

Shared Automated Teller Machine (ATM) Network in Ethiopia: Appraisal of the Competition Concerns

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Abstract

Traditionally, banking transactions have been carried out manually with the help of bank tellers. Nowadays, however, financial businesses are employing advanced technologies to deliver their services efficiently. Among these technologies, ATM is a noticeable one. Using ATM, customers can make a withdrawal, balance inquiry, fund transfer, and cash deposit. Until recent times, customers have been using their bank's proprietary ATM network only. Currently, banks interconnecting their ATM network and allow customers to access their account using the ATM terminal of any bank. The Ethiopian commercial banks have also integrated their proprietary network and allow their customers to access their account using the ATM of any member bank. Though the introduction of a shared ATM payment system in the country makes it convenient for the e-banking users, so far, there is no clarity on its impact on the market competition. The objective of this article is, therefore, to analyze the major competition concerns of shared ATM network in light of the Ethiopian general competition law and the NBE's directive on licensing and authorization of the payment system operators. In addressing this issue, the writer employed a qualitative research approach and typically doctrinal research type. After due analysis of the issue, the writer concludes that the act of creating market monopolization in the Ethiopian national switch system, the unconditional and mandatory access to new entrants, unrestricted membership in more than one network, and the collective determination of network fees at the switch level are anticompetitive acts evolving in the Ethiopian shared ATM network market. Finally, the writer remarks that the NBE should revise its directive on licensing and authorization of the payment system operators to balance cooperation and competition in the payment network market.

Keywords: Automated Teller Machine (ATM), Shared ATM Network, Market Competition Concerns

Introduction

Conventionally, banking transactions have been carried out manually with the help of human agents. When a person needs to deposit, withdraw, or transfer

funds, he can do that only by communicating his intention to the teller through writing bank vouchers. Today, because of the introduction of advanced technologies in the financial sector, banks are rendering their services to customers using technologies. Among such technologies, the automated teller machine (ATM) is the most popular one.¹ Recently, Commercial Banks in Ethiopia have augmented their service delivery by installing ATMs across different parts of the country. They are making their service accessible to their customers. Consequently, customers can make cash withdrawals, balance inquiries, loan payment, fund transfer, cash deposit, and bill payment via ATMs.²

Until a few years ago, customers of a bank could use only the ATMs of their bank since there were no shared network systems in Ethiopia.³ Recently, however, two major shared ATM networks were established in the country. In 2009, three private commercial banks, namely Nib International Bank S.C, Awash International Bank S.C., and United Bank S.C established a consortium known as Premiere Switch Solutions Share Company (PSS).⁴ Following, additional three private commercial banks, namely Addis International Bank, Birhan International Bank, and Cooperative Bank of Oromia joined this consortium, and the members of the platform surge to six. The primary goal of this consortium is to allow customers of member banks to use ATMs of all the member banks with a single plastic ATM card.⁵ Besides, in 2011, another national ATMs shared network, Ethswitch, has been launched by all Ethiopian private commercial banks, the Ethiopian Banker's Association, and the National

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¹ Heli Snellman, Automated Teller Machine Network Market Structure and Cash Usage, Scientific Monographs, Bank of Finland, (2006), p.9 available at <https://helda.helsinki.fi/bof/bitstream/handle/123456789/9346/128493.pdf?sequence=1&isAllowed=y>, last accessed on 22 January 2020.

² Ellen S. Goldberg, Shared Electronic Funds Transfer Systems: Some Legal Implications, *Banking Law Journal*, Vol. 98, No. 8, (1981), Pp. 715-746, p.716 available at https://heinonline.org/HOL/Page?public=true&handle=hein.journals/blj98&div=59&start_page=715&collection=journals&set_as_cursor=2&men_tab=srchresults, last accessed on 22 January 2020.

³ Habte Ashenafi, Effect of ATM Service Quality on Customers Satisfaction in Banking Industry in Ethiopia: The Case of Oromia International Bank in Addis Ababa, MSc Thesis, Addis Ababa University, (2019), p.3 available at <http://etd.aau.edu.et/bitstream/handle/123456789/18645/Habte%20Ashenafi.pdf?sequence=1&isAllowed=y>, last accessed on 23 January 2020.

⁴ *Id.*, p.3.

⁵ Premiere Switch Solutions Share Company (PSS), official website, available at <https://psseth.com/>, last accessed on 23 January 2020.

Bank of Ethiopia (NBE).⁶ Through this national payment network, the ATM networks of all banks in Ethiopia are connected, and customers are getting ATM service from any bank's ATM terminal.

The business of a shared ATM network is recognized in the national payment proclamation of Ethiopia.⁷ The national payment proclamation permits financial institutions to adopt an electronic fund transfer in a shared system including a shared ATM network. It gives the power to set the terms and conditions of the shared payment system to member banks of the shared network, i.e. it shall be decided through multilateral or bilateral agreements of members to the system.⁸ Nonetheless, the NBE is empowered to enact a directive on a shared system and to provide major guidelines to be incorporated into the members' agreement.⁹ Accordingly, in August 2020, the NBE enacted a directive on licensing and authorization of the payment system operators.¹⁰

The purpose of creating a shared payment network is to empower clients to each bank to use all ATMs in the country with a single bank ATM card.¹¹ Because of the shared ATM network between commercial banks of the country, these days, cardholders are using any ATM of member banks of the switch. One can obtain cash by visiting the nearby ATM even if he doesn't have an account in the bank that deploys the ATM. This lets consumers get banking services in their vicinity easily. Even if the shared network eases the life of consumers, there is a suspicion that it may go against the principles of market competition in the ATM network industry. Especially, the issue of market concentration in the ATM network market, access to existing ATM network, the manner of fixing the network fees involved in the shared ATM network, and the rules on dual membership are the concerns that are susceptible to be anticompetitive in the shared ATM network market.¹² The purpose of this article is, therefore, to evaluate these competition concerns of shared ATM network from the

⁶ BPC Banking Technologies, Ethiopia Switches on Unified Payment System with BPC, (2016) available at <https://www.finextra.com/pressarticle/64428/ethiopia-switches-on-unified-payment-system-with-bpc>, last accessed on 23 January 2020.

⁷ The National Payment System Proclamation, Proclamation No.718/2011, *Federal Negarit Gazette*, (2011), Art. 22.

⁸ *Id.*, Art.22/2.

⁹ *Id.*, Art. 22/2.

¹⁰ Directive on Licensing and Authorization of the Payment System Operators, National Bank of Ethiopia, (2020) (hereinafter, Directive on Licensing and Authorization of the Payment System Operators)

¹¹ BPC Banking Technologies, Supera note 6.

¹² Robert D. Anderson and Brian Rivard, Antitrust Policy towards Eft Networks: The Canadian Experience in the Interac Case, *Antitrust Law Journal*, Vol. 67, No. 2, (1999), Pp. 389-451, P.391 available at <https://www.jstor.org/stable/40843438>, last accessed on 24 January 2020.

perspective of licensing and authorization of the payment system operators directive of the NBE and general competition law of the country.

The article has three sections of which the first section deals with the general conceptual framework of ATM. In this section, the author explores the conceptual underpinning of ATM in general and shared ATM Network in particular. This section helps to give some insights to readers about the general understanding of ATM and the shared ATM network before they appreciate the competition concerns thereof. Section two tries to show the practices of banking transactions using proprietary ATM networks in Ethiopia and shared ATM networks. In the third section, an attempt is made to show major competition concerns in the shared ATM networks in Ethiopia. Particularly, in this section, the author attempts to show major competition concerns in the shared ATM networks in Ethiopia in light of general competition law, and NBE's directive on licensing and authorization of the payment system operators.

1. Conceptual Understanding of ATM and Shared ATM Network

The term ATM may be described using different terminologies including automated bank machine, cash machine, 24-hour teller, and others.¹³ Conceptually, ATM means a terminal that a bank supplies so that customers can withdraw money, inquire about balance, transfer funds, deposit funds, or pay bills electronically.¹⁴ It can also be defined as “a computerized telecommunications device that provides the clients of a bank with access to financial transactions in a public space without the need for a cashier, human clerk, or bank teller.”¹⁵ ATM lets customers of a bank access their account electronically, without visiting the bank teller.¹⁶ The ATM connects “a computer terminal, database system and cash vault in one unit” and enables the customer to access his account by inserting the plastic card given to him by his bank and his Personal Identification Number (PIN).¹⁷

¹³ Getachew Tadesse, Challenges and Opportunities of ethiopy ATM Service, MSC Thesis, Addis Ababa University, (2018), p.9 available at <http://etd.aau.edu.et/bitstream/handle/123456789/12583/Getachew%20Tadesse.pdf?sequence=1&isAllowed=y>, last accessed on 25 January 2020.

¹⁴ Habte, *supra* note 3, p.12.

¹⁵ Getachew, *supra* note 13, p.9.

¹⁶ Steven C. Salop, Deregulating Self-Regulated ATM Shared Networks, *Economics of Innovation and New Technology*, Vol. 1, No. 1, (1990), Pp.85-96, p.85 available at https://www.researchgate.net/publication/233212909_Deregulating_Self-Regulated_Shared_ATM_Networks, last accessed on 23 January 2020.

¹⁷ Habte, *supra* note 3, p.13.

Historically, the beginning of ATM in the banking business is traced back to the late 1960s.¹⁸ A Barclay Bank in England installed the first ATM in 1967.¹⁹ Initially, the ATM service faced strong resistance from users, as they didn't trust the machine.²⁰ However, as time went by, users started to accept this technology and enjoyed the service.²¹ In the beginning, the ATM lacks a magnetic-stripe card; customers use the ATM by feeding a paper voucher.²² While the customer fed the paper voucher, the machine holds it and, instead, gives cash to the customer.²³ Through time, the technology of ATM continued to advance. In 1968, Don Wetzel invented an ATM that can use a magnetic-stripe card.²⁴ Passing different revolutions of technology, the ATM banking business reached its development, as we know it today.

At present, ATM is the common machinery that many banks use to deliver their banking service to their customers without the help of a teller.²⁵ The use of electronic payment systems, including ATM and point of sale (POS) has increased drastically across the world.²⁶ We are noticing that, banks are installing their ATM not only in the compound of their branches, but also at the premises of schools, hotels, groceries, hospitals, offices, and other public spaces. By deploying their ATMs at such places, banks are providing their service for 24 hours a day. This brings some benefits for both customers and banks. For customers, it allows them to access their account in the nearest place and fitting time.²⁷ Banks also render their service expeditiously, with reduced cost and without working hour limits.²⁸

For a long period, banks have been providing an ATM service to their clients only through the proprietary system.²⁹ Here the proprietary system refers to when customers can use only their bank's ATM to access their account.³⁰ In this

¹⁸ Fumiko Hayashi *et al*, *A guide to the ATM and Debit Card Industry*, Federal Reserve Bank of Kansas City, (2003), p.12 available at <https://econpapers.repec.org/RePEc:fip:fedkmo:2006agttaadci2>, last accessed on 25 January 2020.

¹⁹ *Id.*

²⁰ Habte, *supra* note 3, p.12.

²¹ *Id.*

²² Hayashi *et al*, *supra* note 18, p.12.

²³ *Id.*

²⁴ *Id.*

²⁵ Snellman, *supra* note 1, p.9.

²⁶ *Id.*

²⁷ James J. Mcandrews, Automated Teller Machine Network Pricing – A Review of the Literature, *Review of Network Economics*, Vol.2, No. 2, (2003), pp. 146-156, p.146 available at https://www.mejournal.com/articles/mcandrews_june03.pdf, last accessed 26 January 2020.

²⁸ *Id.*

²⁹ James J. Mcandrews, Retail pricing of ATM network services, Working Paper No. 96-12, Federal Reserve Bank of Philadelphia, (1995), p.3.

³⁰ *Id.*

system, banks utilize their ATMs only to reach their customers; and the users of the ATM need to be a client of the ATM owner bank and shall hold that bank card. This system creates some inconvenience for users of ATM by imposing an obligation on them to look for the ATM of their bank only. It makes customers walk far for accessing their account. Since the machine is very expensive, banks also faced difficulty in expanding individually their ATMs in different locations. Due to this, banks are compelled to seek cooperation among them. They started to interconnect their proprietary network together through a central switch.³¹ Today, banks in many jurisdictions integrated their ATM network and created one or more shared ATM networks.³² Conceptually, Robert D. Anderson and Brian Rivard defined shared ATM network as:

*[A] set of terminals and computer software connected by telecommunication links that are used to process transactions. In particular, a shared ATM "... coordinates transactions between a customer and cardholder of one institution or "issuer") and a terminal operated by a different institution (the institution acquiring the transaction the "acquirer"). The network processes or coordinates, simultaneously, the transaction between the cardholder and the acquirer, the transaction between the cardholder and the issuer, and possibly the transaction between the acquirer and the issuer.*³³

Through shared ATM network systems, the ATM networks of different banks are linked and the customers of such banks are using the ATMs of all members of the system without being required to be a customer and holding the plastic card of that specific bank.³⁴ It increases banking service accessibility for customers.³⁵ Since the shared ATM network allows customers of a bank to use the ATMs of other member banks, it has a significant role for the customer to access his account in his location.³⁶ Traditionally, banks deliver their ATM service to customers by deploying proprietary ATMs in different geographical locations, which is very costly, and difficult for banks to reach their customers

³¹ Joy Ishii, Compatibility, Competition and Investment in Network Industries: ATM Networks in the Banking Industry, MSC Thesis, Stanford University, (2005), p.5 available at <https://pdfs.semanticscholar.org/2511f/a0b0639628a8158bc6acc80f09f42e0aedfc.pdf>, last accessed on 27 January 2020.

³² *Id.*

³³ Anderson and Rivard, *supra* note 12, p.404.

³⁴ Congressional Budget Office of America, Competition in ATM Markets: Are ATMs Money Machines? Report Paper, (1998), p.1 available at <https://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/6xx/doc666/atmcomp.pdf>, last accessed on 27 January 2020.

³⁵ James J. Mcandrews, the Evolution of Shared ATM Networks, *Business Review*, (1991), p.8.

³⁶ *Id.*, p.5.

in their convenience places. The shared ATM network, however, solves these problems by entitling customers to access their accounts from machines of any member bank. Besides, a shared ATM network is believed to be an incentive for banks to install their ATMs in different locations; i.e. in a location where there is no members' ATM.³⁷

Structurally, shared ATMs networks may be owned by an entity established by member institutions, or it may be owned and operated by another independent company. In the first case, member institutions themselves create the network through a joint venture.³⁸ Members act as a member of the company. However, in the latter case, another third party payment network operator owns the network. In both cases, there is interconnection of members' ATM networks with a single, centralized network switch, namely shared ATM network.³⁹ Here, network switch refers to “[t]he electronic equipment that receives and transmit transaction between the bank that operates the ATM and the bank that holds the customer’s account and issues the card used in the transaction.”⁴⁰ It can be also understood as “a system of computer software and telecommunications facilities acts as a routing, coordinating, and communication agent to the network members.”⁴¹ Principally, the centralized ATM network switch serves as an intermediary that facilitates the clearance and settlement of transactions made between member banks.⁴²

In terms of participation, in the shared ATM transaction, at least three persons are involved: namely card issuing bank (issuing bank), a bank that issues ATM cards for its customers; ATM owning bank (acquirer), a bank that installs an ATM; and Switch network, a network that integrated members' ATM into a centralized system.⁴³ In a shared ATM network, there are some fees involved in each transaction.⁴⁴ To mention a few, foreign fees, surcharge, interchange fees, and switch fees are the major fees involved in the integrated ATM network.⁴⁵ Surcharge means a fee that the cardholder pays to the ATM owners, acquiring bank, for receiving service from the machine other than his bank.⁴⁶ A foreign fee is a fee paid by the cardholder to his bank, the issuing bank and mostly, this fee

³⁷ *Id.*, p. 8.

³⁸ Hayashi *et al*, *supra* note 18, p.26.

³⁹ Salop, *supra* note 16, p.85.

⁴⁰ Mcandrews, (1991), *supra* note 35, p. 5.

⁴¹ Anderson and Rivard, *supra* note 12, P.4040.

⁴² *Id.*, P.4040-405.

⁴³ *Id.*, p.407.

⁴⁴ Hayashi *et al*, *supra* note 18, P.5.

⁴⁵ Mcandrews, (1991), *supra* note 35, p.4-5.

⁴⁶ *Id.*, p.4.

is set by the issuer bank.⁴⁷ The interchange fee is also a type of network fee in the shared ATM network that the issuing bank pays to the acquiring bank for the service that the latter provides to the customer of the former.⁴⁸ Lastly, the switch fee refers to a fee that member banks pay to the switch per each transaction for using the switch's service.⁴⁹ These network fees, especially the interchange fee and network switch fee, and other related terms and conditions are mostly set by the agreement of members of the network switch.⁵⁰

2. Development of Shared ATM Network in Ethiopia

The banking business in Ethiopia has been operated starting from 1905 when the first bank called the Bank of Abyssinia was established.⁵¹ Starting that time, the banking operation has been carried out manually using the paper system, using bank vouchers. Through time, banks in the country transform their service from manual systems to the electronic banking systems. They started to provide their services using ATM, inter alia. In 2001, the Commercial Bank of Ethiopia introduced, for the first time, the ATM service by deploying eight ATMs located in Addis Ababa.⁵² Though the Commercial Bank of Ethiopia is the first to introduce ATMs in the country, it failed to be the leader in providing ATM services because of problems of infrastructure.⁵³ Rather, Dashin Bank, which is the first to introduce ATM in the country among private banks, becomes the leader in expanding the service in the country.⁵⁴ As of June 2009, Dashin Bank has been providing banking service for 24 hours of a day by employing 40 ATMs in different geographical locations.⁵⁵ Afterwards, ATM banking service becomes prominent in the country. Nowadays, almost all commercial banks provide their service by installing ATMs in different corners of the country.

For a decade, most banks in the country have been delivering their service using proprietary ATMs system. Under such system, customers of any bank in Ethiopia can use only the ATMs of their bank, as the proprietary network of each bank was not linked together. However, in February 2009, intending to

⁴⁷ Anderson and Rivard, *supra* note 12, p.408.

⁴⁸ Hayashi *et al*, *supra* note 18, p.6.

⁴⁹ Mcandrews, (1991), *supra* note 35, p.5.

⁵⁰ Mcandrews, (2003), *supra* note 27, p.125.

⁵¹ Arnaldo Mauri, The Short Life of the Bank of Ethiopia, CONOMICA, (2014), p.104 available at https://www.researchgate.net/publication/228466309_The_Short_Life_of_the_Bank_of_Ethiopia, last accessed on 28 January 2020.

⁵² Gardachew Worku, Electronic-Banking in Ethiopia- Practices, Opportunities and Challenges, *Journal of Internet Banking and Commerce*, Vol. 15, No. 2, (2010), P.4.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

facilitate the electronic payment system in the country, three banks, namely Nib International Bank S.C, Awash International Bank S.C, and United Bank S.C integrated their ATM networks into a single network called ‘premier switch solution’ for the first time.⁵⁶ Latter, another three banks, namely Birhan International Bank, Addis International Bank, and Cooperative Bank of Oromia joined to this network. Though the task of creating a shared system was started in 2009, the system was officially launched to operate on July 5, 2012, with 165 million Birr.⁵⁷ The major task of this centralized network is “engaging in the operation and management of ATM, engaging in point of sales (POS) card banking service, and providing platforms (hardware, switch software, database, etc.) to member banks.”⁵⁸ After the commencement of this shared system, a customer of member bank can to use the ATMs of any member bank irrespective of whose bank customer he is.

Even though the premier switch solution is the first shared network in the country, latter, because of the national payment project implemented by the NBE, all commercial banks, the NBE, and the Ethiopian Bankers Association came together and created a single national shared ATMs network, called Ethswitch, in 2011.⁵⁹ Premier Switch Solution is also merged with this national payment system.⁶⁰ Nowadays, the ATMs of all commercial banks in the country are united and resulting in establishment of monopoly in the national payment switch. By 13 May 2016, “the system linked over 1500 ATMS, over 13,000 POS-terminals, and 2.5 million cardholders all over the country.”⁶¹

3. Major Competition Concerns in the Shared ATM Networks in Ethiopia

3.1. Monopolization of the National Payment Switch

As discussed before, currently, there is a monopolization of the national payment switch in Ethiopia. Ethswitch is the only payment scheme that operates as a national payment switch in the country. The NBE’S directive on licensing and authorization of the payment system operators also recognizes this monopolization of the national switch.⁶² It explicitly provides that Ethswitch is

⁵⁶ Habte, *supra* note 3, p.3.

⁵⁷ Premiere Switch Solutions Share Company (PSS), Official Website, available at <https://psseth.com/>, last accessed on 30 January 2020.

⁵⁸ Premier Switch Solution, 9th Annual Report, (2018/2019), p. 26 available at <https://psseth.com/index.php/reports>, last accessed on 30 January 2020.

⁵⁹ BPC Banking Technologies, *supra* note 6.

⁶⁰ Premier Switch Solution, *supra* note 58, p.8.

⁶¹ BPC Banking Technologies, *supra* note 6.

⁶² Directive on Licensing and Authorization of the Payment System Operators, Art. 9.1

the only national switch share company in the nation that provides interconnectivity, interoperability, and clearing all payment transactions in the state.⁶³ Because of a monopoly of the national switch, all commercial banks are obliged to join the Ethswitch joint venture. This creates market monopolization in the national ATM network market. The critical issue here is, should monopolization of the national payment system be tolerated? Usually, market monopoly is supposed to mess up the marketplace competition and causes to have lower productivity, higher cost, and lower product quality.⁶⁴ In the ATM network case, it results in a lower number of ATMs,⁶⁵ higher network fees, inefficient service, and lower ATM quality.⁶⁶

Some scholars, however, attempt to justify the monopoly of market power in the ATM network industry by invoking two reasons. First, they try to justify market monopoly in the ATM network industry by showing its welfare impact on the consumers.⁶⁷ They argue that technical advancement is required to create a friendly environment in the ATM service to customers, and to bring this, the market players need to induce an economy of scale in the market.⁶⁸ The appropriate way of making economies of scale is, thus, by developing a concentrated/monopoly market.⁶⁹ In the short run, this justification may be sound. Because when banks integrate their proprietary ATM network in a single national web, customers can simply access the banking service by using the ATM terminals of member financial institutions in their convenient place and time. To accomplish this, the economy of scale is required, which can be acquired through market concentration or monopoly. In the long run, however, the advantage of market competition between ATM networks will override the advantages of network monopoly since competition brings innovation, efficiency, quality, and lower price, unlike monopoly. Second, proponents suggest that the ATM network is a natural monopoly for the reason that “a single network can serve ATMs at a lower monetary value than multiple competing networks.”⁷⁰ Practically, there are countries that recognized more

⁶³ *Id.*, Art. 9.4 (C).

⁶⁴ Snellman, *supra* note 1, p. 22.

⁶⁵ For instance, the practice in Finland shows that the number of ATM has decreased because of the monopolization of the shared ATM networks in the country (*Id.*, p. 10).

⁶⁶ *Id.*

⁶⁷ Mcandrews, (1991), *supra* note 35, p.8.

⁶⁸ Robin A. Prager, ATM Network Mergers and the Creation of Market Power, *Antitrust Bulletin*, (1999), Vol. 44, No. 2, p. 349-364, p.354.

⁶⁹ *Id.*

⁷⁰ Oxera, Competition, and Innovation in Payments: An Analysis of Market Functioning and Innovation, Report prepared for vocalink, (2015), P.2 available at <https://www.oxera.com/wp->

than one national switch network. For example, in the USA, there are more than one national switch networks, which compete with each other at the national level.⁷¹ PLUS, Cirrus, and the Armed Force Financial Network are some of the National switches operating in the USA.⁷² Even a study conducted in Europe showed that there is no concluding evidence affirming ATM network is a natural monopoly.⁷³

In the case of Ethiopia, we may not find a direct rule under the general competition law that regulates the monopolization of the market. However, the general competition law, indirectly, prohibits market monopolization or concentration by prohibiting anticompetitive merger of businesses.⁷⁴ Of course, literally speaking, it is hardly possible to say that the joint venture in the payment system is merger. A merger is said to exist when “one company acquiring the assets and liabilities of another company, and causing that other company to cease to exist as an independent entity.”⁷⁵ However, different scholars have concluded that even if there is no actual consolidation of entities in the case of ATM network joint ventures, it shall be treated similarly with the merger.⁷⁶ The tendency of treating joint ventures under the cartel has changed and rather, considered in the legal regime of a merger.⁷⁷ The creation of a joint venture is treated as a merger because its effect on creating market power is similar to that of merger.⁷⁸ For example, in the USA, in the case of *United States Vs. Penn-Olin Chemical Co*, the Federal Supreme Court applied the principles of merger to a joint venture antitrust case.⁷⁹ Likewise, the Ethiopian Competition Law treats the acts of pooling the whole or part of resources to conduct commercial activity as a merger,⁸⁰ which implicitly encompasses joint ventures such as shared ATM networks. Hence, though the Ethiopian competition law doesn't explicitly consider a joint venture as a merger, the

[content/uploads/2018/07/15-11-27-Oxera-competition-and-innovation-public.pdf.pdf](#), last accessed on 1 February 2020.

⁷¹ Congressional Budget Office of America, *supra* note 34 , p.21.

⁷² *Id.*

⁷³ Oxera, *supra* note 70, P.2.

⁷⁴ The Trade Competition and Consumer Protection Proclamation No. 813/2013, *Federal Negarit Gazette*, (2014), art. 9/1, (hereinafter, Trade Competition and Consumer Protection Proclamation No. 813/2013).

⁷⁵ Hussein Ahmed Tura, Regulation of Merger under The Ethiopian Competition Law, *Journal of Ethiopian Law* Vol. 26, No.1 (2014), p.13.

⁷⁶ Richard W. Pogue, Antitrust Considerations in Forming A Joint Venture, *Antitrust Law Journal*, Vol. 54, No. 3, (1985), Pp. 925-946, P.926.

⁷⁷ Donald I. Baker, Shared ATM networks-the Antitrust Dimension, *Federal Reserve Bank of St. Louis, Review*, 1995, p.7.

⁷⁸ *Id.*

⁷⁹ Goldberg, *supra* note 2, p.725.

⁸⁰ Trade Competition and Consumer Protection Proclamation No. 813/2013, Art. 9/3(a).

creation of payment system operators through a joint venture shall be treated through the principles of merger.

Once it is concluded that payment network joint ventures are subject to the regulations of a merger, the next question is whether the current act of monopolizing the national payment switch constitutes a prohibited merger. As a rule, the mere presence of a merger of ATM networks may not be problematic for a market competition, which means that the mere existence of a joint venture in the payment switch is not anticompetitive. Even the general competition law of Ethiopia allows the merger of competing entities if the merger is likely to result in technological efficiency or other pro-competitive gains that outweigh the adverse effect of the merger on the market competition.⁸¹ Conversely, the general competition law of Ethiopia prohibits a merger if it “causes or likely to cause a significant adverse effect on the trade competition.”⁸² Looking into its impact along with the trade competition, monopolization of the national network entirely abolishes market competition between networks in terms of network costs and quality of product supply. A single market player exclusively controls the market, and this may even invite Ethswitch to abuse its market power. In fact, one may argue that since the NBE is a member of the Ethswitch, it can closely oversee the switch, for example, not to abuse its monopoly power in setting network prices. Even then, this monopoly switch may not be prompted to go for further investment and innovation in the network system since there is no competition in the ATM network market. The membership of NBE may not be a guarantee to bring efficiency and quality service through regulation. These can be done only through competition between national ATM payment system operators. Hence, though the monopolization of the national payment switch is justified, at least in the short run, by its economic optimality, in the long run, it is market competition that will bring more efficiency, technological creativity and ultimate welfare to the consumers.

On top of that, the interconnection of all commercial banks in the nation in a single national switch closes the chance for the conception of non-national network ventures in the state. By plugging in all banks in the country, Ethswitch enables the customer of all depository financial institutions in the state to find an ATM service from any bank’s ATM. If then, banks will not be inspired to create a network venture other than the national payment network. Therefore, to reduce the anticompetitive effect of a monopoly of the national shared ATM network,

⁸¹ *Id.*, Art. 11/2.

⁸² *Id.*, Art. 9.

the directive should permit the possibility of more than one national switch in the country and the NBE ought to encourage banks, especially the emerging banks, to create a new competitive national ATM network. Though cooperation through joint ventures in the ATM industry is of paramount importance to the consumers' welfare, it should not be extended up to the creation of a market monopoly in the national payment network. The NBE should allow the creation of competing national switch in the payment system market in Ethiopia.

3.2. Access to Established Shared ATM Networks

The most argumentative competition concern in the shared ATM payment system is whether payment systems should be open for new entries or not. As the financial market flourishes, new financial institutions may emerge in a country where the payment market is already controlled by a big ATM network market. At this time, an issue may arise that should existing ATM networks give unrestricted access to new entrants to join or not. Logically, newly emerging markets may face the difficulty of creating a new payment system and compete in the market. This is called the network externality of payment networks.⁸³ To avoid the network externalities and enable emerging banks as competitive as the existing ones in the market, scholars argue that existing networks should open their networks for newly formed financial markets in the country.⁸⁴ Such scholars adopt the "traditional public utility model" which treats payment networks as a public good and enables any market players to access the system without restriction.⁸⁵ They argue that, since the payment network is a public good, it shall be open and accessible for any interested bank to be a member of the venture. Based on this argument, they propose mandatory sharing of payment platforms to any bank that desires to become a member.⁸⁶ The proposal for mandatory sharing of the ATM network is, however, met by a counter argument. It is criticized for making new entrants "free-rider" on the established networks and, consequently, undercuts the incentive of network owners for further investment.⁸⁷ It also discourages new entrants from establishing a new competing network.⁸⁸

⁸³ Oxera, *supra* note 70, P.22.

⁸⁴ David A. Balte, Payment Systems, and Antitrust: Can the Opportunities for Network Competition Be Recognized?, *Federal Reserve Bank of St. Review*, (1995), p.19.

⁸⁵ Anderson and Rivard, *supra* note 12, p.435 & 436.

⁸⁶ Balte, *supra* note 84, p.19.

⁸⁷ Anderson and Rivard, *supra* note 12, p.435 and 436.

⁸⁸ *Id.*

Examining the practice regarding the issue of accessing the network by emerging markets, we couldn't find a consistent practice. For example, the National Commission on Electronic Fund Transfer (NCEFT), which was established in the U.S.A to entertain such concern, refused the mandatory sharing of ATM networks to newly emerging markets.⁸⁹ The commission justified its decision, alleging that the mandatory sharing of the network will weaken competition, which can be realized otherwise when members compete in different platforms.⁹⁰ In describing its concern, the commission puts the following statement:

“...”competition will be diminished if institutions form consortia or sharing arrangements that are overly inclusive in the sense that more competing institutions in a market will join an [electronic fund transfer] system than the economics of operation requires, thus lessening competition in the market.”⁹¹

On the contrary, in the *VISA Vs. Discover Card* Case where Dean Witter (the issuer of the Discover Card) sued VISA as the latter denied it to access its network,⁹² the Trail and District Court recognized mandatory sharing of forums provided it fulfills the following screenings: “a market power screen, an economic sense screen, and an essential facility screen.”⁹³ The first requirement that the court used to recognize mandatory sharing of the platform is when the forum has a dominant market power. According to this criterion, a network shall be required mandatorily to share its forum to emerging markets if it has tough market power or economies of scale.⁹⁴ This is to prevent big forums not to manipulate their market power by excluding newly emerging markets from becoming a member of the network. The second requirement is that to oblige a network to share its network, the purpose of its exclusionary rule must be to bring an economic benefit to its members (an economic screen).⁹⁵ The third condition, namely the essentiality facility screen, is met if the emerging bank is

⁸⁹ Balte, *supra* note 84, p.19.

⁹⁰ *Id.*, p.19 & 20.

⁹¹ Goldberg, *supra* note 2, p.725.

⁹² David A. Blate, Access Demands, and Network Joint ventures, in David Gabel & David F. Weiman, (ed.), *Opening Networks to Competition: The Regulation and Pricing of Access*, 1st ed., Springer Science and Business Media LLC, (1998), p.184 available at

<https://books.google.com.et/books?id=ZNOxhls6gg0C&pg=PA107&dq=Opening+Networks+to+Competition:+the+Regulation+and+Pricing+of+Access&hl=en&sa=X&ved=0ahUKEwiynZXruMLpAhUFxYUKHThMCskQ6AEIJAA>, last accessed on 1 February 2020.

⁹³ *Id.*, p.185.

⁹⁴ *Id.*

⁹⁵ *Id.*

not capable to compete unless it accesses the forums of the existing network.⁹⁶ After analyzing these three criteria, the court reached on the conclusion that though network forums can, in principle, set an exclusionary rule to newly emerging markets, it is mandatory to open for others provided the aforementioned elements are met. Yet, different writers opine that the new entrants should not be allowed to be free riders, and to that end, strict and transparent requirements must be put in place to protect the intellectual property right of the owner, “financial and operational risks.”⁹⁷

The Ethiopian competition law generally requires a market player that has a dominant market power to give access to competitors or potential competitors to essential facilities controlled by it.⁹⁸ The same law, however, allows dominant firms to deny access to competitors or potential competitors provided there is a justifiable economic reason.⁹⁹ From this, it can be understood that the mandatory sharing of a facility is not outright in the general competition law of the country. Rather, it is applied when the facility is essential to the entrants to compete in the market and there is no economic reason for the controlling entity to deny access.

The directive, nevertheless, requires the bylaws of payment system operators to “open network for the reciprocal exchange of transactions with a national switch or licensed financial institution.”¹⁰⁰ The bylaw can’t deny access to new entrants in any case. The term ‘open network’ shows that the sharing of the switch to emerging market players is unrestricted. It seems that no plausible justification exists to refuse access to the switch. What the switch can do is only to set fair criteria to access the system by new participants. The directive also mandatorily requires the national switch to permit open access to any participant.¹⁰¹ Requiring payment switches to give unconditional access to new entrants is not, however, pro-competitive. Giving unrestricted access to any participant, ultimately, results in the concentration of the market in a single or a few firms. In fact, having a monopolized national payment switch in the country, it is naive to argue that there shall not exist mandatory sharing of the switch system. Unless we require the dominant national switch system to share its system to the

⁹⁶ Thanh Tu Nguyen, *EU Antitrust Law in Payment Card Systems*, LL.M Thesis, Lund University, (2003), p.26-27 available at <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1554679&fileOId=1563407%20>, last accessed on 2 February 2020.

⁹⁷ *Id.*, p.26-35.

⁹⁸ Trade Competition and Consumer Protection Proclamation No. 813/2013, Art. 5/2(e).

⁹⁹ *Id.*, Art. 5/2(e).

¹⁰⁰ Directive on Licensing and Authorization of the Payment System Operators, Art. 10.1 (h).

¹⁰¹ *Id.*, Art. 9.4 (C).

emerging markets, emerging markets may face difficulty to compete in the market. It is also clear that becoming a member of the Eathswitch is an essential facility for emerging banks to compete in the market; they can compete only by linking with the existing big market. Thus, until the country's number of national switches boom, it is fair to oblige an existing national switch to permit any newly emerging banks.

Presently, there are about eight banks, which are emerging in Ethiopia, namely; Gada Bank, Ahadu Bank, Ethiopia Diaspora Bank, Sheger Bank, Geez Bank, Jano Investment Bank, Kush Investment Bank, Amhara Bank, Zamzam Bank, Zad Bank,¹⁰² and Goh Betoch Bank.¹⁰³ Requiring the existing networks to share their system mandatorily with this flourishing number of emerging banks at the same time will exacerbate the monopolization of the market in the national payment switch system. If mandatory sharing continues to be the principle, we will not have a chance to see the establishment of a new competing national network switch system in the country. The act of monopolizing this industry should be curtailed at a certain stage, and the right time is now. The NBE ought to enable these newly emerging banks to create new competing national ATMs networks. Thus, the principle of mandatory sharing of a network of the existing switches should not be permitted at this time since there is a chance to have another competitive national and non-national ATM network in the country. As explained before, mandatory access to existing network should be applied only if it is essential to the entrants to compete in the market. Hence, the outright mandatory sharing of payment networks prescribed by the directive needs to be reconsidered in light of the general competition law.

3.3. Exclusivity of Membership

Should financial institutions be allowed to be a member in more than one payment switch simultaneously is another pressing competition concern in a payment system.¹⁰⁴ In some jurisdictions, there are some trends in ATM switch networks to set anti-duality rules in their bylaws. For example, in Canada, membership in VISA and MasterCard is an exclusionary one.¹⁰⁵ Once a certain bank becomes a member of a certain switch network, it can't be a member of

¹⁰² Tesfaye Getenet, Values Banking, (2019), available at

<https://www.capitalethiopia.com/interview/values-banking/>, last accessed on 6 February 2020.

¹⁰³ Muluken Yewendwosen, Private Mortgage Bank Coming to Ethiopia, (2019), available at <https://www.capitalethiopia.com/featured/private-mortgage-bank-coming-to-ethiopia/>, last accessed on 6 February 2020.

¹⁰⁴ Mcandrews, (1991), *supra* note 35, p.13.

¹⁰⁵ Gabel & Weiman, *supra* note 82, p.183.

another switch simultaneously. The exclusionary rule is used as a means “to ensure the commitment of the members of a network to its success.”¹⁰⁶

In some, jurisdictions, on the other hand, like the U.S.A, members of a certain switch network can be simultaneously a member of another competing network in the country.¹⁰⁷ The concern here is whether the anti-duality rule of switches is anti-competitive or pro-competitive. To evaluate this issue, it is better to see the effects of simultaneous membership in more than one switch. Scholars criticized the act of having a dual membership at a time justifying that when there is a dual membership of member banks, there may be conflict of interest in each switch.¹⁰⁸ Since members have an interest in both switches, the likelihood of using the same or identical product and switch is high.¹⁰⁹ When there is dual membership, each network will prefer cooperation to competition.¹¹⁰ For example, they may not be competitive in terms of network fee categories, qualities, and types of technologies used in the system, and efficiencies of their system. In other words, the duality rule may discourage ATM networks to innovate their system, to enhance efficiencies, and to bring network price reduction. The practice also favors this line of argument. For example, in the *MountainWest (SCFC)* case in the USA, the court of appeal and the Supreme Court decided in favor of the exclusionary membership rule.¹¹¹ Their justification was that the exclusionary membership rule of payment system is an important tool to regulate members not to be “free-riding and to bring competition in the market.”¹¹² The actual practice in other jurisdictions also shows that competition between switches is higher in switches that adopt the exclusionary rule than switches, which allow dual membership. For example, the practice in Canada and the U.S.A show that competition is high in anti-duality follower switches than duality membership follower switches.¹¹³

Looking into the current reality of Ethiopia, membership duality may not be an issue since there is only one national payment switch system, namely Ethswitch,

¹⁰⁶ David A. Balto, Creating A Payment System Network: the Tie that Binds or an Honorable Peace?, *The Business Lawyer*, Vol. 55, No. 3, (2000), Pp. 1391-1408, p.1391 available at <https://www.jstor.org/stable/40657075>, last accessed on 29 February 2020.

¹⁰⁷ Gabel & Weiman, *supra* note 82, p.183.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Daniel I. Prywes, ATM-Related Antitrust Developments, *The Business Lawyer*, Vol. 46, No. 3, (1991), Pp.1063-1068, p.1065 available at <https://www.jstor.org/stable/40687230>, last accessed on 8 February 2020.

¹¹¹ Nguyen, *supra* note 96, p.37.

¹¹² Balto David A., The Murky World of Network Mergers: Searching for the Opportunities for Network Competition, *Antitrust Bulletin*, Vol. 42, No. 4, (1997), Pp. 793-850, p.845.

¹¹³ Gabel & Weiman, *supra* note 82, p.183.

and one switch other than the national switch, Premier League Solution switch. However, the issue of dual membership will become a concern for the Ethiopian competition law when there are more than one competing payment networks, be it national or other switches. Regarding membership duality, the Ethiopian general competition law is silent. Similarly, when we look at the directive, it is silent as to whether payment switches could forbid dual membership by their bylaws. Since the directive doesn't prohibit dual membership in the payment industry, a member of a certain payment switch can be also a member of another competitor payment switch if it wants. Payment switches may adopt dual membership or non-exclusivity membership rule.

This approach of membership is, however, open to hamper competition between or among payment switches. When a bank acquires a dual membership in different networks, the competition between those networks will be eliminated. For example, terms and conditions such as network fees of a network will be set by the decision of members. In such cases, a bank that has dual membership may not wish to set different network fees in each network to which it is a member. Rather, it will prefer to set similar terms and conditions in each network. It will result in the convergence of terms and conditions of ATM network in different payment switches. In the end, such an act will go against the objectives of free-market competition, i.e. lower price and higher quality products. Just to avoid such an overlap of interest between switches, the anti-duality membership rule is better than the dual membership approach. The exclusive membership approach is the right approach to enhance competition in the network market. If the dual membership is allowed, the trade secrets of a network will be disclosed to another competitor network. This will also affect the interests of consumers and competitors. Hence, the directive needs to be revised and should adopt the anti-dual approach of membership.

3.4. Network Fee Fixing

In a shared ATM network, there are different varieties of fees that can be paid by either card issuing bank, acquiring bank, or cardholder. The issuing bank pays an interchange fee to the acquiring bank for the cost that the latter incurs in installing the ATM and providing services to the customers of the issuing bank.¹¹⁴ This fee is a means of compensating the acquiring bank for deploying the ATM.¹¹⁵ In a shared ATM network, the customers of a bank with few ATMs

¹¹⁴ Jocelyn Donez, and Isabelle Dubece, *The Role of Interchange Fees in ATM networks*, (2005), p. 2 available <https://ideas.repec.org/p/wpa/wuwpio/0311002.html>, last accessed on 14 February 2020.

¹¹⁵ Salop, *supra* note 16, p.87.

are more exposed to use the ATMs of other banks that have a high number of ATMs. The effect is that a bank with few numbers of ATMs will pay higher interchange fee. Because of this, while banks with higher number of ATMs prefer to have higher interchange fee, banks with lower number of ATMs prefer to lower interchange fee.¹¹⁶ A cardholder may also pay a foreign fee to the issuing bank, his bank, for using the card of the issuing bank in withdrawing money from the ATM of another bank.¹¹⁷ Besides, the cardholder also pays a fee, surcharge, to the acquiring bank for using its ATM, though he is not the customer of that bank.¹¹⁸ Similar to other countries' experiences, these fees are applied here in Ethiopia when banking transactions are made using a shared ATM network.

ATM network fees become the concern of competition law when we think of how these fees are fixed. Particularly, the fixing of network fees becomes an issue of competition law provided these fees are fixed by the collective agreement of member banks at the switch level. When we see the international experiences of fixing ATM network fees, in most countries, interchange fees are fixed collectively.¹¹⁹ Interchange fees are fixed at the integrated network level by the board of the network.¹²⁰ Unlike interchange fees, foreign fees and surcharges are fixed by each bank independently.¹²¹ Because of this, the primary concern of competition scholars, in the international arena, stick with interchange fees set by the shared ATMs network collectively.

Observing the Ethiopian case in fixing network fees in a shared ATM network, the directive does not expressly address the issue of determination of fees for the ATM network. It is silent as to the determination of network fees unless one argues that the determination of network fees is part of a system rule, which is required to be determined through collective agreements.¹²² Looking into the practice, nowadays, there is a collective determination of fees in the system through multilateral agreements. Most network fees in the Ethswitch, for example, are fixed at the switch level through collective agreements. In particular, surcharges, interchange fees, and switch fees are determined collectively in the Ethswitch.¹²³ In the Ethswitch, the cardholder pays 0.50 cents

¹¹⁶ Congressional Budget Office of America, *supra* note 34, p.24.

¹¹⁷ Salop, *supra* note 16, p.87.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*, p.89.

¹²¹ Hayashi *et al*, *supra* note 18, p.30; Salop, *supra* note 16, p.89.

¹²² Directive on Licensing and Authorization of the Payment System Operators, Art. 6.5.

¹²³ Etswitch S.C, Commencement of the Revised ATM Cash Withdrawal Fees, A Circular Letter Written to All Banks in Ethiopia, Ref: Ets/CEO-010/17, February 23, 2017.

per one hundred ETB withdrawals from the ATMs of a bank other than his bank.¹²⁴ This fee is a surcharge fee that a customer pays to the owner of the ATM for withdrawing cash using that ATM. Unlike other countries, the surcharge is set by the collective agreement of member banks of the switch in Ethiopia. It is determined collusively at the switch level. Besides, member banks of the Ethswitch set collectively the interchange fee of 0.25 cents per one hundred ETB cash withdrawal by customers of issuing bank from another member's ATM.¹²⁵ The sum becomes 0.75 cents per one hundred ETB cash withdrawal out of which, 0.45 cents is paid to the acquiring bank and 0.30 cents paid to the central switch Ethswitch. Not only this, but collective network fee determination is also made when a cardholder withdraws cash from his bank, provided the bank is a member of the Ethswitch. Accordingly, the fee that the cardholder should pay to his bank for withdrawing cash using the machine of his bank is 0.50 or less per one hundred ETB.¹²⁶ Of course, member banks are allowed to set their fees unless it exceeds the maximum cap set by the Ethswitch. Furthermore, the issuer bank pays ETB 0.05 per ETB 100 cash withdrawal by its customer using its ATM.¹²⁷ When a customer withdraws one hundred ETB from his bank's ATM, the total fee paid by both the bank and the customer is 0.55 ETB out of which, Ethswitch gets paid ETB 0.30 per one hundred ETB withdrawal the bank while issuing bank, gets paid ETB 0.25 or less depending on the decision of the bank.¹²⁸ Generally, the current practice in Ethiopia tells us that almost all fees in the shared ATM networks are fixed collectively at the switch level.

Considering this reality of the country, the next concern is whether the act of fixing the ATM network fees in the shared network collectively is anticompetitive or not, according to the Ethiopian competition law. Normally, some competition law scholars argue that setting the interchange (network) fee collectively goes against the market competition principle of competition law.¹²⁹ In market competition, the price of ATM networks shall be determined by the interaction of market players independently. If the fees involved in the shared ATM network are set by the negotiation of each member bank, then, there will be low network fees, high quality of service, and maximum convenience for the

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Donez and Dubece, *supra* note 114, p. 2.

users.¹³⁰ Fixing the fees collectively avoids competition between ATM of banks, as the fee that a customer would pay is the same everywhere regardless of the cost and convenience.¹³¹ The act of collective price fixing in shared ATMs is against the norms of a competitive market.

When we see the Ethiopian competition law, anti-competitive agreements made by market players are prohibited.¹³² “An agreement, or concerted practices, between business persons or a decision by an association of business persons in a horizontal relationship is prohibited if [i]t involves, directly or indirectly, fixing a purchase or selling price or any other trading condition“...”.¹³³ If we evaluate the current practice of the integrated ATMs in Ethiopia, almost all fees are determined by the boards of Ethswitch, which is an association of all banks in the country. This means the acts of the association is anti-competitive agreement. The fees are fixed by the decision of the association of banks in Ethiopia. This decision violated the competition rules of the country. It avoids competition among banks in terms of the price of the ATM network. This will affect the interests of consumers who would have been the ultimate beneficiary of reduced network fees, high quality product, and efficient service. Unless there is fierce competition in the ATM network industry, there will not exist any advancement in the ATM networks in the country. This problem exacerbates in Ethiopia because of the existence of a single, monopolized national ATM network in the country. In a nutshell, the collective determination of the network fees in the shared ATM network is anticompetitive according to the current competition law of the country.

Some writers, of course, try to justify and tolerate the act of fixing network fees collectively, though, literally, it is anti-competitive, arguing that the independent negotiation of banks to set the price of the network is costly and inconvenient.¹³⁴ Based on this argument, especially, the act of fixing network fees and interchange fees collectively is tolerable. Even court decisions in some countries are favoring the practice of collective network fee fixing on the ground that requiring independent network fee negotiation is cumbersome and inefficient. For example, in the U.S.A, the court permitted the collective setting of interchange fees by the Visa credit card network in the *NaBanco antitrust* case.¹³⁵ Partly, this justification is sound since it avoids redundant independent

¹³⁰ Salop, *supra* note 16, p. 89.

¹³¹ Nguyen, *supra* note 96, p.23.

¹³² Trade Competition and Consumer Protection Proclamation No. 813/2013, Art. 7.

¹³³ *Id.*, Art. 7/1 (b).

¹³⁴ Nguyen, *supra* note 96, p. 22.

¹³⁵ Salop, *supra* note 16, p.89.

negotiations among member banks. If network fees are set by the negotiation of each member, it will be very difficult even to reach consensus. The disagreement of members may affect the efficient running of the network. Not only this, since a switch is a software that helps to clear and settle the transactions made between each bank, but it will also be inconvenient to set different prices especially for interchange fees. Similarly, in the Visa International-Multilateral Interchange Fee case, the European Commission concluded that though the act of collective fixing of fees in a network is anticompetitive, it should be an exception to cartel rule in the competition law.¹³⁶ Unlike the *NaBanco anti-trust* case in the USA and Visa International-Multilateral Interchange Fee case in Europe, the competition tribunal of Canada prohibited the collective setting of network fees at the switch level in the *interact* case.¹³⁷ This tribunal explicitly orders member banks to determine their network fees in the system individually.¹³⁸ Generally, the international practice shows that there is no single accepted stance concerning setting the price involved in a payment network.

However, the Ethiopian case is different from other countries on two grounds. On the one hand, there is a high concentration of the national ATM network, monopolized by Ethswitch. There is only one national network switch called Ethswitch in the country that integrated all banks. Considering the inconveniences of independent negotiations, we may tolerate a collective network fee setting provided there are many switches in the country. If there is more than one national switch, competition may still be intact between those switches. The act of collective setting of network fees in one switch may not highly affect the interests of consumers since there is another competitive network. However, in a monopolized national switch, like the Ethiopian case, the collective setting of network fees will result in high network fees. This affects the consumers' welfare. Therefore, the practice in other countries where there is more than one network switch could not be used to justify the act of collective network fees setting in Ethiopia since the national payment system operator is monopolized and open to be manipulated. The author believes that in a monopolized market the network fees should be determined by the negotiation of each bank independently to bring intra-network competition. The cost of inconvenience could not be a justification to curtail the interests of the consumers that they would otherwise have received in a competitive market.

¹³⁶ Nguyen, *supra* note 96, p. 26-27.

¹³⁷ Anderson and Rivard, *supra* note 12, P. 439ff.

¹³⁸ *Id.*, p. 440.

What is more concerning in Ethiopia, unlike the case in other countries, is that even the surcharge that a cardholder pays to the owner of the ATM for using the service is determined collectively. The collective determination of the surcharge cannot be justified by any means. In our case, the surcharge of all ATMs is the same, i.e. 0.50 ETB per one hundred ETB withdrawal. This means once the cardholder decided to use the ATM of a bank other than his bank, there is no choice among other bank's ATM because of similar surcharge fees for all banks. To safeguard market competition, this fee should be set independently by the owner of the ATM. Furthermore, the act of setting network fees in Ethiopia extends even to set the maximum price that a cardholder pays to his bank using the ATM's of his bank. By the mere fact of membership to the switch, the maximum price that each bank shall impose on their customers for withdrawing cash from their ATM is determined to be ETB 0.50 or less. For a stronger reason, fixing collectively the maximum fees that each bank imposes on their customers is an anti-competitive agreement. Generally, the act of collusive fixing of ATM network fees by Ethiopian banks is violating the competition law of the country and deviates from the international experience. The anticompetitive agreements in determining network fees must not be treated exceptionally so long as it puts the consumers at disadvantage.

Conclusion

The shared ATM network enables customers to access their bank account using a single ATM card from any ATM of member banks. It also helps member banks to deliver their service through the ATM of another member bank. Beyond these, shared ATM network gives power to banks to introduce sophisticated technologies as it involves cooperation among member banks. Yet, shared ATM network has some competition concerns that call for careful regulation. Market concentration in the ATM network, access to existing ATM network, the manner of fixing the network fees involved in the network, and the anti/dual membership in the ATM network are key competition concerns, which require proper regulation.

Lookin into the case in Ethiopia, the directive explicitly allows the Eswitch to monopolize the national ATM network market. The act of venturing all commercial banks in a single national shared ATM network is, however, detrimental to the interests of consumers as it may lead to higher prices, lower product quality, and inefficient service. Though competition law promotes the well-being of consumers by discouraging market concentration, the current act

of monopolization of the national shared ATM network in Ethiopia is deviating from this principle.

Besides, the directive requires both the ‘national’ and ‘other switches’ to give open access to all participants in the industry. It adopts the unconditional mandatory sharing of the ATM network. Automatic imposition of mandatory sharing of the existing network to emerging markets will, however, hamper market competition in the network market. The mandatory sharing of a network is sound only in some exceptional cases, namely when the existing shared ATM network has market dominance, and the emerging bank can’t compete unless it accesses the existing network. Even, these conditions are not strong enough to apply a mandatory sharing approach as of today as there is a proliferating number of emerging banks in the country that can create a new competing payment network.

Moreover, the directive does not prohibit the adoption of the dual membership approach in the payment networks, i.e. a bank can be a member in more than one switch. The article, however, argued that dual membership of banks in more than one payment switch may impede competition in the network market. Since the dual membership is open for overlap of interest for a member in two switches, it discourages competition between such switches. It could expose those different networks to have similar markets such as similar fees.

Lastly, the article concludes that even if the directive is silent how the network fees should be decided, practically, the network fees, including interchange fees and surcharge are set by the collusive agreement of member banks. Nevertheless, the Ethiopian competition law forbids anticompetitive price agreements if it lessens competition. The act of collective setting of network fees, obviously, affects competition between networks in terms of network fees. To bring to market competition among banks in terms of network fees, network fees, especially, interchange fees and surcharge should be set through independent negotiation of each bank.

To make a balance in cooperation and competition in the shared ATM network, the NBE should revise its directive on licensing and authorization of the payment system operators. In doing so, the NBE needs to give due consideration to the tasks of de-monopolization of the national switch, setting conditions such as essential facility requirement to access existing ATM networks, adopting anti-duality of network membership, and prohibiting collective setting of network fees, particularly, interchange fees and surcharge.