of a liberal investment law and integrating the Ethiopian economy with the global economy.[8] These different schemes of liberalization, though they are far from complete, have enhanced the role of the private sector in the Ethiopian economy. Nonetheless, as Hailegabriel noted, neither privatization of nationalized industries nor opening of previously closed markets, were able to guarantee smooth competition in the actual market as there have been structural barriers inherited from the previous system which created monopolies and restrictive business practices in various sectors which could only be dealt with appropriately if competition is regulated.[9]

Noting this fact, in April 2003, the Ethiopian Government announced the Trade Practice Proclamation (No. 329/2003) as its first ever competition law to promote competition in the domestic market. This proclamation, however, was found to be inadequate in certain respect, particularly, in terms of its thematic scope, as it did not include merger control provisions. As a result, the Trade Practice and Consumers' Protection Proclamation (No. 685/2010) repealed and replaced the Proclamation No. 329/2003. Proclamation No. 685/2010 met many of the shortcomings of the repealed Proclamation, one aspect of which is inclusion of merger control provisions. This Proclamation was further amended in March 2014, comprehensively addressing anti-competitive practices and consumer protection which resulted in the adoption of the Trade Competition and Consumer Protection Proclamation (No. 813/2013), which is the current competition legislation in Ethiopia. Though it is explicitly stated in the proclamation that subsidiary legislations are to be enacted for the proper implementation of its provisions, no Regulation and Directive has been enacted so far except for the merger control provisions, which will be discussed in the following sections. The objective of the proclamation is to protect the business community from anticompetitive and unfair market practices, and to establish a system which is conducive for the promotion of competitive free market.[10] And, the proclamation is applicable to any commercial activity or transaction in goods or services conducted or having effect within Ethiopia.[11] The proclamation, as anti-competitive trade practices,

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5 *See* (n. 8).

6 *See* (n. 27 and 28).

7 Hailegabriel, G. Feyisa. (2009). European Influence in the Ethiopian Anti-Trust Regime: A Comparative and Functional Analysis of Major Problems. *Mizan Law Review,* 3(2), 271-272.

8 Solomon, Abay. (2009). Designing the Regulatory Roles of Government in Business: The Lessons from Theory. *International Practice And Ethiopia's Policy Path, Journal of Ethiopian Law,* XXIII(2), 119.

9 Hailegebriel (n. 7) 272.

10 FDRE, Federal Trade Competition and Consumer Protection Proclamation, Proclamation No 813/2013, Fed Neg Gaz, 9th Year No. 28, Article 3.

11 *Ibid.*, Article 4.

has provided provisions relating to abuse of dominant position, anti-competitive agreements, and acts of unfair competition.[12] With respect to the institutional framework, the proclamation has established, as an autonomous federal government body, an institution responsible for enforcing the competition law provisions of the country, namely, the Trade Competition and Consumer Protection Authority (TCCPA).[13] The TCCPA is endowed with investigation, prosecution and judicial functions (with its administrative adjudicative tribunal) in relation to anti-competitive practices enshrined under the proclamation.[14]Apart from this, the proclamation has also established a Federal Trade Competition and Consumer Protection Appellate Tribunal (TCCPAT) with powers of hearing and deciding on appeals against decisions of the adjudicative bench and other administrative decisions of the Authority.[15] Equally important, merger control, which is the focus of this paper, is a core operational concern of the Proclamation, which seeks to prevent merger operations that would adversely affect competition by mandatorily requiring them to pass through a review process. This will lead us to the discussion of the Ethiopian merger control regime.

2. Overview of Ethiopian Merger Control

As noted earlier, merger control is an important third component of the Ethiopian competition system. And, the purpose behind the regulation should be understood within the broad conceptual and theoretical framework underpinning merger control in any jurisdiction. Consequently, the purpose behind merger control in such jurisdiction is to enable the competition authority to regulate permanent and lasting changes in a market structure resulting from merger operations.[16] Merger control is also said to be tended to prevent the creation or strengthening of market power before it occurs ('ex ante control'), which can result in future abuses, and maintain competitive markets that can lead to better outcomes for consumers.[17] Furthermore, the control is also intended to prevent acts of evading competition laws by enterprises using the merger route to achieve a conclusion of an anti-competitive agreement.[18] In a nut shell, though mergers are not anti-competitive per se and have numerous advantages as a means of corporate restructuring,[19] the basic principle considered for exercising merger control in the regime is based on the fact that mergers could normally lead to concentration of market power, by reducing the number of business entities operating in a market and increasing the market share controlled by the merged entity that may create risk of abuse of dominance, which could in turn negatively impact competition and harm consumer welfare. Setting aside the theoretical perspective, it is very important to discuss, at this juncture, the actual motivating factors that have triggered merger control in the country. In this respect, it is very relevant to mention the subsequent internal developments that had occurred following the different restructuring works that took place in the economy, in the mid 2000's, towards opening several sectors of the economy to competition.[20] Externally, the actual and desired growth in merger transactions at a regional and international level following the opening of the market for a private sector investment and the flourishment of Foreign Direct Investment (FDI) in some sectors posit a case for merger control regime to equip the country with the tools to deal with the increased market power of multinational companies and their possible abuse of dominance. Nonetheless, there is also equally competing argument that claims Ethiopia's involvement in the Common Market for Eastern and Southern Africa (COMESA) coupled with its status in the accession process of the World Trade Organization (WTO) claimed to have been the triggering factor.[21] Likewise, the pressure and conditioning of funds from international funding agencies like International Monetary Fund (IMF) and World Bank (WB) on a range of liberalization issues which include the adoption of different competition policies, is the other likely reason for the adoption of the merger control regime.[22] In any case, the growing consensus that merger control law is not a luxury, but a necessity, to developing free market states, that are not of course invulnerable to abusive conducts and coordinated practices, coupled with the significant rise in domestic and cross border mergers, has been one of the main driving forces behind the growing interest in Ethiopia in merger regulation. These competition

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12 *Ibid.*, Part 2.

13 *Ibid.*, Article 27.

14 *Ibid.,* Part 4.

15 *Ibid.*, Article 33 Electronic copy available at: https://ssrn.com/abstract=4042861

16 Jones and Sufrin (n. 2).

17 Richard, Whish. and David, Bailey. (2015). *Competition Law*, 8th Edition, 860, Oxford University Press.

18 Neeraj, Tiwari. (2011). Merger Under the Regime of Competition Law: A Comparative Study of Indian Legal Framework with EC AND UK. *Bond Law Review*, 23, 118.

19 Whish and Bailey has rightly discussed some of the beneficial effects of mergers, which includes, but not limited to, efficiency and achievement of economies of scale and scope.

20 United States Agency for International Development, Ethiopia Commercial Law & Institutional Reform and Trade Diagnostic, (January 2007), 59.

21 Hailegebriel (n. 7) 272

22 *Ibid.*

and industrial policy considerations have therefore motivated the country to develop a merger control framework. The system of merger control was for the first time introduced when the Trade Practice and Consumers Protection Proclamation No. 685/2010 came in to force as explicit merger control regulations were absent in the Trade Practice Proclamation No. 329/2003. Currently the merger control rules are embodied in the TCCPP No. 813/2013, which has not truly made a significant change in terms of merger control compared to the previously enacted proclamation. The proclamation has exclusively devoted a chapter dealing with the substantive and procedural rules governing merger control, which is Section 2 of Part two of the proclamation. The scope of application of the provisions dealing with merger control is extended to apply to any commercial activity or transaction in goods or services conducted or having effect within the country. Despite this, the Council of Ministers of the government may specify by regulation those trade activities it deems vital in facilitating economic development to be exempted from the application of the provisions.[23] The proclamation, as a guiding principle for merger control, explicitly provides a prohibition on business persons not to enter into an agreement or arrangement of merger that causes or is likely.[24] To enforce this provision, the proclamation has prescribed a mandatory pre-merger notification system which works ex ante and requires firms to notify their intention to merge to the authority and wait for its implementation until assessment is made and decision is given by TCCPA, which implies the suspensory nature of the regime. In addition to the Proclamation, which is the main body of law in relation to merger control, the Ministry of Trade has issued a Merger Directive, Merger Directive No. 1/2016[25] which does not, however, address many of the substantial and procedural elements of merger review. Though the Directive in many cases simply restates what is provided under the proclamation and does not provide a very detailed guidance for the application of merger control rules embodied under the proclamation, it could be considered to reflect the merger review practice of the authority. Also, in terms of cross border mergers involving Ethiopia, the merger control rules provided under the COMESA Competition Regulations might be of importance since Ethiopia is subjected to the regional competition policy as one of the member states to COMESA.

3. Analysis of the Legal Framework

In general terms, merger control legislations encompass the specific process and broad procedural framework of a merger review, which include substantive and procedural rules relating to definition of mergers, requirement of notification, substantive assessment of notified mergers, and remedies and sanctions that could be taken by competition authorities. In this respect, the paper in subsequent discussions, tries to review, by way of a comparative analysis, how merger is construed under the Ethiopian regime, followed by analysis of the rule relating to pre-merger notification and substantive assessment, and finalize with examination of rules pertaining to remedies and sanctions, which also include the issue of appeal and judicial review.

3.1. What Constitutes Merger?

The first step of any merger review process requires a determination of whether a transaction in question constitutes a merger. It is generally agreed that a true merger (merger proper) involves two separate undertakings merging entirely into a new entity.[26] However, the term merger in competition law is used in a broad sense covering combinations of enterprises in various forms which includes, but not limited to, amalgamations, acquisition of shares, voting rights or assets, or establishing a joint venture company.[27] The question of what constitutes a merger, however, depends on the definition adopted in a given jurisdiction. Therefore, it is important to look at how merger is construed in the Ethiopian merger control legislation. TCCPP, instead of providing a formal definition of a merger, has prescribed situations under which mergers transactions could occur. Article 9(3) of the proclamation reads as follows:

"For the purpose of applying the provisions of this article merger shall deemed to have occurred

a) when two or more businesses organizations previously having independent existence amalgamate or when such business organizations pool the whole or part of their resources for the purpose of carrying on a certain commercial purpose; or

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[23] Proclamation no 813/2013 (n. 10) article 4.

[24] *ibid.*, Article 9(2).

[25] Ethiopia is a Civil Law country which does not rely on case laws. In the hierarchy of Ethiopian legislations, Directive is in the lowest level of hierarchy. They describe how Regulations (detailed description of rules to supplement Proclamation) should be implemented and are usually developed by a ministry or a department within a ministry. As Directives are not published in the official legislation gazette of the country, the Merger Directive is not publicized under the Official Gazette. Here, one might also question the appropriateness of the issuance of the Directive before the enactment of a Regulation, which is in the second level of legislation hierarchy.

[26] Whish and Bailey (n. 17) 853.

[27] *ibid.*, 854.

b) by directly or indirectly acquiring shares, securities or assets of a business organization or taking control of the management of the business of another person by a person or group of persons through purchase or any other means

The definition adopted in the law seems to encompass all the merger related corporate transactions, which include, amalgamation or combination of enterprises, joint venture agreements or acquisition of interest in another enterprise (acquisition of shares, assets or securities). The definition is also outlined to include all types of mergers, i.e, horizontal mergers, vertical mergers and conglomerate mergers.[28] It is also important to note from the definition that acquisition of interest over another could be achieved either directly or indirectly and exercised by a single undertaking (sole) or two or more undertakings (joint) though there are no clear legal guidelines as to their application. Having said this, the apaper deemed necessary to identify some of the shortfalls of the definition incorporated under the proclamation.

3.1.1. The Issue of Control

It has been stated earlier that the main purpose of regulating mergers is based up on the premise that mergers can naturally create changes in market structure. Therefore, the central issue, for the purpose of merger control, is to determine whether there is a change in the quality of control resulting from a given merger operation. Control could either be sole control (where one undertaking acquire the possibility of exercising decisive influence over another undertaking) or joint control (where two or more undertakings come under common control and have the possibility of exercising decisive influence over another).[29] Consequently, merger control legislations in almost all jurisdictions apply to operations leading to change in quality of control.[30] Looking at the South African merger control legislation, for purposes of the Competition Act, 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, whether such control is achieved as a result of the purchase or lease of the shares, an interest or assets of the other firm, by amalgamation or any other means.'[31] The Act further sets out ways in which control may be achieved, which are referred to as instances of 'bright line' and 'catch all' control that includes, but not limited to, the ability to materially influence the policy of the firm, vote a majority of the votes that may be cast at a general meeting of the firm and appoint or veto the appointment of a majority of the directors of the firm.[32] Similarly, Looking at the Zambian merger control regime, for the purpose of its Competition Act, a merger is said to be occurred where an enterprise, directly or indirectly, acquires or establishes, direct or indirect, control over the whole or part of the business of another enterprise, or when two or more enterprises mutually agree to adopt arrangements for common ownership or control over the whole or part of their respective businesses.[33] A person or an entity will be considered to have control over an enterprise if that person, among other things, has the ability to materially influence the policy of the enterprise or the ability to veto strategic decisions of the enterprise such as the appointment of directors and other strategic decisions which may affect the operations of the enterprise.[34] Thus, in both systems, it is the acquisition of control (both de facto and legal) which is of importance and any acquisition of interest would constitute mergers if it leads to acquisition of control. This is not, however, true in the Ethiopian merger control legal regime. A careful examination of the provision of the proclamation defining a merger reveals that a lasting change in control of an enterprise seems to be immaterial for an acquisition of interests (either in the form of shares or assets or securities) to be construed as a merger. The provision does not require acquirers to have the ability to exercise controlling interests or decisive influence over another for an operation to be regarded as a merger. And hence, for the purpose of the proclamation, a mere acquisition of an interest (be it a minority or nonvoting securities), which does not confer the possibility of exercising decisive influence over another undertaking, could still be considered as a merger. Similarly, the act of pooling of resources as provided under paragraph-

(a) of the provision could again be considered as a merger, even if the previously independent businesses do not come under common control. Besides, there is no clear rule (in terms of objective numerical thresholds) defining what types of share acquisitions are within the scope of the proclamation. The law does not also clearly define in what circumstances asset acquisitions are considered sufficiently material to merit inclusion within the scope of the

[28] A horizontal merger is one which occurs between undertakings operating at the same level of the economy. A vertical merger is one concluded between firms at different levels of production in the economy. Conglomerate mergers are mergers which have no horizontal or vertical effect.

[29] Whish and Bailey (n. 17), 853-854.

[30] Jones and Sufrin (n. 16), 1097-98.

[31] South African Competition Act, 89 of 1998 (as amended), Section 12(1).

[32] *ibid.*, Section 12(2)

[33] Zambian Competition and Consumer Protection Proclamation Act 24 of 2010, Section 24(1) & (2)

[34] *Ibid.*, Section 24(3)

proclamation as opposed to asset acquisitions that are unlikely to affect competition. Here, one might otherwise argue that the element of control has been recognized under the same provision defining mergers, particularly in paragraph (b) of Article 8 (2) of the proclamation which includes a phrase "…taking control of the management of the business…" I do not however agree with this assertion for the following two major reasons. Firstly, it should be clearly noted that the phrase in paragraph (b) of the stated article is provided as one of the criterion or instances where by mergers can be contemplated and should not be read cumulatively (as similar transactions) with other forms of acquisitions provided under the same paragraph, for a conjunction 'or' is used to distinguish between the phrase "taking control of the management" and other forms of acquisitions. Secondly, the phrase stated under the paragraph, though there seems to be overlap, refers to and apply for means of acquisitions of control other than the common means of acquiring control (acquisition of shares, assets or securities), the best example of which is acquiring control based on contractual basis.[35]And therefore, it can be safely concluded that the term 'taking control' in the paragraph does not apply to transactions relating to acquisition of shares and assets, which means that any kind of acquisition of shares, securities or assets will automatically fall under the definition of a merger for the purpose of the proclamation, without a need to prove the existence of change in control or whether the operation has conferred the acquirer the possibility of exercising decisive influence over the target. Despite the fact that the proclamation does not rely on the concept of 'control', the Merger Directive issued by the Ministry has tried to consider the concept in the sense that issue of control is one of the factors to be taken in to account in the course of merger assessment.[36] This does not still, however, address the concern as the directive included the concept as something that should be considered at the stage of substantive assessment as opposed to the stage of notification in general and defining mergers in particular.

3.1.2. The Treatment of Joint Venture

The other essential point that should be examined under the issue of what constitutes a merger is the question of how Joint Venture (JV) is treated under the proclamation. In general terms, JV is a joint commercial arrangement whereby two or more parties co-operate in order to run a business or to achieve a commercial objective retaining their distinct identities. Some joint ventures involve the integration of parts of the business activities of the undertakings to the joint venture, which can result in a reduction or elimination of competition between the undertakings to the joint venture in the joint venture's field of activity. Whether it does so, however, depends on the relative permanence of the joint venture and the degree of autonomy it enjoys from its parent companies.[37] As a result, many jurisdictions treat some forms of JV as mergers while some of JV agreements can still be dealt under provisions dealing with anti- competitive agreements. Looking at the Zambian Act, JV's are specifically addressed under the definition part of the Act which considers a JV between two or more independent enterprises as one of the ways in which a merger may be achieved.[38] However, not all JVs are subject to merger control under the regime. The Commission's Merger Guideline of 2015 distinguish between "full function" joint ventures (which require merger approval) and "auxiliary" joint ventures (which do not require merger approval) and explain that only a full-function joint venture, performing on a lasting basis all the functions of an autonomous economic entity, shall constitute mergers within the meaning of the Act.[39] Looking at the South African regime, although the legislation does not specifically refer to JV agreements, it can easily be inferred from Article 12 (1)a of the Act that all transactions including JV that result in the sole or joint acquisition of control over another would constitute mergers. This interpretation is consistent with the approach adopted by the Commission. The Commission has published a practitioners' note to help determine whether a joint venture should be notified, and it described in the practical note that only "concentrative (full function) joint ventures" could bring about a lasting change in the structure of the undertakings concerned and be considered as mergers.[40] Coming to the Ethiopian merger control rules, unlike the case of Zambia, there is no explicit reference in the proclamation as to whether a JV could be considered as mergers. It could, however, be argued that the concept of JV is implicit and can easily be inferred from paragraph (a) of Article 12 of the proclamation which clearly provides that one of the ways in which mergers can be achieved is pooling of resources, i.e, when such business organizations pool the whole or part of their resources for the purpose of carrying on a certain commercial purpose. Apart from this, what is important to note here, however, is that, given the absence of subsidiary legislations addressing the matter in question, there is no clear and predictable criteria to distinguish those JV transactions

[35] The EC in its Jurisdictional Notice udder Merger Regulation, paragraph 18 provides the possibility of control to be acquired on a contractual basis.

[36] Ministry of Trade, Merger Directive, Section 7.2.

[37] COMESA Merger Assessment Guideline of 2004, Section 2.11.

[38] Zambian Competition Act (n. 33) Article 24(2)c.

[39] Zambian Competition and Consumer Protection Commission Guidelines for Merger Regulations, 2015, Section 10.

[40] The Practical Note is found in the Commission's website. It can be accessed at http://www.compcom.co.za/practice-notes

that are subject to merger review from those that are not. The requirement of common control and full functionality are not recognized under the legislations (both in the proclamation and directive), which may imply that any kind of JV arrangement would automatically fall under the definition of a merger.

3.1.3. Parties to a Merger

It is a matter of general fact that mergers are corporate transactions occurring between two or more business entities in an economy. It follows therefore naturally that parties to a merger are business entities which could be organized in different forms. Looking at merger control legislations around the world, terminologies like 'undertakings', 'firms', 'enterprises', 'company' or 'cooperation' are used to denote what could be parties to a given merger. While the Zambian Act used the term "enterprises" to describe parties to a certain merger operation, the South African legislation preferred to use the expression 'firms'. Looking at TCCPP, unlike the two regimes, the proclamation has used a different terminology in that a merger, for the purpose of the proclamation, is a transaction that occurs between what is known as "persons." Though terminologies used to name parties to a merger do not really matter, it could be strongly otherwise argued that the nomenclature used under the proclamation could certainly create a controversy and call up on an interpretation which may lead to unintended result. The issue is essentially related to the question of what is meant by 'persons' and whether the term is exclusively referring to 'business persons.' Article 2 (16) of the proclamation defines the term as it refers to a 'natural' or 'artificial person', which does not have to be a business person. The cumulative reading of Article 2(16) and Article 12 of the proclamation delivers a meaning that acquisition of interest by any person (which does not have to be a business person and includes a mere individual person) over another firm could fall under the definition of mergers. This implies, therefore, that, for the purpose of the proclamation, acquisition of interests, for instance, by an individual private investor who had not previously been in a business operation but would like to acquire an interest on a certain enterprise, would be construed as a merger. Also, the terminology used may lead to the inclusion of group-internal or intra-person restructuring, which has no effect on market structure, within the scope of merger review. It is not very clear why the proclamation opts for using the term 'persons' instead of 'business persons'[41] while this is not the case on the provisions dealing with abuse of dominance and anti- competitive agreements.[42] This will certainly cause ambiguity in practice and could lead to the inclusion of transactions which are not mergers by their nature and has no competition concern.

3.2. Pre- Merger Notification

Once a certain transaction falls under the scope of the definition of merger provided under the proclamation, the next step in a merger review process is related to notification. Many States, in controlling mergers, have established a system of notification prior to consummation of mergers. Some countries have retained a mandatory system of notification after consummation of the merger and a few countries have submitted merger control only to a voluntary notification process. For most countries, notification is mandatory only when the enterprises concerned have, or are likely to acquire, a certain level of concentration.[43] The Ethiopian legal regime has adopted a mandatory pre-merger notification mechanism considering that mergers are more efficiently dealt with prior to their occurrence. The proclamation imposes an obligation on any business person who proposes to enter into an agreement or arrangement of merger to give a notice to the authority by disclosing the details of the proposed merger in a form and manner prescribed by the authority.[44] The notification requirement is further reinforced by other provision of the proclamation which sets out an obligation on government registration offices to require the presentation of authority's clearance before registering a merger in the commercial register.[45] Also, the proclamation has adopted a suspensory regime in that a merger shall not be implemented either before its notification or until it has been approved by the authority by explicitly stating that no agreement or arrangement of merger may come into effect before obtaining approval from the Authority.[46] And parties cannot get their mergers cleared or authorized other than through this route. The policy consideration behind the suspensory nature of

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[41] Article 2(5) of the Proclamation defines 'business persons' as any person (natural or artificial) who professionally and for gain carries on any of the activities specified under Article 5 of the Commercial Code, or who dispenses services or carries on those commercial activities designated as such by law.

[42] If we look at Article 5 of the proclamation, it states that no 'business person' could carry out commercial activities by abusing the dominance he has in the market. Article 7 of the proclamation provides that an agreement between 'business persons' that can prevent, significantly lessens competition shall be prohibited.

[43] UNCTAD 'Model Law on Competition' (2007) 50 <https://unctad.org/en/Docs/tdrbpconf5d7rev3_en.pdf>accessed on 12/10/2019

[44] Proclamation 813/2013 (n 10) Article 10(1)

[45] *Ibid.*, Article 12

[46] *Ibid.*, Article 9(2)

the regime is that standstill obligation will mitigate the implementation risks for deals raising substantial competition issues that would otherwise have been caused if there is no suspension. In terms of procedural rules relating to notification, the directive has provided some procedural rules in respect of the form and manner of filing notifications. In terms of who should notify, any party to the transaction or the parties' appointed representatives can notify the authority. Regarding notification timing, the proclamation does not impose deadlines for filing given the jurisdiction is a suspensory regime. And, there is no filing fee provided for notifications under the system. And there is no system that offers merging parties the opportunity to have pre-notification discussions of whether their transaction will be subject to notification and on the scope of the information to be submitted. Having said this, it is important here to note a few aspects that warrant further attention.

3.2.1. Threshold Limits

It is very common to see threshold limits, in terms of assets or turnover, set out in merger control provisions of competition statutes to determine which merger, acquisition or joint venture will be required to be notified or may be reviewed by the competition authority. The rationale for limiting the notification requirement for mergers valued above certain monetary thresholds is to lessen the administrative burden for competition authorities. Threshold limit also aims at enabling competition authorities to identify and focus upon mergers which are most likely to be of concern.[47] Consequently, many merger control regimes impose a notification requirement for mergers of a certain size. Looking at the case of South Africa, the Competition Act establishes three categories of mergers which are determined with reference to turnover or assets, as 'small', 'intermediate' and 'large' mergers. And only intermediate and large mergers normally require prior notification and approval.[48] As per these classifications, for a merger to be subjected to the mandatory notification requirement must be an intermediate merger, which means that the combined assets or annual turnover of the acquiring and the target firm must equal or exceed 600 million Rand and also the target firm's assets or annual turnover shall equal or exceed 100 million Rand.[49] If the proposed transaction does not meet the prescribed threshold criteria of intermediate, it will be categorized as 'small merger' which are not in the ordinary course subject to mandatory notification requirement. In the case of Zambian merger control regime, a merger transaction requires authorization by the Commission in any instance where the combined turnover or assets, whichever is higher, of the merging parties in Zambia, is at least 50 million fee units (i.e. 15 million Kwacha).[50] Like the case of South Africa, there are circumstances, however, in which transactions falling below the above thresholds may be required to be notified where the Commission has reasonable grounds to believe that the merger has a substantial competition concern.

Looking at the Ethiopian regime, unlike those two jurisdictions, parties to a merger transaction need to notify their mergers and acquire an approval from the Authority irrespective of the financial magnitude of the transaction constituting the merger. There has been no threshold set by the Proclamation or implementing regulations which served as a criterion to exempt small transactions from the mandatory notification requirement. On the contrary, the law is enacted in such a way that all kinds of merger arrangements are mandatorily required to be notified to the authority irrespective of their size.[51] Unlike the case of South Africa and Zambia[52], where the respective trade ministries are explicitly mandated under the Act to set out thresholds for merger notifications, there is no explicit provision in the proclamation that stipulates the possibility where by threshold limits can be prescribed by the concerned body under a subsidiary legislation. Despite this, the Merger Directive, out of blue, has set out what it considers to be the minimum threshold limit for merger notifications, i.e., the combined asset or turnover or capital of 30,000,000 Ethiopian Birr (783, 695.94 GBP)[53]. It is very interesting to note three serious pitfalls here. Firstly, the legality of the directive setting forth threshold limits is disputable as it is not legally acceptable to set out a threshold limit under a lowest subsidiary legislation in a situation where there is no explicit permission to do so under the proclamation, as it is in the case of south Africa and Zambia. Furthermore, as

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[47] Alan H. Goldberg. (2007). (Vinod Dhall 'ed') *Competition Law Today: Concepts, Issues and the Law in Practice*. 1st Edition, 96, Oxford University Press.

[48] The South African Competition Act (n 31), Section 13(A).

[49] South African Ministry of Trade and Industry, Determination of Merger Thresholds and Methods of Calculation Notice No. 216 of 2009 (Government Gazette No. 31957) as amended, 2007, Section 2.

[50] Zambian Competition and Consumer protection Proclamation (General) Regulations 97/2011, Section 8(1).

[51] Article 10(1) of the proclamation reads as follows; "any business person who proposes to enter into an agreement or arrangement of merger shall give notice to the Authority by disclosing the details of the proposed merger".

[52] The thresholds under South African regime are set out by the Ministry of Trade and Industry by the power granted to it under Section 11(4) of the Competition Act. Similarly, the Zambian Minster prescribed thresholds limits as per the power conferred to it by Section 26(5) of the Competition Act.

[53] There is no appropriate guidance as to the method of calculation and criterion used to determine the threshold. For example, the question "Is the threshold value for the acquiring firm or target firm or both?" is left an answered. Further, it is not clear how capital of merging parties is used as a criterion to determine threshold.

it did in the case of the issue of control, the directive provided a threshold limit as something to be considered at the stage of substantive assessment as opposed to the stage of notification[54]. Lastly, prescribing a threshold in an instrument which is not required to be publicized, and lacks clarity in many respects is against the International Competition Network (ICN) recommendation which dictates threshold to be clear, understandable (which includes providing publicly available written guidance on the application of their merger notification thresholds), based on objectively quantifiable criteria and on information that is readily accessible to the merging parties.

3.2.2. Local Nexus Provision

It is widely accepted practice that notification should not be required unless the merger transaction has a material nexus to the reviewing jurisdiction. This criterion may be satisfied if each of at least two parties to the transaction have significant local activities. Alternatively, this criterion may be satisfied if the acquired business has a significant presence in the local territory, such as significant local assets or sales in or into the reviewing jurisdiction.[56] Looking at the Zambian regime, an enterprise in Zambia that comes within the control of a foreign enterprise will be subject to notification and reviewed as far as the operation affects competition in Zambia. Nonetheless, where the control of a Zambian enterprise comes about purely as a result of a merger or acquisition involving enterprises wholly domiciled outside Zambia, the Commission should only be notified if the merger has a local nexus or connection. The Commission will only, therefore, assert jurisdiction over those transactions if the foreign enterprise has a local nexus of sufficient materiality, such as having subsidiaries in Zambia or having made 10% of its sales in Zambia over the last three years.[57] Likewise, in the case of South Africa, "foreign-to-foreign" mergers are captured by South African merger control provided that there is an effect in South African territory. And such an effect will be manifest where the target has assets or turnover in or into South Africa. If the target business has no assets and turnover in or into South Africa, there is no need to notify.[58] Coming to the case of Ethiopia, unlike those jurisdictions, the legal regime does not have a local nexus provision which requires certain minimum part of the assets of the acquiring or target company to be within the territorial limits of the country. Examination of the provision dealing with scope of application of the proclamation reveals that foreign mergers which have a direct or indirect effect on the structure of local markets are notifiable through the application of 'effects Doctrine' principle. However, the question of when and under what circumstances do the merger control rules apply on a given foreign merger is not addressed under the legislations (the proclamation and directive), which means that every foreign merger will automatically be subjected to review by the competition authority irrespective of its material nexus.

3.3. Merger Analysis

Once competition authorities received notifications from parties to a merger, they should immediately begin substantive investigation process to assess the effects of notified mergers on competition. And the core component of any merger control regime is the assessment of proposed mergers to determine whether a merger will result in competition being prevented or substantially reduced, to the detriment of consumers, which involves the examination of various factors. Looking at the Ethiopian merger control rules regulating substantive analysis of mergers, the relevant provision of the proclamation is Article 10(2) and 10(3) which explicitly stipulates that, up on receipt of notification, the authority shall investigate the possible adverse effect of the proposed merger. And, in the course of investigating the possible effects of a proposed merger, TCCPA is empowered, where deemed necessary, to require the parties to the merger to submit additional information or document within a specified period.[59] Apart from this, the authority, as part of its merger review process, may also invite, by a notice published on a newspaper having wide circulation, any business person who is likely to be affected by the said merger, to submit his written objections, if any, within 15 days from the date of publication of the notice.[60] Subsequently, a number of legal loopholes, associated with substantive analysis of mergers, are considered.

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54 The Directive under Section 16 provides that those transactions which are below the prescribed threshold will be exempted from investigation and automatically be considered as if they are allowed by the authority to be implemented.

55 ICN, Recommended Practices for Merger Notifications and Review (2017) 5-7, https://www.internationalcomp...er-np-recommended-practices accessed on 22/10/2019

56 *Ibid.*, 4.

57 Zambian Guidelines for Merger Regulation (n. 38), Section 15 and Section 16.

58 Notice No 216 2017 (as amended) (n. 48).

59 Proclamation No. 813/2013 (n 10), Article 10(3)a.

60 *Ibid.*, Article 10(2)b.

3.3.1. Time Limit for Review

Given merger transactions are always time sensitive, merger reviews by competition authorities should be completed within a reasonable time frame. Specially in jurisdictions where there is a suspensive regime, the law needs to set timely review periods for parties are barred from proceeding with the transaction during the pendency of the agency's review.[61] The primary rationale behind prescribing time limits is essentially based up on the premise that the absence of legally binding reasonable time limit for merger investigations will negatively affect certainty of deals and transactions raising no substantial competition concerns. Consequently, many merger control regimes set out timeframes within which competition authorities are expected to complete their merger investigations.

Looking at the Zambian regime, under the Competition Act, the Commission is required to complete its assessment of a proposed merger and issue its determination within 90 days of the date of the application with the possibility of an extension of 30 days. Where the Commission does not issue its determination regarding a proposed merger, within the period specified, the proposed merger shall be deemed to be approved.[62] Looking at the South African regime, the time limit for review is provided under the Act based on the type of mergers under consideration. For small and intermediate mergers, the maximum period for consideration is 60 business days.[63] For large mergers, the Commission has an initial period of 40 business days to consider and refer a large merger to the Tribunal with a possibility of an extension of 15 days. Within 10 business days of the hearing, the Tribunal must approve or prohibit the merger. On expiry of the initial period (if not extended) or the extended period, the Commission must render a decision to approve (with or without conditions) or prohibit the merger, failing which the merger is deemed to have been approved.[64] Coming to the Ethiopian merger control rules, unlike the two regimes, the proclamation does not prescribe a time limit within which a decision on notifications has to be given. The previous proclamation, which was Proclamation No. 685/2010, had a provision which sets out an obligation on the authority to immediately communicate to the applicant in writing of its decision, either to grant or deny its permission. This provision, though vague in nature, speaks in terms of timing for review. On the contrary, the current proclamation is silent as to the time limit within which TCCPA must complete its investigation and issue a determination, which could lead to the conclusion that the authority can take any time long to finalize its merger review process. The absence of legally binding shorter time limit coupled with the suspensory nature of regime will negatively affect certainty of deals and transactions raising no substantial competition concerns. Despite this, the directive has tried to specify some sort of recommended time limits for a practical purpose. As per the directive, the maximum period for merger consideration is 30 working days with a possibility of extension for 15 days. Here, it should be noted that, unlike the two regimes, where failure to comply with the time limit specified results in the proposed merger to be deemed to have been approved, the directive does not set out a clear legal remedy for failure to render decision within the specified time limit, for the time limit in the directive is stipulated in a way it could serve as a practical guidance for the authority as opposed to a strong legally binding time frame.[65]

3.3.2. Substantive Test and Criteria of Assessment

The substantive assessment of mergers normally involves the identification of a relevant market and assessment of the proposed merger as per the substantive test set out in the respective laws, in consideration of various factors and criteria. It is widely agreed that prior to looking into the impacts of a merger, the primary task should be defining the relevant market which frequently determines whether a merger is judged anti-competitive and unlawful.[66]

A. Relevant Market Definition

Looking at the South African regime, it is implied from many of the provisions of the Act that, when determining whether a merger is likely to substantially prevent or lessen competition, the Commission or the Tribunal must assess the strength of competition within the confines of the identified 'relevant market' or 'market' that may be affected.[67]Similarly, if we look at the Zambian merger control legislations, the Act under article 30 and other provisions sets out that the Commission shall consider the likely and actual factors that affect competition in a 'defined market' in considering a

[61] ICN (n. 53), 11.

[62] Zambian Competition and Competition Act (n 33), Section 32.

[63] South African Competition Act (n32), Section 13 and Section 14.

[64] *Ibid.*, Section 17.

[65] Looking at the framing of the directive setting out time limits, Section 22 of the directive reads that "the time limit for a merger review could possibly take 30 days with a possibility of extension for 15 days" which implies the permissive nature of the provision. Note also that the directive is not publicized in an official legal gazette.

[66] OECD/ World Bank. (1999). *A Framework for the Design and Implementation of Competition Policy and Law,* 46 , available at: http://www.oecd.org/dataoecd/10/30/27122278.pdf (visited on 11-09-10)

[67] South African Competition Act (n. 31) Section 12(1).

proposed merger. Therefore, under both systems, the market or markets to be affected by the merger accordingly need to be identified. Coming to the Ethiopian merger control rules, the proclamation does not imply the need to define a relevant market in assessing the possible effects of mergers. Unlike the case of abuse of dominance, where it explicitly acknowledges the relevance of defining relevant market for the determination of dominance[68], TCCPP does not consider the specific market on which merger investigations should be restricted as a major integral part of merger assessment process. Though it might be argued that defining a relevant market is conceptually apparent in any assessment of mergers, the relevance should either be implicit in the proclamation or the directive issued or any other guidelines to be issued. Also, there are no detailed guidelines (including market definition guideline) in the regime on how to define a relevant market in the context of mergers.

B. Substantive Test

Every system of merger control sets out a substantive test to determine whether a merger ought to be blocked and must decide upon a standard of proof required before a competition authority can block a merger.[69] While the terminology used in the context of the substantive test in different jurisdictions might differ, what is essentially examined under the assessment is whether and to what extent the proposed merger negatively impacts competition. Many jurisdictions require the impact to be substantial if any action is to be taken by the competition authority.[70] Looking at the case of South Africa, the overall reading of the Act reveals that the Commission adopts the Substantial Lessening of Competition (SLC) test[71] while the Zambian regime seems to include the dominance test in determining the issue of whether the merger in question will lead to substantial lessening of competition.[72] In the case of Ethiopia, neither the proclamation nor the directive clearly dictates the substantive test to be applied by the Authority in assessing effects of a given merger on competition. The provision dealing with investigation of proposed mergers, which is Article 10(2), provides that 'the authority upon receipt of the notification of merger, shall investigate the possible adverse effect of the proposed merger on trade competition.' This provision is deficient not only because it does not require the adverse effect on competition to be substantial, but also does not imply the substantive element or test (whether it is a SLC or Significant Impediment to Effective Competition or Dominance Test) used to determine the existence of adverse effect on competition. Therefore, the substantive test to be applied to determine whether a merger should be approved or prohibited is not clearly articulated both in the proclamation and the directive.

C. Criteria of Assessment

The substantive analysis of a proposed merger involves the assessment of various quantitative and qualitative factors to determine the effects of the proposed transaction on competition. Thus, Competition authorities employ numerous criteria for the analysis of the impacts of proposed mergers on competition, depending upon the type of merger involved in the case.[73] A substantive test usually involves the examination of various factors such as pre and post-merger market shares, market concentration, barriers to entry, extent of effective competition, etc., among others to assess whether the proposed merger will negatively impact competition.[74] Considering the case of Zambia, three major assessments should be carried out. Firstly, the Commission shall carry out market assessment, which simply seeks to determine the likely effects of the proposed merger in the relevant market, on trade and the economy in general.[75] Secondly, the Commission shall assess whether the merger is likely to prevent or substantially lessen competition in a market in Zambia (Competition Assessment) by taking into account factors including, but not limited to, the levels of concentration, barriers to market entry, the level of imports, countervailing buyer or supplier power, and the risk of abuse of dominance.[76]Thirdly, the Commission shall consider any factor which bears up on public interest in the proposed merger (Public Interest Assessment).[77]Also in the assessment of mergers, the Commission generally considers the basic theories of harm, namely unilateral or monopolization effects, coordinated effects and non-horizontal (foreclosure) effects. In the case of South Africa, the Commission, in evaluating a merger, first considers whether the merger is likely to substantially prevent

[68] Proclamation no. 813/2013 (n. 10) article.

[69] Whish and Bailey (n. 17) 788.

[70] Neeraj (n. 18) 135.

[71] The Commission is there to determine whether a merger will result in competition being substantially prevented or reduced, to the detriment of consumers.

[72] The dominance test could be implied from Article 27 and Article 30(2)h of the Competition Act.

[73] Neeraj (n. 18) 136.

[74] *ibid.,* 17.

[75] Zambian Competition Act (n 33) Section 29 76 Ibid, Section 30(2) 77 Ibid, Section 31 78 South African Competition Act (n. 31) Section 12(A).

[76] *Ibid.*, Section 30(2).

[77] *Ibid.*, Section 31.

or lessen competition by looking at factors including, but not limited to history of collusion, the dynamic characteristics of the market, the nature and extent of vertical integration and whether the merger will result in the removal of an effective competitor. Also, in considering all mergers, including pro-competitive mergers, the Commission considers the effect the merger will have on the public interest. In terms of theory of harm, the Commission more generally considers the potential horizontal, vertical, unilateral and coordinated effects of the merger.[78] Coming to the Ethiopian legal regime, unlike the two regimes, the proclamation does not clearly specify the criteria and factors to be considered for the analysis of effects of proposed mergers on competition. It does not prescribe the competition related assessment factors and basic theories of harm that should be considered in the course of investigating competition concerns of a given merger. In this connection, it is worth to discuss some of the rules reflected under the Directive. It is provided under the Directive issued that the authority, in the course of investigation of mergers, may take in to account some substantive assessment considerations which are related to market, competition and public interest, which resembles to what is adopted under the Zambian regime. However, two issues need serious consideration here. Firstly, the assessment factors which are assumed to be considered under the directive, more particularly, the market and public interest assessment considerations, cannot be considered as legally binding considerations for it is not legally acceptable to introduce assessment factors (by a directive) which are not recognized under the proclamation. Secondly, the legal regime does not have a detailed guideline that clearly defines the assessment factors that should be considered, and theory of harms that should be investigated in the course of assessment of mergers, as it is clearly provided under the South African and Zambian regimes.

D. Public Interest Considerations

One of the basic questions in any merger control regime is the question of to what extent non¬ competition factors are relevant in a review process of mergers. Despite the controversy, most domestic merger control regimes continue to reserve the role of non- competition factors, particularly, public interest criteria centering on the perceived inability of competition to respond to short-term public interest concerns which, if left unaddressed, may have lasting implications on fundamental interests such as employment. In this respect, if we take the case of Zambia, the Commission applies the public interest criteria in almost all merger evaluations and the criteria is said to include the extent to which the proposed merger is likely to result in a benefit to the public that would outweigh any detriment attributable to a substantial lessening of competition. The Commission may, in considering a proposed merger, take into account any factor which bears upon the public interest in the proposed merger, including but not limited to the extent to which the proposed merger shall maintain or promote exports from Zambia or employment in Zambia; the extent to which the proposed merger may protect the interests, of micro and small business enterprises in Zambia, the extent to which the proposed merger may affect the ability of national industries to compete in international markets and any socio economic factor as may be appropriate.[79] In the case of South Africa, the Commission should determine whether the merger can or cannot be justified on substantial public interest grounds. The Commission, in considering all mergers, considers the effect the merger will have on the public interest, with specific reference to its effect on a particular industrial sector or region; employment; the ability of small and black business to become competitive; and the ability of national industries to compete internationally. A merger with no anticompetitive effect could in principle be prohibited if, for instance, it will result in substantial job losses or an impact on local procurement. Public interest issues are often championed by the Minister of Economic Development, who has a statutory right to participate in proceedings from a public interest perspective.[80] Coming to the Ethiopian merger control rules, unlike the two systems, the proclamation has not adopted a public interest assessment criterion as one of merger assessment considerations. Though Ethiopia, as a small economy, needs to concern itself with the issue of unemployment and competitive ability of its small national industries, non-competition factors more importantly, public interest considerations, are not the integral part of the merger investigation process. The authority is not, therefore, authorized to apply public interest test in merger evaluations and mergers cannot be justified or prohibited on substantive public interest grounds.

3.3.3. Defenses

It is believed that the purpose of merger assessment is to identify and prohibit mergers that can adversely impact competition that any benefits resulting from them are outweighed. Merger control rules, therefore, require competition authorities to ensure that beneficial mergers are permitted to proceed and are not unduly hampered which require a delicate balancing act of prohibition and permission in merger control. And hence, most merger control regimes set out defenses that may be raised in the context of prohibition of mergers. There are two common 'defenses' that may be raised

[78] South African Competition Act (n. 31) Section 12(A).

[79] Zambian Competition Act (n. 33) Section 31.

[80] South African Competition Act (n. 31) Section 12(A) 3.

in the context of the prohibition of mergers namely the efficiencies defense and the failing firm defense. The efficiencies that result from a merger may be considered to offset the negative impacts where the benefits are shown to flow to the ultimate consumers. Also, where the undertakings being acquired are in a condition that without the takeover, it would be forced to exit the market, the 'merger' may be permitted irrespective of its negative impacts.[81] Looking at the South African regime, two sets of defenses are provided in the Act. Firstly, if the Commission finds that a merger is likely to have an anti-competitive effect, it may still find the merger to be justifiable based on efficiency, technology or other pro competitive gains that are shown to outweigh any anti-competitive effect and would not likely be obtained if the merger is prevented. Secondly, if it appears that the merger is likely to substantially prevent or lessen competition, the Commission shall determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in the Act.[82] Apart from this, the Commission, when determining whether or not a merger is likely to substantially prevent or lessen competition, should assess whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail[83], which indicates that the regime has integrated assessment of failing firm defense in investigation of mergers. In the case of Zambian merger control regime, the Commission, in considering a proposed merger, may take into account the extent to which the proposed merger is likely to result in a benefit to the public which would outweigh any detriment attributable to a substantial lessening of competition. It should also consider the extent to which the proposed merger would, or is likely to, promote technical or economic progress and the transfer of skills, or otherwise improve the production or distribution of goods or the provision of services in Zambia. The saving of a failing firm is also another factor the Commission should take into account in considering a proposed merger.[84] Examining the Ethiopian merger control legislation in the context of defense, the relevant provision of the proclamation is Article 11(2) of the proclamation which essentially stipulates an efficiency defense. As per the provision, the authority may approve a merger proposal (which is likely to have a significant adverse effect on trade competition) where the merger is likely to result in technological, efficiency or other procompetitive gain that outweigh the significant adverse effects of the merger on competition, and such gain may not otherwise be obtained if the merger is prohibited. Unlike the two regimes, however, the fact that one of the merging parties has failed or is likely to fail could not be taken as a ground justifying a merger which is likely to have anti- competitive effects. Similarly, mergers cannot be justified on substantial public interest grounds. So far, an examination of the Ethiopian merger control rules regulating merger notifications and substantive assessment has been made. In the following sub section, the article tries to address the rules relating to the last stage of the merger review process, i.e., remedy on merger notifications.

3.4. Remedies, Appeal and Enforcement

3.4.1. Remedies and Appeals

After scrutiny of proposed mergers, competition authorities in any merger control regime may authorize the merger conditionally or unconditionally or prohibit it. It is quite often the case that most aspects of a merger give rise to no competition concern. And when there are certain parts of the businesses of merging parties that overlap horizontally, competition authorities, instead of prohibiting the whole transaction, may look for a remedy whereby its competition concern is assuaged, and the rest of the deal can proceed.85 Looking at the Ethiopian merger control rules in relation to the power of the authority on a proposed merger, the proclamation has provided three possibilities. The authority, after having investigated a proposed merger, approves the merger, if it is of the opinion that the merger is not likely to have any significant adverse effect on trade competition. It can also prohibit the merger if it is of the opinion that the merger is likely to have a significant adverse effect on trade competition. It has also a power to approve the merger subject to certain conditions, if it is of the opinion that the likely significant adverse effect of the merger on trade competition can be eliminated by complying with certain conditions attached.[86]

The proclamation has also introduced the concept of revocation of in the sense that the authority is authorized to revoke a merger approval when it discovers that the approval was obtained based on the presentation of false and fraudulent evidence or where the conditions based on which the approval has been obtained are not fulfilled. And the authority is required, following the revocation of a merger approval, to inform the concerned government office to cancel the merger from the commercial register.[87] Apart from this, the regime has provided opportunities for appeal and judicial review of a decision in respect of a merger that the parties are dissatisfied with. Any person or an enterprise that is

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[81] Neeraj (n. 18) 133.

[82] South African Competition Act (n. 31) Section 12(A).

[83] *Ibid.*

[84] Zambian Competition Act (n 33) Section 31.

[85] Whish and Bailey (n. 17)867.

[86] Proclamation No. 813/2013 (n 10), Article 11(1).

[87] *Ibid.*, Article 13.

aggrieved by an order of TCCPA may appeal to the Appellate Tribunal within 30 days of the order. Also, any party wishing to appeal against a decision of the Appellate Tribunal claiming the existence of mistake on question of law, may appeal to the Federal Supreme Court within 30 days of the Tribunal's determination.[88] It is interesting here to note three serious pitfalls. Firstly, neither the proclamation nor the directive oblige the authority to justify its decision in a written form or issue written reasons when it has decided either to prohibit or conditionally approves a proposed merger. Unlike the case of South African and Zambian legislations, where explicit obligation is provided on the Commission to inform the parties of its decision and provide a reason thereof[89], there is no rule under the Ethiopian regime that requires the authority to provide a written justifications for any of its decision, more importantly where it prohibits or conditionally approves mergers. Secondly, though the regime has adopted a judicial review mechanism of merger decisions, the appeal rights to courts is only limited to claims relating to errors committed by the Appellate Tribunal on question of law.

Unlike the regime of South Africa and Zambia, where the decisions of tribunal may be taken on review to courts irrespective of the error in question (whether it is question of law or question of fact), any party that is aggrieved by the decision of the Ethiopian Appellate Tribunal can only make an appeal on errors committed by tribunals relating to question of law.[90] Thirdly, the authority, when it proposes to revoke an approved merger, is not required under the law to provide a notice of the proposed merger to the parties so that they will have the opportunity to express their views. If we look at the Zambian regime, the commission, where it proposes to revoke an approved merger, is required to give notice to every party to a merger and to any other person who is likely to have an interest in the matter and call upon such party or person to submit to the Commission, within 30 days of the receipt of the notice, any representations which they may wish to make on the proposed revocation.[91] Unlike the Zambian Act, we do not find the same rule in the Ethiopian regime that tries to ensure procedural fairness by requiring the authority to give notice of the proposed action to the parties to a merger and call up any representation on the proposed revocation.

3.4.2. Enforcement

It is common to see merger legislations envisaging sanctions on those who fail to comply with merger control rules. More particularly, they prescribe sanctions mostly in the form of fine on those entities that fails to make pre- merger notifications or implement mergers before obtaining merger clearance or in any way violate provisions of merger control. Looking at the Zambian system, an enterprise which intentionally or negligently implements a merger that is reviewable by the Commission without the approval of the Commission or implements a merger that is rejected by the Commission or fails to comply with conditions stated in a determination or with undertakings given as a condition of a merger approval commits an offence and is liable to a fine not exceeding 10% of its annual turnover.[92] In the case of South African regime, implementing a notifiable merger prior to approval being obtained or failing to notify the Commission of a merger is a contravention of the Act and exposes the parties to administrative penalties of up to 10% of turnover payable by each of the parties to the merger (target, acquirer and seller), as well as potential injunctions on implementation. Coming back to the Ethiopian regime, the proclamation has provided a legal consequence for engaging in a merger transaction in violation of the merger control rules. A business person who participates in a merger in violation of the merger control rules provided in the Proclamation (which can include the three forms of violations stated under the Zambian Act) shall be punished with a fine from 5% up to 10% of his annual turnover. Apart from this no agreement or arrangement of merger may come into effect before obtaining approval from the Authority pursuant the provision of the proclamation.[93] Here, there are few aspects that warrant further attention. To begin with, the proclamation is not clear as to whether the liability for fine is several or joint or joint and several liability. Secondly, unlike the two regimes, where the fine for violations of the rules is imposed by the Commission itself based up on the facts and evidences presented, the sanctions to be imposed under the Ethiopian regime require a very long process for its implementation as sanctions under the system can only be imposed by the Tribunal (not the Authority) after passing through the regular hearing process which requires institution of cases before the tribunal.[94]

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88 *Ibid*., Article 39.

89 Zambian Competition Act (n. 33) Section 34(2), and South African Competition Act (n. 31), Section 14.

90 Under the proclamation,courts assume appellate jurisdiction only on error of the Appellate Tribunal relating to the specific application of the rules. They do not assume jurisdiction on question of factual issues.

91 Zambian Competition Act (n. 33) Section 35(2).

92 Zambian Competition Act (n. 33) Section 37.

93 Proclamation No. 813/2013 (n. 10) article 42(4).

94 Looking at article 36, 37, and 38 of the proclamation clearly indicates that the enforcement of competition laws under Ethiopian competition regime requires investigation of cases by Investigators under the authority followed by institution of legal cases by Prosecutors before the Tribunal and finally judgment of the tribunal after conducting a formal hearing between the authority and defendant firm.

4. Conclusion

The article has examined the major deficiencies surrounding the legal regime regulating merger control in Ethiopia. As discussed in the preceding lines, the country, motivated by competition and industrial policy considerations, has enacted a merger control legislation as part of its anti‐ trust regime. The merger control provisions are designed to prevent mergers that are likely to have an adverse effect on competition. To this end, the law has adopted a mandatory pre-notification mechanism having a suspensory effect. In so doing, the legislation has provided some basic substantive and procedural rules regulating to what constitutes mergers, notification of mergers, substantive assessment of notified mergers, and remedies and sanctions (which includes the issue of appeal and judicial review). From this point of view, it can generally be said that the Ethiopian legal regime is inline and consistent with the best practices and approaches of merger control and it shares some common positive features with most foreign merger control legislations, more importantly the South African and Zambian legal regimes. Despite this, a closer comparative examination of the Ethiopian merger control legal regime in light of the Zambian and South African counterparts (the major advanced African competition regimes adopting best practices and approaches of merger review, at the same time reflecting the economic reality in Africa) reveals that the legal regime is riddled with numerous deficiencies and shortfalls that must be addressed in order that the law can effectively deal with mergers.

In terms of the rules relating to what constitutes mergers, the proclamation, should be amended in a way it should explicitly and clearly incorporate the concept of 'control' within the scope of the definition of mergers for a merger legislation should only concern itself with transactions which are likely to materially change market structure. The legal regime should then set out an inclusive definition of control either in the proclamation or regulations to be issued. The law should also provide clear rule (in terms of objective numerical thresholds) that defines what types of share acquisitions and asset acquisitions are sufficiently material to fall within the scope of merger rules as opposed to shares and asset acquisitions that are unlikely to affect competition. Apart from this, the definition provided in the proclamation is unclear whether JV agreements, if they meet the elements of the definition set out under Article 9, would constitute mergers. The legal regime should, therefore, provide clear and predictable criteria to distinguish those JV transactions that are subject to merger review from those that are not. Lastly, the terminology in the proclamation used to denote parties to a merger, i.e., 'persons' should be amended and replaced by the term 'business persons' to avoid ambiguity which could lead to an inclusion of transactions which has no competition concern within the scope of the definition.

In terms of the rules relating to notification of mergers, the legal regime, as one of the biggest concerns, should set out a clear and objectively quantifiable notification threshold limit so that the authority can focus on mergers which are most likely to have a competition concern, which in turn lessens its administrative burden. The proclamation should either stipulate the threshold limits or provide a possibility whereby threshold limits could be prescribed under subsidiary legislations. Besides, the legal regime should incorporate a local nexus provision to screen out transactions that are unlikely to result in appreciable competition effects within its territory. In terms of the rules relating to substantive assessment of mergers, the legal regime, as a serious concern, should provide either in the proclamation or regulations to be issued, a strict and legally binding reasonable time frame within which merger review should be completed since parties are barred from proceeding with the transaction during the pendency of the authority's review. And in terms of the substantive test applied in the system, the legal regime should firstly acknowledge the relevancy of defining a relevant market in assessing the possible effects of mergers and adopt detailed guideline for market definition in the context of mergers so that investigations could be restricted to the specific market of concern. The legal regime should also clearly define the substantive test applied in assessing the possible effects of mergers. More importantly, the legal regime (either in the proclamation or regulation to be issued) should have a detailed guideline that clearly outlines the qualitative and quantitative factors that should be considered, and theory of harms that should be investigated in the course of analyzing impacts of proposed mergers. Furthermore, I suggest the adoption of a clearly articulated public interest criterion as one of merger assessment considerations, at least as a defense, for the country, as a developing country, should also concern itself to the short-term public interest issues. Lastly, failing defense should for stronger reason be taken as a ground of defense under the law.

In terms of the rules relating to remedies and sanctions, the law should firstly provide an obligation on the authority to justify and reason out its decision in a written form when it has decided either to prohibit or conditionally approve a proposed merger. Besides, the regime should reconsider the judicial review system in such a way that decisions of the Appellate Tribunal should be reviewed by courts irrespective of the error in question. In respect of revocation of orders, the law should ensure procedural fairness by requiring the authority to provide notice of the proposed action to the merging parties and call up any representation on the proposed revocation. There are also some aspects that needs clarification in the law in relation to sanctions. The law should be clear as to whether the liability for fine is several or joint

or joint and several liability. And in terms of enforcing sanctions, I suggest that the law should be reconsidered in the sense that the authority should be authorized under the law to impose fine on offenders relating to mergers, without a need to take the case to the Tribunal by prosecutors, which will be of course subjected to the right of appeal and judicial review.

In the process of addressing the deficiencies outlined above, it should also be noted that the legal regime not only requires amendment of current legislations in many respects, but also need to have detailed subsidiary legislations and merger guidelines that provides many of the substantive and procedural aspects of merger review, more particularly, rules and guidance on various issues relating to the stages, specific processes and broad procedural framework of a merger review, which essentially calls for legal reform measures.

To sum up, for a smooth and effective functioning of the merger control system, the abovementioned issues should be resolved at an early stage. If not, not only it will be difficult to effectively deal with merger related issues of concern, but also to achieve the very goals of merger control in the system. Besides, some of the deficiencies, if not rectified, will continue to result in creating unnecessary obstacles and hinderances to transactions and affecting certainty of deals which might have an adverse implication on ease of doing business in the country, which is one of the current concerns of the country as a developing economy. Furthermore, some of thedeficiencies if not properly dealt, will continue to impose unnecessary administrative burden and work load on the competition authority.

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