# Bank Merger Regulation and Enforcement in Ethiopia: The Need for Fitness or Wellness Approach

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## Abstract

*The current trend of deregulation, liberalization, and privatization hastened the proliferation of banking sector mergers, even though the sensitiveness of the sector urges tight regulatory and enforcement institutions. This article aims at examining how existing Ethiopia's bank merger regulatory framework and enforcement institutions regulate and enforce bank merger proposals; both already executed bank mergers and imminent future proposals. The analysis employed a qualitative approach using primary and secondary data to assess the existing Ethiopian bank merger regulatory framework. The findings indicate that the existing bank merger regulatory framework and enforcement institutions suffer from various regulatory deficiencies. The substantive legal frameworks are: incomprehensive, haphazardly chopped in different legislations, and not capable of effectively dealing with complex bank merger issues. Likewise, the existing enforcement institutions lack: clearly defined guidelines on procedures, jurisdictional interaction, transparency, accountability, and cooperation platform. These pose a risk of regulatory uncertainty, parallel decisions, and jurisdictional conflict between the enforcement organs. Therefore, it is recommended to: reform the existing bank merger regulatory frameworks in line with internationally well-adopted principles; strengthen the existing enforcement institutions; define their jurisdictional interface; and develop a mutually initiated cooperation-platform among the regulatory organs as crucial for effective regulation of the regime.*

**Keywords:** Bank, Mergers, Prudential Regulation, Competition Regulation, NBE, TCCPA

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## 1. Introduction

Mergers have been considered as an intermediate to achieve various economic objectives including increasing asset and product portfolios, access to technological innovations and integrations, access to new researches and development, access to diversified market and resources that finally contribute to corporate growth and efficiency.[1] Besides the perceived advantages, bank mergers result in anti-competitive effects and are encircled with various practical and regulatory issues to deal with, including practical issues such as incompatibilities in ambition, vision, corporate governance culture, incivility of employees and shareholders could lead to hostile mergers.[2]

The privatization and liberalization measures, which have been adopted by the Ethiopian government since 1991, have incentivized the county to open up its financial service sector. This requires competitive banks at the international financial market.[3] The National Bank of Ethiopia, herein after NBE or the Regulator, has also directed private banks to capitalize through a merger scheme and set a target of minimum paid up capital of at least 2 billion birr by June 2020.[4]Amidst these demanding push by the Ethiopian government, there are prevalent concerns on the adequacy of the existing regulatory framework for a proper execution of mergers in the banking sector. Mainly, the limited prior bank

[1] Yadav, A.K., and Kumar, B. R, 'Role of Organization Culture in Mergers and Acquisitions' [2005] 2 (3) SCMS JM 53

[2] Dr. K. S. Adeyemi, 'Banking Sector Consolidation in Nigeria: Issues and Challenges' (2014) Research Gate, 2. <https://www.researchgate.net/publication/242780351_pp.11-14> accessed 22 February 2018 See also Asrat Seyoum, 'Mega Banking: Future of Ethiopian Banks', (*The Reporter Ethiopia*, May 2017 <http://archiveen nglish.thereporterethiopia.com/content/mega-banking-future-ethiopian-banks> accessed 22 February

[3] FDRE President Mulatu Teshome's, 'Keynote Address' (Joint Session of House of Peoples' Representative and House of Federation, Ethiopian Broadcast Corporation, 8 October2018)

[4] A circular dispatched by NBE (26 September 2015). Through this circular he NBE instructed all private banks to set a target of minimum paid up capital of at least 2 billion birr by June 2020, Interview 'Confidential' conducted within NBE, Legal Service Directorate (Addis Ababa, 01 May 2018)

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merger experience of the country,[5] exacerbated by the inadequacy of the existing regulatory framework and lack of cooperation among the enforcement bodies are considered as imminent challenges. Studies show that merger control legislations have far-reaching impact on mergers, transcend combating anti-competitive transactions and can affect merger activity even in heavily regulated sectors, such as the banking sector.[6] Otherwise, if the anti-competition legislations are missing, banks and even the sectoral regulator may approach to undertake anti-competitive mergers in order to create giant entities that could serve as national economic figures.[7]

The Organization for Economic Cooperation and Development (OECD) recommends national regulators to proactively and clearly specify conditions, requirements and procedures of bank mergers and ensure coordinated and joint enforcement with the general competition authorities.[8] Apart from competition review, there is a defined regulatory review by the regulator which considers financial and managerial resources, future prospects, convenience and needs of the communities, anti-money-laundering records and compliance with banking laws.[9] However, relevance of merger provisions incorporated under the current Ethiopian Trade Competition and Consumers' Protection Proclamation No. 813/2013 (TCCPP) to regulate bank mergers and its consistent applicability on bank merger

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[5] The country's experience is confined only to the public owned bank merger of CBB to CBE on 2008 E.C

[6] Jan-Peter Siedlarek, 'Merger Control in the Banking Sector' *Federal Reserve Bank of Cleveland*, (Cleveland, 2017) <https://www.clevelandfed.org/newsroom-and-events/publications/economic-commentary/2017-economic-commentaries/ec-201710-merger-control-in-the-banking-sector.aspx> accessed 20 November 2017

[7] Carletti, Elena, *et al.,* 'The Impact of Merger Legislation on Bank Mergers' (2016) Federal Reserve Bank of Cleveland Working paper 16-14

[8] OECD, *Mergers in Financial Services*, (Directorate for Financial, Fiscal and Enterprise Affairs Committee on Competition Law and Policy, 2000) p. 33 <http://www.oecd.org/daf/clp> accessed 02 November 2019

[9] Peter Lim Felton, Too Big to Manage: A Case for Stricter Bank Merger Regulation, (2012) 52(3) SCLR 1081-1109, 1089 <http://digitalcommons.law.scu.edu/lawreview/vol52/iss3/11> accessed 02 November 2018 *See also,* Brian W. Smith and Laura R. Biddle, 'Is the Bank Merger Regulatory Review Process Ripe for Change?' [2005] CCHI 9. Some also consider the "needs and convenience of the community to be served" and preservation of employment

reviews to be made by the NBE is disputed. As to the institutional aspect, literature shows that in the absence of cooperation between the general competition authority and sector-specific regulators, this could lead to conflict of jurisdiction, dilatoriness and inefficiency.[10] To alleviate such problems, developed countries have adopted detailed rules on competence, procedures and priorities of the institutions,[11] since mergers in financial sector could pose particular challenges to understand and supervise effectively.[12]

Against this backdrop, the purpose of this study is to assess bank merger regulatory framework and enforcement institutions as well as jurisdictional interface of the NBE and the Trade Competition and Consumers' Protection Authority (TCCPA) or the general competition authority. To this end, doctrinal research method was employed where primary data was gathered through purposive interview, and secondary data was collected from legislations, cases, reports and literature. The following section highlights some conceptual points on bank merger in general while the second section illustrates some practical and regulatory concerns in the execution of bank merger by exploring literatures. Subsequently, the paper discusses the general trends of bank mergers in Ethiopia, and examines the relevant legal and institutional frameworks. This section also tries to show the legal and regulatory/enforcement challenges prevalent in the Ethiopian bank merger regulatory regime. Finally, a brief conclusion is offered in the last section.

[10] Muhammed K. 'A Critical Appraisal of the Institution Controlling Competition in Ethiopia: Analysis of the Law and the Practice' (LLM thesis, Addis Ababa University, 2014) 68

[11] Strategic Priorities of Competition and Regulatory Agencies in Developing Countries <http://www.circ.in/pdf/strategic%2520priority> accessed 02 February 2018

[12] IMF, *Financial Sector Regulation: Issues and Gaps-Background Paper* (Monetary and Financial Systems Department 2004) 6

## 2. Some Conceptual Points on Bank Merger

In common parlance, a merger is a fusion between two firms into a single entity[13] wherein at least one loses its corporate existence. The surviving company, also called the merged company, acquires both the assets and liabilities of the company that loses its existence.[14] A bank merger is an occurrence when formerly separate banks are unified into one.[15] It happens when an autonomous bank ceases its very existence to form part and parcel of a bank by unifying its functions, operations, and branches under a single headquarter.[16] According to Weinberg, "*Merger is a marriage between two companies roughly of the same size*."[17]

Legal scholars define a merger as a combination of two or more firms in which all but one ceases to exist legally; the combined organization continues under the original name of the surviving firm.[18] In typical mergers, there are two companies, namely; the acquirer (bidder/acquiring company) and the second one is the

[13] Lubna Yusuf, 'Mergers and Acquisitions: An Insight into Its Use and Purpose in the Corporate Scenario' <https://www.legalserviceindia.com/article/l381-Mergers-and-Acquisitions.html>. accessed on 27 February2019] See also, Marshall Hargrave, 'Guide to Mergers and Acquisitions'(*Investopedia,* 22 March 2021) <https://www.investopedia.com/terms/m/merger.asp> accessed 22 March 2021

[14] Agarwal, M., 'Analyses of Mergers in India' (M.A Thesis, University of Delhi, 2002) cited in Priya Bhalla, 'Mergers & Acquisitions in India: A Sectoral Analysis' (2014) 2 IJBED 120

[15] Steven J. Pilloff & Anthony M. Santomero, 'The Value Effects of Bank Mergers and Acquisitions', *Wharton School Center for Financial Institutions, University of Pennsylvania* (1999) 99

[16] Dario Focarelli, Fabio Panetta and CarmeloSalleo, 'Why Do Banks Merge?'(2002) 34 JMCB 1051

[17] Weinberg M. A and Blank M. V., *Take-Overs and Mergers,* (5th edn., Sweet & Maxwell, 1989) 23

[18] Fox B & Fox E, *Corporate Acquisitions & Mergers*, (1st, Matthew Bender & Co., 2004) 1-5

target/passive company.[19] Accordingly, a merger is a mechanism by which a less important firm is absorbed by a more important one.[20]

On the other hand, the notion of statutory merger can be defined as a mechanism in which the acquiring company assumes assets and liabilities of the target under the statutes of the state in which the combined companies will be incorporated.[21] Maleka Femida defines a statutory merger as "*a simple, uncomplicated and effective procedure by which two or more companies may merge by agreement, with the approval of the prescribed majority of their shareholders, and without the need for any court approval*."[22] Scholars classified mergers into various categories. To name few, from an economic chain perspective, they can be roughly categorized as horizontal merger[23], vertical merger[24], conglomerate merger[25], congeneric merger,[26] purchase merger[27] and consolidation merger.[28]

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[19]HCL, 'Theoretical concepts of Mergers and Acquisitions' 23 <https://www.google.com/url?q=http://shodhganga.inflibnet.ac.in/bitstream/10603/100632/10/10_capter%25202.pdf&sa=U&ved=2ahUKEwiB2TViK3bAhXC2qQKHb0LA9sQFjAAegQICBAB&usg=AOvVaw2PgPbMyTDm8UqUXOnRTdFC> accessed 22 March 2018

[20] "Mergers and Acquisitions" <ahref=http://legal-dictionary.thefreedictionary.com/M%26A>Mergers and Acquisitions</a> accessed 28 February 2018

[21] Donald DePamphilis, *Mergers and Acquisitions Basics: All You Need to Know*, (Elsevier Inc., Burlington, USA, 2011) 12

[22] Maleka Femida Cassim, 'The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right, University of the Witwatersrand, (2008) 20 SAMLJ 1, 32.

[23] A horizontal merger is arranged to unify two independent companies generating or provisioning of basically similar products or services and are or could be direct rivals competing to the same product or geographic market. cf HCL (n 19) 24

[24] A vertical merger happens where one of the two firms is the actual or potential supplier of goods or services to the other, so that the companies are both engaged in the manufacturing or provision of the same goods or services, but at different stages in the supply route**.** cf Agarwal ( n 14) 24

[25] In such a merger, there are no middle universal factors between and among the companies in production, marketing, research, and development technology. cf HCL (n 19) 25

[26] Weston, J. F., and Mansinghka, K. 'Test of Efficiency Performance of Conglomerate Firms', *Journal of Finance*, 1971, as cited in cf Elena (n 7) 25, in a congeneric merger the bidder firm enjoys several gains by utilizing the tactical resources and access to a connected market and receives a greater reward than it would otherwise receive.[26]

[27]'Mergers and Acquisitions – M&A' <https://www.investopedia.com/terms/m/mergersandacquisitions.asp>. accessed 20 February 2018. This type of merger happens when one company

## 2.1. Reasons and Motivations for Bank Mergers

Bank merger is not a mere process of decreasing the number of banks in a given banking industry, rather it is required to improve synergy, promote efficiency, and instigate investor hub and prompt production and welfare gains.[29] Regardless of their category or structure, all mergers and acquisitions have a common ambition, to produce a synergy that enhances the value of the united firms greater than the sum of the two parts.[30] The rationales, as determined by Imala, includes: cost savings which are gained from the economics of scale and proficient allotment of resources; revenue improvement; market dominance; risk minimization; cost diversification; the emergence of deregulation that avoids many legal and regulatory taboos; globalization that stimulates a financial conglomeration and convergence throughout the globe; building a financial system that is responsive to crisis and the influence of shareholders on the management to increase profitability; and investment returns.[31]

The fundamental synergies acquired through the mechanism of merger within the banking industry could be described as follows. The primarily perceived advantage of the banking sector mergers is mostly the ability for firms in the sector to benefit from economies of scale.[32] Regardless of the things to be purchased, including the purchase of stationery or technological apparatuses, a larger firm placing the orders

purchases another and the purchase is undertaken through effecting cash payment or through the issuance of debt instruments.

[28] Ibid. In this type of merger a genuinely new entity with a distinct legal personality will be commenced. Accordingly, both the bidder and the target company will cease to exist and lastly fused under the new firm which has distinct existence.

[29] Nnanna, O. J. 'Beyond Bank Consolidation: The Impact of Society', (The 4th Annual Monetary Policy Conference of the Central Bank of Nigeria. Abuja, 18th – 19th November 2004) as cited in cf Adeyemi (n 2) 6

[30] cf M & A (n 27)

[31] Imala, O. I. 'Consolidation in the Nigerian Banking Industry: A Strategy for Survival and Development' (Nigerian Economics Students' Association (NESA), University of Abuja, 2005) as cited in cf Adeyemi (n 2) 6

[32] cf Adeyemi (n 2) 7

can save more on costs and energy.[33] Mergers confer a company with immense purchasing power to buy various office equipment and infrastructure, as larger firms will have better bargaining power in price negotiation with suppliers or sellers.[34] In the international arena, size has become a central component of success so long as it grants a competitive advantage to a bank.[35] Many banks suffer from a lack of depth in management and, when two banks merge, the best personnel of the banks can be used to manage and develop the larger assets of the combined bank.[36] In other words, mergers and acquisitions enable a bank to obtain significant technology, trained and high-quality personnel, and resist financial distress by empowering banks to compete in the local, regional and international arenas.[37]

Secondly, the motivation of mergers may be the aspiration to enlarge the capital assets of a company.[38] Many entities utilize mergers and acquisitions to grow in size using a shortcut since it can take a prolonged period to double its size through organic growth.[39] Thirdly, companies can strengthen their capacity through mergers creating a unified form and receiving more revenue than two distinct entities. Revenue enhancement may result from the consolidation of marketing or strategic gains and strong market power where an entity will be able to pool its resources thereby reducing its cost of production.[40]

The fourth aspiration of a bank merger emanates from a desire to have diversified competition where banks attempt to diversify their deposits and services.[41] Through merger, a bank can increase the number of its branches and or can unify

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[33] cf M & A (n 27)
[34] Ibid
[35] cf Adeyemi (n 2) 7
[36] Earl W. Kintner & Hugh C. Hansen, 'A Review of the Law of Bank Mergers' (1972) 14 (1) BCICLR 217 <http://lawdigitalcommons.bc.edu/bclr/vol14/iss2/1> accessed 02 February 2019
[37] cf Adeyemi (n 2) 7 See also, Tadesse S, 'Consolidation, Scale Economics and Technological Change in Japanese Banking' cited in cf Adeyemi (n 2) 8
[38] cf Earl (n 36) 217
[39] cf M & A (n 27)
[40] cf Adeyemi (n 2) 7
[41] Casson & Burrus, 'Federal Regulation of Bank Mergers' (1969) 18 AULR 681, as cited in cf Earl (n 36) 217

its area of expertise with another bank.[42] On some occasions, even a large-sized bank could persuade potential competitors to merge.[43] The fifth advantage is that, it may serve as cost cutting strategy through staff reduction. It is clear that mergers tend to mean job losses and companies are keen on saving plenty of money by reducing the number of staff members from various sections, including accounting, marketing, and other departments, and sometimes including the former management.[44] The sixth motive behind bank mergers can be the need to acquire new technology. In order to keep on competitiveness, firms need to possess top technological and business appliances, and through mergers, a firm can transfer technologies possessed by a certain company and stay competitive in the market.[45]

A seventh advantage of bank mergers can emanate from the desire to be a leader within the sector. Nonetheless, such motive could pose a potential threat to the market. Hence, it should be firmly scrutinized from an anti-competition perspective by the competition and regulatory authorities.[46] Moreover, firms use merger schemes in order to have improved market reach and industry visibility where they can buy other firms so as to access new markets and increase their revenues. Mergers can be used as a mechanism to enlarge and extend the company's marketing and distribution. This would grant better and easier access to raise capital within the investment society than small separate firms that would face harder challenges.[47] These considerations may provide ample justification for the banks' stockholders and the Comptroller.[48] Lastly, tax benefits may be a powerful incentive for mergers and acquisitions. The increased size of a firm resulting from

[42] cf Earl (n 36) 217
[43] Ibid, See also cf M & A (n 27)
[44] Ibid
[45] Ibid
[46] Ibid
[47] Ibid
[48] cf Earl (n 36) 217

consolidation enables it to enjoy tax gains resulting from the use of tax losses that would have resulted from separate net-operating losses.[49]

## 3. Practical Issues Associated with Bank Mergers

The practical issues accompanying voluntary/policy-induced merger process are evaluated under two captions as pre-merger and post-merger issues.

### 3.1. Pre-Merger Issues

The first issue during pre-merger is time allocation in which the process of a typical merger requires a prolonged time and progressively successive events. In some jurisdictions such as the US and Nigeria, there are several conditions and procedures to be undertaken to complete the scheme successfully. These include: preparation and clearing of the Scheme document; separate shareholders' meetings of the banks be convened; publishing the notices of shareholders' meetings in the newspapers; approval of the schemes of merger by shareholders; review and approval by the prudential regulator and the general completion authority must be secured.[50]

Second, as witnessed from Nigeria's policy-induced bank merger experience, bankers' limited awareness of merger transactions and shortage of human power acquainted with advanced knowledge and skill of mergers could inhibit the success of compulsory merger schemes.[51] Limited exposure to bank mergers processes such as due diligence and "know your customer" investigations could be exacerbated by the absence of the Security Exchange Market and the existence of a few numbers of Asset Management Companies.[52]

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[49] cf Adeyemi (n 2) 7

[50] John V. Austin, Esq., 'The Role of Supervisory Authorities in Connection with Bank Mergers', (IMF Conference, Washington, D.C., May 7-17, 2002) 11. See also cf Adeyemi (n 2) 9-10

[51] cf Adeyemi (n 2) 9-10

[52]Ibid.

The third issue is the high cost of mergers. Executed policy-induced bank mergers such as in Nigeria show that the process is highly expensive to complete successfully. Especially the majority of the small and medium banks with weak financial capability had to sustain costs to raise funds in the capital market and needed to assume the cost of the merger transaction.[53] These costs include costs to comply with due diligence reports, consultant fees, costs of scheme document preparation, and related miscellaneous costs.[54]

Fourth is resistance and lack of cooperation in policy-induced bank mergers, which are usually non-voluntary. Some banks may find it hard to find a strong bank or from the very start, they may have resistance to cooperate due to its involuntary nature. In some instances, there could be fundamental shareholders' identity differences or discrepancies in the corporate governance model adopted before the merger scheme, which could obstruct the process.

The fifth concern relates to employees' issue which could make the employees of the bank taking part in merger transactions feel nervous and create job insecurity. As a mechanism for economies of scale and cost reduction, banks resort to maintaining workforce reduction. This can pose an issue of job losses and lay-offs.[55] The discrepancy of the two constituent banks in terms of seniority, salary, transfers, promotion, and parity in perks are potential employment issues.[56]

The sixth issue is related to the incompatibility of communication technology. Banks utilize different information and communication technologies and software

[53]Ibid 12

[54]Ibid.

[55]John C. Soper, 'Consolidation in Banking and Financial Services: The Demise of Glass-Steagall', *John Carroll University* (2007) 6

[56]Duvvuri Subbarao, 'Banking Structure in India – Looking Ahead by Looking Back Speaking Notes', (FICCI-IBA Annual Banking Conference Federation of Indian Chambers of Commerce & Industry - Indian Banks' Association, Mumbai, 13 August 2013) 8

which are expensive to install.[57] After the imminent merger, these banks are required to harmonize their information and communication technology platform. Otherwise, incompatibility could obstruct the success of any bank merger scheme. In a nutshell, bank mergers can create problems including technology migration issues, customer attrition issues, and high cost of implementation of the merger scheme.

### 3.2. Post-Merger Issues

The first major challenge in the post-merger phase is the issue of corporate governance. Once banks are merged, the material existence of the new bank is different and its ownership structure will be changed. Hence, when banks with different backgrounds in corporate governance and management appeared to merge, there is a serious potential for divergent opinions and quarrels.

The second post-merger challenge is integrating the structural and institutional units of each constituent bank. This poses a serious risk due to the divergent background experience of each bank and lack of flexibility in a certain bank involved in the merger scheme.[58] Similarly, each constituent bank develops its own peculiar corporate culture. This will be an entanglement to the newly merged bank with cultural divergence and clashes.[59] Hence, the newly merged bank should be committed to integrating the overall managerial, operational and procedural, processes, products, and services at and standstill.[60]

Lastly, the issue related to the notion of Too-Big-To-Fail (TBTF) comes into the picture when an institution is constituted largely and its functions constitute a considerable segment of a nation's payment system, credit-granting process, or

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[57] Saving the recent attempt by the NBE to integrate the Automated Transfer Machine (ATM), they are still not integrated.
[58]Ibid.
[59] Such cultural clashes and management squabbles are natural in any merging firm with different backgrounds.
[60] cf Adeyemi (n 2) 14

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other major financial functions.[61] Any disorder in that institution results in a serious impact on the entire financial system. In return, the creation of large banks would result in these large banks behaving recklessly, which is technically called a moral hazard problem.[62] Generally, bank mergers are deemed to result in sophistication and TBTF or Too-Connected-To-Fail (TCTF) moral hazards with undesirable effects on financial stability.

## 4. Modus Operandi of Bank Mergers and Regulatory Concerns

In authorizing bank merger proposals, whether voluntary or policy-induced bank merger schemes, the regulator has to consider two sets of factors: banking and competitiveness.[63] The banking factors include (1) the financial history and condition of each of the banks involved; (2) the adequacy of its structure; (3) its future earnings prospects; (4) the general character of its management; (5) the convenience and needs of the community to be served; and (6) whether or not the bank's corporate powers were consistent with the purpose of the law.[64] On the other hand, the competitive factor was simply defined as the effect of the transaction on competition including any tendency towards monopoly.[65] As regards the second factor, the regulator is not expected to conduct a sharp competitive litmus test since it does not confer expertise on the area, which intimately belongs to the general competition authority.

In executing bank merger schemes, the regulator could face a problem in striking a balance between risk and stability in the financial system.[66] Hence, the regulator should function in a way to promote efficiency within the financial system and at

[61]Gill Marcus, 'Speech on Issues for consideration in mergers and takeovers from a regulatory perspective', (Institute for International Research 9th Annual Conference, Johannesburg, 18 July 2000) 3 <https://www.bis.org/review/r000721b.pdf> accessed 02 March 2019
[62]Ibid. 4
[63] cf Felton (n 9) 1081-1109, 1089
[64]Ibid.
[65]Ibid.
[66] cf Marcus (n 61) 2

the same time build public trust in the monetary system as a whole.[67] Similarly, the concern of systemic risk that poses the possibility of failure of one bank to settle net transactions with other banks will trigger a chain reaction, depriving other banks of funds and, in turn, preventing them from closing their positions.[68] This could erode the public confidence in the system. Hence, conglomeration through mergers and acquisitions within the banking industry should be managed seriously. If not, it could place the entire financial institution at risk. The regulator's capability to observe and oversee the group risk management practices within banks becomes an important concern.[69]

Apart from the sector-specific concerns, the issue of competition could lead significant big banks to resort to monopolistic or oligopolistic practices that lessen competition and fair-trade practice. Moreover, big banks could tend to conduct through predatory behavior and this could hamper the financial conduction and market mechanism for efficient distribution of resources. [70]

Accordingly, merger in some situations may be set up to rescue a certain bank at stake. This can be considered as a crucial way to deal with such problems and alleviate risks in the financial system. In such an instance, both the general competitions agency and the prudential regulator need to work in cooperation. Hence, several jurisdictions have a "failing firm defense" from being subjected to the application and process of the competition law review.[71] Similarly, some other jurisdictions have a "regulated conduct" defense in cases when the prudential regulator impels the banking sector to merge, what is known as a government-led or policy-induced merger program.[72]

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[67]Ibid
[68]Ibid
[69]Ibid
[70]cf Subbarao (n 56)
[71] cf OECD (n 8) 33
[72]Ibid. 34

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There is also a need to be cautious and take some discreet inquiry on the potential effect of bank merger proposals on public policy, particularly on employees of the proposing banks and generally to the employment regime.[73] These public concerns are best addressed through procedures that provide for transparency and accountability on the part of the agencies of government that deal with bank mergers. The International Monetary Fund has developed codes of *Good Transparency Practices for Financial Policies by Financial Agencies*. These codes of conduct are appropriate to financial regulators, which require clearly defined, preferably relevant legislation or regulation: financial policies should be openly communicated to the public; periodic public reports on major developments in the financial system should made; report aggregate data on a timely and regular basis; make texts of regulations and directives readily available to the public; and publicly disclose special protections such as deposit insurance schemes and consumer protection arrangements. Moreover, bank supervisors should be accountable for their actions through reporting to public authorities, or otherwise explain the basis for actions taken and their effect on the financial system.[74]

In connection with bank mergers, the principle of transparency requires members of the public and the financial industry to determine, in advance, of the filing with the Regulator of any proposal for a bank merger. This, among others, entails identifying: what information future proposers will be required to submit; what opportunities will be available for participation by the public in the process; what criteria the prudential and antitrust authorities will bring to bear on the proposal; what time frames will govern regulatory action on the proposed merger; and how persons aggrieved may obtain review and appeal on the decisions of the Regulator

[73] cf Austin (n 50) 211. See also, Ibid 24

[74] IMF, *Code of Good Practices on Transparency in Monetary and Financial Policies: Declaration of Principles*, (September 26, 1999). See also IMF, *Transparency in Monetary and Financial Policies* (March 2001) (Factsheet)

on the proposal.[75] Furthermore, notice to the public of the filing of a bank merger proposal should be provided in a timely fashion; members of the public and other competitors should be provided with the opportunity to inspect non-confidential portions of the filing, and to submit comments thereon for consideration by the Regulator in passing upon the proposal; and the proponents should be allowed to respond to any comments filed in this fashion.

## 5. Bank Merger Regulation in Ethiopia

### 5.1. General Trend

In 2015, the NBE instructed all banks through a circular dispatched on September 26, 2015 to set a target of minimum paid-up capital of at least two billion Birr by June 2020 upon the end of GTP II. The regulator recommended and informed professionals and corporate governance of banks to contemplate and resort to banking sector mergers in case they fail to meet the minimum capital requirement or the regulator would take the compulsive approach, and this signals the inevitability of policy-induced bank mergers. Subsequently, in 2017, the Regulator has officially introduced a national financial inclusion strategy, which states the need to strengthen the financial capability of financial institutions and increasing their competitiveness as a major strategy that would contribute to the financial sector by the year 2025.[76] Over the past twenty-plus years, the NBE has thrice set the capital requirement banks are expected to meet. A few years back, the NBE has signaled the same approach by increasing the paid-up capital of banks from 75 million birr to 500 million urging banks to comply within the time frame till June 2016, or as a way out, they would be able to merge vertically or horizontally.[77] To date, at face value, it is likely that most banks in Ethiopia currently meet that

[75] In the case of the TCCPA's decision on the merger, there is a legal recourse and appeal procedure stated under the Proc. No. 813/2013 Art. 33(2) (a) *cum.* Art. 39 (1) allows any aggrieved party by the decision of the Authority on merger proposal can appeal to the Federal Appellate Tribunal.
[76] Ethiopian National Financial Inclusion Strategy, (Addis Ababa, April 2017) 35
[77] Minimum Capital Requirement for Banks Directive No SBB/50/2011, National Bank of Ethiopia, 2011

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requirement.[78] The above factual trends make the compulsory future mergers of the banking sector imminent and inevitable. To date, except for the recent statutory merger of the two state-owned commercial banks (Commercial Bank of Ethiopia and Construction & Business Bank),[79] no merger proposal is made from private banks after the 1991 economic transformation.

### 5.2. Bank Mergers Legislations

The current Ethiopian substantive legal framework governing mergers of banks is mainly built upon Ethiopian Commercial Code, the Banking Business Proclamation No. 592/2008, the Trade Competition and Consumer Protection Proclamation No. 813/2013, and the Public Enterprises Proclamation No. 25/1992. There are also a group of domestic legislations on which merger of firms bear ramifications including the Civil Code of 1960, the Federal Income Tax Proclamation No. 979/2016,[80] the Federal Tax Administration Proclamation No. 983/2016, the Labor Proclamation No. 1156/2019, Commercial Registration and Licensing Proclamation No. 980/2016, and the Commercial Registration and Licensing Council of Ministers Regulations No. 392/2016.

#### a. The Competition Law Regime

In Ethiopia, the regulation of mergers under the competition law regime was first introduced by the previous Trade Practice and Consumer Protection Proclamation No. 685/2010. Currently, this proclamation has been amended by the Trade Competition and Consumer Protection Proclamation No. 813/2013. The new

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[78] To date, most of the existing banks have reached the recommended capital requirement. But it seems inevitable that the NBE will require higher requirements.

[79] The Council of Ministers has decided that the Commercial bank of Ethiopia take over the Construction and Business Bank through the Commercial Bank of Ethiopia's Takeover of the Construction & Business Bank Share Company Regulation No. 384/2016, and instantly repealed Regulation No. 203/1994, which established the CBB.

[80] Art. 35 of the Proclamation is devoted to addressing taxation of companies involved in reorganization. It provides a broad definition of the term reorganization. And Art 10 of proclamation No 983/2016 urges the firms to give notification to the Tax Authority and secure its affirmation as the scheme does not have tax avoidance as a principal objective.

proclamation provides instances that merger is deemed to have occurred; when two or more organizations, previously having independent existence, amalgamate or when such business organizations pool the whole or part of their resources to carry on certain commercial activity.[81] A merger may take place through a direct or indirect acquisition of shares or 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 jointly or the business of another person through purchase or any other means.[82] Here, it is clear that under the proclamation, the term merger now describes and includes the term and concepts of acquisition and consolidation in its definition. One of the inherent problems of this proclamation emanates from its fusion of far different transactions within a single provision and its failure to distinctly regulate mergers from other neighboring transactions such as acquisition/takeover and consolidation.

Similar to abuse of dominance, a merger is not prohibited *per se* under the TCCPP. Instead, a merger could be prohibited if it is established that it causes or is likely to cause a significant restriction against competition or eliminates competition.[83]

The proclamation prohibits merger to be undertaken without the prior notification and approval of the Authority.[84] The law obliges any business person to give prior notification and disclose details of the proposed merger to the Authority.[85] A failure to notify a merger to the Authority will have a consequence of a fine penalty under Article 42(4) of the TCCPP. For a detailed determination and implementation of the TCCPP, the Ministry of Trade has issued a Merger Directive No. 1/2016. This Directive introduced several alternative modes of merger application, allowing business persons to file their proposals through various

[81] Trade Competition and Consumer Protection Proclamation No. 813/2013, article 9(3) (a) & (b)
[82] Proclamation No. 813/2013, Art 9(3)(b)
[83] Proclamation No. 813/2013, Art 9(1)
[84] Ibid
[85] Ibid, Art 10(1)

mediums including in person, fax, post, and email.[86] However, in practice, the only medium available for business persons is to submit a proposal in person due to the absence of a currently active online delivery system. Moreover, the proclamation requires publication of a proposed merger in a newspaper of wide circulation, inviting third parties affected by the proposed merger to file their objections within 15 days of publication.[87]

The TCCPP explicitly confers the power to investigate and authorize merger proposals and this simultaneous task requires the Authority to undertake investigation and make prior assessments on the potential adverse effects of a proposed merger on trade competition.[88] In assessing the competitive effect of a certain merger proposal, the Authority will be required to determine the specific relevant product and geographic market where a particular product or service is available.[89]

As a principle, in pre-merger assessment, the Authority will consider the anti-competitive effect of the proposed merger on the market, including: its effect on the entry of new businesses to the market; its impact on micro industries; and finally, its impact on public interest.[90] As a general competition authority, it is wise to limit its scope of the review and factor to be considered by the Authority, but could be taken as one of the grounds not to fully rely on the TCCPP in case of bank mergers. The TCCPP is not a perfect and exclusively adequate legal instrument (is not expected to be) in case of bank mergers. That is because it does not incorporate other traditional banking factors due to its general spatial application to all sectors, and cannot address particular sector-specific issues.

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[86] Merger Directive No. 1/2016, Art 12 (1)
[87] Proclamation No. 813/2013, Art 10(3) (b)
[88] Proclamation No. 813/2013, art 10(1 & 2), Art 30 (3)
[89] Proclamation No. 813/2013, art 10(2) (e)
[90] Interview conducted with Ato Neyou Bellete, Director of Merger and Acquisition Directorate in the TCCPA, dated on May 04/2018 at 8:30 am

If the Authority's assessment found a proposed merger is not likely to harm trade competition in the relevant market, it shall approve the merger or conditionally approve the merger attaching certain conditions to be fulfilled in advance.[91] Otherwise, if the Authority found any proposed merger to likely affect or lessen trade competition, it shall prohibit the merger.[92]

In some exceptional instances, the Authority may permit anti-competitive merger proposals, but the applicant must justify that gains from merger outweigh its anticompetitive effect.[93] These justifiable grounds that could supersede positive anticompetitive result mentioned under Art. 11 (2) states, "…where the merger is likely to result in technological, efficiency or other pro-competitive gains that outweigh the significant adverse effects of the merger on competition, and such gain may not otherwise be obtained if the merger is prohibited." These enumerated grounds are very susceptible to interpretation which allows the authority to stretch its discretionary power through broader construction of the provision. However, it can be considered as a provision that exempts policy-induced bank merger schemes from being subjected to the general competition authority's review on the ground of its efficiency gain. In conducting its assessment, the Authority may require additional documents to be adduced, and examines those documents to decide on granting or denying a merger application.[94]

### b. The Banking Law Regime

The current Banking Business Proclamation No. 592/2008 is one of the relevant substantive legislations which introduced provisions that specifically attempt to regulate bank mergers even before the emergence of merger regulation under the general competition law of the country. Nevertheless, the proclamation only asserts

[91] Proclamation No. 813/2013, Art 11 (1) & (2)
[92] Proclamation No. 813/2013, Art 11(1)(b)
[93] Proclamation No. 813/2013, Art.11(2)
[94] Proclamation No. 813/2013, Art 10(3)(a)

few provisions that compel banks to secure the written approval of the regulator before executing any merger or amalgamation.[95]

Let alone the absence of separate bank merger legislation in the country, the Banking Business Proclamation No. 592/2008 and its amendment do not contain a separate section to deal with bank mergers. From the proclamation, one can easily observe that there is haphazard method employed by the legislator in incorporating provisions concerning bank mergers. Those provisions are inserted under the Section titled "Licensing of Banking Business." The assertion of bank mergers under this section seems incidental. In a true sense, such general prohibition of a merger without prior notification and authorization of the regulator could not be a sufficient legal instrument to regulate bank mergers that includes a sophisticated transaction.

To reiterate, Part two of the Banking Business proclamation Art. 3 which deals particularly with the licensing procedure of banking business, provides prohibition of any plan or arrangement to a merger between banks without securing the prior written approval of the regulator (NBE). This provision is primarily crafted to deal with licensing of banking businesses and not the particular concern of the merger procedure of banks. Essentially, Article 3(3) (d) of the banking business proclamation provides that no compromise, amalgamation, or arrangement that involves a bank as one of the principal parties to the relevant transaction, and no arrangement for the transfer of all or any part of the assets and liabilities of a bank to another person, shall have legal effect unless the consent of the National Bank of Ethiopia is conveyed in writing.[96] However, the proclamation follows a holistic approach in prohibiting any plans or arrangements that combine the assets and liabilities of banks. Article 3 (c) reads "*merge with or take over the banking business of another bank;"* and the subsequent sub-article (d) asserts "*enter into*

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[95] Banking Business Proclamation No. 592/2008, art. 3 (3) (c) & (d), Art. 33 & Art. 40.
[96]Ibid

*any arrangement or agreement for the sale or disposal, by amalgamation or otherwise, of its business, or effect major changes in its line of business."*[97]

From the above sub-articles, it can be seen that the legislators were not cognizant or at least interested in going to the bottom line by distinguishing the different modalities of bank-to-bank transactions, including acquisitions and takeovers. Moreover, it does not incorporate detailed types of merger transactions that could be direct or indirect. In contrast, in this regard, the TCCPP has attempted to firmly distinguish the possible types of transactions that are deemed to be a merger.

The banking business proclamation refrains from going further and simply asserts the various modalities and transactions that amount to bank merger. Primarily, it does not incorporate a definitional provision that gives meaning to the term merger in context to the banking sector mergers. In addition, it does not set conditions, requirements and procedures to be complied with by banks and considerations to be recounted by the regulator.

The possible consequence provided under Article 33 (1) of the banking business proclamation on default banks failed to notify and secure the regulator's approval would be getting subjected to receivership[98] and a penalty.[99] In this case, the NBE will subject any defaulting bank that transcends the red line by disregarding its duty to give prior notification as to the proposal, and merging without securing the blessing of the NBE.

As a principle, the ultimate fate of banks subjected to receivership could be winding up and termination. Though there is no clear assertion to this, the implied meaning of Article 41 states "Alternative measures to winding up" reveals that the

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[97] Proclamation No. 592/2008, art 3 (3) (c) & (d), Art. 33 & Art. 40.

[98] Proclamation No. 592/2008, art 33 (1) (n) Article 33 (1) of the proclamation states that: "*The National Bank shall appoint a receiver to take possession and control of a bank if it determines that one or more of the following circumstances exist in respect of the bank"…"(n) The bank is merged with another bank without the prior written authorization of the National Bank"*

[99] Proclamation No. 592/2008, Art 58

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firsthand measure to be taken by the receiver under its powers and duties vested under Article 39 of the proclamation would be winding up and termination. However, these provisions lack clear measures to be taken on banks that merged without securing the prior written approval of the NBE.

Similarly, the alternative measures lined up under Article 41 of the proclamation would be irrelevant to unnoticed bank mergers. Hence, an attempt to trace the possible and ultimate outcome of bank mergers without notification to the regulator through the channel of receivership via Article 33 of the proclamation could lead to nowhere and end up with a deadlock. Through a broader construction of Article 25 (1) (b) and (d) and (2) of proclamation No. 591/2008, there is a chance that such actions could be considered as criminal offenses.

The assessment method incorporated under proclamation No. 591/2008 lacks comprehensiveness, as it mingled various provisions or failed to address the bank merger issue in detail. Generally, the proclamation does not allocate a separate section that deals with bank mergers. The provisions incorporated under Proclamation No. 592/2008 do not make a distinction between volunteer and compulsory bank merger schemes that may be introduced by the central bank. Among the differences, mostly in the case of policy-induced bank merger schemes, there is no vigorous competition review process and blockade by the general competition authority.[100]

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[100] For instance, when five Korean banks were in serious financial difficulty in 1998, the Korean Financial Supervisory Commission issued decrees mandating consolidation and restructuring of those banks. Hence such legally, mandated merger was excluded from any review requirement under the competition law. See cf OECD (n 8) 46

## 6. Bank Merger Regulatory Institutions

In bank merger transactions, the relevant institutional frameworks in Ethiopia are the Ministry of Trade,[101] the Ministry of Revenue, the Trade Competition and Consumer Protection Authority, the National Bank of Ethiopia, and the Document Authentication and Registration Agency. In contrast, in the case of state-owned bank mergers, the Council of Ministers and the Public Financial Institutions Supervisory Agency are indispensable organs. The central question in the case of publicly owned bank mergers lies on whether other conventional enforcement bodies are involved is left unanswered. To delimit the scope and objectives of this article, the following sections are confined to discuss the TCCPA and the NBE as the main enforcement institutions in bank mergers schemes in particular.

### 6.1. Trade Competition and Consumers' Protection Authority

As a principle, the TCCPA as a general competition authority is empowered to review any merger proposal in the country.[102] And such arrangements need to pass through the procedure specified under the TCCPP. Any business people who proposes to enter into an agreement or arrangement of a merger, or the concerned government organ responsible for the registration of the merger should give prior notification to the TCCPA.[103] After determining the type of merger and a thorough assessment of its effect on competition of the relevant product and geographic market, the Authority approves or rejects the application. Then, registration of the merger will be effectuated.[104] The Authority's power has been reinforced by

[101] The Ministry of Trade that is mandated to register banks in the Commercial Register, in accordance with the Commercial Registration and Business Licensing Proclamation, 2016, Art. 5-7, proc. No. 980, Fed. Neg. Gaz., 22nd year, No. 101

[102] Proclamation No. 813/2013, Art. 10 (1) and art 4 (1) of However, art 4 (3) roughly limits the scope of application of the TCCPP from affecting the applicability other regulatory functions and administrative measure to be undertaken under other laws.

[103] Proclamation No. 813/2013, Art. 10

[104] Proclamation No. 813/2013, Art. 11

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subsequent merger directives and relatively comprehensive merger guidelines applicable in assessing mergers under the general competition regime.

### 6.2. The National Bank of Ethiopia

The Banking Business Proclamation prohibits any plan or arrangement to a merger between banks without securing the prior written approval of the Regulator.[105] It only asserts few provisions that compel banks to secure the written approval of the Regulator before executing any merger or amalgamation and the consequence of revocation and receivership for noncompliance.[106] Moreover, the banking business proclamation authorizes the Council of Ministers to issue Regulation and the NBE to issue a Directive for effective implementation of the Proclamation including that of the merger of banks.[107] Nonetheless, to date, the Council of Ministers and the NBE have failed to issue Regulation and Directives, respectively, as mandated concerning the process banks mergers.

The Banking Supervision Directorate is an office established within the internal institutional apparatus of the NBE, customarily mandated to undertake bank merger authorization process.[108] The directorate set three main objectives to achieve: ensuring safety and soundness of the banking sector; promotion of efficiency and ensuring compliance of banks with rules and regulations; and protection of depositors' interest.[109] This can be contemplated as an implied assignment of the Banking Supervision Directorate office, from the fact that there

[105] Proclamation No. 592/2008, Art. 3 (3) (c) & (d), Art. 33 & Art. 40
[106]Ibid
[107]Proclamation No. 592/2008, Art. 59
[108] cf Interview Confidential NBE (n 4)
[109] National Bank of Ethiopia, Bank Supervision Directorate, Circular BSD/03/11, Information Kit (Brochure).

are directives as to the conditions, requirements, and procedures required by newly establishing banks and CEOs.[110]

However, to date, there is no separate bank merger review office/board within the Banking Supervision Directorate with supporting directives on bank merger. Though there are several piecemeal directives issued by the Bank, they create difficulty to determine the specific mandate of the directorate. The Banking Business Proclamation stipulates that without the prior written approval of the NBE, merger or takeover of a bank is prohibited.[111] Moreover, it authorizes the NBE to issue a Directive for effective implementation of the Proclamation including that of the merger of banks.[112] However, the Regulator failed to issue a directive incorporating conditions, requirements and procedures and assigning separate merger review office/board[113] that encumbers the effective administration of the bank merger process.

### 6.3. The Case of Merger between Commercial Bank of Ethiopia and Construction and Business Bank

The Commercial Bank of Ethiopia (CBE) and the previous Construction and Business Bank (CBB) have been established by Council of Ministers Regulation No. 202/2002 and 203/2002, respectively. The fact both banks are state-owned attracts the application of the Public Enterprise Proclamation No. 25/1992. Technically speaking, the merger between CBE and CBB, which constitutes a statutory merger, is not comprehensively addressed under the existing bank merger legal framework.

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[110] NBE Directive No.SBB/39/06, NBE, directives SBB/39/06, & circular BSD/03/11), directive SBB/40/06, directives SBB/40/06, & circular BSD/01/11, circular BSD/02/11, directives SBB/31/02, directives SBB/19/96

[111] Proclamation No. 592/2008, art 3(3)

[112] Proclamation No. 592/2008, art 59

[113] Similar to it is made to licensing of new banks and other approval considerations to be recounted by the Directorate, NBE, Bank Supervision Directorate, Circular BSD/03/11, Information Kit (Brochure)

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According to the Public Enterprise Proclamation No. 25/1992, two or more enterprises may be amalgamated by the decision of the Council of Ministers.[114] This will be effectuated through the issuance of regulation by the Council of Ministers.[115] Initially, the merger proposal has been made by Ethiopian Public Financial Enterprise Supervisory Agency. Upon the decision of the Council of Ministers and issuance of Regulation No. 384/2016, the two banks have been merged. The Council of Ministers passed a final decision in the affirmative for the merger of CBB with CBE and communicated the NBE by the same letter of notification of such decision to that of Public Financial Institutions Supervisory Agency.[116] However, the aim of this communication to the NBE was not to secure prior approval and authorization of the regulator. Instead, it was for the sake of proper and effective implementation of the merger scheme already decided by the Council of Ministers, as the NBE is subordinate and accountable to the Prime Minister's Office.[117]

In this regard, whether the decision of the Council of Ministers in case of publicly owned bank mergers is self-contained or requires additional approval of the TCCPA and the NBE is not clear. The Banking Business Proclamation empowers the Council of Ministers to issue Regulation and the National Bank of Ethiopia to issue Directive for effective implementation of the provision of the Banking Business proclamation including that of merger of banks. However, both organs failed to come up with the instrument they were empowered to issue.[118]

From anti-competition perspective, the merger of CBE and CBB could create some pressure on other private banks in Ethiopia. In the first place, the CBE is

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[114] Public Enterprises Proclamation No. 25/1992, Art. 37 (1).
[115] Proclamation No. 25/1992, art 37(2)
[116] Letter From FDRE Office of the Prime Minister to the Public Financial Institutions Supervisory Agency, Hidar 29, 2008 E.C (Unpublished)
[117] cf Confidential Interview NBE (n 4)
[118] Proclamation No. 592/2008, art 59 (1) & (2); The National Bank of Ethiopia Establishment (as Amended), Proclamation, 2008, Proc. No. 591Art. 3(4).

incomparable with other private banks even before the merger, and this is clear that the merger is detrimental to them as there is a potential for the CBE to abuse its market dominance or other predatory behaviors. This could also bring negative bearings on the formation of new banks.

Typically, the competition Authority should have been called for a separate review testing of the competitive effect of such a merger.[119] However, the Authority did not take part in the merger authorization process of the CBE and CBB.[120] Similarly, the NBE had not been consulted (officially) or did not take part to check the prudential test.[121] Rather, the regulator was merely informed after the decision had been made by the Council of Ministers, if any.[122]

### 6.4. Institutional and Regulatory Challenges

#### a. Lack of Effective Review Procedure

Currently, there is no directive or guideline issued by the NBE to ensure transparency and accountability of the bank merger process.[123] The procedures of how the review is held (public hearing or in-camera), how witnesses are examined and complaints are presented on a bank merger proposal, what evidence the party would present at the hearing, and how much reasonable time and opportunity would be given for the parties to inspect the application filed by proponents to the merger are not defined.

Moreover, it is not clear whether an aggrieved party such as disappointed applicants, competitors, and customers believing themselves to be adversely affected by the decision of the Regulator on a proposal can resort to judicial review

[119] cf Interview with Nebiyou TCCPA (n 90)
[120] Interview 'Confidential' within Merger and Acquisition Directorate in the TCCPA, Addis Ababa, 04 May 2018
[121] cf Confidential Interview NBE (n 4)
[122] Ibid. Through the letter sent to NBE cf Letter (n 116)
[123] Ibid

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or have an appeal right. Besides, the transparency requirement in the review process, in the interest of preserving public confidence in the banking system is neglected. In particular, the procedure undertaken in the merger of the two state-owned banks (CBE and CBB) is not clear.[124] The NBE has no information as to how it was undertaken.[125] This shows the absence of transparency in the execution of two state-owned banks where the NBE does not take part at all.

### b. Lack of Clarity on Allocation of Jurisdiction

Most developed economies incorporate detailed rules on competence, procedures, and priorities of the institutions that would eliminate conflict of objectives between the competition law enforcement and the application of sectoral regulation.[126] Hence, defining the jurisdictional boundaries based on a mutually supported and harmonized manner between the general competition authority and the sector-specific regulators is crucial to avert the risk of conflict and parallel decisions (or, maybe, deadlocks).

In the existing Ethiopian bank merger regime, no legislation or document is serving as a platform between the prudential Regulator and the general competition authority which defines how the two governmental agencies interact. This jurisdictional loophole can be a source of regulatory uncertainties and conflict. Though a serious dialogue was being held on the issue of jurisdiction between the NBE and the TCCPA, the latter claimed to take part in a bank merger review that presents various concerns on consumer protection law enforcement and the issue of anti-competition.[127] However, the NBE resistance comes out of the premise for the need for special expertise knowledge, and skill on the protection of its

[124]Ibid

[125]Ibid, Particularly the NBE has failed to comply with the requirement of transparency which is shown its dubiousness and concealed facts, reasons, and procedures followed in the takeover or acquisition/ of the CBE and the CBB which is still not disclosed to the public.

[126] cf Muhammed (n 10) 62

[127] cf Confidential Interview NBE (n 4)

customers.[128] The issue of jurisdiction is a critical problem, which is not yet clearly defined by any legal framework or internal working customs.[129] Moreover, the regulator firmly claims bank merger reviews should be conducted exclusively by the Regulator, and the need to construe Art 4(3) of the TCCPP restrictively exempting the financial sectors.[130] Further, the law should require that any challenge instituted by the competition law authority to block the merger be filed within a short time following the Regulator's approval of the transaction.[131]

The same problem is persistent in the jurisdictional relationship in the case of government-owned banks mergers that attract the central role of the council of Ministers and the conventional regulatory organs Viz. the NBE and TCCPA which are simultaneously entrusted with the power to review and approve bank mergers proposals within their respective legal frameworks. To date, none of these organs took initiatives to define their relationship.

### c. The Possibility of Conflicting Decisions

Under the existing Ethiopian bank merger regulatory framework, there is no legal instrument that confers the NBE as a prudential Regulator to have ultimate and discretionary approval or disapproval power over any bank merger proposal. The Basle Core Principle 4 provides that: *"Banking supervisors must have the authority to review and reject any proposals to transfer significant ownership or controlling interests in existing banks to other parties."* Regardless of the division of

[128]Ibid.

[129]Ibid.

[130]Ibid. Surprisingly, the previous Proclamation No. 685/2010 under Art 24, attempted to incorporate a jurisdiction clause by envisaging a provision that calls for a compromise approach to be utilized to resolve the conflict of jurisdiction that may arise between the Authority and other regulatory body. However, the current proclamation that vowed to fill the intricacies of its predecessor depleted the provision. Likewise, the National Bank of Ethiopia Establishment (as Amended) Proclamation No. 591/2008, tried to define the relationship of the NBE and the government (conventionally to the executive organ to whom the NBE is accountable) and its relationship with the entire financial institutions (Banks, Insurances and Micro-finance Institutions). However, this Proclamation does not incorporate governing principles in its jurisdictional or functional relationship with the general competition authority and or other sectoral regulators.

[131] cf Austin (n 50) 8

responsibilities between the Regulator and other authorities and the consideration of competition law issues, the prudential regulator must have ultimate discretionary authority over any bank merger proposal.[132] The competition law authority may seek to block, on competition law grounds, a merger approved by the Regulator, but that authority should not be able to cause a transaction opposed by the prudential Regulator to be approved.[133]

Under the OECD, *"…if a prudential regulator ever found it necessary to block a precompetitive merger, competition law would not thereby be abrogated…because competition law regarding mergers is proscriptive rather than prescriptive in nature,[thus]can be used to block but not to require mergers."*[134] Accordingly, to the level that the regulation becomes prohibitive than normative, mergers rejected by the general competition agency should not generate an outright contradiction with the sectoral regulators.[135] Besides, any challenge instituted by the competition law authority to block the merger must be filed within a short time following the Regulator's approval of the transaction.[136] However, under the Ethiopian bank merger regime, the absence of such allocation of power could yield parallel decisions and jurisdictional conflict between these agencies.

### d. Lack of Effective Coordination Mechanisms

Currently, under the Ethiopian bank merger regime, there is no such asserted legal provision calling for cooperation and coordinated action between TCCPA and NBE. Beyond this, there is not customarily developed cooperation platform

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[132] Andrews, Michael A., Addressing the Prudential and Antitrust Aspects of Financial Sector Mergers and Acquisitions, *IMF/Monetary and Exchange Affairs Department*, (2000) cited in cf Austin (n 50) 8
[133] cf Austin (n 50) 8
[134] cf Strategic Priorities (n 11)
[135] Ibid
[136] cf Austin (n 50) 8

between these bodies, and the area has remained blurred to the expertise of these organs.[137]

Practically in most international jurisdictions, bank mergers are reviewed by both prudential regulators and competition agencies.[138] That necessitates a need for collaboration between these organs to eliminate unproductive redundancy.

In this regard, the OECD has also recommended countries to incorporate unequivocal and comprehensive procedures to guarantee the mutual evaluation is transparent and likely predictable so that it does not excessively encroach on private sector affairs.[139] Moreover, there should be a clearly defined legal provision that compels the action by the competition law authority to be coordinated with that of the Regulator to permit timely action by the latter.[140]

## Conclusion

This article scrutinized the existing relevant bank merger enforcement-regulatory frameworks. It explored the persistent institutional challenges in the enforcement of bank merger schemes. The TCCPP provisions that deal with mergers are not fully compatible to bank merger schemes in particular. These provisions are crafted only from anti-competition perspective and do not address the peculiar sector-specific and traditional bank merger factors. Though both the NBE and the Council of Ministers are empowered to issue Directive and Regulation, respectively, for the implementation of the provisions of mergers, neither of these organs issued any law to this effect to date. Specifically, the NBE needs to come up with a proactively defined set of rules, guidelines and procedures in the enforcement of bank mergers. With regard to the jurisdictional aspect, as a principle, the TCCPA is

[137] cf Confidential Interview NBE (n 4). Reveals that there is no clear cognizance as to how the two organs interact concerning the bank merger review process.

[138] cf OECD (n 8)

[139] Ibid, For instance**,** several OECD countries, including Australia, Canada, Norway, and the United States, have taken formal steps to promote such coordination.

[140] cf Austin (n 50) 8

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empowered to decide on every merger scheme. On the other hand, the general proscription of the authority from impeding the applicability of other regulatory functions and administrative measures is blurred and broadly constructed.

This jurisdictional interplay under the TCCPP does not provide on what types of regulatory functions the general competition authority should abstain from and in which one it could take part. Such blurredness can be a source of conflict and jurisdictional discrepancy in case of bank mergers. Both authorities claim legitimacy in process of bank merger review and authorizations regardless of the involving bank's ownership structure though the public enterprise merger regime has special procedures wherein the NBE and the general competition authority should be involved. However, these institutions have shown abstinence and neglected in the case of a merger between CBE and CBB which was executed exclusively with the decision of the Council of Ministers. Moreover, there is no statutorily or customarily installed cooperation platform between the NBE and the TCCPA, and the Council of Ministers (in case of merger of state-owned banks). The capability of the sector-specific regulator to cope up and handle drastic changes in the corporate structure of banks after the implementation of compulsory bank mergers is critical. The indicators can be in terms of its organizational structure, adequacy of the legal framework, skill, and division of labor. These legal and institutional challenges are potential that requires due consideration in the advent of the imminent compulsory bank merger scheme in Ethiopia.

Hence, the following recommendations are forwarded to remedy the above-recognized problems. The general competition authority should take part in any bank merger review process from competition perspective and should be empowered to blockade of a bank merger on the ground of an anti-competitive effect. Likewise, the NBE as a prudential Regulator needs to issue guidelines, rulebooks, and directives that pro-actively give awareness and caveat to the bankers to make them ready by internalizing the exit strategy of a merger. These

legal framework needs to be comprehensive enough to address and set forth special requirements relating to timeline and mode of offering, announcements, documentation, and provide adequate information to shareholders to make an informed decision as to the merits of an offer, including the option of surrendering their holdings. The NBE Directive should contain a clearly defined bank merger due diligence, valuation, and community convenience factors in considering bank and an appeal procedure and judicial review for aggrieved parties on the decision of the merger proposal. The NBE as a prudential regulator needs to scrutinize any bank merger proposals, principally from traditional banking factors perspective and should be conferred with a veto power to approve/disapprove the bank merger proposal. The jurisdictional interface between the general competition authority and the prudential regulator needs to be defined based on mutually initiated coordination and cooperation platform. Clearly specifying the separate task and role of each organ is important to demark the jurisdictional boundary of these organs and alleviate the risk of illegitimate encroachment in the task of the other. Lastly, in case of state-owned bank mergers authorization, there should be a transparent procedure on how the Council of Ministers decides on mergers with due implementation of the conditions specified under Art. 37 of the Public Enterprises Proclamation.

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