

Roles and Responsibilities of the BoD of Share Companies: Critical Analysis of Revised Commercial Code of Ethiopia in Light of OECD's Principles of Corporate Governance

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ABSTRACT

The aim of this study is to critically analyze the roles and responsibilities of BoDs of SCs as contained in RCC and Banks' Corporate Governance vis-à-vis the Principles that are included as in OECD's Principles, which are accepted as an international best practice to be emulated. The study has utilized a qualitative research approach and exploratory research design. The theoretical and empirical reviews of the pertinent literature, as well as the interview conducted, have revealed that RCC has gone leaps and bounds in embodying what is expected by the sixth principle of OECD.

Yet, there are still observable lacunae like failing to require ethical standards from BoDs, failing to mandate BoDs to decide on remuneration issues, and failing to put a requirement in place that ensures disclosure and communication mechanism. All of these and other deficiencies of RCC relating to corporate governance call for the promulgation of a Code of Corporate Governance by the Ethiopian Council of Ministers that obliges all financial and non-financial SCs and a Directive by MoTRI that ensures the effective implementation of the Regulation to be passed by the Council of Ministers.

1. INTRODUCTION

The term corporate governance has been used in many different ways and the boundaries of this subject matter vary widely. The shareholder model describes senior management's formal system of accountability to shareholders. The stakeholder's model is used to describe the network of formal and informal relations involving the corporation: Maria, M. and Thomas, A. (2020)¹. For this study, "Corporate governance is a system of rules and institutions that determine the control and direction of a company and that define the relationship among the company's primary participants including the board of directors, managers, shareholders, and other stakeholders": Ahmed (2012)².

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¹ Maria, M. and Thomas, A. (2020) *Corporate governance: effects on firm performance and economic growth*. Available at SSRN: <https://ssrn.com/abstract=218490>. or <http://dx.doi.org/10.2139/ssrn.218490> Accessed May 14th, 2022.

² Ahmed, H. (2012) Overview of corporate governance in Ethiopia: the role, composition, and remuneration of boards of directors in share companies. *Mizan Law Review* 6 (1), 45-76.

The concept of corporate governance is said to go as back as the 18th century: Mekonen (2015)³. As compared to the rest of the world, corporate governance is a new issue in Ethiopia: Negash, M (2008)⁴. Ethiopia enacted its first Bankruptcy and Company Law, which is its pioneering codified company law, on 12th July 1933. Yet, as it was found to be insufficient to regulate the then rapidly growing flow of foreign investment, this law was repealed and the Commercial Code of 1960 was promulgated: Negash, M. (2008). As the Commercial Code of 1960 ('the Repealed Commercial Code') itself was found to be inept to regulate contemporary business relationships, it is now partly repealed and is replaced by the Commercial Code of 2021, which came into effect as of 12th April 2021 ('RCC').

2. REVIEW OF RELATED LITERATURE

Hereunder, the literature and studies that contain the theories, the principles, and the definitions that underpin these roles and responsibilities of the board of directors ('BoDs') of share companies ('SCs') as included in RCC are briefly reviewed and summarized from the perspectives of the OECD's *Principles*⁵.

2.1 Introduction

Gulshan (2007), as quoted in Zeleke (2017)⁶, has stated "business is as old as civilization itself. It has a great contribution to the world since no development could have taken place in the absence of business. The business provides to the society the things it needs to survive, enjoy life, and improve its material and social wellbeing".

Article 106 has defined business as "*an incorporeal movable consisting of all movable property brought together and organized to carry out any of the commercial activities [listed] in Article 5 of this Code*" and Article 172 (2) has defined a business organization as "*an association established through a memorandum of association (MoA) by persons who bring together contributions for undertaking an economic activity in cooperation and of participating in the profit made*". SCs are one of the seven types of business organizations.

³ Mekonen, T. (2015) *Corporate governance in an emerging economy: the antecedents of board performance and practices in the Ethiopian banks*. Unpublished Thesis. The University of South Africa. Pretoria, South Africa.

⁴ Negash, M. (2008) Rethinking corporate governance in Ethiopia, *Paper for a Conference on Corporate Governance in Africa*, South Africa, September 7th, 2008.

⁵ G20/OECD. *Principles of Corporate Governance*, OECD Report to G20 Finance Ministers and Central Bank Governors, (September 2015), Available at <https://www.oecd.org/corporate/principle-corporategovernance.htm> Accessed 14 May 2022.

⁶ Zeleke, S. (2017) *The role of courts in ensuring good corporate governance in Ethiopia: the law and the practice*. Unpublished Thesis. AAU, Ethiopia.

2.2 Definition, Features, Formation, and Organs of Governance of Ethiopian SCs

2.2.1 Definition and Features of SCs

Article 245 (1) has defined SC as “*a company whose capital is fixed in advance and divided into shares and whose liabilities are met only by the assets of the company.*” Article 245 (2) has buttressed this definition by stating “*The obligation of the shareholders shall be limited to making the contribution they pledged to make to the company*”.

It is worthwhile to consider the salient features of SCs. Zeleke (2017) has cited *incorporated association, artificial legal personality, separate legal entity, limited liability, perpetual succession, transferable shares, and separation of management from ownership* as the main features of SCs. While, Yohannes (2008)⁷, has pointed *legal personality, limited liability, capital, and its protection, requirements of formation of SC (minimum of 5 members, minimum initial capital, full subscription of the capital, payment of quarter of the par value of cash shares and lawfulness of the contribution in kind), adoption of MoA and articles of association (AoA) and registration and publicity* as attributes of SCs.

2.2.2 Formation of SCs and Organs of Corporate Governance of SCs

As per RCC, SC can be formed in two ways with different legal consequences: among the founders or through public subscription. In the first case, the law requires a full subscription to the fixed capital, to show in MoA that all the shares have been allocated and a quarter of the sums have been deposited in a bank in the name and to the account of the company under formation, attached the valuation report of the contribution in kind, if any, and they have put in place all the required administrative organs [Articles 254 (1) (a) (b), 255 and 257].

The second is done by issuing a prospectus, an offer to subscribers to raise the pre-fixed capital of the company, to which applicants of shares must subscribe to acquire these shares. Other formalities that are required for formation by subscription are auditing the formation procedures of the SC and conducting subscribers’ meetings [Articles 258 to 264].

There are common requirements that are applicable for the formation of SCs, irrespective of the manner of their formation. These are: having a company name, a minimum capital of ETB 50,000 (fifty thousand), the par value of the shares shall not be less than ETB 100 (one hundred), its members shall not be less than 5 (five), which shall be formed by MoA and that shall be registered in the commercial register by fulfilling all of the mandatory legal requirements (Articles 246, 247, 255, and 265). It should also be noted that the minimum capital requirements for financial SCs differ from that of non-financial SCs.

⁷ Yohannes, S. (2008) On formation of a share company in Ethiopia. *Journal of Ethiopian Law* 22 (1), 102-127.

Article 362(1) have stated that “*A general meeting of shareholders is the highest decision-making organ in a company in which all shareholders take part*”. The remaining two “principal organs of management” of SCs that are recognized by RCC are BoDs and the auditors: Aboma, T. and Gudeta, L. (2021)⁸. However, it should be noted that writers like Yismaw (2014)⁹ include managers of SCs as one of the four organs of governance of SCs.

2.2.3 BoDs under RCC: Definition, Composition, Qualification, and Remuneration

RCC does not define neither “board” nor “BoD”. Fernando (2006), as quoted by Ahmed (2012), has defined a “director” as “a person having control over the direction, conduct, management or superintendence of the affairs of the company.” For Giday (2014)¹⁰, BoD is “a group of individuals which is responsible to strategically direct a company, overseeing of management and stewardship towards the shareholders and a company in particular as well as society and environment in general.”

The composition of BoD refers to the number and type of directors that participate in the work of the board: Ahmed, H. (2012). Article 296 provides that the directors of SCs who shall be elected by the shareholders of SCs “...shall not be less than three or more than thirteen...” and two-thirds of these members of the BoD are not allowed to play a role in the day-to-day management of the affairs of the company. This provision also stated that directors who are members of the BoD can be shareholders or non-shareholders. However, the number of non-shareholder directors shall not exceed one-third of the total members.

As opposed to its precursor, RCC under Article 297 lists the requirements that should be fulfilled by a person to qualify for board membership. These are: of the minimum age as specified by MoA or law, if any, be of good moral character, no record of conviction for breach of trust, theft, robbery, or other similar criminal offenses while serving as a promoter, director, manager, member of the supervisory board or auditor or holding any other managerial position or under any other circumstance and be compliant with other requirements set by MoA or another law, if any.

RCC recognizes three types of remuneration schemes for BoDs of SCs: fixed annual remuneration, a share in annual net profits, and mixed remuneration schemes. RCC provides directors shall receive an annual remuneration the amount of which shall be fixed by a general meeting and charged against general expenses [Article 304].

⁸ Aboma, T. and Gudeta, L. (2021) The gaps and lessons of Ethiopian share company governance in light of international company model laws. *International Journal of African and Asian Studies* 71, 20-35.

⁹ Yismaw, A. (2014) *Merits and demerit of introducing non-shareholder directors in the governance of Ethiopian share companies*. Unpublished Thesis. AAU, Ethiopia.

¹⁰ Giday, K. (2014) *Remuneration of share company directors in Ethiopia: the law and the practice*. Unpublished Thesis. AAU, Addis Ababa, Ethiopia.

2.2.4 Roles, Responsibilities, Duties, and Powers of BoDs of SCs as provided in RCC

2.2.4.1 Roles of BoDs of SCs as per RCC

Article 315 provides instances of decision making, supervisory and relational roles of BoDs: Tariku, D. (2020)¹¹. On the ***decision-making roles of BoDs***, Article 315 (1)-(3) and (5) provides “Directors shall be responsible for exercising duties imposed on them by law, MoA, and resolutions of general meetings of shareholders” and then it enumerates instances of its decision making roles by stating that “without prejudice to the generality of the foregoing”, the BoDs shall “manage the company’s finances to ensure that the company has adequate capital and liquidity to meet its liabilities promptly, ensure that the company’s governance arrangements are such as to ensure the proper monitoring of the company’s financial statements and positions; make certain that sufficient procedures for risk management and internal control are established and prevent damage to the company; or where prevention is not possible, mitigate the adverse impact of acts which are prejudicial to the company”.

On the ***supervisory roles of BoDs***, Article 315 (6) lists out “keeping regular records of the meetings of BoDs and shareholders, accounts and books, registers of shareholders and directors, and other necessary documents; setting up the reserve funds required by the Code or MoA or the resolution of the general meeting of shareholders and where the company’s ability to meet its financial obligations diminishes or where it suspends payment of debt applying, as appropriate, for preventive restructuring, reorganization or bankruptcy”.

On the ***relational roles of BoDs***, Article 315 (4) and (6) (b) (c) and (d) mandate BoDs “to provide to the supervisory board, if any, all information needed for the performance of the duties of the supervisory board promptly; to ensure the submission of accounts and books to Auditors when required; to submit an annual report of the company's operations including a financial statement to the general meetings of shareholders, and to convene meetings as provided in the Code or MoA and where three quarters of the capital is lost due to loss”.

2.2.4.2 Responsibilities of BoDs of SCs as per RCC

RCC contains other provisions which empower BoDs to undertake basic responsibilities in the management of SC. Simachew (2015)¹² argued that “boards have been given three broad responsibilities in the governance of the company. BoDs are responsible for strategically directing the company, overseeing managements and stewardship towards the shareholders and the company”. Some of these important responsibilities of BoDs are stated hereunder.

¹¹ Tariku, D. (2020) *The desirability of introducing a two-tier board structure in the Ethiopian corporate governance system*. Unpublished Thesis. AAU, Ethiopia.

¹² Simachew, G. (2015) Ethiopian share company law in light of OECD principles of corporate governance. *Abyssinialaw Blog.*, <https://www.abysinialaw.com/blog-posts/itemlist/user/723-gebeyawsimachew> Accessed 14 May 2022.

a. Calling of Shareholders' Meeting and Setting its Agenda

BoDs have the responsibility of calling shareholder meetings and setting the agenda for the meeting of the shareholders [see Articles 315 (6) (d) and (e), 366 (1), and 372 (1)].

b. Appointing and Dismissing the Chairperson or Deputy Chairperson of the Board, and the General Manager of SCs meetings

BoD is the highest organ next to the shareholders' meeting. RCC gives the board the right to elect the chairperson or the deputy chairperson from among its members where no chairperson or deputy chairperson has been elected by the meeting. The board may also revoke at any time their appointment. In addition, BoDs are empowered to appoint and remove the general manager of the company (see Articles 300 and 337).

c. Supervision of the Management

The manager is directly accountable for BoDs and hence, BoDs have the mandate to supervise the acts performed by the manager and his/her team. That is why Article 338 (2) (c) and (d) obliges the general manager to "...discharge responsibilities entrusted to him by the BoDs and implement the decisions of BoDs" and, "...prepare an annual work plan and budget of the company and implementing the same upon approval by BoDs".

d. Determination of the Annual Accounts and Reports its Action

Article 315 (6) (b) and (c), have mandated BoDs to "ensure the submission of accounts and books to the Auditors when required" and to "submit an annual report of the company's operations including a financial statement to the general meetings of shareholders"; hence, BoDs are authorized to determine the annual accounts and are required to submit them to the approval of shareholders' meeting [Article 394 (1)].

2.2.4.3 Duties of BoDs of SCs as per RCC

RCC, as opposed to the Repealed Commercial Code, has introduced the following duties that a member of BoDs, as an individual and as a group, should observe.

a. Duty of Loyalty

Article 316 has stated "directors shall act in the way they consider, in good faith, would be most likely to promote the success of the company", and BoDs are urged to "act for the benefit of shareholders of the company as a whole" and should "...have regard to the long-term interests of the company, the interests of the company's employees, the interest of company's creditors and the impact of the company's operations on the community and the environment".

b. Duty to Exercise Independent Judgement

Article 317 obliges BoDs to “exercise independent judgement in the exercise of their responsibilities” and a director will not be considered as infringing this duty where he/she/it acts “... by an agreement duly entered into by the company that restricts the future exercise of discretion by its directors” or “...in a way authorized by the company’s MoA or by the resolution of the general meeting of shareholders”.

c. Duty of Care and Diligence

Article 318 forces “a director of a company to discharge his responsibility with care, skill, and diligence” and imposes liability on the director who caused damages to the company and shareholders due to lack of care or diligence. This provision postulates that “the responsibility of the director is to be measured in terms of care and skill that a director of a company must exercise as well as diligence that may reasonably be expected of a person carrying out the functions of a director of the company”.

d. Restraints on Private Trade and on Obtaining Benefits from Third Parties

Article 319 articulates “unless authorized by a general meeting, directors may not be a partner in rival business entities nor compete against the company either on their behalf or on behalf of third parties”. Article 322 on driving of benefits from third parties prohibits “A director of a company may not without the consent of the non-beneficiary directors or the shareholders accept a gift or another type of benefit from a third party conferred because of his or her being a director” and this restriction, that continues after the director ceases to be a member of BoD will “...not apply where accepting the gift or the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest”.

e. Avoiding Conflict of Interest and Duty to Disclose Conflict of Interest

Article 320 has stated “... a director of a company should avoid a situation in which he has a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company” and this prohibition applies even after the director ceases to be a member of BoD, relates “... to the exploitation of any property, information or business opportunity regardless of whether the company could take advantage of the property, information or opportunity” and this prohibition does not apply to a conflict of interest that might arise out of a contract of employment with the company. BoDs are exonerated from such duty where the matter has been authorized by BoDs or by the general meeting of shareholders.

Article 321 imposed on BoDs the duty to “... inform the BoDs of any situation that may involve a conflict of interest between his own and of the company’s interest” and “where a director of a company is in any way, directly or indirectly, interested in a proposed

transaction, he shall declare the nature and extent of that interest to the other directors”. Directors are debarred from not voting on matters entailing conflict of interest [Article 323].

f. Dealings between SCs and their BoDs

Article 306 limits the rights of BoDs (including persons related to them by affinity or by consanguinity) not to undertake any dealings with the company unless the same is preapproved by BoDs and directors having a conflict of interest shall not vote regarding such matter and notice of dealings made with prior approval of BoDs shall be given immediately to the Auditors, which in turn should submit the same for the general meeting of the shareholders, which can approve or reject it. Yet, Article 306 (5) confines this duty “... not to apply to routine dealings between a company and persons affiliated with such company, conducted in the same manner as normal dealings between the company and its clients”.

Similarly, Article 307 prohibits the company not to “...make a loan to a director of the company or of its holding company, or give a guarantee or provide security in connection with a loan made by any person to such a director”, unless it is preapproved and it also should be submitted to the external auditor and for the approval or rejection by the shareholders.

2.2.4.4 Powers of BoDs of SCs as per RCC

Article 324 has authorized BoDs “..such powers as are given to it by law, MoA and resolutions passed at general meetings of shareholders” and goes on to say “MoA shall specify whether the directors are jointly responsible as managers and agents of the company or whether one only of the directors is responsible for this purpose”.

The powers that are conferred unto BoDs by MoA and resolutions of the general meetings come from the shareholders, while the power given to BoDs by the law principally comes from the provisions of RCC and other relevant laws like the Civil Code, which regulates the relationship between the principal (SC) and the agent (BoDs). Concerning the principal-agency relationship, Article 324 considers BoDs as agents of SCs. This agency power shall be interpreted in light of Article 2211 of the Civil Code which requires the agent (BoDs) to exercise its obligation in the same diligence as a *bonus pater familias*.

2.3 Overview of Corporate Governance of SCs and its Landscape in Ethiopia

2.3.1 The Significance of Corporate Governance

Corporate governance occupies a central role in the modern economy, in both developed and emerging nations, as a large proportion of economic activity is undertaken by firms organized as corporations. Corporations are formed by interested citizens who demand protection. This is made possible through different mechanisms of corporate governance: Mekonen, T. (2015). It enables the building of an environment of trust, transparency, and accountability

necessary for fostering long-term investment, financial stability, and business integrity, thereby supporting stronger growth and more inclusive societies: OECD's *Principles* (2015). Ethiopia's developmental and poverty alleviation pursuits require stronger enterprises that can generate and increase employment opportunities, produce goods and services, and create profit for the investors. This envisages continuous investment of capital and human resources as well as consumer satisfaction and public confidence in these enterprises. To achieve these objectives, companies must have a good and effective system of corporate governance and must also be perceived to be properly managed: Ahmed, H. (2012).

2.3.2 Overview of the Current Laws Regulating Corporate Governance in Ethiopia

Currently, RCC is the principal legislation for governing corporate governance issues of all types of business organizations. Besides, there are other Proclamations and Directives which directly and indirectly deal with corporate governance issues of Ethiopian SCs. The Commercial Registration and Licensing Proclamation No. 980/2016 (as amended) and the Commercial Registration and Licensing Council of Ministers Regulation No. 392/2016 regulate the formation and running of all types of SCs.

There are also Proclamations and Directives regulating corporate governance on a sector-by-sector basis. For instance, Banking Business Proclamation No. 592/2008 (as amended), Insurance Business Proclamation No. 746/2012 (as amended), Microfinance Business Proclamation No. 626/2009 (as amended) and Capital Goods Leasing Business Proclamation No. 103/1998 (as amended) regulates corporate governance of SCs in their respective areas.

There are also specific Directives issued by the National Bank of Ethiopia (NBE) based on these Proclamations and which regulate corporate governance of SCs operating in their respective sectors. Directive No. SBB/71/2019 (Bank's Corporate Governance) ['BCG'], Directives No. SIB/32/2012 (Requirements for Persons with Significant Influence in an Insurer), Directives No. MFI/21/2012 (Requirements for Persons with Significant Influence in a Microfinance) and Directives No. CGFB/02/2013 (Requirements for Licensing of Capital Goods Finance Business) regulates part of corporate governance issues of banks, insurance, microfinance, and capital goods finance companies, respectively. Likewise, the Ministry of Trade and Regional Integration (MoTRI) has issued Trade Registration, Licensing, and Post-licensing Inspection Directives No. 010/2009 E.C. These Directives puts forward compulsory corporate governance policies and practices on financial and non-financial SCs.

Just recently the Capital Market Proclamation No. 1248/2021, came into effect as of 23rd July 2021. This Proclamation has established the Ethiopian Capital Market Authority, which is empowered by Article 6 (24) to "prescribe notices or guidelines on *corporate governance* of

a company whose securities have been issued to the public or a section of the public” and its Article 29 (2) (a) obliges, self-regulatory organizations to “submit a report on the *corporate governance* policy and practices of the self-regulatory organization.” The Proclamation expects any person acting as a collective investment scheme operator to meet minimum requirements for licensing including putting in place its *corporate governance*. Its Articles 2 (13) cum 32 requires all companies that intend to operate non-government-owned securities exchange, derivatives exchange, or over-the-counter-trading platforms should be SCs.

The Capital Market Proclamation is of the first of its kind at the level of Proclamation to use the concept of corporate governance and it is expected to further usher the concept of corporate governance into Ethiopia and requires SCs that are amenable to it to observe and adhere to the policies and practices of corporate governance.

2.3.3 Overview of OECD and its Corporate Governance Principles

First published in 1999 the OECD’s *Principles* signify the first initiative by an inter-governmental organization to develop the core elements of good corporate governance. These *Principles*, which have been revised in 2004 and 2015, have since become an international benchmark for policymakers, investors, corporations, and other stakeholders worldwide. These *Principles* have incorporated six main core areas of good corporate governance. These are 1) Ensuring the basis for an effective corporate governance framework; 2) The rights and equitable treatment of shareholders and key ownership functions; 3) Institutional investors, stock markets, and other intermediaries; 4) The role of stakeholders; 5) Disclosure and transparency, and; 6) The responsibilities of the board.

The sixth *Principle* calls for boards to strategically direct the company, effectively supervise management, and make them accountable to shareholders and the company. It is designed to apply to all board structures. It orders BoDs should discharge their responsibilities “on a fully informed basis, in good faith, with due diligence and care, in the best interest of the company and its shareholders, and it also to give due regard to the interest of other stakeholders”. The details of this sixth *Principle* are stated in the below table, which is self-explanatory.

3. THE ROLES AND RESPONSIBILITIES OF THE BoD OF SCs UNDER RCC COMPARED WITH THE OECD’S PRINCIPLES

Below, the roles and responsibilities of BoDs of SCs as included in RCC are critically examined vis-à-vis OECD’s *Principle VI*. BCG is also used to elaborate and explain the comparison, as Ethiopian banks are legally required to be established as SCs, as they are highly regulated and play a very pivotal role in the economic activities of any country.

Comparative Analysis of the Provisions of RCC, BCG vis-à-vis the OECD's Principles

Principle VI	<p>The responsibilities of the board: <i>The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders.</i></p>			
	The OECD's Principles	The Provisions of RCC and BCG		
Supporting Sub-Principle of Principle VI	A. Board member should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders.	<p>Article 316 (1): Directors shall act in the way they consider, in good faith, would be most likely to promote the success of the company; they shall act for the benefit of shareholders of the company as a whole.</p> <p>Article 316 (2): In the discharge of the duty under Sub-Article (1) of this Article, a director shall have regard to the long-term interests of the company, the interests of the company's employees, the interest of the company's creditors and the impact of the company's operations on the community and the environment.</p> <p>Article 318 (1): A director of a company shall discharge his responsibility with care, skill, and diligence. The director shall be liable for damages caused to the company and shareholders due to a lack of care or diligence on his part.</p> <p>Article 318 (2): In this regard, the responsibility of the director shall be measured in terms of care and skill that a director of a company must exercise as well as diligence that may reasonably be expected of a person carrying out the functions of a director of the company.</p>	<p>BCG under its Article 10.4.20 call for the board of a bank to adopt a Code of Conduct as per which the board and senior management are to be regulated and which shall cover what is stated in its Annex II, in which "<i>duty of care to the bank</i>" and "<i>duty of care</i>" is defined to refer "<i>to the duty of directors and senior management to act on an informed and prudent basis in decisions concerning the bank</i>". Besides, what is provided under item 4 of Annex II also demands them to act in the interest of the bank. Yet, the duty of loyalty is not specifically provided by it.</p>	
	B. Where board's decisions may affect different	The RCC does not have a provision that obliges BoDs to treat all shareholders of SC fairly.		

<p>shareholder groups differently, the board should treat all shareholders fairly.</p>	<p>Item 9 of Annex II which is attached to BCG imposes on the board “<i>the duty to act fairly and impartially</i>”. As per this clause “<i>directors and senior management should avoid bias, discrimination, caprice or self-interest; they should demonstrate respect for others by acting professionally and courteously</i>”, the word “<i>others</i>” cannot be construed as including the different classes of shareholders as Article 10 (1) of the Banking Business Proclamation only recognizes one class of shares.</p>
<p>C. The board should apply high ethical standards. It should take into account the interests of stakeholders.</p>	<p>The RCC does not have a provision that obliges BoDs to apply high ethical standards. Yet, Article 316 requires acting in good faith, which can be widely construed as applying high ethical standards. BoDs are also demanded to act in good faith by taking into account the interest of stakeholders, which includes, the shareholders, the company, the employees, the creditors, the community, and the environment.</p> <p>BCG does not directly say that the board of a bank should apply high ethical standards. But rather Annex II (Item 2) orders BoDs to prevent “<i>unethical actions such as bribery and corruption inside and outside the bank</i>”.</p>
<p><i>D. The board should fulfil certain key functions, including:</i></p>	
<p>1. Reviewing and guiding corporate strategy, major plans of action, risk management policies and procedures, annual budgets, and business plans; setting performance objectives; monitoring implementation and corporate performance; and overseeing major capital expenditures, acquisitions and divestitures.</p>	<p>Article 315 (1): BoDs of SCs shall manage the company’s finances to ensure that the company has adequate capital and liquidity to meet its liabilities promptly.</p> <p>Article 315 (3): BoDs of SCs shall make certain that sufficient procedures for risk management and internal control are established.</p> <p>Article 338 (2) (d): provides as one of the duties of the general manager the preparation of the annual work plan and budget of the company and implementation of the same upon approval by BoDs.</p> <p>Article 10.4.17 and 11.1 of BCG clamor for BoDs of banks to “<i>review and approve strategies, policies, systems, annual business plans & budgets</i>”, which are prepared by the CEO. Article 10.4.18 demands the board to “<i>monitor the performance</i>” that is stated under Article 10.4.17 by putting in place the proper Key Performance Indicators that are listed in its Annex I.</p>

		<p>The board is also required to approve the “<i>risk management strategies, policies, and risk tolerance limits</i>”, which are to be prepared by its Risk Management and Compliance Sub-Committee. Articles 10.4.7 and 10.5.2 (a) reserve the right to define and approve “<i>acquisitions and disposals of equity investment, fixed assets, and technology of material nature</i>” to BoDs of banks.</p>
Supporting Sub-Principle of Principle VI	<p>2. Monitoring the effectiveness of the company’s governance practices and making changes as needed.</p>	<p>Article 315 (2): BoDs of SCs shall ensure that the company’s governance arrangements are such as to ensure the proper monitoring of the company’s financial statements and positions.</p> <p>BCG under Article 10.5.1 (c) and its Annex IV requires the board of a bank to put in place corporate governance policy. This also includes monitoring the corporate governance that is put in place.</p>
	<p>3. Selecting, compensating, monitoring, and, when necessary, replacing key executives and overseeing succession planning.</p>	<p>Article 337 (1): A company shall have a general manager appointed by the board of directors. The general manager shall be accountable to the board of directors.</p> <p>Article 337 (2): The board may revoke the appointment of the general manager. The general manager shall have no right to be reinstated as a general manager even where he has been dismissed without good cause; however, the board may reappoint him.</p> <p>Article 332 (5): the supervisory board of SCs is empowered to undertake supervision to ensure that directors and other members of the management are discharging their responsibilities properly; where it has been ascertained that they have committed an act that jeopardizes the interests of the company, demand that corrective measures be taken; recommend the removal of those who have failed to discharge their responsibilities properly, as appropriate, to the board of directors or general meeting of shareholders.</p>
		<p>Article 10.4.4. of BCG gives to the board of a bank the mandate of “<i>selecting and appointing CEO and chief internal audit and chief risk management and/or compliance officer, who is qualified and competent with integrity, to administer the affairs of the bank effectively and efficiently, or removing the same where they fail to be fit and proper</i>” and its Article 10.4.5 has also mandate the board to “<i>appoint senior executive officer selected by CEO</i>”.</p>

<p>4. Aligning key executive and board remuneration with the longer-term interests of the company and its shareholders.</p>	<p>Article 301 (2): BoDs may decide to create committees consisting of directors to review matters as and when it deems that appropriate and recommend a course of action if need be. It shall determine the composition and powers of the committees that it establishes without exceeding powers vested in the board itself.</p> <p>RCC does not contain a provision that requires BoDs of SCs to align key executives’ and board’s remuneration with the longer-term interests of the company and its shareholders.</p> <p>BCG urges the Human Resource Affairs Sub-Committee to “<i>recommend and monitor the salaries and benefits for the members of senior management and overall benefits packages (bonus, salary increment, etc.,) of the bank</i>”. This same sub-committee is expected to “<i>oversee any major changes on the overall benefit structure of the bank</i>”. BCG is silent on the issue of remuneration and this might be due to the fact that the decision on the board’s remuneration is within the mandate of the shareholders’ meeting.</p>
<p>5. Ensuring a formal and transparent board nomination and election process.</p>	<p>Article 301 (2): BoDs may decide to create committees consisting of directors to review matters as and when it deems that appropriate and recommend a course of action, if need be. It shall determine the composition and powers of the committees that it establishes without exceeding powers vested in the board itself.</p> <p>Article 10.4.1. of BCG expects BoDs of banks to “<i>develop and submit to the ordinary general meeting of shareholders for approval transparent rules and procedures for the nomination of potential candidates for the board membership taking due consideration to industry standards and the relevant National Bank’s directives</i>”.</p>
<p>6. Monitoring and managing potential conflicts of interest of management, board members and shareholders, including misuse of corporate assets and abuse in related party transactions</p>	<p>Article 315 (2): BoDs of SCs shall ensure that the company’s governance arrangements are such as to ensure the proper monitoring of the company’s financial statements and positions.</p> <p>Article 320 (1): A director of a company shall avoid a situation in which he has a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.</p> <p>Article 320 (2): The prohibition under Sub-Article (1) of this Article shall apply in particular to the exploitation of any property,</p>

information, or business opportunity regardless of whether the company could take advantage of the property, information or opportunity.

Article 320 (3): A person who ceases to be a director continues to be subject to the duty to avoid the exploitation of any information or business opportunity of which he became aware because of his position either for his benefit or for the benefit of third parties.

Article 320 (5): A director may be exonerated from the prohibition under this Article where the matter has been authorized by the board of directors or the general meeting of shareholders under the relevant provisions of this Code.

Article 321 (1): Each director shall inform the board of directors of any situation that may involve a conflict of interest between his or her own and the company's interest.

Article 321 (2): Where a director of a company is in any way, directly or indirectly, interested in a proposed transaction, a contract entered into or any other relationship with the company, he shall declare the nature and extent of that interest to the other directors.

Article 321 (3): Any declaration required by Sub-Articles (1) and (2) of this Article shall be made as soon as the existence of a situation that could give rise to a conflict of interest is known.

Article 322 (1): A director of a company may not without the consent of the non-beneficiary directors or the shareholders accept a gift or another type of benefit from a third party conferred because of his or her being a director.

Article 322 (2): The prohibition under Sub-Article (1) of this Article shall not apply where accepting the gift or the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.

Article 320 (3): A person who ceases to be a director of a company continues to be subject to the duty under Sub-Article (1).

Article 10.4.15. of BCG coerces board of banks “to prevent conflict of interest in the bank by putting in place sound policies and implementing them” and the board is also obliged by Article 10.4.20 and Annex II, to put in place a Code of Conduct that shall stipulate the

		<p><i>“duties to avoid conflict of interest” and as per this stipulation “directors and senior management should not directly or indirectly engage in any action, transaction and business activities that compete or conflict with the interest of the bank”.</i></p>
	<p>7. Ensuring the integrity of the corporation’s accounting and financial reporting systems, including the independent audit, and that appropriate systems of control are in place, in particular, systems for risk management, financial and operational control, and compliance with the law and relevant standards.</p>	<p>Article 315 (3): BoDs of SCs shall make certain that sufficient procedures for risk management and internal control are established.</p> <p>Article 315 (6) (a): BoDs of SCs shall keep regular records of the meetings of BoDs and shareholders, accounts and books, registers of shareholders and directors, and other necessary documents;</p> <p>Article 315 (6) (b): BoDs of SCs shall ensure submission of accounts and books to Auditors when required;</p> <p>Article 315 (6) (c): BoDs of SCs shall submit an annual report of the company's operations including a financial statement to the general meetings of shareholders;</p> <p>Article 332 (6): Supervisory BoDs of SCs shall supervise as well as cause the Auditing of the financial affairs of the company.</p> <hr/> <p>Article 10.4.24. of BCG expects from board of a bank to <i>“ensure an effective internal audit system, staffed with qualified personnel to perform internal audit functions (covering at least financial, operational, legal, technology and management audit) is put in place”</i> and Article 10.4.23. also obliges the board to <i>“ensure that the bank puts in place comprehensive risk management program”</i>. BCG also requires the Audit Sub-Committee of the Board to <i>“check compliance with the policies & rules of the company and proclamations, regulations, directives, guidelines of the National Bank and other relevant laws”</i>.</p>
	<p>8. Overseeing the process of disclosure and communications.</p>	<p>Article 382 (1): Where a shareholder requests, in addition to documents specified under Article 381 and other provisions of this Code, to have access to additional information which is necessary to take a position on the agenda submitted for a general meeting, the board shall give the meeting access to the same. However, the board may refuse to provide such information where disclosure of the information is prohibited by law or doing so would in its opinion cause significant damage to the company.</p>

	<p>Article 10.4.20 and Annex IV of BCG require the board of a bank to put in place “disclosure” and “communication” policies and procedure.</p>
<p><i>E. The board should be able to exercise objective independent judgement on corporate affairs.</i></p>	
<p>1. The board should be able to exercise objective independent judgement on corporate affairs. Boards should consider assigning a sufficient number of non-executive board members capable of exercising independent judgement to tasks where there is a potential for conflict of interest. Examples of such key responsibilities are ensuring the integrity of financial and non-financial reporting, the review of related party transactions, the nomination of board members and key executives, and board remuneration.</p>	<p>Article 296 (1): Two-thirds of members of BoD may not play a role in the day-to-day management of the affairs of the company.</p> <p>Article 317 (1): A director of a company must exercise independent judgement in the exercise of his responsibilities.</p> <p>Article 317 (2): This duty is not infringed by his acting: a) by an agreement duly entered into by the company that restricts the future exercise of discretion by its directors; or b) in a way authorized by the company’s MoA or by the resolution of the general meeting of shareholders.</p> <hr/> <p>BCG is silent on the ability of a BoD of a bank on its responsibility to exercise objective and independent judgement on the affairs of the Bank. In addition, BCG does not distinguish between members of an executive and non-executive BoDs.</p>
<p>2. Boards should consider setting up specialised committees to support the full board in performing its functions, particularly with respect to audit, and, depending upon the company’s size and risk profile, also with respect to risk management and</p>	<p>Article 301 (1): The BoDs may give one or more of its members a special mandate as regards one or more specific matters including representing the company in a specific transaction.</p> <p>Article 301 (2): The BoDs may decide to create committees consisting of directors to review matters as and when it deems that appropriate and recommend a course of action, if need be. It shall determine the composition and powers of the committees that it establishes without exceeding powers vested in the board itself.</p> <p>Article 301 (3): The board shall establish an audit committee consisting of members of the board alone; a director who takes part in</p>

<p>remuneration. When committees of the board are established, their mandate, composition, and working procedures should be well defined and disclosed by the board.</p>	<p>the day-to-day management of the affairs of the company may not become a member of the audit committee.</p> <p>Article 315 (3): the BoDs shall make certain that sufficient procedures for risk management and internal control are established.</p>
	<p>Article 10.4.11. of BCG mandatorily urges the board to “<i>establish and ensure the effective functioning of various board committees including, but not limited to, Audit Sub-Committee, Risk Management, and Compliance Sub-Committee and Human Resource Affairs Sub-Committee</i>”. These sub-committees are mandated to oversee the audit function, the risk management system, and the remuneration, respectively, that will be adopted and implemented by the bank. BCG also governs the mandates, composition, and working procedures of these sub-committees, whose duties and responsibilities are listed in detail under its Annex III. These sub-committees are required to meet at least once a month and are obliged to report regularly to the full board.</p>
<p>3. Board members should be able to commit themselves effectively to their responsibilities.</p>	<p>Article 324 (3): Directors authorized to act as agents for the company may exercise in its name their powers as agents. Any restriction on their powers shall not affect third parties acting in good faith.</p>
	<p>Article 10.3.5. of BCG provides “<i>a director shall attend in person at least seventy-five percent (75%) of the board meetings of a bank within a financial year. Failure to do so, unless there is good cause accepted by the ordinary general meeting of shareholders, shall result in automatic cancellation of his seat from the board</i>” and its Article 10.3.7. dictates the board’s remuneration to be paid in proportion to his/her/its attendance of board meetings during the year under consideration.</p>
<p>4. Boards should regularly carry out evaluations to appraise their performance and assess whether they possess the right mix of background and competences.</p>	<p>RCC does not require BoDs of SCs to regularly carry out an evaluation and appraisal of their performance as well as their mix of background and competence.</p>
	<p>Article 10.4.12. of BCG requires the board to “<i>assess semi-annually the effectiveness of the board, its sub-committees, and individual directors in carrying out their responsibilities and reporting the</i></p>

		<i>outcomes to the annual ordinary general meeting of shareholders and the National Bank”.</i>
	F. In order to fulfil their responsibilities, board members <i>should</i> have access to accurate, relevant, and timely information.	<p>Article 315 (4) requires BoDs of SCs so as they provide to the supervisory board, if any, all information needed for the performance of the duties of the supervisory board in a timely manner.</p> <p>Article 332 (1): The supervisory board shall cause the submission of documents and information necessary to discharge its responsibility, and examine the same.</p> <p>Annex III of BCG provides “<i>the Audit Sub-Committee should have full and unrestricted access to information and be able to obtain independent professional advice</i>”.</p>
Supporting Sub-Principle of Principle VI	G. When employee representation on the board is mandated, mechanisms should be developed to facilitate access to information and training for employee representatives so that this representation is exercised effectively and best contributes to the enhancement of board skills, information, and independence	<p>Article 300 (1): Only a director who is a shareholder may become the chairperson of BoDs. A director who takes part in the day-to-day management of the affairs of the company may not become the chairperson of BoDs.</p> <p>Article 337 (3): The general manager is an employee of the company; he may be a member of the board of directors. He may not be the chairperson of the board.</p> <p>Article 320 (4): The prohibition under this Article does not apply to a conflict of interest arising out of an employment contract with the company. [አንቀፅ 320 (4): በዚህ አንቀፅ የተደነገገው ክልከላ ዳይሬክተሩ ከማኅበሩ ጋር ከሚያደርገው የሥራ ውል ጋር በተያያዘ ሊነሳ የሚችል የጥቅም ግጭትን አይመለከትም::]</p> <p>As per Article 6.3 of BCG, employees of banks are prohibited not to being a member of the Nomination and Election Committee. Besides, Article 5 of Directive No. SBB/67/2018 provides “<i>no employee of a bank sits on the board of any bank</i>”.</p>

4. FINDINGS OF THE STUDY

The findings of this study have revealed that:

- 4.1. On acting on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders, RCC has well accommodated and addressed these key elements, while BCG has dealt only with the duty of care while it has neglected the duty of loyalty;

- 4.2. On treating all shareholders fairly, there is no provision in RCC to this end, while BCG cannot be expected to address the issue as only one class of shares is allowed for banks;
- 4.3. On applying high ethical standards and taking into account the interests of stakeholders, both RCC and BCG are defective in addressing this key role;
- 4.4. From the key functions of BoDs that are listed out by OECD's *Principle*:
 - 4.4.1. The first one which relates to oversight over the company's risk management, RCC has tried to include most of the points envisaged but BCG is more comprehensive;
 - 4.4.2. On the second key function of monitoring the effectiveness of the company's governance practices and making changes as needed, both RCC and BCG have fairly addressed it;
 - 4.4.3. On the third key function of selecting, compensating, monitoring, and, when necessary, replacing key executives and overseeing succession planning, RCC and BCG gave such mandate to BoDs. However, there is no provision neither in RCC nor in BCG that deals with the succession planning of the key executives;
 - 4.4.4. On aligning key executive and board remuneration with the longer-term interests of the company and its shareholders, which is the fourth key function of BoD, RCC has failed in mandating the BoDs to decide on the remuneration to be paid to the key executives, while BCG is relatively exhaustive;
 - 4.4.5. On ensuring a formal and transparent board nomination and election process, which is the fifth key function, RCC indirectly enabled BoDs of SCs to establish a nomination and election sub-committee. BCG has included detailed obligations on BoDs so that they ensure a formal and transparent board nomination and election;
 - 4.4.6. On the key function of monitoring and managing potential conflicts of interest of management, board members and shareholders, RCC compels BoDs to exercise such function in a very detailed fashion; but lacks imposing an obligation on BoDs to monitor and manage the conflict of interest. However, BCG is much more explicit;
 - 4.4.7. On the seventh key function of ensuring the integrity of the corporation's accounting and financial reporting systems, RCC has exhaustively addressed it. But BCG is much more comprehensive and pertinent;
 - 4.4.8. On the overseeing the process of disclosure and communications, there is no explicit provision in RCC while BCG is explicit.
- 4.5. From the four sub-supporting principles which requires the board to have the ability to exercise objective independent judgement on corporate affairs:

- 4.5.1. On the first one, RCC on top of introducing executive and non-executive BoD members, it has mandated them to assign members of non-executive board to exercise “...independent judgement to tasks where there is a potential for conflict of interest”, while BCG is silent on creating committees to cases involving conflict of interest;
- 4.5.2. On the second sub-supporting dealing with the establishment of sub-committees, RCC requires the formation of risk management sub-committees and mandates BoDs to grant to the sub-committees powers and responsibilities without exceeding their legal mandates. BCG, is very detailed and comprehensive, both on the types of sub-committees and on their duties and responsibilities;
- 4.5.3. On the third sub-supporting principles which compels BoDs members to have the ability to commit themselves effectively to discharge their responsibilities, regrettably RCC is not explicit. Yet, BCG demands the commitment of members of BoD in discharging their responsibilities and in addition to envisaging the possibility of removing the lackluster member from the board seat, it has attached the remuneration payable to them to their attendance of meetings.
- 4.5.4. On the last of the sub-supporting principles which obliges BoDs to regularly carry out evaluations to appraise their performance and assess whether they possess the right mix of background and competences, RCC has missed this most important aspect. Yet, BCG is much more explicit and it can be taken as a benchmark.
- 4.6. Both RCC and BCG are lacking in dealing with this most important aspect of authorizing BoDs to have access to accurate, relevant, and timely information. However, the BoD is obliged to provide information as needed by supervisory boards, which is also is entitled to ask the BoDs for submission of documents and information.
- 4.7. Although as opposed to BCG, RCC has allowed for the participation of employees in board and in a way it avoids fusion of power, it is lacking in providing for such employee to have access to information and obtain the necessary trainings.

5. CONCLUSIONS

This study has revealed that the roles and responsibilities that are given to BoDs of SCs by RCC are relatively exhaustive as compared to the Code it has repealed. The literature review as well the interviews conducted for the purpose of this study conclusively showed that OECD’s *Principles*, in general, and the contents of the sixth principle of OECD, which regulates responsibilities of boards, in particular, are taken into account when drafting RCC.

RCC has recognized BoDs as the most important organ in the management of SCs and it makes them responsible for decision making on the major businesses of the company. It is

also mandated to oversee the general affairs of the company. In addition, to recognizing the two-tiered board structure, and allowing non-shareholders to be a member of the board, RCC have considerably amended the role and responsibilities of BoDs and has come up with an illustrative list, in addition to their roles and responsibilities of directors, conferred unto them by the shareholder's general meeting and MoA. RCC have remedied the likelihood of fusion of power in which a member of board holds both the board chairmanship and CEO positions.

RCC has shifted the burden of proof unto the member of BoD, otherwise any damage to the company due to directors will entail on them both civil and criminal liabilities. The civil liability is extended to the extent of affecting the private property of the culprit board member. By doing so, RCC has tried to address corporate governance problems which were said to be rampant due to the inefficiencies of the Repealed Commercial Code.

6. RECOMMENDATIONS

Having thoroughly scrutinized the roles and responsibilities of BoDs of SCs vis-à-vis OECD's *Principles* and BCG, the writer recommends the following:

- 6.1. On top of the existing numerous legislations, Ethiopia has enacted the Capital Market Proclamation, which obliges non-government owned securities exchange, derivatives exchange, or over the counter-trading platforms to be established as SCs. In addition, Ethiopia is on the verge of ushering foreign banks to partner with Ethiopian banks, which are incorporated as SCs. Ethiopia is in the process to be a member of the World Trade Organization. All these of these calls Ethiopia, to put in place robust corporate governance scheme that will effectively regulate all types of SCs.
- 6.2. As RCC is enacted just a year ago, it might be too much at this time to ask for its revision. However, RCC under its Articles 4 and 5 had mandated the Council of Ministers and MoTRI to issue Regulations and Directives, respectively, that are necessary for the proper implementation of RCC. The writer of this study recommends so as the Council of Ministers issues Regulations on Code of Corporate Governance that shall be compulsorily applicable to all SCs and for MoTRI to issue detailed Directive to execute the Regulations on Code of Corporate Governance.
- 6.3. The Code of Corporate Governance of the Council of Ministers and the Directive of MoTRI should in general address all of the six principles of OECD's *Principle*. In particular, they, *inter alia*, should take into account the deficiencies observed in the sixth principle of OECD's, should bind all share companies that intends to operate in Ethiopia, and should take into account all of the positive aspects of BCG and the Code of Corporate Governance of the Ethiopia Institute of Corporate Governance.