Institute of Advanced Legal Studies
School of Advanced Study
University of London

Gebeyaw Simachew Bekele

A Critical Analysis of the Ethiopian Commercial Code in Light of OECD Principles of Corporate Governance

LLM 2011-2012
International Corporate Governance, Financial Regulation and Economic Law (ICGFREL)

Institute of Advanced Legal Studies
School of Advanced Study
University of London

Gebeyaw Simachew Bekele

“A Critical Analysis of the Ethiopian Commercial Code in Light of OECD Principles of Corporate Governance Framework"

LLM 2011-2012

International Corporate Governance, Financial Regulation and Economic Law (ICGFREL)

Dissertation F1002

“A Critical Analysis of the Ethiopian Commercial Code in Lights of OECD Principles of Corporate Governance Framework”

Abstract

In the contemporary world, the existences of appropriate and effective legal, regulatory and institutional underpinnings are backbones for a given country’s sound corporate governance framework. Sound corporate governance framework in turn fosters market integrity, improves economic efficiency and growth as well as builds investor confidence. This dissertation critically analyzes whether the current Ethiopian share company law (part of the Commercial Code) envisaged such outcomes or not by using the six key minimum standards of OECD Principles of corporate governance as a template. It demonstrates how the legal and regulatory framework of the share company law provisions apparently has failed to create incentives for market players and also failed to promote transparent and efficient market. To smooth the progress of new investment and provide adequate investors’ protection, this dissertation recommends Ethiopia should revisit and update its share company law in light of the relevant OECD Principles by taking into account its own legal, economic and cultural circumstances.

Table of Contents

Introduction 1

Part One: General overviews of the Ethiopian Share Company Law 5

- 1.1 The Setting up Process and Formation of Share Company 5
- 1.2 Regulatory and Supervisory Institution 7
- 1.3 Basic Ownership Rights of Shareholders 8
  - 1.3.1 Right to Information 8
  - 1.3.2 Rights to Participate and Vote at the Shareholders Meetings 8
  - 1.3.3 Right to Share the Profits/Proceeds of the Company 9
  - 1.3.4 The Right to Transfer of Shares or Withdraw from the Company 10
- 1.4 Rights of Minority and Foreign Shareholders 10
- 1.5 Issuance of Debt Securities and Rights of Creditors 11
- 1.6 Duties and Responsibilities of Directors and Auditors 12

Part Two: OECD Principles of Corporate Governance 14

- 2.1 OECD Principles of Corporate Governance as International Benchmark 14
- 2.2 Ensuring the Basis for an Effective Corporate Governance Framework 15
- 2.3 The Rights of Shareholders and Key Ownership Functions 16
- 2.4 The Equitable Treatment of Shareholders 17
- 2.5 The Roles of Stakeholders in Corporate Governance 18
- 2.6 Disclosure and Transparency 19
- 2.7 Boards Responsibilities 20

Part Three: Revisiting and Updating the Ethiopian Share Company Law Provisions in Light of OECD Principles of Corporate Governance 22

- 3.1 Enhancing the Legal and Regulatory Framework 22
- 3.2 Strengthening the Basic Rights of Shareholders 25
- 3.3 Improving the Equitable Treatments of Shareholders and Protection of Minority shareholders 28
- 3.4 Addressing the Interests and Roles of Stakeholders within the Company 31
- 3.5 Require the Minimum Disclosure and Transparency Standards 34
- 3.6 Expand the Duties and Responsibilities of Boards and Auditors 36

Part Four: Conclusion and Recommendations 39

Bibliography 43

Introduction

The creation of companies in the modern legal form is a recent history in Ethiopian business practice. Traditionally, "small scale Greek, Armenian and Ethiopian stall keepers and itinerant peddlers" dominated the business practices of Ethiopia. However, through time the "Indians, Italians and Levant" wholesalers, distributors and merchandisers dominated this business practice by holding a massive range and quantity of commodities in towns. Consequently, these enterprising merchants and tradesmen were the basis for the creation of modern companies in Ethiopia.[1] To regulate these modern companies, Ethiopia enacted the 1931 Company and Bankruptcy Law.[2] Nevertheless, the rapid growth of the sector in large scale and increased flow of foreign investment forced Ethiopia to enact a new commercial law. As a result, Ethiopia repealed the 1931 Company and Bankruptcy Law and enacted the 1960 Commercial Code (hereafter the Commercial Code).[3]

It modeled from the French Commercial Code and drafted by Professor Jean Escarra, a French legal scholar.[4] The enactment of the commercial code facilitated the formation of several public and private companies in the country until 1974.[5] However, the Derg Revolution (1974-1991) entirely suspended the commercial code and nationalized all incorporated companies by a series of Proclamations and Decrees.[6] During this time, the formations of new companies were prohibited. The commercial code resumed in 1991 after the fall of the Derg Regime by the current government. Consequently, several public and private companies are being incorporated. Though, private limited companies are still the dominant business practice in Ethiopia, the formation of companies through the offering of shares to the public under the share company law provisions are dramatically increasing since 2005.[7] The share company law provisions are part of the Commercial Code under the heading of Business Organizations entitled "Companies Limited by Shares."[8]

---

[1] Minga Negash, 'Rethinking Corporate Governance in Ethiopia' (2008) Metropolitan State College of Denver Working Paper 8/2008, 4 <http://ssrn.com/abstract=1264697> last accessed 20 July 2012.
[2] Getahun Seifu, 'Revisiting Company Law the Advent of Ethiopian Commodity Exchange' (2010) 4(1) Mizan Law Review 102,103
[3]Negarit Gazeta Gazette Extraordinary Commercial Code of the Emperor of Ethiopia Proclamation No 166 of 1960(see recital three of number 3).
[4] Paul Brietzke, 'Private Law in Ethiopia' (1974), 18 (2) Journal of African Law 149, 163
[5] Negash n 1.
[6] Brietzke n 4.
[7] Fekadu Petros Gebremeskel, 'Emerging Separation of Ownership and Control in Ethiopia Share Companies: Legal and Policy Implications' (2010) 4(1) Mizan Law Review 1, 14.
[8] Commercial Code (n3) arts (304-509).

Despite the fact that the share company law has relevant provisions, it is apparently unable to create conducive legal and regulatory environments to the smooth running and ongoing operation of public companies. Its legal and regulatory frameworks are not properly articulated and failed to provide comprehensive legislative response to the modern complicated corporate governance issues of public companies.

For instance, requirements to form or increase the company's capital through issuing of equity/debt securities to the public are inadequate to protect potential investors.[9] Similarly, to form a share company, it imposes a minimum of shareholder membership[10] and capital requirement.[11] These two provisions not only contravene current international standards and best practices but also discourage new investment and pools of capital resources. Its statutory frameworks also failed to provide adequate and clear allocation of powers to regulatory institutions. It neglected to require legislation of other enabling legal instruments like security laws and regulations.

Correspondingly, the basic governance aspects of share company law provisions are defective and inadequate. Among others, the followings are the major loopholes and shortcomings. Restricting shareholders rights to transfer of their shares[12] not only limits shareholders to exercise their ownership rights but also impedes liquidity of company's shares in the capital markets. Imposing voting caps on shareholders at the company meetings[13] contravenes "one share one vote principle." Likewise, the provision that requires shareholders to deposit their shares prior to the meeting of shareholders prevents minority shareholders to sell their shares before the meetings.[14] Further, allowing companies to issue bearer shares[15] may contribute to the creation of anonymous ownerships. This in turn hampers company's transparency and may lead to tax evasions and misappropriation of company's assets by corporate insiders to the detriment of the company and minority shareholders. In addition, minority shareholders are not protected from abusive corporate insiders and in case of violation they have no rights to derivative suit against directors or challenge the decisions of controlling shareholders in

[9] Commercial Code arts (317-322) and (468-469) respectively.
[10]Commercial Code art307(1), even after the company formed and commenced its operation, the reduction of members blows the legal limits results in the winding up of the company (article 313).
[11]Commercial Code art 306(1).
[12] Commercial Code art 333.
[13] Commercial Code art 408.
[14] Commercial Code art 401.
[15] Commercial Code art 325.

courts. There are no minimum mandatory and voluntary disclosure and transparency standards. The requirements of accounting and auditing standards do not comply with the international financial reporting standard and best practices.[16] It also entirely disregarded the interests and roles of stakeholders within the company. Finally, the functions and responsibilities of boards and auditors in the company are also inadequate.

The government of Ethiopia has already recognized the inadequacy of the entire commercial code provisions and drafted a new commercial code. However, the drafted commercial code was disregarded because of poorly drafted even before submitted to public comments. For this reason, the government of Ethiopia mandated the Ministry of Justice to draft another new commercial code. Thus, during the drafting of the new commercial code, the Drafting Committee should take into account the relevant OECD Principles of corporate governance[17] to facilitate the present business realities and to rectify the above mentioned defects.

This dissertation provides three main reasons why the OECD Principles are relevant to the Ethiopian corporate governance context. First, they obtained international acknowledgment as minimum standards and best practices for sound corporate governance framework.[18] Second, they are mainly developed to assist policy makers of both OECD and non OECD countries to formulate and ameliorate their legal, regulatory and institutional framework for proper corporate governance by taking into account their national economic, social and business practices.[19] Third, they are not only non-prescriptive and outcomes oriented but also comprise common elements of all legal traditions and cultural circumstances of OECD and non OECD members, no matter how their economic developments and company's ownership structures vary.[20] Consequently, the dissertation argues that the supposed new draft commercial code should be scouted in lights of the relevant principles by taking into account the Ethiopian legal, regulatory and business practices. It also advocates consulting of the relevant principles as a reference during the drafting of share company law will have

[16] Read commutatively Commercial Code arts 63, 446 and 448.
[17] EOCD Principles of Corporate Governance (April 2004). Available at <http://www.oecd.org/home/0,3675,en_2649_201185_1_1_1_1_1,00.html> last accessed 15July 2012.
[18] ibid 11; Louis Bouchez, 'Principles of Corporate Governance: the OECD Perspective' (2007) 4(3) European Company Law 109.
[19] Ibid.
[20] Luka Cerioni, Corporate Governance: "The OECD Principles, the Scope for A "Model of the Successful Company", and A New Challenge for the Company Law Agenda and the Broader Regulatory Agenda" (2008 Brunel University Unpublished Paper) 2 <http://works.bepress.com/luca_cerioni/1 > last accessed 21July 2012; OECD Principles (n17) 13.

significant roles to establish sound corporate governance framework within the country. Establishing sound corporate governance framework in the country will in turn improve the financial soundness of the country, increases private investment and economic development.

The rest of the dissertation is organized into three main parts. Part One briefly demonstrates the relevant share company law provisions. It discusses the legal and regulatory requirements to the creation of share companies. Then it presents the core corporate governance aspects of the share company law provisions. These include the basic rights of shareholders; protection of minority shareholders; rights of creditors, and duties and responsibilities of directors. Part Two presents the reason why the OECD Principles of corporate governance gained international recognition as benchmarks and best practices. It also discusses the relevancy of the principles to the Ethiopian corporate governance context. Then, it briefly discusses the minimum standards of the six core areas of OECD principles of good corporate governance. The Third Part is the main works of the dissertation. It critically analyzes the share company law provisions in light of the six minimum standards of OECD Principles of corporate governance. It also identifies the loopholes and drawbacks that should be rectified during the drafting of the new Commercial Code. Finally, Part Four of the dissertation will make concluding remarks and recommendations.

Part One

General overviews of the Ethiopian Share Company Law

In general, the share company law provisions comprise 205 articles and divided into eight chapters under the heading of Business Organizations sub titled "Companies Limited by Shares." Chapter one and two set out the legal and procedural requirements for the formation of share companies (Articles 304-324). Chapter three and five provides for the issuance of shares and debt securities and the rights, and duties of share and debt holders (Articles 325-346 and 429-461 respectively). Chapter four prescribes about company's directors, auditors and meetings of shareholders (Articles 347-428). Chapter six provides how the accounts and books of the company should be held (Articles 445-461). Chapter seven lays down the requirements for the amendments of company's statutes (Articles 462-494). The last chapter provides for the desolation and winding up of the company (articles 495-509). However, for convince, this dissertation will discuss the relevant provisions of share company law by dividing into the following structures.

1.1 The Setting up Process and Formation of Share Company

A share company's capital is fixed in advance, allocated into equal nominal value of shares and its liabilities are limited to the assets of the company; consequently shareholders are liable to the extent of their contribution to the company.[21] To form a share company, the initial capital and members should not be less than the minimum legal limits.[22] It can be formed by two ways: by signing the memorandum of association and subscribing the whole capital among founders or by issuing and offering the prospectus to the public.[23] In the first way, founders are required to prove in the company's statutes that all shares are allocated and subscribed among members. One quarter of the subscribed capitals are paid up and deposited in bank. And if any, reports of members contributed in kind sworn in front of experts of the Ministry of Trade for the proper valuation of the property.[24] In the second way, founders issued and offered prospectus to the public without any approval and registration by the Ministry. Then, they submit applicants' subscriptions and resolutions passed at the

[21] Commercial Code art 304.
[22] Commercial Code art 306 and 307(1).
[23] Commercial Code art 307 (2&3).
[24] Commercial Code arts (312-316).

subscribers meetings for registration.[25] In both cases, liabilities of founders of the company failed to cover where the offered prospectus contained untrue or misleading statements or omitted relevant information.[26] Lastly, the share company acquires the legal personality by depositing all necessary documents and registration in commercial registrar.[27]

Once the share company acquires legal personality, it issues shares to its subscribers. Shares can be issued either registered or unregistered bearer form and can be converted vise-versa per shareholders' interests unless prohibited by law or company's statutes.[28] The contents and manner of registration of shares are stipulated under articles 330 and 331 of the commercial code. Based on the statutes of the company or agreements of the general meetings, the company may also issue various classes of shares which confer different rights; however it is prohibited to issue the same classes of shares which confer different rights.[29] Among various classes of shares, preferred shares confer holders several priority rights over ordinary shareholders.[30]

1.2 Regulatory and Supervisory Institution

The share company law only provides regulatory and supervisory powers to the Ministry of Trade in the formation, ongoing functions and governance of companies.[31] The Ministry has the following regulatory and supervisory powers on share companies. These are registering newly formed companies and depositing companies' statutes and other periodical reports;[32] regulating crossholdings of shares among holding companies;[33] reduce the remunerations of directors upon the application of shareholders not less 10% of the share capitals of the company[34] and by its initiation or upon the application of shareholders, order to conduct investigations of the companies' scandals and nominee shareholders.[35]

[25] Commercial Code arts (317-322).
[26] Commercial Code arts (308-310).
[27] Commercial Code art 123.
[28] Commercial Code art 325 but the company cannot issue shares before its registration art 327.
[29] Commercial Code art 335.
[30] Commercial Code art 337.
[31] However Banks and Insurance Companies are regulated by National Banks of Ethiopia per article 5(7) of Proclamation to Amend National Bank of Ethiopia Establishment No. 591/2008.
[32] Commercial Code arts 90, 323 and 447.
[33] Commercial Code art 344.
[34] Commercial Code art 353(7)
[35] Commercial Code arts (318-387).

1.3 Basic Ownership Rights of Shareholders

As owners of the company and separated from direct controls, shareholders have rights to exercise all inherent ownership rights provided by laws and companies statutes.[36] They can exercise their rights either in persons or in absentia through proxies.[37] This section describes the basic ownership rights of shareholders in the share company law provisions by classifying in to four categories.

1.3.1 Right to Information

Shareholders have the right to obtain all material and accurate information timely and regularly concerning the governance of the company prior to any meetings so that they can make informed decisions. In principle, share companies are required to publish the name, nature, capitals and head office of the company, the place, date and time of the meetings in the Official Commercial Newspaper and in the legal newspaper.[38] However, when all the company's shares are registered, information of meetings is sent to every shareholders address via post by registered letter at the expense of the company.[39] Any registered shareholder has also the right to require the company to inform him of the meetings by registered letter at his own expense.[40] Notification of the meetings should not be less than fifteen full days for the first meetings and eight full days for subsequent meetings in case where the first meeting failed to hold for lack of quorum.[41] Interested shareholders have also the right to inspect company's documents at head office before the meetings prescribed under articles 406, 417, 422 and 427 of the commercial code.

1.3.2 Rights to Participate and Vote at the Shareholders Meetings

The share company law provides shareholders rights to participate and vote in shareholders meetings. In principle, every share carries one vote;[42] however, there are exceptions to this principle. Companies are not allowed to vote on its redeemed shares.[43] The statutes of the

[36] Commercial Code art 389(2).
[37] Commercial Code art 398.
[38] Commercial Code arts392 (1) and 396.
[39] Commercial Code art 392(2).
[40] Commercial Code art 392(3).
[41] Commercial Code art 395.
[42] Commercial Code art 407.
[43] Commercial Code art 400.

company may also limit the number of voting rights of shareholders.[44] Shareholders may not vote when their interests conflict with company. Directors are also not permitted to vote on resolutions concerning with their duties and liabilities.[45] The memorandum of association may limit holders of preferred shares to vote only matters on extraordinary meetings.[46]

Subject to these exceptions, shareholders have the following voting rights in the shareholders meetings. At the ordinary general meetings they, have the right to participate and approve or reject directors and auditors' report on the balance sheet, the profit and loss accounts, and decided the allocation of dividends.[47] They appoint or remove directors and auditors, determine the amount of their remunerations, approve the issuance of debt securities along with guaranties attached thereto, and after discussion they may amend the accounts of the company.[48] They also authorize or prohibit directors to be partner with joint and several liabilities in competitor companies or to compete against the company on their own behalf or third parties.[49] They vote and take the necessary action on director's direct or indirect business transactions with the company approved by boards.[50] They pass a resolution to institute proceedings against directors whether such issue was on the agenda or not.[51] Shareholders have also the right to participate in extraordinary meetings to amend the companies' statutes.[52] Similarly, holders of classes of shares have the right to approve or reject resolutions passed by general meetings relating to the modification of their classes of shares.[53]

1.3.3 Right to Share the Profits/ Proceeds of the Company

Subject to statutes of the company, shareholders have inherent right to participate in the annual net profit or distribution of the proceeds of the company upon dissolution in proportion to their shares.[54] Shareholders may also obtain fixed or interim interest even without profit during company's preparatory works and construction provided that the

[44] Commercial Code art 408.
[45] Commercial Code art 409(1 &3).
[46] Commercial Code art 336(3).
[47] Commercial Code arts 419(1), 347(1), 350(2), 351(1), 354, 368(1), 369(1&2) and 371.
[48] Commercial Code arts 419(2), 353(1) and 372.
[49] Commercial Code art 355.
[50] Commercial Code art 356.
[51] Commercial Code art 365(1).
[52] Commercial Code art (423-425).
[53] Commercial Code art 426.
[54] Commercial Code art 345(1&2) and 458.

articles of association authorized and fixed the date of cease of such interest payments.[55] They have also preferential right to subscribe new shares in proportion to their number of shareholdings.[56]

1.3.4 The Right to Transfer of Shares or Withdraw from the Company

On one hand, the share company law prescribes shareholders rights to free transfer of shares may be restricted by the articles of association or by resolution of an extraordinary meetings; as well as assignment of shares may also be subject to prior approval of directors.[57] On the other hand, it provides shareholders right to withdraw from the company with the redemption of their shares at average prices on stock exchange or at the price proportionate to the assets of the company when they dissent on the resolutions relating to any changes in the nature, objects of the company or the transfer of head office to abroad.[58]

1.4 Rights of Minority and Foreign Shareholders

In case where there are several groups of shareholders having different legal status in the share company as per article 336 of the commercial code, each group of shareholders have the right to vote and be represented at least by one board of director.[59] Correspondingly, shareholders representing 20% of the capital of the company have the right to elect one auditor under article 368(2) of the commercial code. Moreover, shareholders representing 10% of the share capitals of the company have two rights. First, they have the right to request the court to be called the general shareholders meetings. Second, they have the right to petition to the Ministry of Trade to appoint examiners to investigate and report the scandals of the company; hence the Ministry may require guarantees from petitioners the expenses of the investigations.[60] Conversely, minority shareholders are not permitted to institute proceedings against directors where one fifth of the capitals of the company vote against the resolution.[61] Although, foreign shareholders are not restricted to exercise their inherent rights

[55] Commercial Code art 457.
[56] Commercial Code art 470.
[57] Commercial Code art 333.
[58] Commercial Code art 463.
[59] Commercial Code art 352.
[60] Commercial Code art 381 and 391(2).
[61] Commercial Code art 365(3).

once they become shareholders, at the first place companies may discriminate by issuing shares which are not transferable to foreigners.[62]

1.5 Issuance of Debt Securities and Rights of Creditors

To issue debt securities, companies are required to demonstrate that their capitals are fully paid-up and their first year balance sheets are issued.[63] The contents of the debt security issued by the companies are prescribed under article 433(a-h) of the Commercial Code. Companies are also only allowed to issue debt securities to the extent of their paid-up capitals indicated in the last approved balance sheets. However, the amount may exceed the paid-up capitals where they mortgaged their immovable properties and the issued debentures do not exceed two third of the value of the mortgage or the exceeded amounts are guaranteed by registered securities or by government/public authorities.[64] Like the issuance of shares, debt securities can be issued either in bearer or registered form with different classes that entitle holders various legal rights.[65]

As creditors of the company, debenture holders have the right to engage and vote at meetings called by their agents, company's directors or at least 20% of the same classes of debenture holders.[66] At the meetings, they may discuss and pass resolutions to enforce their loan agreements.[67] The meeting may also approve or reject the debtor company's proposals relating to the modification of the structure of the company; merger with another company; on matters of creditors having preferential right over the existing loans and proposals related to the variation of the terms of the loan agreements.[68] For legal effects, resolutions passed by debenture holders should be presented in the court for confirmation.[69] Finally, debenture holders may elect and represented by one or more agents for the effective exercise of their rights on the debtor company.[70]

[62] Commercial Code art 330(f).
[63] Commercial Code art 429.
[64] Commercial Code art 432.
[65] Commercial Code art 434.
[66] Commercial Code art 436.
[67] Commercial Code art 437.
[68] Commercial Code art 438.
[69] Commercial Code art 441.
[70] Commercial Code arts (442-444).

1.6 Duties and Responsibilities of Directors and Auditors

Since companies are legal persons and separated from shareholders control, they are directed by a board of directors elected by the general assemble of shareholders. In the share company law companies' managements are composed of directors, general manager and secretary.[71] The first boards of directors are appointed by the statutes of the companies and approved by meetings of subscribers for three years. The subsequent directors are elected or removed by shareholders general assembly and they are legible for re-election unless prohibited by company's statutes.[72] The members of directors must range from 3-12, and all are required not only be shareholders of the company but also deposit their shares fixed in the memorandum of association until they left powers.[73] Boards of directors elect the chairman, general manager and secretary. Nevertheless, the general manager is an employee of the company and may not be members of the boards except the articles of association required directors should be managers of the company.[74]

Directors have the core responsibilities of preparing management and meeting minutes; keeping accounts and books as per articles 445-447 of the Commercial Code; submitting directors' remuneration to shareholders for approval;[75] convene meetings of shareholders; set reserve funds required by law and statutes; apply to the court in case where the company failed to pay its debts.[76] Moreover, they have the duty to act with due care and diligence in their overall directing of the company as powers given by the law, company's statutes and decisions made by the general shareholders meetings.[77] Decision of directors require absolute majority and they may not take any decision unless majority of them are present or represented.[78]

To avoid conflict of interests between the company and directors, it provides two types of provisions: prohibited and regulated transactions. In one hand, directors are not allowed to loan agreements with the company nor to be partners with joint and several liabilities in compotator companies or contend against the company directly or indirectly; on the other

---

[71] Commercial Code art 348.
[72] Commercial Code arts 350 and 354.
[73] Commercial Code art 347 and 349.
[74] Commercial Code art 348 and 363(2).
[75] Commercial Code art 361.
[76] Commercial Code art 362.
[77] Commercial Code arts 363 and 364.
[78] Commercial Code art 358.

hand, a director may make transactions with the company with the prior approval of boards.[79] Finally, directors' remuneration is determined by shareholders meetings and company's statutes.[80]

The appointment, remuneration and removal of auditors are similar to directors.[81] Nevertheless, persons mentioned in article 370(1) and (2) of the commercial code are not eligible to be auditors of the company. The major responsibilities of auditors are auditing the company's account, certifying and preparing reports which are submitted to shareholders general assembly;[82] inform to shareholders or public prosecutors for directors' breach of legal and statutory obligations;[83] convening shareholders meetings in directors' failure.[84] Finally, auditors will be liable both civil and criminally if they failed to observe their obligations as per article 380 of the commercial code.

For the third part analysis, the second part of this dissertation will discuss the six minimum standards of OECD Principles of corporate governance and its relevance to the Ethiopian context.

[79] Commercial Code arts 355-35.
[80] Commercial Code art 353.
[81] Commercial Code arts 368, 369, 371 and 372.
[82] Commercial Code arts 374 and 375.
[83] Commercial Code art 376.
[84] Commercial Code art 277.

Part Two

OECD Principles of Corporate Governance

The OECD Principles were first agreed and issued by OECD member states in 1999 after the occurrence of 1997 Asian financial crisis.[85] To address the concerns of the newly developing markets and corporate governance failures, the principles have been revised in 2004. They incorporated inputs obtained from consultations of five Regional Corporate Governance Roundtables and additional special meetings of 43 non OECD and developing countries.[86] Accordingly, the principles reflected the concern and experience of both the OECD and non OECD members including developing countries. They are designed to provide a specific guidance for policy makers, regulators and market players in their endeavor to improve their legal, regulatory and institutional framework for sound corporate governance.[87] They are also nonbinding standards, principle based and an outcome oriented. Consequently, they can be benchmarked and adapted whether or not a given country's legal framework is common or civil law and irrespective of the company's ownership structures and level of economic development. All these make the principles internationally accepted benchmarks and best practices for sound corporate governance.[88] Thus, the principles have relevancy to improve share companies' corporate governance in Ethiopia.

2.1 OECD Principles of Corporate Governance as International Benchmark

The initiatives of OECD member states are at the forefront in the global movement towards the setting of minimum standards of good corporate governance framework.[89] Currently, the principles gained international acceptance and have been approved by different international organizations. The Financial Stability Forum adopted the principles for its "Twelve Key Standards for Sound financial System." The principles provide the basis for cooperation between OECD and non OECD countries. They also form the basis for "World Bank/IMF"

[85] OECD Principles (n17) 9.
[86] Fianna Jesover and Grant Kirkpatrick, 'The Revised OECD Principles of Corporate governance their Relevance to non OECD Countries' (2005) 3. Available at<http://www.oecd.org/dataoecd/41/38/33977036.pdf> last accessed on 12July 2012.
[87] Policy Brief: The OECD Principles of Corporate Governance (2004) 1. Available at <http://www.oecd.org/dataoecd/41/32/33647763.pdf >last accessed 10July 2012.
[88] Grant Kirkpatrick, 'Improving Corporate Governance Standards: the Work of the EOCD and the Principles' (2004) 1. Available at< http://www.oecd.org/dataoecd/45/24/33655111.pdf > last accessed 20 July 2012.
[89] Thomas Clarke, *International Corporate Governance: A Comparative Approach* (Routledge 2007)243.

review of countries corporate governance framework based on "Reports on Observance of Standards and Codes (ROSC)."[90] In this regard, in 2007 the World Bank reviewed the Ethiopian accounting and auditing standards and recommended for the revision of the commercial code provisions.[91] Hence, revisiting and updating the Ethiopian share company law provisions in light of the OECD Principles not only helps the country to comply with the World Bank/IMF review standards but also facilitates its application acceptance to WTO accession. Finally, the Banks of International Settlements (BIS) and International Associations of Insurance Supervisors also recognized the principles.[92] The principles covered six key areas of good corporate governance. Hence, part two of the dissertation briefly discusses the minimum standards of the principles one by one with reference to their relevant annotations.

2.2 Ensuring the Basis for an Effective Corporate Governance Framework

The first areas of the principles are added in the 2004 review. The principles advocate corporate governance framework which comprises legal, regulatory and institutional underpinnings should promote transparent and efficient markets, be consistent with the rule of law and clearly allocate powers among supervisory and regulatory institutions.[93] Consequently, the principles recommended policy makers to formulate an adequate and comprehensive legislative response. The formulated laws and regulations should have the overall economic impact and foster market integrity which meets the new market development and creates incentive to different market players. In doing so, the principles suggested to emphasize on ultimate economic outcomes and assess all alternative policy options that shape the proper functioning of markets. In other words, the newly designed corporate law and regulation should not only be cost effective and enforceable equitably with all market players but also avoid contradictory and overlapping provisions or regulatory gaps. The designed laws and regulations should also be supplemented by voluntary codes and standards provided with clear articulation of their status in scope and applications.

---

[90] Christine A. Mallin, *Corporate Governance* (2nd edn, Oxford University Press2007) 33.
[91] ROSC: Reports on Observance of Standards and Codes Ethiopia (Commissioned Report 2007). Available at <http://www.worldbank.org/ifa/rosc_aa_ethiopia.pdf> last accessed on 21 July 2012.
[92] Bouchez (n18) 110.
[93] OECD Principles I.

In general, the principles advocate that the legal, regulatory and institutional framework of a country that shapes the corporate governance of companies should be adjusted with the new developments of markets.[94]

2.3 The Rights of Shareholders and Key Ownership Functions

The second areas of the principles insist on an inherent ownership rights of shareholders should be promoted and protected by corporate governance framework.[95] Shareholders inherent rights include secured ownership registration, free transfer of shares, obtain all material and reliable information timely and regularly, participate and vote at shareholders meetings and partake in dividends.[96] In case where boards proposed to modify the company's statutes or subscriptions of new shares or extraordinary transactions of the company's assets, the principles recommend shareholders should be fully informed and actively participate before passing such resolutions.[97] Hence, prior to the meetings, shareholders should be fully and timely informed the voting procedures, dates, location, agenda and the issues to be decided. During the meetings, shareholders should have the opportunity to ask questions, put in place issues on the agenda and propose resolutions with certain limitations. They should have the right to nominate and elect boards, express their opinions on boards and key executives remuneration and approve when the compensation are equity based.[98]

The principle also advocates the company's pyramid structures, cross shareholdings and shares with limited or multiple voting rights that allow shareholders certain level of control disproportion to their shareholdings must to be disclosed.[99] The principles further state that market mechanisms for corporate controls should be permitted. However, the rules and procedures governing corporate holdings, mergers and sales of considerable portions of company's assets must be revealed to investors so that they can understand their rights and duties. The prices of such transaction should be also faire enough that protects the interests of all classes of shareholders.[100] In such cases, boards and managements anti takeover

---

[94] Policy Brief: (n85) 2.
[95] OECD Principles II.
[96] OECD Principles II, A
[97] OECD Principle II, B.
[98] *OECD Principle II, C.*
[99] OECD Principle II, D.
[100] OECD Principle II, E.

mechanisms to avoid their accountability to shareholders and the company should be prohibited. Moreover, the principles recommend that institutional investors' exercising of ownership rights should be promoted. Nevertheless, while performing in fiduciary capacity, they should disclose their corporate governance, voting policies and procedures, and how conflicts of interests are being managed.[101] Finally, the principles insist shareholders should be allowed to discuss with each other on matters concerning with their fundamental ownership rights unless engaged for abusive purpose.[102]

2.4 The Equitable Treatment of Shareholders

The third areas of the principles state that the corporate governance framework should equitably treat all shareholders' rights, including minority and foreign shareholders, and in case of violation they should have the right to obtain effective remedies.[103] Treating shareholders equitably builds investors confidence because they understand that their investments within the companies are protected from misuse by corporate insiders. Consequently, the principles recommended both ex-ante and ex-post rights of shareholders. Ex-ante rights includes:-

a) preemptive rights to subscribe new shares;
b) qualified majority on certain shareholders resolutions;
c) use of cumulative voting on the board members election;
d) right to information all the series and classes of shares before their acquisitions; and
e) requirements of prior approval if subsequent changes are made on voting rights attached to those classes of shares.[104]

Moreover, it calls for custodian and nominees of shares should be permitted to cast votes on behalf of their beneficiaries upon the agreed manners and barriers of cross border voting should be avoided. In this regard rules and procedures to convene meetings of shareholders are required to be equitable to all shareholders and any obstacles or expensive costs to cast votes should be eliminated. It also strongly advocates that minority shareholders should be protected from abusive behaviors of insiders trading and abusive self-dealings, including

[101] OECD Principle II, F.
[102] OECD Principle II, G.
[103] OECD Principle III.
[104] OECD Principle III, A.

controlling shareholders transaction with the company.[105] Similarly, any transactions made by board members and executives directly, indirectly or on behalf of third parties are required to be prior approval of boards.[106] In case of violation of these basic ownership rights, the principle maintains minority shareholders ex-post right to institute derivative or class actions unless such rights are abused.

2.5 The Roles of Stakeholders in Corporate Governance

The four areas of the principles urge that corporate governance frameworks should address the concerns of stakeholders provided by laws or contractual agreements. It should also facilitate strong relationships between companies and stakeholders in producing wealth, jobs and the long-term sustainability of companies' capital resources.[107] The principles dictate that the long term sustainability of companies depends on the outcomes of teamwork that integrates different resource providers inter alia investors, employees, creditors and suppliers. They also assert that the rights of these stakeholders provided by the law or contractual agreement should not only be respected but also in case of violations they should be fully compensated.[108] They further suggested employees' engagement in corporate governance should be permitted; however, their degree of engagement may be varied. It may be in board members representation, representation by the workers council to express their concerns on certain key governance decisions or partake in equity ownership plans or share profit depending on national laws and companies corporate governance structures.[109] Once stakeholders are allowed to engage in the governance of the company, they should obtain full and material information timely and regularly for the accomplishment of their responsibilities.[110] Moreover, to tackle unethical conducts and illegal practices within the company, stakeholders and their representatives should be allowed to freely communicate such practices to the boards and their rights should not be affected as a result.[111] Finally, the

[105] OECD Principle III, B.
[106] OECD Principle III, C.
[107] OECD Principle IV.
[108] OECD Principle IV, A and B.
[109] OECD Principle IV, C.
[110] OECD Principle IV, D.
[111] OECD Principle IV, E.

principle urges corporate laws and regulations should be backed by efficient and effective contract and insolvency laws with robust enforcement of creditors' rights.[112]

2.6 Disclosure and Transparency

These areas of the principles states corporate governance frameworks should assure that the disclosure of information is made timely and accurately on all relevant issues regarding internal governance of the company inter alia, financial performance and results, ownership structure and corporate governance.[113] Companies' disclosure and transparency is crucial for shareholders to exercise their ownership rights and for regulators to detect and fix unethical and illegal practices within companies. However, disclosure standards should not be unduly burdensome to companies or jeopardize their competitive position in the market. For this reason, the principles recommend disclosure should incorporate but not limited with the following information. The financial and operation results (the balance sheet, profit and loss accounts and the cash flow statements); objectives of the company; major ownership structures and voting rights; boards and senior managements remuneration policy; boards selection process, qualification, their independence and directorship to other company; related parties transactions; matters on employees and stakeholders; corporate governance structures; procedures and policies, and how they are implemented.[114] The principles stress that the disclosed information should be not only prepared in "accordance with high quality financial and non financial accounting standards" but also audited by independent, competent and qualified external auditors.[115] Here, external auditors are accountable to shareholders and the company, and owed fiduciary duties to their auditing professions.[116] It also advocates that the means of disseminating the prepared information should be equitable to all users in time and cost effective to access.[117] Finally, the principle calls for the disclosed information should be backed by analysts, brokers and rating agencies for better investors' decision making. However, their services should be regulated to manage material conflicts of interests with the company.[118]

[112] OECD Principle IV, F.
[113] OECD Principle V.
[114] OECD Principle V, A.
[115] OECD Principle V, B and C.
[116] OECD Principle V, D.
[117] OECD Principle V, E.
[118] OECD Principle V, F.

2.7 Boards Responsibilities

The last areas of the principles calls for boards to strategically direct the company, effectively supervise managements and accountable to shareholders and the company.[119] In guiding the company and overseeing the managements, boards' structures and compositions may range from executive and non executive boards to supervisory and management boards or additional statutory boards for auditing roles. Accordingly, the principles are designed to apply to all board structures and advocate boards should perform "in a fully informed basis, in good faith, with due diligence and care," and in the best interest of the company and shareholders.[120] This requirement imposes two fiduciary duties on the boards: the "duty of care and duty of loyalty." The "duty of care" requires boards strategically guiding of the company and overseeing of the management. Conversely, the "duty of loyalty" requires boards' interests to pursue and their stewardship towards the shareholders and the company.

To implement the "duty of care and loyalty" the principles recommended boards should handle all classes of shareholders in an evenhanded manner when their judgments affect those classes of shareholders differently.[121] In addition, they are required to apply high standards of codes of conduct and consider the interest of company's stakeholders.[122] The principle lists the core functions of boards that are required to insure:-

a) compliance of laws and standards;
b) the overseeing of internal control systems for financial reporting;
c) monitoring and controlling of conflicts of interests;
d) proper board members nomination and voting process;
e) the alignment of senior managements and boards remuneration with the long term interest of shareholders and the company; and
f) monitoring companies' transparency and disclosure.[123]

To implement these core functions, the principle urges boards to apply objective and independent judgments.[124] For boards' objective and independent judgments, they are required to assign non executive board members. Their responsibilities are to insure the

[119] OECD Principle VI, P.
[120] OECD Principle VI, A.
[121] OECD Principle VI, B.
[122] OECD Principle VI, C.
[123] OECD Principle VI, D.
[124] OECD Principle VI, E.

integrity of financial and non financial reporting systems; evaluate related party transactions; nominate board members and senior managements and determine their remuneration. In case where board committees are organized, their mandate, composition and working procedures should be clearly articulated and disclosed to shareholders. And each member of the boards is required to demonstrate their commitments to the responsibilities entrusted to them. For their collective and overall responsibilities, boards are required to access accurate, material and timely information before making any decisions.[125]

The above two parts briefly discussed the Ethiopian share company law provisions in part one and the standards of OECD Principles of corporate governance in part two. Then, part three will critically analyze the share company law provisions in light of the standards of OECD Principles.

[125] OECD Principle VI, F.

Part Three

Revisiting and Updating the Ethiopian Share Company Law Provisions in Light of OECD Principles of Corporate Governance

This part of the dissertation critically analyzes the share company law provisions discussed in part one in light of the OECD Principles discussed in part two. For convenience, it organizes and analyzes the share company law provisions corresponding with the structures of OECD Principles. This part also identifies and demonstrates the loopholes and drawbacks of the share company law provisions that should be revisited and updated in light of the relevant OECD Principles of corporate governance.

3.1 Enhancing the Legal and Regulatory Framework

As discussed previously, the OECD Principles urge government policy makers should craft their legal, regulatory and institutional bases that ensure the effective and efficient corporate governance framework. It should foster market integrity and create incentives to different market players. The principles suggested three prerequisites for effective corporate governance framework. First, it should integrate effective corporate laws, regulations and voluntary codes and standards. Second, it should avoid overregulation and regulatory vacuum, as well as be to cost effective, equitably enforceable to all market players. Third, it should be supplemented by clearly allocated regulatory and supervisory powers with robust implementing institutions.

Nonetheless, as noted in part one, the legal frameworks of some share company law provisions apparently failed to create incentives to market players and also failed to encourage transparent and efficient markets. To demonstrate these, the provisions requiring minimum capitals and memberships for the formation of share companies are inappropriate and unnecessary.[126] These requirements not only discourage new pools of resources and investments but also contravene international best practices. Currently, several countries have abolished minimum capital requirement for two reasons.[127] First, it is blurred and confusing

[126] Commercial Code arts 306(1) and 307(1).
[127] USID: 'Ethiopian Commercial Law & Institutional Reforms and Trade Diagnosis' (January 2007) 31. Available at < http://egateg.usaid.gov/sites/default/files/ethiopia.pdf > last accessed on 13 July 2012.

because capital requirements are prone to accounting manipulation. Second, such provision neither protects shareholders nor creditors in the first place. Similarly, minimum shareholding requirement has two shortcomings. On one hand, it creates obstacles to form new share companies by less than the legal limits. On the other hand, it compels incorporated companies to winding up by the fact that company's shareholder memberships are less than the legal limits.[128] However, in practice companies may have less than the legal limit shareholders but may have several wholly owned subsidiary companies. Therefore, compelling to wind up such companies by mere reason of the reduction of membership to the legal limits is clearly unfeasible to the modern realities of corporate structures.

Second, the share company provisions have loopholes in the requirements of initial offering of shares to the public. The requirements of the initial offering of shares to the public provided from articles 317-323 of the Commercial Code are defective and inadequate. First, the contents of the prospectus under article 318 do not require an audit opinions of the financial information incorporated in the prospectus. Second, there are no requirements for approval and registration of the draft prospectus by regulatory authority before issued and offered to the public.[129] In addition, the offering of additional new shares in article 469(5) or debt securities provided in articles 429-433 of the commercial failed to require financial reports to be prepared based on established accounting and auditing standards and audited by independent auditor.[130] It also neglected to clearly articulate the liabilities of founders/issuers where the offered prospectus to the public contained untrue or misleading statements or omitted the relevant information for investors' investment decisions. All these legal and regulatory loopholes of the share company law provisions will have potential impacts on investors' investment decisions. This in turn not only creates loss of investors' confidence in the Ethiopian capital markets but also results in market inefficiency, raises the cost of capitals and inefficient use of scarce resources in the country.

Third, the share company law provisions are not supplemented by other legislation. Including security laws, regulations, and voluntary codes and listing standards. Only two sets of laws regulating banking and insurance companies exist.[131] For this reason, there are no stock

[128] Commercial Code art 311.
[129] ROSC: (n91) 16.
[130] Commercial Code art 469(5).
[131] A Proclamation to Approve Business Banking Proclamation No. 592/2008 and A proclamation to Provide for the Licensing and Supervisions of Insurance Business Proclamation No. 86/94 respectively.

exchanges or alternative trading systems for trading of shares in the capital markets.[132] Hence, in Ethiopia company shares can be only traded by direct dealings between the shareholders and investors or informal contacts between the company and investors.[133] Therefore, the legal and regulatory frameworks should allow the establishments of organized stock exchanges and alternative trading systems by considering the country's business culture. The establishment of stock markets will have crucial roles for the existence of strong capital markets in Ethiopia. They will serve as markets organizer (companies share liquidity), information distributors (between investors and issuers), standard setters (setting the listing standards for companies), regulators (regulating their members based on sated standards) and as business compotators.[134]

Forth, the share company law provides regulatory and supervisory powers solely to the Ministry of Trade. It also failed to mandate sufficient powers to the Ministry for regulating public companies from their incorporation to ongoing operations and corporate governance. The Ministry has very limited regulatory powers: registering and receiving companies' reports; regulating share transfers between holding companies; reducing boards' remuneration and ordering investigation of companies' scandals based on shareholders petition.[135] The Ministry's supervisory roles are almost omitted in the provisions. Even after the finding of the investigation of companies' scandals, there is no provision that allows the Ministry to take appropriate disciplinary action on failure companies. This regulatory framework is inadequate to protect investors and to avoid market inefficiencies.

Above all, the analyses demonstrated that the Ethiopian legal, regulatory and institutional framework is flawed to provide incentives to market players and failed to foster market integrity and promote effective and efficient corporate governance.

[132] Negash (n1) 11.
[133] USID (2007): (n127) 28.
[134] Andreas M. Fleckner, 'Stoke Exchange at the Crossroads' (2006) 74 Fordham Law Review 2541, 2546; Jonathan R. Macey and Maureen O'hara, 'Regulating Exchanges and Alternative Trading Systems: A Law and Economics Perspective' (1999) 28 Journal of Legal Studies 17, 22.
[135] Commercial Code (n 32-35).

3.2 Strengthening the Basic Rights of Shareholders

Generally, in part one the discussion on the share company law provisions show the basic rights of shareholders. These are: - right to ownership registrations, right to information, right to pare take and vote in the meetings of shareholders, right to transfer or sale shares and participate in the profits or proceeds of the company. These ownership rights of shareholders are similar to the OECD Principles discussed in part two. However, except the rights to share the profits of the company, the other basic ownership rights of shareholders are not properly articulated. Thus, this section analyzes each of the basic shareholders rights on by one in light of the corresponding OECD Principles.

Registrations of ownership rights in the share company law provisions are two types: registered and unregistered ownership rights.[136] In case where the company's shares are bearer they are not registered and holders of bearer shares will not have secured ownership rights as advocated by OECD Principle II (B). Thus, any holders of bearer shares in bona fide may exercise the ownership right no matter how he/she obtained from illegal holders.[137] Further, allowing companies to issue bearer and unregistered shares may contribute the concentration of anonymous ownership within the company. This in turn will have two drawbacks. Firstly, it hampers company's transparency by creating opaque companies structures. Secondly, it leads to tax evasion and misuse of the company's assets by corporate insiders to the detriment of minority shareholders and the company. Even to participate in shareholders meeting and exercise voting rights, holders of bearer shares are compelled to deposit their shares in the company before meetings of shareholders.[138]

Information rights are another main tool for shareholders to make informed decisions in shareholders meeting. However, as noted in part one of the share company law provisions, the modes, materiality and accuracy of information disclosed to shareholders meeting are deficient and inadequate. The methods of disclosure prescribed in article 392 are inadequate and in terms of cost effectiveness they are burdensome for the company. Correspondingly, the means of an accessing company's information provided under articles 392(3), 406, 417, 422 and 427 of the commercial code are expensive for shareholders; rather it should be

[136]Commercial Code arts 325(1) and 331.
[137] Commercial Code art 340(2).
[138] Commercial Code art 402.

supplemented by requiring companies to publish full and material information in their company's website, public media and send to each shareholder via e-mails. The share company law also failed to requires the disclosure of relevant information inter alia, voting procedures, the agenda of the meeting and the issues to be decided at the meetings.[139] Especially when the board plan to alter the basic structures of the company such as amendments of companies' statutes, issuance of additional equity/debt securities or extraordinary transactions of the company's assets, full and timely disclosure of such information is not explicitly provided. Unless shareholders are fully informed the voting procedures, the agenda of the meeting and the issues to be decided at the meeting, it is hardly possible for them to make informed decisions at meetings of shareholders.

Shareholders voting rights are the main tools for shareholders to influence the company by participating and voting in the meetings of shareholders. As pointed out in part one, shareholders are entitled to appoint/remove directors and auditors; determine the amount of directors' remuneration and review their transactions with the company; pass resolutions to institute proceedings against liable directors; vote on the amendments of company's statutes and approve the changes made on classes of shares by class holders. However, some prerequisites for shareholders to make better decisions in the meetings are not provided. These includes, allowing shareholders the right to ask questions, to put in place issues in the agendas and with certain limitations propose resolutions in the meetings.[140]Similarly, it cannot provide shareholders the base to participate in the board nomination process before election. This enables shareholders to identify the qualified and appropriate board nominees. It also failed to include their voting rights to via emails in absentia.[141]

The share company law provisions also impose several voting caps that limit shareholders voting rights irrespective of their shareholdings in the company contrary to "one share one vote rules".[142] In fact, several European countries corporate laws adopt such voting restriction rules as opposed to United States "one share one vote rules."[143] Since the commercial code of Ethiopia patterned from the French commercial code, it imposes several voting caps on

---

[139] Commercial Code art 396; OECD Principle II B (1).
[140] Commercial Code art 397(2) stated the meetings may not discuss issues other than the agendas prepared by person calling the meetings; OECD principle II B (2).
[141] OECD Principles II C (3 and 4).
[142] Commercial Code (n42-46).
[143] Klaus J. Hopt, 'Comparative Corporate Governance: The State of Art and International Regulation' (2011) 59 The American Journal of Comparative Law 1, 47

shareholders. In this case, the OECD Principles neither take the position of "one share one vote rules" nor voting caps.[144] Nevertheless, two drastic disadvantages are identified in provisions that restrict the number of voting rights in shareholders' meetings. First, they diminish and redistribute shareholders control ownership over the company in proportion to their investments. Second, they hamper their incentives to pare take in the meetings of shareholders.[145]

Before shareholders pass resolutions, the share company law failed to require full disclosure of the rules and procedures governing the holdings of corporate assets in the capital markets inter alia, mergers and extraordinary transactions. Such transactions play pivotal roles in the capital markets where they are fully disclosed to investors, executed in transparent and efficient manner and their prices are aligned with the interest of all classes of shareholders. Institutional investors under articles 328 and 398(2) of the commercial code have voting rights through proxies. However, they may not vote in fiduciary capacity where their interests are in conflict with the company as per article 409(1) of the commercial code. On the other hand, the OECD Principles promote institutional investors to vote in meetings of shareholders with the preconditions of disclosing their corporate governance, voting policies and procedures, and how their conflicts of interests are being managed.[146]

Another basic ownership right of shareholders is the right to transfer/sale of shares or withdraws from the company. Free transferability or trading of shares in open or organized stock exchanges is the main distinct features of public companies. Free transfer of share facilitates the liquidity of public companies shares, so that investors can easily buy and sell shares in the capital markets. Contrary to this rule, article 333 of the commercial code allows the company's statutes or resolutions of extraordinary meetings not only restrict the free transfers of sharers but also subject assignment of shares to approvals of boards. These restrictions will have two drastic shortcomings. First, it limits shareholders exercise of their key ownership rights. Second, it impedes liquidity of the company's shares in the capital markets. Hence, the existence of this provision in the share company law is unfeasible with the distinct features of public companies.

[144] OECD Principle III A (1).
[145] OECD Principles D 36.
[146] OECD Principles II, F (1&2).

Shareholders rights to withdraw or exit is provided under article 463 of the commercial code in cases where any changes are made in the nature or objects of the company or the company's head office are transferred in abroad. Likewise, such rights are permitted in a narrow circumstance in others corporate laws on the assumption that greater numbers of shareholders exit may affect the capital integrity of the company.[147] However, once the share company law allows shareholders rights to exit from the company, establishing stock exchanges and prescribing mandatory takeover bid provisions are very essential to guarantee shareholders full redress of their investments.

3.3 Improving the Equitable Treatments of Shareholders and Protections of Minority Shareholders

There are instances where boards, managements and controlling shareholders may participate in activities that adversely affect the interests of the company and minority shareholders. Thus, the principle of boards' fairness is crucial in corporate governance. It requires boards and corporate managers to equitably treat all shareholders and protect companies' assets against misuse by corporate insiders.[148]

As illustrated in part one, the share company law prescribe some relevant provisions regarding the equitable treatments and protection of minority shareholders. The same series and classes of shareholders have the same rights and any subsequent changes require prior approval by class holders.[149] Shareholders have right to subscribe additional new shares.[150] They have the right to qualified majority or unanimous vote on amendments of the company's statues.[151] They have the right to withdraw from the company subject to prescribed preconditions.[152] Shareholders representing 10% of the share capitals of the company have also the right to call shareholders general meetings pursuant to article 391(2) of the commercial code. Groups of shareholders having different legal status have the right to

[147] Klaus (n143) 47.
[148] Clarke (n89) 245.
[149] Commercial Code arts 335 and 426.
[150] Commercial Code arts 245(4) and 470(1).
[151] Commercial Code arts (423-425).
[152] Commercial Code art 463.

elect at least one representative as a board member[153] and shareholders having 20% of share capitals of the company have also the right to appoint one auditor.[154]

The last two share company law provisions are called cumulative voting systems. They assist minority shareholders to strengthen their voice within the company by electing their representatives in board members and auditor proportion to their shareholdings.[155] These are exceptions to ordinary voting systems which confer controlled shareholders to elect the whole board members and auditors.[156] All the above provisions are to some extent incompliance with the standards of OECD Principles III.

However, since providing adequate basic ownership rights of shareholders are prerequisite for incentivizing boards to improve the company's efficiency and solid financial markets, the current share company law provisions should be strengthened. It should prescribe additional ex-ante and ex-post provisions that enhance the equitable treatments of shareholders and the protection of minority shareholders. In these case, shareholders voting rights should be extended by mail, custodian or nominee of shares (OECD Principles III, A (3and5) of Annotations. The share company law under article 401 also stipulated another hindrance that compels shareholders to deposit their shares before the general meetings. This requirement has two disadvantages. First, it imposes unduly impediments to shareholders to cast votes. Second, it has the potential means for controlling shareholders to block minority shareholders from selling their shares for certain days.[157]

The main challenges in public companies corporate governance is the misuse of companies' assets by majority shareholders to the detriment of minority shareholders and the company.[158]In this case, the share company law provisions had loopholes. It failed to adequately protect minority shareholders from corporate insiders and abusive self-dealings by

[153] Commercial Code art 352, however this provision is unclear what does legal status mean? Does it mean the classes of shares under arts 333,336 and 337? Or shareholders divided into different groups within the same class?
[154] Commercial Code art 368(2).
[155] Jeffrey N. Gordon, 'Institutions as Relational Investors: A New Look at Cumulative Voting' (1994) 94 Colum L Rev 124,126-127.
[156] Charles W. Steadman and George D. Gibson, 'Should Cumulative Voting for Directors be Mandatory? - A Debt (1995) 11 Bus Law 9.
[157] Fekadu (n7) 17
[158] Yu Hsin Lin, 'Controlling Shareholders: Do Independent Directors Constrain Tunneling In Taiwan? (2011) 12 San Diego Int'l L J 364; Victor Zitian Chen, Jing Li and Daniel Shapiro, 'Are OECD Prescribed Good Corporate Governance Practices' Really Good in an Emerging Economy?' (2011) 28(1) Asian Pacific Journals of Management 105, 116.

or in the interests of majority shareholders directly or indirectly. Abusive self-dealings and insider trading by controlling shareholders can be exercised in the forms of electing their family or friends in board members, participating in related party transactions, pursuing personal and political agendas at shareholders meetings and extracting the profits of subsidiary companies in pyramid business structures.[159] Such activities of controlling shareholders are identified as impediments of the development of capital and financial markets. As a result, the OECD Principles III (B) called for policy makers to prohibit such activities and fill the gaps. Hence, the share company law has to provide legal protections to minority shareholders in two ways. In one hand, impose fiduciary duties on controlling shareholders. On the other hand, require review of their transactions with the company by independent directors coupled with full disclosure and faire accounting treatments.[160]

The share company law prohibits directors' loans and any business transaction with the company directly or indirectly requires a prior approval of boards and auditors notice. However, it neglected to include the general managers. Especially, the gaps become apparent when as per article 348(3) of the commercial code the general managers are not members of the boards. Consequently, by using this loophole, general managers may abusively transact with the company without disclosure and subject to prior approval of boards. It also missed to cover the director's transactions with the company on behalf of third parties and their families. These loopholes are not only detrimental to minority shareholders but also to the whole shareholders and the company. Similarly, the share company law failed to provide to minority shareholders rights to derivative actions against the directors or controlling shareholders resolutions or third parties on behalf of the company once they have reasonable ground to believe that their rights are violated (OECD Principles III, A (2) Annotation). Contrarily, article 365(3) of the commercial code blocked minority shareholders right to institute proceedings against the liable directors where one fifth of share capitals of shareholders vote against the resolution.

Finally, Fekadu Petros also clearly demonstrated the inadequacies of minority shareholder protections under the share company law. He took five criteria adopted by authors La-Porta, Lopez-de, Shleifer and Vishny and six criteria adopted by author Pistor's. After evaluated the

[159] Chen, Li and Shapiro (n145) 116.
[160] OECD: '*Related Party Transactions and Minority Shareholder Right*' (2012) 27 OECD Publishing at <http://dx.doi.org/10.1787/9789264168008-en >last accessed 28July 2012.

two different criteria developed by those authors one by one corresponding with the relevant share company law provisions, he concluded that the level of minority shareholder protections under the Ethiopian share company law only comply with two of both the five and six criteria.[161]

3.4 Addressing the Interests and Roles of Stakeholders within the Share Company

As noted previously, corporate governance framework integrates private voluntary internal governance of the company and mandatory regulations of external governance of the company. Both internal and external governance framework intends to ensure the effective functioning of companies in the creations of wealth by minimizing costs. To attain these corporate objectives, there are two long lasting debates by legal scholars and policy makers in shaping the structure of corporate governance framework and the roles of companies. These debates are "shareholders' primacy approach an Anglo- American model" in one hand and "stakeholders' primacy approaches Germany and Japanese corporate governance models" on the other hand. Berle, one of the leading proponents of the first approach dictated that boards and companies managers should direct the company for the sole interests of maximizing shareholders profit by disregarding the interests of stakeholders.[162] On the other hand, Dodd proponents of the second approach contended that boards should direct the company not only for the interests of shareholders but also for the interests of various stakeholders who make "firm specific investments" within the company.[163] In the second models, bank creditors and employees are entitled to represent in board members and other stakeholders have also an influential voice in the governance of the company.

However, through time these two contending approaches converge into another theory called an "enlightened shareholders value" approach. According to this approach, for the long term profit maximization of shareholders and sustainability of the company, the decisions of the board should align the interest of shareholders profit maximization with the interest of

[161] Petros (n7) 16-22.
[162] Adolf A. Berle, 'Corporate Powers as Powers in Trust' (1931) 44 (7) Harvard Law Review 1049.
[163] E. Merrick Dodd, "For Whom Are Corporate Managers Trustee?" (1932) 45(7) Harvard Law Review 1145, 1149; Janis Sarrat, 'Governance versus Divergence, Global Corporate Governance at the Crossroads: Governance Norms, Capital Markets & OECD Principles for Corporate Governance' (2002) 33 Ottawa Law Review 177, 196-20; Luka, (n 20) 5-7.

stakeholders.[164] Recently, this approach is to some extent reflected even in the "Anglo-American corporate governance model." For instance, in United States more than 25 States enacted "constituency statutes" which permit boards to take into account the concerns of stakeholders in their decisions.[165] Similarly, the United Kingdom Companies Act requires boards to promote the interests of stakeholders.[166] However, in both cases their statutes failed to clearly articulate stakeholders substantive and procedural enforceable rights in the corporate governance of the company.

Similarly, the OECD Principles discussed in part two apparently takes the position of the "enlightened shareholders Value" approach. They recommended corporate governance frameworks should address the interests of stakeholders provided by laws and contracts. Once national laws and contractual agreements addressed stakeholders' interests, they should obtain all reliable and material information timely and regularly in order to proactively participate in company's corporate governance process. In case where their rights are violated, they should be fully compensated. The principles particularly emphasised that to enhance companies' performances, employees should be allowed to engage in the corporate governance of the company. Participation of employees may vary board member representations or consulting representatives of workers council on core company decisions or participate in the company's shares or profits depending on national laws. The principles further advocate corporate governance frameworks are expected to have effective and efficient insolvency laws and robust enforcement of creditors' rights.

From these analyses and part one discussions, the share company law provisions ostensibly adopted the traditional "Anglo- American models" of corporate governance of shareholders' primacy approach. As a result, it entirely disregarded the interests of stakeholders within the company except rights of creditors. Only company's creditors are permitted in certain circumstances to participate and vote in meetings called by their representative, company's directors or by 20% of debt holders on matters related to the effective enforcement of their

[164] Virginia Harper Ho, '"Enlightened Shareholders Value": Corporate Governance Beyond the Shareholders and Stakeholders Divide' (2010) 36 J Cop L 59, 62.
[165] Sarrat (n163) 216.
[166] Companies Act of 2006(UK) Sections 172(1) provides companies' directors have the responsibility to promote the interests of employees, customers, suppliers and companies operations affect on the community and the environments.

rights on debtor companies.[167] Correspondingly, companies' directors are liable to creditors under article 366(1) when they failed to preserve the assets of the company. Under articles 362, 363 and 364 of the commercial code, directors are only accountability to the laws, shareholders and the company. These provisions entirely disregard and failed to address the interests of employees, suppliers, customers, the community and environments as a whole required by the current United Kingdom Companies Act of 2006 and OECD Principles IV.

Here, one may argues that as long as directors are accountable to the company and the law, the interests of stakeholders are recognized under the share company law impliedly. Nevertheless, it is undeniable that with the exception of creditors, other stakeholders have no recognized substantive or procedural enforceable rights in the share company provisions. Unless stakeholders' interests are addressed and their roles of engagement are clearly articulated, they may not claim to engage in the corporate governance of the company. In particular, employees and other stakeholders should be allowed to communicate with boards when there are malpractices within the company. It is obvious that malpractices by company managers not only detrimental to stakeholders and the company but also have potential risk to an overall country's financial soundness and economic developments.

In contrast, article 5 of the Ethiopian National Bank Directives unequivocally prohibited bank employees from board members representation.[168] From this, it is reasonable to infer that the policy objective of Ethiopian corporate governance framework declines to address the interests and roles of stakeholders in the corporate governance of the company. At least the Directive should allow companies to determine whether or not employees are allowed to be represented at board members. Conversely, such clear prohibition will have disincentive for employees to apply their human capitals in the banking companies.

Since cooperation between stakeholders and companies are important to generate wealth, jobs and long run sustainability of companies in the country, the share company law should address the interest of stakeholders. More importantly, Ethiopian companies are unsophisticated, labour intensive and lacks credit access. As a result, addressing stakeholders' interests and promoting their active cooperation with the company will be essential for the

---

[167] Commercial Code (n 66-68).
[168] Licensing and Supervisions of Banking Business, Limits on Boards Remunerations and Number of Employees Who Set on Bank Board Directive No. SBB/49/201. Available at <http://www.nbe.gov.et/pdf/directives/bankingbusiness/sbb-49-11.pdf >last accessed 22 July 2012.

long term shareholders profit maximization and companies' financial sustainability. On the other hand, the long term shareholders profit maximization and companies' financial sustainability would be at risk unless the share company law provisions adequately address stakeholders' interests within the company.

3.5 Require Minimum Disclosure and Transparency Standards

Companies' transparency is among the four pillars of corporate governance.[169] It requires timely disclosures of all relevant and accurate information that reflects the "true and faire view" of the company's financial position and corporate governance. Disclosure requirements comprise both mandatory laws and voluntary codes. In both cases, a strong corporate disclosure regime will have three advantages. First, it enhances companies' transparency. Second, it enables shareholders to make informed decisions and to monitor boards' stewardship towards the company and themselves. Third, it serves as main tools for regulators to supervise and control corporate malpractices for the protection of investors and avoiding market inefficiencies. Therefore, a strong disclosure corporate governance framework assists to attract capitals and foster investors' confidence on the capital markets whereas poor and inadequate corporate disclosure deter the proper functioning of capital markets, raise costs of capitals and result in poor allocations of resources.[170]

In Ethiopian corporate governance framework context, disclosure and the transparency of companies are neglected and almost impossible at the current situation.[171] The share company law provisions discussed in part one failed to clearly articulate the minimum standards of companies 'disclosure of all relevant and reliable financial and non financial information timely and regularly. In addition, there are no other mandatory or voluntary disclosure standards in the country.

Financial and non financial disclosure requirements in the share company law provisions noted in part one is insufficient and defective. The financial disclosure requirements provided under 419(1), 446, 447 and 448 of the commercial code failed to comply with international

[169] Clarke (n 89) 245.
[170] Jeans Jacques Du Plessis, Anil Hargovan and Mirko Bagaric, *Principles of Contemporary Corporate Governance* (2nd edn Cambridge University Press, New York 2011) 341-342.
[171] Petros (n7) 2.

financial reporting standards and best practices (OECD Principles V (B&C)). The financial reports required by these provisions only cover balance sheets and profit and loss accounts. They neglected other important components of financial reports (companies' cash flows and income statements, and any equity changes, recognized gains or losses statement).[172] Moreover, the share company law provisions had loopholes to require auditors to apply established accounting and auditing rules and standards. It also failed to require independently audited financial reports. Further, even company's auditors have no established accounting and auditing rules and standards in the country to apply in their auditing functions.[173] Unless independently audited and prepared based on established accounting and auditing rules and standards, it is hardly possible to expect that the financial statements truly and fairly represents the company's financial position and performance.

Similarly, non financial disclosures are very limited and only included publishing the name, nature, capitals, head office and the place of the meetings in the commercial newspaper as per articles 392(1) and 396 of the commercial code. However, as noted in part one, these disclosure requirements are not applicable when all shareholders are registered shareholders. The disclosure of shareholdings between parent and subsidiary companies as per article 344 of the commercial code and disclosure of companies directors' civil status, professions and their directorship to other companies as per article 359 of the commercial code. These non financial disclosure provisions missed the basic elements of disclosure standards. These includes, companies' ownership structure and voting rights, related parties' transactions, companies' objectives and potential risk factors, corporate governance structures, procedures and policies and how they are implemented (OECD Principles V, (A)2-8)). Such disclosures are vital for investors to decide whether or not to invest in a particular company. More severely, there is no channel of disseminating even these limited companies' information to the public. Rather, they are kept in the companies or the registrars of the Ministry of Trade. So there is a complete information asymmetry between investors and companies in the current corporate governance framework of Ethiopia. Thus, there should be minimum mandatory and voluntary disclosure standards requirements that do not burdensome to the companies or endanger their competitiveness in the markets.

---

[172] ROSC (2007): (n 90) 6 at foot note (n 9).

[173] ibid 12.

3.6 Expand the Duties and Responsibilities of Boards and Auditors

As discussed in part two, boards have given three broad responsibilities in the governance of the company. They are responsible to strategically directing the company, overseeing of managements and stewardship towards the shareholders and the company. In doing so, their composition and structures may be one tier, two tiers or additional statutory board structure. In terms of board member compositions, the share company law contains controversial provisions. There may be three types of board structures under the share company law. First, article 348 (3&4) of the commercial code clearly stipulated that the general manager is an employee of the company and may not be members of the boards. Therefore, in this case all board members become none-executive. Second, article 363(2) of the commercial code provides that the articles of association should determine whether all boards or one/more board member are managers of the company. In this provision, there will be two possible board structures. In one hand, in case where the articles of association assign all board members to be managers of the company, all the boards' composition become executive directors. On the other hand, in case where the articles of association only specifies one/more directors as manager of company, the rest of board members are non executives and the composition becomes executive and non- executive boards. Thus, the two provisions seem to contradict and needs to harmony to avoid confusion. Especially, it will be more difficult for boards to make objective and independent judgement when all boards are assigned by articles of association as managers of the company pursuant to article 363(2) of the commercial code.

Accountability of boards is among the four pillars of corporate governance and hence they are required to effectively overseeing managements and accountable to shareholders and the company.[174] As noted above, boards have two fiduciary duties while discharging their responsibilities: "duty of care and duty of loyalty." Duty of care refers the possible best performance of boards in the discharging of their duties entrusted on them whereas "duty of loyalty and faire dealings" refers the supremacy and prevailing of the interests of shareholders over the boards.[175] Boards of directors not only under article 364 (3) have a general duty to perform with due care in overseeing the managements of the company but also they have the responsibility to demonstrate that they are acting with due diligence and

---

[174] Clarke (n89) 245.

[175] Maria, Aluchna, '*Corporate Governance- Responsibilities of Boards'* in Guler Aras and David Crowther *(eds), A handbook of Corporate Governance and Social Responsibility* (Gower Publishing Ltd, England 2010) 161-162.

care as per article 364 (5) of the commercial code. Hence, in this case the share company law is in compliance with OECD Principle V (A). However, the relevant requirements of act in fully informed and a bona fide basis are missed. Both these to requirements are crucial for boards to discharge their duties with “due care and diligence,” especially those boards who are not executive members. In the absence of fully informed basis, it would be difficult for boards to act upon with “due care and diligence.”

As discussed in part one, article 358 of the commercial code requires boards decisions must be taken with an absolute majority. Nonetheless, this article only provides the quantitative and missed the qualitative requirements of board decisions. Since the decisions of the board may affect different classes of shareholders, they should make objective and independent judgments which align the interests of all shareholders with the stakeholders (OECD Principles VI, (B&C)). So in this case, the share company law should make clear that board decisions must be not only absolute majority but also treat all shareholders equitably and take into account the interest of companies’ stakeholders. Act in due care and deal in fairly (loyalty) also requires boards to establish and apply ethical standards in the company. In this regard, the share company law provisions ignore to prescribe requirements of boards to adopt an appropriate ethical code of conduct to evaluate their own acts and companies managers.

The core functions of directors discussed under article 362 (a-g) of the commercial code are more procedural and neglected substantive duties and functions of boards. This provision failed to prescribe how boards strategically direct, review companies risks policy, overseeing managements and the effective compliance of the company’s governance practices. It also failed to set out their roles in nomination and election of board members; supervising and managing conflicts of interests with the company and corporate insiders, and monitoring company’s disclosures (OECD Principles VI, D).

Even though article 361(1) of the commercial code requires boards’ balance sheet to clearly show the total amount of remuneration, it failed to align with long run interests of shareholders and the company. Unless boards’ remuneration policy shows such alignment, shareholders may not properly determine the boards’ remuneration. Similarly the share company law failed to state how managers’ remuneration is determined. Especially, as per article 348(3 and 4) of the commercial code managers are outside board members, failing

clearly articulate may have potential impacts on the company's transparency and may result in managers corporate abuse.

Key functions of boards to review related parties transactions other than directors are not stated in the share company law provisions.[176] Needles to say, the accounts and books prepared under 362 (b & c) of the commercial code are not audited by independent auditor and failed to comply with the international financial reporting standards. Without accounting and auditing standards and independent auditor, it would be difficult for directors to ensure the integrity of the company's accounts and financial reporting systems.

Independent and objective judgements in corporate affairs are essential elements for boards' stewardship towards shareholders and the company. To deliver independent and objective judgements and avoid conflicts of interests, the existence of non-executive and independent board members in the company is crucial. In this case, the separation of chairman man of boards and manager pursuant to 348(1&3)) of the commercial code is one step. However, as illustrated in the above paragraph, there is the possibility that all board members are executive directors as per article 363(2) of the commercial code. In such case, there will be apparent conflicts of interests when executive boards review their own transactions with the company pursuant to article 356 of the commercial code. Board members are collectively responsible to exercise their duties and responsibilities according to the law, the company's statutes and resolutions of shareholders meeting under article 364(1) of the commercial code. This provision imposes on boards' cumulative responsibility though they may act individually.[177]

In the case of auditors, the share company law has two drastic loopholes. First, it failed to require auditors to carry out their accounting and auditing functions based on established rules of accounting and auditing standards. Second, it failed to require minimum qualification to be eligible an auditor or holding a practicing license issued in accordance with the regulations of the country's accountancy professions. Finally, the share company law also failed to provide boards and auditors liability of failures to observe the sated accounting, auditing and financial reporting

[176] Commercial Code art 356.
[177] John Carver, *Boards that Makes the Difference: A New Design for Leadership in Non-Profit Organization* (3rd edn, Jossey –Bass, San Francisco 2011).

Part Four
Conclusion and Recommendations

It is undeniable that formulating and establishing appropriate and effective legal, regulatory and institutional framework are a prerequisite for good corporate governance in Ethiopia. The existence of good corporate governance framework within the country will not only foster market integrity, improves economic efficiency and development but also builds investor confidence. As the share company law is one of the major components of corporate structure of the country, this dissertation critically analyzed whether the Ethiopian share company law envisaged such outcomes or not in light of the six minimum standards of OECD Principles of corporate governance. The findings of this dissertation demonstrated that the Ethiopian share company law legal and regulatory framework apparently failed to intend to achieve these outcomes. Rather, the legal and regulatory framework of the share company law provisions lagged far behind from the new markets development and concerns of complex corporate governance issues. The government of Ethiopia has also already recognized the inadequacy of the entire commercial code and committed to draft a new one.

Hence, formulating an appropriate and efficient share company law that reflects the modern business realities and accommodates the demands of different market players in the country is very importance. As noted above, the OECD Principles of corporate governance will have relevancy to improve the legal, regulatory and institutional framework of Ethiopian corporate governance by taking into account its national legal, economic and business practices. Therefore, to update the share company law provisions with the modern markets development and concerns of complex corporate governance issues, this dissertation advocated that consulting the relevant OECD Principles of corporate governance as a reference and benchmark is worthwhile. It also recommends that the identified gaps and shortcomings of the share company law provisions should be rectified during the drafting of the new commercial code.

This dissertation depicted that the requirements of minimum capitals and shareholders membership to form share companies have no relevance to protect shareholders or creditors. Rather, they will discourage pools of new capital investments; consequently these two provisions should be revised. It also identified that the requirements to incorporate or increase

the capital of share companies through the offering of equity or debt securities to the public have three major loopholes. First, the financial reports incorporated in the initial prospectus offered to the public neither incorporate auditor's opinions nor approved and registered by Ministry of Trade. Secondly, in the offering of additional equity or debt securities, the provisions failed to require the prospectus to include independently audited financial reports. Thirdly, there is no provision that makes founders or issuers liable when the prospectus offered to the public contained misleading or inaccurate statements or omitted the relevant information. Thus, to protect investors and avoid markets inefficiencies all these gaps should be filled.

In addition, the share company law legal framework should also require supplementary laws and regulations, including voluntary codes and standards. Illiquidity of shares and lacks of credit accesses in the capital markets are the main challenge for Ethiopian share companies. In this regard, allowing the establishment of stock exchanges and alternative trading systems will have crucial roles. Without stock exchanges and alternative trading systems, there will not be strong capital markets within the country. The share company law should also allocate adequate and sufficient regulatory and supervisory powers to regulators. Thus, besides to the Ministry of Trade, there should be clear allocation of regulatory and supervisory powers among government and private agencies subject to avoiding over regulation and conflict of powers.

With regard to the basic ownership rights of shareholders, allowing companies to issue bearer shares have three identified disadvantages. First, it failed to confer secured shareholders ownership rights. Second, it deters companies' transparency. Third, this may lead to evasion of government taxes and abuse of company's assets by mangers. Thus, article 325 of the commercial code needs to be rectified. This dissertation also suggested that shareholders right to information provided in the share company law is inadequate and should to be revised. Especially, shareholders should have the right to be informed about the voting procedure, the agenda and the issues to be decided before they participate and vote at the meeting. Similarly, article 397(2) of the commercial code that prohibits shareholders to put in place items in the agenda at shareholders meetings should be avoided. Instead, they should be promoted to ask questions, forward issues to put in place on the agenda and propose resolutions subject to certain limitations to prevent abuses. Shareholders right to vote in proxy should also include voting via E-mail. Since voting restrictions of shareholders diminish control ownership and

disincentive to participate in shareholders meetings, such provisions should be liberalized as much as possible. It would be advisable not to impose restrictions more than half of the share capitals of the company. Therefore, make it clear that at least half of the capitals of the company's shares should be ordinary shares. Moreover, restricting free transfers of shares in public company impedes liquidity of the company's shares in the capital markets. As a result, article 333 of the commercial code should be deleted. To make enforceable shareholders right to exit provided in article 364 of the commercial code, introducing stock markets and prescribing additional mandatory takeover provisions would be very crucial.

To protect minority shareholders from corporate insiders, the share company law should clearly prohibit direct or indirect insider trading and abusive self-dealings within the company, including controlling shareholders. In this case, two mechanisms can be devised. First, transactions between controlling shareholders or/and managers and the company should be reviewed by non-executive boards. Second, provisions can be made that impose a fiduciary duty on controlling shareholders. Cumulative voting rights of minority shareholders provided under article 352 of the commercial code is vague and unclear; consequently it should explicitly refer each class of shareholders. Compelling shareholders to deposit their shares before the meetings of shareholders has the potential to block minority shareholders from selling their shares for certain days. Hence, article 401 of the commercial code should be relaxed to the extent possible. Likewise, article 365(3) of the commercial code that restricts minority shareholders right to institute proceedings against liable directors should be avoided. Rather, minority shareholders should be allowed the right to derivative actions when they have a reasonable ground that their rights are violated. Nonetheless, devising appropriate mechanisms should be made to prevent using of such rights for abusive purpose.

Since stakeholders are an integral parts of company's capital resource, clearly addressing their interests and roles within the company will improve the financial sustainability of the company and the development of the economy. In this regard, the share company law should at least require the accountability of boards to the interests of employees, creditors, suppliers, customers, the community and the environment as a whole. To the extent possible, provisions may also be made that permit companies employees to engage in the corporate governance of the company.

Regarding companies disclosure and transparency, poor disclosure regime deters effective functioning of capital markets, raises costs of capital and result in poor allocations of resources. As a result, the financial disclosure provided in the share company law should include companies' cash flows and income statements, and statements of any equity changes and recognized gains or losses. The financial reports should also be prepared based on established accounting and auditing standards and be audited by independent auditor. Equally, minimum mandatory and voluntary non-financial public disclosures should be provided. Especially, companies' ownership structures and voting rights, related parties' transactions, companies' objectives and potential risk factors, and the company's corporate governance structure are very importance.

With regard to boards, the contradicted provisions of articles 348(3&4) and 362(2) of the commercial code that prescribe the compositions of boards should be harmonized. Since allowing companies' statutes to assign all board members as managers of the company will make boards incompetent to deliver independent and objective judgments, it should be rectified. Boards decisions provided under article 358 of the commercial code should also qualify objective and independent judgments for equal treatments of all classes of shareholders. The provisions of boards' duties, functions and liabilities set out in articles 362, 363 and 364 of the commercial code should clearly articulate how boards strategically direct and review companies risk policy; supervise managements and controls conflict of interests. It should also provide how companies' managers are remunerated and compensated.

Boards' review of related parties' transaction with the company should extend to managers and controlling shareholders. For this, boards should be required to apply an appropriate ethical code of conduct to evaluate their own acts and control managements. The boards' books and accounts should also clearly show that the financial reports are prepared according to established accounting and auditing standards and audited by independent auditor.

Regarding auditors, the share company law should require auditors to carry out their auditing functions based on established accounting and auditing rules and standards. It should also prescribe the minimum qualification to be eligible an auditor or holding a practicing license issued according to the regulations of country's accountancy professions. Finally, the share company law should stipulate applicable penalties on boards and auditors who failed to observe accounting, auditing and financial reporting standards.

Bibliography

I. Secondary Sources

A. Books

- Aluchna M, '*Corporate Governance- Responsibilities of Boards' in* Guler Aras and David Crowther *(eds), A handbook of Corporate Governance and Social Responsibility* (Gower Publishing Ltd 2010).
- Carver J*, Boards that Makes the Difference: A New Design for Leadership in Non-Profit Organization* (3rd edn, Jossey –Bass, San Francisco2011).
- Clarke T, (2007), *International Corporate Governance: A Comparative Approach (*Routledge 2007*).*
- Du Plessis J.J, Hargovan A, and Bagaric M*, Principles of Contemporary Corporate Governance (2nd edn Cambridge University Press, New York 2011).*
- Mallin A. C, *Corporate Governance* (2nd edn Oxford University Press 2007).

B. Journal Articles

- Berle A. A, 'Corporate Powers as Powers in Trust' (1931) 44 (7) Harvard Law Review 1049-1074.
- Bouchez L, 'Principles of Corporate Governance: the OECD Perspective' (2007) 4(3) European Company Law 109-115.
- Brietzke P, 'Private Law in Ethiopia' (1974) 18 Journal of African Law 149-167.
- Dodd E. M, For Whom Are Corporate Managers Trustees? (1932) 44(7) Harvard Law Review 1145-1163.
- Fleckner M. A, 'Stoke Exchange at the Crossroads' (2006) 74 Fordham Law Review 2541- 2620.
- Gebremeskel F. P, 'Emerging Separation of Ownership and Control in Ethiopia Share Companies: Legal and Policy Implications' (2010) 4(1) Mizan Law Review (1-58).
- Gordon R. J, 'Institutions as Relational Investors: A New Look at Cumulative Voting' (1994) 94 Columbia Law Review 124-194.

- Harper H.V, '"Enlightened Shareholders Value": Corporate Governance Beyond the Shareholders and Stakeholders Divide' (2010) 36 Journal of Corporation Law 59- 96.
- Hopt J. K, Comparative Corporate Governance: The State of Art and International Regulation' (2011) 59 American Journal of Comparative Law 1-74.
- Lin Y. H, 'Controlling Shareholders: Do Independent Directors Constrain Tunneling In Taiwan?' (2011) 12 San Diego International Law Journal 363-416.
- Macey J and O'hara M, Regulating Exchanges and Alternative Trading Systems: A Law and Economics Perspective (1999) 28 Journal of Legal Studies 17-54.
- Sarrat J, 'Governance versus Divergence, Global Corporate Governance at the Crossroads: Governance Norms, Capital Markets & OECD Principles for Corporate Governance' (2002) 33Ottawa Law Review 177-223.
- Seifu G, 'Revisiting Company Law the Advent of Ethiopian Commodity Exchange' (2010) 4(1) Mizan Law Review 102-141.
- Steadman W. C and Gibson D. G, Should Cumulative Voting for Directors be Mandatory? - A Debt' (1995) 11 Business Lawyers 9-30.
- Chen Z. V, Li J and Shapiro D, 'Are OECD Prescribed Good Corporate Governance Practices' Really Good in an Emerging Economy?' (2011) 28 Asian Pacific Journal of Management115-138.

C. Working Papers and Commissioned Reports

- Cerioni L, "Corporate Governance: The OECD Principles, the Scope for a "Model of the Successful Company", and A New Challenge for the Company Law Agenda and the Broader Regulatory Agenda" (2008). Available at <http://works.bepress.com/luca_cerioni/1 >
- Ethiopian Commercial Law & Institutional Reforms and Trade Diagnosis (USID: 2007). Available at < http://egateg.usaid.gov/sites/default/files/ethiopia.pdf >
- Minga N, 'Rethinking Corporate Governance in Ethiopia' (2008) Metropolitan State College of Denver Working Paper 8/2008. Available at <http://ssrn.com/abstract=1264697>

- Jesover F and Kirkpatrick G, 'The Revised OECD Principles of Corporate governance their Relevance to non OECD Countries' (2005). Available at <http://www.oecd.org/dataoecd/41/38/33977036.pdf>
- Kirkpatrick G, 'Improving Corporate Governance Standards: the Work of the EOCD and the Principles' (2004). Available at < http://www.oecd.org/dataoecd/45/24/33655111.pdf >
- OECD: Related *Party Transactions and Minority Shareholder Rights* (2012) OECD Publishing at <*http://dx.doi.org/10.1787/9789264168008-en* >
- Policy Brief: The OECD Principles of Corporate Governance (2004). Available at <http://www.oecd.org/dataoecd/41/32/33647763.pdf >
- ROSC: (2007), Reports on Observance of Standards and Codes Ethiopia. Available at <http://www.worldbank.org/ifa/rosc_aa_ethiopia.pdf>

II. Primary Sources

A. Legislations

- A Proclamation to Amend National Bank of Ethiopia Establishment No. 591/2008.
- A Proclamation to Approve Business Banking Proclamation No. 592/2008.
- A proclamation to Provide for the Licensing and Supervisions of Insurance Business Proclamation No. 86/94.
- Negarit Gazeta Gazette Extraordinary Commercial Code of the Emperor of Ethiopia Proclamation No 166 of 1960.

B. Directives

- Licensing and Supervisions of Banking Business, Limits on Boards Remunerations and Number of Employees Who Set on Bank Board Directive No. SBB/49/201. Available at <http://www.nbe.gov.et/pdf/directives/bankingbusiness/sbb-49-11.pdf >

C. Soft Law

- OECD Principles of Corporate Governance Framework (Revised April 2004). <http://www.oecd.org/home/0,3675,en_2649_201185_1_1_1_1_1,00.html>