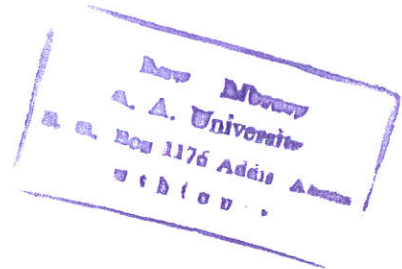


**ADDIS ABABA UNIVERSITY
SCHOOL OF GRADUATE STUDIES
FACULTY OF LAW**

**THE LEGAL AND INSTITUTIONAL FRAMEWORK OF THE ETHIOPIAN
COMPETITION LAW AND ITS ENFORCEMENT**

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A Thesis submitted to Addis Ababa University, the School of Graduate Studies, Faculty of Law in Partial Fulfillment of the Requirements for the Degree of Master of Laws (LLM) in Business Law.

JUNE, 2011

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Declaration

This thesis is my original work, has not been presented for a degree in any other university and that all sources of materials used for the thesis have been duly acknowledged.

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Date. July 6, 2011



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Those who deserve great thanks throughout the work of this thesis are:

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ABSTRACT

Competition is the cornerstone of a free-market economy. Without competition a free-market economy cannot yield the expected benefits and fruits to bring about sound economic development. However, competition requires the public control to protect it from being abused by private firms. This means the government has to intervene in the market to control how businesses are transacting. But the mechanism of intervention matters. The government has to intervene in the market to control market imperfections, and to promote and maintain competitive markets through the arms of competition policy and competition law. This competition policy and law should also be well designed taking into account once country's specific development goals to have effective competition regime. As such, it also requires effective enforcement institutions to achieve the desired goals and benefits. However, there are many challenges to adopt effective competition policy and law and to establish effective enforcement institutions. On top of that, there are so many constraints to implement competition policy and law effectively. This, in effect, makes the public to miss benefits of competition. In order to maintain and promote competition and competitive markets, Ethiopia has promulgated her recent competition law named "Trade Practice and Consumers' Protection Proclamation No.685/2010". Therefore, if Ethiopia implements this Proclamation effectively the public will secure benefits of competition and fruits of a free-market economy. Of course there are some issues related to the legal and the institutional framework of the Ethiopian competition law which might affect the effective enforcement the law that those require the amendment of the law.

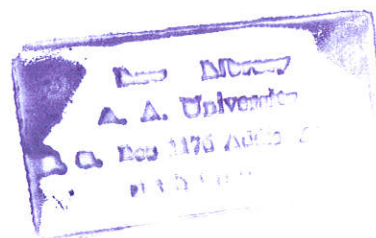


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CHAPTER ONE INTRODUCTION

1.1. BACKGROUND

It is important to note the economic system where competition has a role to play. Based on the role of the state in the economy, there are various economic systems such as planned or command economy, free-market economy and mixed economy.¹ In a planned economy, the state directly or indirectly operates the economy.² And the participation of private firms or individuals in the economic life is either prohibited or at best very limited.³ In a planned economic system, market is not recognized as the mechanism to allocate resources. Thus, such economic system does not entertain market competition.

In the mixed economy, two models of control of an economy exist side by side, sometimes reinforcing each other, and sometimes in some degree of confusion, if not actually in antagonism.⁴ One of these models is where the state does not itself take over any sectors of the economy, but seeks through a variety of regulatory and other mechanisms to influence the conduct of economic actors, who are private parties. The other model is where the state actually enters into production, and moves from control to the management of the economy. Here market competition has some role in the economy.

In a free market economy, the market is employed as the mechanism to allocate resources in the economy.⁵ "The market" is the mechanism by which supply and demand interact. In a free market economy; the market is made up of private sectors with the minimum state intervention in the regulation of the economy. There are different market structures or arrangements such as perfectly competitive market, oligopoly and monopoly.⁶ In a perfect market, both buyers and sellers would be price takers in that they could not influence market price by withholding their sales or purchases and would have to accept the going price.⁷ For there are "external costs" and "public goods", a perfect market would not necessarily produce an optimum allocation of the nation's productive resources and government interference can give a preferable allocation.⁸ As soon as individual firms are in a position where they can influence price, imperfect competition is said to exist.⁹

Monopoly is a situation where there is a single seller in the market, which is usually taken as the polar opposite of perfect competition.¹⁰ And an oligopoly is a market characterized by a small number of firms who realize they are interdependent in their pricing and output policies.¹¹

¹ Edith H. Whetham and Jean I. Currie, The Economics of African Countries, (Cambridge at the University Press, 1969), P.145

² Ibid

³ Ibid

⁴ Yash Ghai, "Law in the Political Economy of Public Enterprise, (Africa Perspectives), Uppsala offset center AB, 1977, p.18

⁵ A Berkely Hill, An Introduction to Economics, concepts for students of Agriculture and Rural Sector, (CABI, 3rd Edition, 2006), p.63

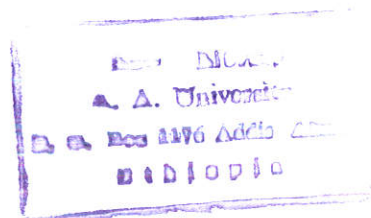
⁶ Clair Wilcox, Public Policies Toward Business, (Richard D.Irwin, Inc. Homewood, Illinois, Fourth, Edition, 1971), p.3

⁷ A Berkely Hill, Supra note 5, p.64

⁸ Clair Wilcox, Supra note 6, p.66

⁹ Ibid

¹⁰ As elaborate in R.S. Khemani and D.M. Shapiro's Glossary of Industrial Organization Economics and Competition Law; and as cited by Gebremedhine Birega, Preliminary Country Paper of Ethiopia on Competition



A free market economy assumes especially free competition between business entrepreneurs; as a result monopolies are, as a rule, regarded with disfavour.¹² Competition is the cornerstone of a free-market economy.¹³ It refers to a situation in a market in which firms or sellers independently strive for the patronage of buyers in order to achieve a particular business objective, e.g. profits, sales and/or market share.¹⁴ Competition has the benefits such as decentralized decision-making by firms, promotes efficient allocation of society's scarce resources, increases consumer welfare and gives rise to dynamic efficiency in the form of economy as a whole.¹⁵ These benefits are also called benefits of competition.

However, the private acts or conducts of competitors may deprive the public these benefits of competition. The firms may gain market power, by limiting competition by erecting barriers to commerce, entering into collusive arrangements to restrict prices and output, and engaging in other anti-competitive business practices.¹⁶ In the modern Western state freedom of competition is emphasized, but at the same time it is realized that under certain circumstances state regulation is necessary-not to restrict competition, but to secure and strengthen it.¹⁷ This denotes that competition is not an article of faith,¹⁸ and there must be public control to secure benefits of competition. To this end, countries adopt competition policy and law. Competition policy is defined as spanning the broader set of measures and instruments that may be pursued by governments to enhance the contestability of markets.¹⁹ Although competition policy, in terms of content and direction, is conditioned by the domestic structure and international relations of the economy concerned, its objective should be the promotion of economic efficiency.²⁰

Competition law is an essential part of the economic constitution of a free market economy.²¹ It is made for the maintenance and promotion of competition.²² And the agreements which have the effect of limiting competition, mergers which harm competition process and abuse of a dominant

Regime: Capacity Building on Competition Policy in Select Countries of Eastern and South Africa (7UP 3 PROJECT), at [http://www.Cuts-international.org/7UP 3/Ethiopia-final.doc](http://www.Cuts-international.org/7UP%203/Ethiopia-final.doc), visited on 10/7/2010

¹¹ Ibid

¹² J NEETHLING, VAN HEERD-NEETHLING Unlawful Competition, 2nd Edition, 2008, Lexis Nexis Group Worldwide, p.2

¹³ Bahaa Ali El Dean and Mahmoud Mohieldin, "On the Formulation and Enforcement of Competition Law in Emerging Economics: The Case of Egypt," Working Paper 60. The Egyptian Center for Economic Studies, Cairo, September 2001, at <http://www.eces.org.eg/Downloads/ECESWP60.pdf>, visited on 20/9/2009

¹⁴ Gebremedhine Birega, Supra note 10, p.6-7

¹⁵ The World Bank and OECD, A Framework for the Design and Implementaiton of Competition Law and Policy, (The World Bank and OECD, 1999). At

<http://rru.worldbank.org/Documents/PaperSLinks/2427.pdf>, visited on 7/10/2009

¹⁶ Ibid

¹⁷ J NEETHLING, Supra note 12, p.13

¹⁸ Symposium on Enterprise Law of the 80s, Enterprise Law of the 80's, European and American Perspectives on Competition and Industrial Organization, (Luxemburg, 1979), P. 205

¹⁹ Bernard Hoekman and Petros C. Mavroidis, "Economic Development, Competition Policy and the WTO," Policy Research Working Paper 2917. World Bank, Washington, D.C., October 2002, P.4

²⁰ Bahaa Ali El Dean and Mahmoud Mohieldin, Supra note 13

²¹ The World Bank and OECD, Supra note 15

²² J NEETHLING, Supra note 12, p.10

position or monopolization are the areas of competition policy which the competition law should effectively address them.²³ These are anti-competitive practices which the substantive provisions of the competition laws of different jurisdictions are made to tackle.

Historically, Canada and the United States were among the first countries to introduce competition law, in 1889 and 1890 respectively.²⁴ Many European countries introduced competition laws in the 1950s, after World War II. Most developing and transition countries did not introduce competition laws until 1990s.²⁵ The two dominant systems, which have been transplanted to many developing countries, are the U.S. and the European Union systems.²⁶

Adopting effective competition policy and law is the first step to reap the benefits of competition. On top of this, competition policy and law have to be enforced effectively. So there must be efficient enforcement authorities to implement and enforce the same. Establishing a competition agency is an integral part of introducing competition law.²⁷ Given its pivotal role, the establishment of an efficient agency is imperative if competition law is to be introduced as it is the enforcement policy that will determine the practical impact of the legislation.²⁸

Vigorous law enforcement against collusive behavior, abuse of dominant position, and anticompetitive mergers requires effective enforcement institutions.²⁹ The competition authorities need to have proper legal powers to implement the competition laws effectively. A competition agency must have a transparent, independent and impartial administrative structure; qualified staff and adequate resource to enforce the law effectively.³⁰ The establishment of an impartial and independent competition authority has been viewed as the best watch dog of fair competition.³¹ The main features of an effective competition Commission have been identified as: "independent, insulated from political interference,... transparent,... subject to checks and balance,..."³² In enforcing the competition law, there must be public enforcement. And it is the vigilance of public law enforcement, which provides the drive towards conformity.³³

In Ethiopia, the Haile Sellassie era (Imperial era) economic policy was encouraging market competition. However, the Derg regime had adopted command economy where competition did not

²³ Bahaa Ali El Dean and Mahmoud Mohieldin, Supra note 13

²⁴ World Bank, "Building Institutions for Markets: Competition," World Development Report (WDR) 2002. World Bank, Washington, D.C., 2002, at http://web.worldbank.org/external/default/WDScontentserver/IW3P/Ib/2011/10/05/00094946_01092204010635/additional/310436360_20050006102139.pdf, visited on 7/10/2009

²⁵ Ibid

²⁶ Ibid

²⁷ Bahaa Ali El Dean and Mahmoud Mohieldin, Supra note 13

²⁸ Ibid

²⁹ OECD, "Stock-Taking of Experience with Review of Competition Law and Policy," From: Global Forum of the Organization for Economic Co-operation and Development (OECD), Paris, 12-13 February 2004, at

http://www.oecd.org/document/56/0%2c2340%cen_2649_37463_177731256_1_1_37463%2c00.htm1, visited on 7/10/2009

³⁰ Bahaa Ali El Dean and Mahmoud Mohieldin, Supra note 13

³¹ World Bank, Supra note 24

³² Bahaa Ali El Dean and Mahmoud Mohieldin, Supra note 13

³³ A.D. Neale, The Antitrust Laws of the United States of America, Cambridge at the University Press, 2nd, 1970, P.

have the role in the economy. After the fall of the Derg regime, the present regime has adopted the free-market economic policy,³⁴ where the private sectors should have major role in the economic development and growth.³⁵ The Transitional Period Economic Policy provides that all actors in the economy should interact in the competitive market environment.³⁶ If public enterprises or state-owned enterprises are to participate in the economy, they do so only on the basis of principle of profitability and free competition.³⁷ Moreover, it is stated that free-market economy can play a role in fastening the economic development only where there is strong market competition.³⁸ In the free-market economy where there is no strong market competition, the market cannot efficiently allocate the scarce economic resources.³⁹ These documents denote that there is a need to have strong competition in the Ethiopia's markets.

Ethiopia has been taking different policy measures and reforms toward the building of a free-market economy. The adoption of competition law is one of those measures. In line with free market economic policy, Ethiopia adopted her competition law in year 2003. This law was named as "Trade Practice Proclamation No. 329/2003".⁴⁰ Presently, this proclamation was repealed and replaced by the newly adopted Proclamation called "Trade Practice and Consumers' Protection Proclamation No. 685/2010" (hereinafter called as "Proclamation"), which came to force as of 16th of August 2010.⁴¹ This Proclamation No.685/2010 is expected to maintain and promote competition, and protect consumers' interests in a better manner than the repealed proclamation. The Proclamation provides for its rationales in its Preamble, and its objectives under Art 3. The scope of application of the Proclamation is stated under Art 4. The Proclamation is applicable to all persons undertaking commercial activities and to any transactions in goods and services with in Ethiopia; and commercial activity outside Ethiopia if it has adverse effect in Ethiopia. However, there are exemptions provided under this provision where the Proclamation has no applicability. The substantive provisions of the Proclamation concerning anti-competitive practices are covered under part two of the Proclamation which is classified into three chapters. This part of the Proclamation covers abuse of market dominance; collusive agreements, concerted practice, and decision by association; and regulation of merger and unfair competition. And part four of the Proclamation deals with the establishment, responsibilities and duties of the Trade Practice and Consumers' Protection Authority (Authority). Part five of the Proclamation is concerned with instituting of actions and conducting of investigation. Finally, part seven of the Proclamation stipulates miscellaneous provisions.

³⁴ Federal Democratic Republic of Ethiopia, The Document Rural Development Policies, Strategies and Methods, November 2001/2002, p. 21

³⁵ The Ethiopian Transitional Period Economic Policy 1991, P. 15-18

³⁶ Ibid

³⁷ Id. At p.29

³⁸ Federal Democratic Republic of Ethiopia, The Document Industrial Development Strategy, Ministry of Information, August 2002, p. 189

³⁹ Ibid

⁴⁰ Trade Practice Proclamation, Proclamation No. 329/2003, Federal Negarit Gazeta, (9th Year No. 49, Addis Ababa, 17th April 2003).

⁴¹ Trade Practice and Consumers' Protection Proclamation No. 685/2010, Federal Negarit Gazeta, (16th Year No. 49, Addis Ababa, 16th August 2010).



1.2. Statement of the Problem

As already noted, competition is a cornerstone of the free-market economy. However, leaving competition to itself is not advisable for competitors or firms may engage in practices or activities which limits, restricts, impede or eliminate fair market competition. In order to secure benefits of competition, there must be effective competition policy and law, and effective enforcement authorities. Ethiopia has also recognized the need to have competition in the free-market economy. To this end, Ethiopia has adopted competition law and provided for the mechanism to enforce this law.

This paper attempts to note whether the legal framework provided under the Ethiopian competition law (the Proclamation) enables the effective enforcement of the law. It attempts to address whether or not the rationale; objectives; substantive provisions and sanctions provided under the law enable the effective enforcement of the law. Moreover, the paper tries to point out whether the enforcement mechanism provided under the law enables the enforcement authorities to enforce the law effectively. It focuses on whether or not the institutional framework provided under the Ethiopian competition law establishes the enforcement institutions which are independent, accountable and transparent in the enforcement of the law. Of course this thesis does not cover issues related to provisions concerning consumers' protection. This is because the writer prefers to focus on issues related to competition areas; and it is also difficult to deal with both the competition law and consumer protection laws in this thesis.

1.3. Objectives of the Study

The objectives of this study are:

- A. To assess effectiveness of the legal framework provided under the Ethiopian competition law (the Proclamation) in the enforcement of the law, to point out the weakness and the strength of the law and thereby suggest possible alternative in this respect.
- B. To assess whether the institutional framework provided under the Ethiopian competition law (the Proclamation) enables the Trade Practice and Consumers' Protection Proclamation Authority and other organs to enforce the law effectively, to identify the weakness and strength of the law and thereby recommend the possible alternative.

1.4. Scope and Limitations of the Study

It is an impossible task to try to cover each and every detail issue related to the legal and institutional framework of the Ethiopian competition law and its enforcement in this study. The study focuses on the major issues of the law and its enforcement which may have impact on the effective enforcement of the same.

However, since the Trade Practice and Consumers' Protection Proclamation is newly adopted one and the Authority entrusted with the enforcement of the Proclamation is not yet established, there is lack of practical cases entertained by the concerned enforcement Authority pursuant to the Proclamation. Moreover, since the enforcement of the Proclamation by the Trade Practice and Consumers' Protection Authority is not yet begun, it would be difficult to gather empirical information from various stakeholders through interviews and questionnaires about the implementation of the Proclamation by the Authority. But the writer would do all his best at least to come up with findings which initiate others for further research on the area.

1.5. Methodology of the Study

In this study the following research methodologies are employed:

1. Analysis concepts, texts and cases (where necessary cases already entertained by the concerned authority as per the repealed proclamation).

2. Synthesis legal provisions or provisions of laws.
3. Reference is made to the competition policies and laws of different countries and their enforcement, and various documents of some international organizations to point out best practices with the view to use them as a bench marks to analysis the legal and institutional framework of the Ethiopian competition law and its enforcement.

1.6. The Structure of the Study

This paper is categorized into four chapters. The first chapter deals with this introductory part of the thesis. The second part deals with competition policy and law and their enforcement in general. The third chapter focuses on the legal framework provided under the Ethiopian competition law and its effectiveness in the enforcement of the law. The fourth chapter of the paper deals with the institutional framework to enforce the Ethiopian competition law. This part of the paper explains issues related to the enforcement of the law, specifically, with the powers and duties of the Trade Practice and Consumers' Protection (Authority) and other organs entrusted with the enforcement of the law and factors which have impact on the effective enforcement and implementation of the law. Finally, there would be conclusions and recommendations to wind up the study.

CHAPTER TWO

Competition Policy and Law; and their Enforcement in General

2.1. Introduction

This chapter briefly focuses on the review of literatures concerning the enforcement of competition policy and competition law in general. In particular, this part deals with the concept and rationales of competition, the objectives of competition policy and law, the substantive provisions of competition law, the need to have competition policy and law both by developed and developing countries, the purpose of enforcement of competition policy and law and the enforcement mechanisms in general to point out best international practices to enforce competition policy and law effectively.

Even if its form differs from one country to another, the government has a role in the economy. The role of the state in the economy determines the role of competition in the economy. Biblically, the government's function is to carry the sword of protection so the righteous can be productive.¹ In the economic theory, one of the basic assumptions is the existence of governments which maintain law and order and which follow some kind of economic policy.² Thus the role of the government in the economy is not a new phenomenon.

However, the role of the state in a market economy differs fundamentally from its role in planned and command economies.³ In the latter systems, economic activities are run almost exclusively, either directly or indirectly, by the state.⁴ These activities occur within a framework that treats relationships between state-owned or otherwise state-dominated entities on the basis of organizational subordination or co-ordination.⁵ The participation of private firms or individuals in economic life is either prohibited or at best very limited.⁶ Accordingly, the legal infrastructure is shaped in such a way as to suit these economic realities.⁷ Under central planned economy, there is no role for competition and therefore no need for competition policy.⁸

¹ Dr. Myles Munroe, The Burden of Freedom, (Raey Publishers, Addis Ababa, 2003), p. 70

² Edith H. Whetham and Jean I. Currie, The Economics of African Countries, (Cambridge at the University Press, 1969), P. 145

³ Bahaa Ali El Dean and Mahmoud Mohieldin, "On the Formulation and Enforcement of Competition Law in Emerging Economics: The Case of Egypt," Working Paper 60. The Egyptian Center for Economic Studies, Cairo, September 2001, at <http://www.eces.org.eg/Downloads/ECESWp60.pdf>. visited on 20/9/2009

⁴ Ibid

⁵ Ibid

⁶ Ibid

⁷ Ibid

⁸ Ping Lin, The Evolution of Competition Law in East Asia, at <http://www.In.edu.hk/econ/staff/plin/ch2plin-proof.pdf>, visited on 10/9/2010

On the other hand, a free market economy presupposes free competition amongst the participants in the market (such as businesses, the professions and labor) with the minimum of state intervention in the regulation of the economy.⁹ In a market economy, private legal entities interact, contract and conduct business freely in pursuit of their own interests.¹⁰ Normally, it is the government that provides the institutional foundation upon which business rests, the legal framework within which it functions, and many of the instruments through which its activities are carried.¹¹ This shows that free market economy is not referring to economy devoid of government intervention.

The behavior of business inescapably affects the general welfare; it is properly a matter of public concern.¹² Businesses affect jobs, prices, local prosperity, future resources, national security, and often the quality and meaning of life.¹³ It is not always safe to leave business to its own devices; experience has shown that its freedom will sometimes be abused.¹⁴ Free competition carries within itself the seed of its own destruction by creating the possibility of the formation of cartels and monopolies.¹⁵ This denotes business and competition require proper public regulation. The need to regulate competition is brought clearly by the following statement made by Adam Smith: "It is not from the benevolence of the butcher, the brewer or the baker, that we can expect our dinner but from their regard to their own interest...People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."¹⁶ Where there is no proper state intervention in the market, imperfect competition which is generally viewed as market failures may occur and result in inefficient allocation of resources and adversely affect industry performance and economic welfare.¹⁷ To what extent these factual restrictions of competition should be tolerated depends on the economic policies of the state.¹⁸

⁹ J NEETHLING, VAN HEERDEN-NEETHLING Unlawful Competition, (Pretoria, 2nd Edition, October 2007), p. 1

¹⁰ Clair Wilcox, Public Policies Toward Business, (Richard D. Irwin, Inc. Homewood, Illinois, Fourth Edition, 1971), P.3

¹¹ Ibid

¹² Id. at p. 8

¹³ Peter Muchoki Njoroge, ENFORCEMENT OF COMPETITION POLICY AND LAW IN KENYA INCLUDING CASE STUDIES IN THE AREAS OF MERGERS AND TAKEOVERS, PREVENTION OF POSSIBLE FUTURE ABUSE OF DOMINANCE AND COLLUSION/PRICE FIXING, at <http://www.ifc.org/ifcext/fias.nsf/Attachments.pdf>, visited on 10/9/2010

¹⁴ Clair Wilcox, Supra note 10, p.8

¹⁵ J NEETHLING, Supra note 9, p. 10

¹⁶ Adam Smith: The Wealth of Nations, (Harmondsworth, Eng: Penguin Books, 1982), p.782.

¹⁷ The World Bank and OECD, A Framework for the Design and Implementation of Competition Law and Policy, (The World Bank and OECD, 1999). At <http://rru.worldbank.org/Documents/PapersLinks/2427.pdf>, visited on 7/10/09

¹⁸ J NEETHLING, Supra note 9, P.10

Therefore for its proper functioning, business demands intervention of the government. Government does not willfully interfere with business.¹⁹ It intervenes only when it is forced to intervene.²⁰ In the modern Western state freedom of competition is emphasized, but at the same time it is realized that under certain circumstances state regulation is necessary-not to restrict competition, but to secure and strengthen it.²¹ Accordingly, in most countries today legislation exists which is directed at the exclusion or regulation of restrictions on competition through horizontal or vertical links. In other words, legal provision is made for the maintenance and promotion of competition.²² Hence, the need is paramount for governmental intervention to protect competition by prohibiting agreements and activities that undermine it.²³ So then, what is competition?

2.2. Competition

2.2.1. Definition

"Competition" is defined as "the process by which economic agents, acting independently in a market, limit each other's ability to control the conditions prevailing in that market."²⁴ Black's Law Dictionary also defines the term competition as:²⁵

"Contest between two rivals. The effort of two or more parties, acting independently, to secure the business of a third party by the offered of the most favorable terms; also the relations between different buyers or different sellers which result from this effort. It is the struggle between rivals for the same trade at the same time; the act of seeking or endeavoring to gain what another is endeavoring to gain at the same time."

These definitions denote:

- a) Competition is the process, contest, struggle, or effort between economic agents, sellers or buyers or rivals in the market are to face to achieve business or gain.
- b) These economic agents are called rivals because they strive or struggle to secure business or gain which others seek at the same time.
- c) These rivals in the market have to keep their independence so that none of them should have power to control certain conditions in the market to limit competition.
- D) Thus there is a need to control practices of the rivals which affect their independence and thereby undermine competition.

¹⁹ Clair Wilcox, Supra note 10, P. 10

²⁰ Ibid

²¹ J NEETHLING, Supra note 9, p. 10

The term "regulation" refers to the various instruments by which governments impose requirements on enterprises and citizens.

²² Ibid

²³ Bahaa Ali El Dean and Mahmoud Mohieldin, Supra note 3, p. 2

²⁴ The World Bank and OECD, Supra note 17

²⁵ Black's Law Dictionary, (The Publisher's Editorial Staff, ST. PAUL MINN. WEST GROUP, Six Edition, July 1990), P. 284

2.2.2. Rationale of Competition

"Of all human powers operating on the affairs of mankind, none is greater than that of competition".²⁶ From Adam Smith's *Wealth of Nations* onwards, there has been awareness amongst economists that competition promotes the common good.²⁷ Free competition is a fundamental assumption in any market economy and has even been seen as one of the foundations for democratic societies.²⁸ Whereas political vibrance assures political democracy, robust competition assures economic democracy.²⁹ And there are some rationales of competition which are worth mentioning.

- A. Business men are selfish in seeking to maximize their profit.³⁰ Competition would thus harness selfishness and make it serve the common weal. It makes business to serve the general interest.³¹
- B. Private enterprise is justified to seek profit for service it renders to the people.³² But, to obtain profit, it must serve consumers, for this is the only way to profit that competition will allow.³³ Thus it is on the foundation of competition that the case for private enterprise is built.³⁴
- C. In a market economy, competition enables the private enterprises to determine how to allocate scarce productivity resources efficiently and what goods to produce based on consumer demands.³⁵ In such an economy, the consumer exercises sovereign power.³⁶ Thus competition is the regulator that compels producers to follow the guidance of consumer choice.³⁷
- D. Competition is unambiguously a good thing in neoclassical economic theory. This stems from a belief that competitive markets give consumers wider choice and lower prices and give sellers stronger incentive to minimize their costs and eliminate waste.³⁸ In addition, in competitive

²⁶ World Bank, "Building Institutions for Markets: Competition," (World Development Report (WDR) 2002. World Bank, Washington, D.C., 2002), at http://web.worldbank.org/external/default/WDScontentserver/IW3P/Ib/2011/10/05/00094946_01092204010635/additional/310436360_20050006102139.pdf, visited on 7/10/09

²⁷ MARTIN BRASSEY, *Competition Law*, JUTA Law 2002, p. 10

²⁸ Lucian Cernat, UNCTAD, *The Role of Competition in the Promotion of Competitiveness and Development: Experiences from a sample of developing and least developed countries*, at http://www.competition-regulation.org.uk/conferences/southafrica_04/cernat.pdf, visited on 3/9/2010

²⁹ Peter Muchoki Njoroge, *Supra* note 13

³⁰ Clair Wilcox, *Supra* note 10, p. 10

³¹ *Ibid*

³² *Ibid*

³³ *Ibid*

³⁴ *Ibid*

³⁵ *Id.* at p. 12

³⁶ *Ibid*

³⁷ *Ibid*

³⁸ Lucian Cernat, UNCTAD, *Supra* note 28

Neoclassical economic theory (which is also associated with neoliberal political policies) is grounded in the rejection of the Marxian notion of exploitation and the promotion of the idea that the distribution of social resources produced by market exchanges is innately fair and just (when it is allowed to work "without friction.") Neoclassical economic theory dominates the teaching and practice of economics in the United States and in many other countries, as well. It provides an analytical framework from which to argue in favor of the existing distribution of wealth:

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²⁷ MARTIN BRASSEY, Competition Law, JUTA Law 2002, p. 10

²⁸ Lucian Cernat, UNCTAD, *The Role of Competition in the Promotion of Competitiveness and Development: Experiences from a sample of developing and least developed countries*, at http://www.competition-regulation.org.uk/conferences/southafrica_04/cernat.pdf, visited on 3/9/2010

²⁹ Peter Muchoki Njoroge, *Supra* note 13

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³¹ *Ibid*

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markets, firms need to innovate and adapt quickly to changing circumstances, thus creating dynamic efficiency.³⁹

- E. Competition is essential if markets are to work for the poor. Competitive markets are more likely to provide the poor with opportunities to be employed or to start their own small business.⁴⁰
- F. Competitive domestic markets can benefit farmers. They will be in a more favorable position if the markets in which they buy their inputs, arrange transport of their crops to market and sell their outputs are competitive.⁴¹
- G. Competition allows the market to reward good performance and penalize poor performance by producers. It encourages entrepreneurial activity, stimulates efficiency and market entry by new firms, and encourages production of a greater variety of products of good quality.⁴²
- H. Competition has long been acknowledged as an important force bringing about economic development and growth.⁴³ Competition is a potential legal tool to fight poverty and to promote economic development. Competition-domestic and international-provides incentives for institutional change around the world by modifying the effect of existing institutions.⁴⁴ Competition is a general principle for organizing the economy.⁴⁵ And the micro-economic foundations for competition will ultimately determine productivity and competitiveness.⁴⁶

Thus competition is a process that a country should promote and maintain to secure these benefits. Competition is held to be a stern disciplinarian.⁴⁷ However, in a competitive economy, there is still a need for public controls.⁴⁸ This is because firms may agree not to compete, or form combinations, or abuse their dominance and thereby threaten the existence of competition.⁴⁹ If the consumer is to reap the benefits of competition, government must make sure that competition is maintained.⁵⁰ Therefore, government must be concerned, not only with the preservation of competition, but also

wealth is the result of the decisions that individuals make, not the result of processes of coercion, theft, colonization, etc.

³⁹ Ibid

⁴⁰ John Preston, *Implementing Competition Policy in Developing Countries: The Role of Donors*, at <http://www.businessenvironment.org/dyn/be/docs/80/session3.4prestonDoc.pdf>, visited on 5/9/2010

⁴¹ Ibid

⁴² UNCTAD, *Competition policy, Trade and Development in the Common Market for Eastern and Southern Africa (COMESA)*, at <http://r0.unctad.org/en/subsites/cpolicy/docs/cpsafrica.pdf>, visited on 5/9/2010

⁴³ World Bank, *Supra* note 26

⁴⁴ Ibid

⁴⁵ OECD, "Stock-Taking of Experience with Review of Competition Law and Policy," From: Global Forum of the Organization for Economic Co-operation and Development (OECD), Paris, 12-13 February 2004, at http://www.oecd.org/document/56/0%2c2340%cen_2649_37463_177731256_1_1_37463%2c_oo.htm1, visited on 24/8/2009

⁴⁶ Charles, Edquist, Maureen, McKelvey; *Systems of Innovation: Growth, Competitiveness and Employment*, (Volume I, An Elgar Reference Collection, 2000), p.321

⁴⁷ Clair Wilcox, *Supra* note 10, p. 12

⁴⁸ Ibid

⁴⁹ Ibid

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⁴¹ Ibid

⁴² UNCTAD, Competition policy, Trade and Development in the Common Market for Eastern and Southern Africa (COMESA), at <http://r0.unctad.org/en/subsites/cpolicy/docs/cpsafrica.pdf>, visited on 5/9/2010

⁴³ World Bank, Supra note 26

⁴⁴ Ibid

⁴⁵ OECD, "Stock-Taking of Experience with Review of Competition Law and Policy," From: Global Forum of the Organization for Economic Co-operation and Development (OECD), Paris, 12-13 February 2004, at http://www.oecd.org/document/56/0%2c2340%cen_2649_37463_177731256_1_1_37463%2c_oo.html, visited on 24/8/2009

⁴⁶ Charles, Edquist, Maureen, McKelvey; Systems of Innovation: Growth, Competitiveness and Employment, (Volume I, An Elgar Reference Collection, 2000), p.321

⁴⁷ Clair Wilcox, Supra note 10, p. 12

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Ibid

with the ways in which men compete.⁵¹ It must act to equip traders with accurate information, to protect the weak against the strong, and to safeguard future needs against present wastes.⁵² Governments often intervene when markets fail but in the absence of a clearly defined competition policy and regulatory mechanisms, the intervention can be arbitrary and served vested interests rather than the poor.⁵³ The government must set the rules of competition. So the government intervention in the market has to be via competition policy and competition law.

2.3. Competition Policy and Competition Law

2.3.1. Definitions

Since competition policy and competition law are the two terms frequently confused in policy details, defining these terminologies might avoid such confusion. Competition policy is defined as spanning the broader set of measures and instruments that may be pursued by governments to enhance the competitiveness of markets.⁵⁴ Moreover, competition policy essentially refers to all governmental measures that can have an impact on competition, in local and national markets, by directly affecting the behavior of enterprises and the structure of industry.⁵⁵ It is an instrument for achieving an efficient allocation of resources, technical progress and consumer welfare.⁵⁶ Competition policy might include actions to privatize state-owned enterprises, deregulate activities, reduce licensing requirements for new investment or entry, cut firm-specific subsidy programs, and trade liberalization.⁵⁷

On the other hand, the governments translate policies into binding rules through the law.⁵⁸ So competition law is defined as a set of rules that govern the way that businesses interact with each other in the marketplace.⁵⁹ A specific instrument of competition policy is competition law, that is,

⁵¹ Ibid

⁵² Ibid

⁵³ Pradeep S.Mehta, Competition Policy In developing Countries: An Asia-Pacific Perspective, at [http://www.usescap.org/drpad/publication/bulletin 2002/ch7.pdf](http://www.usescap.org/drpad/publication/bulletin%202002/ch7.pdf), visited on 12/8/2009

⁵⁴ Bernard Hoekman and Petros C. Mavroidis, "Economic Development, Competition Policy and the WTO," Policy Research Working Paper 2917. World Bank, Washington, D.C., October 2002, at

<http://scholar.google.com/scholar?q=Bernard+Hoekman+and+petros+C.Mavroidis>, visited on 12/8/2009

⁵⁵ Rijit Sengupta & Cornelius Dube, Competition Policy Enforcement Experiences from Developing Countries and Implications for Investment, at <http://www.oecd.org/dataoecd/42/55/40303419.pdf>, visited on 5/9/2010

Another definition According to Khemani and Dutz (1995), "competition policy is defined in the broader sense as consisting of two parts—which is commonly referred to as antitrust or competition law and the other, which compromises micro industrial policies such as tariff and non-tariff policies, foreign direct investment, unnecessary market intervention in the market place and economic regulation designed to prevent anticompetitive business practices by firms. Both parts of the policy impact on economic agents in the market place."

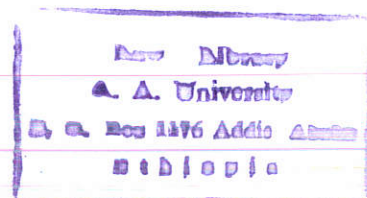
⁵⁶ Ibid

⁵⁷ Bernard Hoekman and Petros C. Mavroidis, Supra note 54

According to Hoekman and Homes,1999: Competition Policy comprises the set of measures and instruments used by governments that determine the "conditions of competition" that reign on their markets.

⁵⁸ Bahaa Ali El Dean and Mahmoud Mohieldin, Supra note 3, p.1

⁵⁹ Ping Lin, Supra note 8



the adoption of legislation to prohibit anticompetitive conduct by the private sector that reduces competition in markets. Thus competition law is a sub-set of competition policy.⁶⁰

2.3.2. Objectives of Competition Policy

Some scholars classify the goals of competition policy as ultimate and intermediate. They believe that the ultimate goal of competition policy is to further economic development which can be accomplished through faster economic growth (amongst other means); and the intermediate objective is increasing investment expenditures.⁶¹ However, the objectives of competition policies of developing countries differ from those of developed countries.⁶² Initially, protecting market processes and rights to engage in commerce were accorded a high priority in national competition policies, as the following quotation from a joint World Bank and OECD study points out:⁶³

"While many objectives have been ascribed to competition policy during the past hundred years, certain major themes stand out. The most common of these objectives cited is the maintenance of the competitive process or of free competition, or the protection or promotion of effective competition. These are seen as synonymous with striking down or preventing unreasonable restraints on competition. Associated objectives are freedom to trade, freedom of choice, and access to markets. In some countries, such as Germany, freedom of individual action is viewed as the economic equivalent of a more democratic constitutional system. In France emphasis is placed on competition policy as a means of securing economic freedom, that is, freedom of competition".

The scholars of market processes in developing and industrial nations increasingly point to the importance of dynamic efficiency considerations as an appropriate objective of competition policy.⁶⁴ Singh argues that competition policy in developing economies should support the overall development path of an economy. He points to:⁶⁵

⁶⁰ Taimoon Stewart, Julian Clarke and Susan Joekes, COMPETITION LAW IN ACTION, Experiences from Developing Countries, at <http://www.idrc.ca/en/eu-111739-201-1-Do-Topic.html>, visited on 25/8/2010
According to Hoekman and Homes, 1999: National competition law can be defined as the set of rules and disciplines maintained by governments relating either to agreements between firms that restrict competition or to the abuse of a dominant position (including attempts to create a dominant position through mergers).

⁶¹ Simon J. Evenett, What is the Relation between Competition Law and Policy and Economic Development?, at www.evenett.com/Publicpolicy/.../ADBpresentationEvenett.pdf, visited on 06/08/2011

⁶² Ibid

⁶³ World Bank and OECD, A Framework for the Design and implementation of Competition Law and Policy. Paris. 1997, p.2, at www.oecd.org/dataoecd/10/58/35488898.pdf, visited on 06/08/2011

⁶⁴ Simon J. Evenett, Supra note 61

⁶⁵ Singh, A, Competition and Competition Policy in emerging markets: International and Development dimensions, G-24 Discussion Paper Series, Paper No. 18, United Nations, 18 September 2002, at www.unctad.org/templates/Download.asp?docid=3058&lang..., visited on 06/08/2011

The concept of efficiency has both static & dynamic aspects. Static efficiency refers to maximization of the benefits of voluntary exchange at a given point in time; that is, maximizing the sum of producer and consumer surpluses in a given market at a point in time. Dynamic efficiency refers to the maximization of the sum of such surpluses over time or over specific time. The latter takes account, in particular, of the impact of technical progress, innovation, and investments of various types.

“the need to emphasize dynamic rather than static efficiency as the main purpose of competition policy”.

Even if there are differences as to the objectives of competition policies across countries, some objectives of competition policy are noted in various studies. Generally competition policy by promoting competition aims to secure benefits to the consumers from lower prices.⁶⁶ It also aims to encourage innovation, but will discourage it if pursued too strong or too weakly.⁶⁷ This shows competition policy has to promote and maintain optimal competition. Competition policy promotes good governance in the corporate sector as well as in government by diminishing the opportunities for rent-seeking behavior and the corruption that often accompanies it.⁶⁸ Moreover, competition policy disciplines constrain both private and government actions whereas antitrust rules pertain to the behavior of private entities (firms).⁶⁹

Finally, competition policy includes: the restructuring of government utilities and their privatization and/or corporatization, the implementation of competitive neutrality between public and private enterprises, the enactment of sector-specific regulation in areas of market failure, including access to essential facilities, and finally the enactment of competition law.⁷⁰ It encompasses the area commonly known as anti-trust or anti-monopoly law and practice as well as various micro-industrial policies affecting markets.⁷¹

2.3.3. Objectives of Competition Law

Every law has its own purpose to achieve. The Model Law on Competition put forward by the UNCTAD outlines the aim of Competition Law: ⁷²

“To control or eliminate restrictive agreements or arrangements among enterprises, or merger and acquisitions or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development”.

The principal goal of competition law is to ensure that the trade remains free and the markets are kept open.⁷³ By regulating the market to make it free, antitrust legislation promotes the liberty of suppliers, the customer’s freedom of choice and the creativity of both; it enhances equality of

⁶⁶ NKONZO HLATSHWAYO, *The Interface Between Intellectual Property Rights and Competition Law*, (Webber Wentzel Bowens, Johannesburg), at [http://qo.warwick.ac.uk/jilt/2008 2/hlatshawyo](http://qo.warwick.ac.uk/jilt/2008%20hlatshawyo), visited on 20/7/2009

⁶⁷ Ibid

⁶⁸ Bernard Hoekman and Petros C. Mavroidis, *Supra* note 54, p. 4

⁶⁹ Ibid

⁷⁰ Kathryn McMahon, *DEVELOPING COUNTRIES AND INTERNATIONAL COMPETITION LAW AND POLICY*, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1523143.pdf, visited on 5/9/2010

⁷¹ UNCTAD, *Supra* note 42

⁷² UNCTAD, *The Model Law on Competition*, at <http://www.unctad.org/en/docs/tdrbpconf5d7.en.pdf>, visited on 10/9/2010

⁷³ MARTIN BRASSEY, *Supra* note 27, p. 2

opportunity and perhaps equality of outcomes too (much being made of the benefits of regulation for the small entrepreneur); it promotes fairness in commercial dealing; and it acts a brake on the arbitrary exercise of power, especially that brand of power-private power—otherwise so difficult to reach and control.⁷⁴ Competition law is aimed at preventing or remedying conduct or structures in the economy that nullify and/or distort competition.⁷⁵ It concerns itself with the conduct of participants in the economy or “industrial structures” that influence competition.⁷⁶

Furthermore, a more specific goal of competition law is to prevent economic agents from distorting the competitive process either through agreements with other companies or through unilateral actions designed to exclude actual or potential competitors.⁷⁷ Thus the law should control horizontal agreements; vertical agreements; dominant firms which are large enough to harm competition unilaterally; mergers which are anticompetitive.⁷⁸

To note experiences of some jurisdictions, in U.S.A., the general objective of the antitrust laws was stated in Attorney-General’s report 1955 to be the promotion of the competition in open markets.⁷⁹ While social as well as economic values like efficiency underlie U.S. antitrust, the weight given to the latter may be greater.⁸⁰ The U.S. antitrust statutes are the Sherman Act 1890, the Federal Trade Commission Act 1914, the Clayton Act 1914 and other statutes.⁸¹

In Europe, “the common policy towards restrictive practices...was not only a question of the best policy towards business agreements but the best way of uniting Europe.”⁸² Only competition, not economic planning, could bring about economic integration and optimum use of resources.⁸³ The objectives of European competition policy have been market integration⁸⁴, a form of equity or equality of competition, an aspect of “the level playing field” to which many business aspire in the

⁷⁴ Id. at p. 3-4

⁷⁵ Pieter Francois Van Aswegen, The Right To Exclude Others From Using Claimed Intellectual Property: (A Perspective From Competition Law, STELL LR 2003), at <http://heinonline.org/HOL/Landingpage?>, visited on 14/8/2010

⁷⁶ Ibid

⁷⁷ The World Bank and OECD, Supra note 17

⁷⁸ Ibid

⁷⁹ D.M. Raybould and Alison Firth, Law of Monopolies, (Competition Law and Practice in the USA, EEC, Germany and the UK, (Graham & Trotman, 1991), p. 11

⁸⁰ Symposium on Enterprise Law of the 80’s, Enterprise Law of the 80’s: European and American Perspectives on Competition and Industrial Organization, (Luxemburg, 1979), P. 47

⁸¹ D.M. Raybould and Alison Firth, Supra note 79, p. 11-12

⁸² Symposium on Enterprise Law of the 80’s, Supra note 80, p. 210

⁸³ Ibid

⁸⁴ John Fairhurst and Christopher Vincenzi, Law of the European Community, (Pearson Ongman, Fourth Edition, 2003), p.441

Community⁸⁵ and the promotion of efficiency.⁸⁶ However, the EU Commission also expressly acknowledges that “social” and “human” demands sometimes require a modification of results otherwise mandated on purely economic grounds.⁸⁷ And the Community competition policy is directed towards three kinds of anti-competitive activity:⁸⁸

- Cartels and restrictive agreements,
- Abuse of a dominant position,
- Mergers which are anti-competition.

Competition policy in India draws inspiration from the Articles 38 and 39 of the Constitution of India.⁸⁹ The first competition law of India was Monopoly Restrictive Trade Practices Act (MRTP Act) (1969), and this Act was repealed by the Competition Act (2002). The Competition Act (2002) was amended by Competition Amendment Bill (2007).⁹⁰ The objective of the Act is “...to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India...” The key substantive provisions of the Act include anti-competitive agreements, abuse of dominance and combinations (mergers).⁹¹

In South Africa, the Competition Act no.89 was adopted in 1998 and became effective as of 1 September 1999 (“Competition Act”). The Act was amended in 2000, in part to clarify the relationship between general competition law and regulatory bodies.⁹² The primary, general purpose of the Competition Act, to “promote and maintain competition,” is supplemented by six particular sets of goals.⁹³ The first of these is the efficiency, adaptability, and development of the economy. The second goal, competitive prices and choices for consumers, recognizes the foundation of an economics-based policy in concerns about consumer welfare.⁹⁴ The other 4 sets of policy goals represent other public interest issues that have been important to stakeholders in the debate: employment and social and economic welfare, opportunities to participate in World markets (and to recognize foreign competition in South Africa), equitable opportunities for Small and Medium-sized Enterprises (SMEs) to participate in economy, and increasing the ownership

⁸⁵ Ibid

⁸⁶ Ibid

⁸⁷ Ibid

⁸⁸ Ibid

⁸⁹ Subhadip Ghosh and Thomas W. Ross, India’s New Competition Law: A Canadian Perspective, at http://www.csgb.ca/files/2007_ghosh.pdf, 14/9/2010

⁹⁰ Ibid

⁹¹ Ibid

⁹² OECD, Competition Law and Policy in South Africa, An OECD Peer Review, May 2003, at <http://www.oecd.org/dataoecd/52/13/2958714.pdf>, visited on 16/9/2010

⁹³ Ibid

⁹⁴ Ibid

stakes of historically disadvantaged persons (Sec.2). The substantive provisions cover horizontal agreements, vertical agreements, abuse of dominance and mergers.⁹⁵

In Zambia, the Zambian government recognized that an active competition policy remains a key guarantor to economic efficiency and consumer welfare and contributes to greater availability to the consumer of a broad range of products and services at lower prices. The government passed the Competition and Fair Trading Act in 1994.⁹⁶ The objectives of the Act are to encourage competition in the economy by prohibiting anti-competitive trade practices; to regulate monopolies and concentration of economic power; to protect consumer welfare; to strengthen the efficiency of production and distribution of goods and services; to secure the best possible conditions for the freedom of trade; and to expand the base of entrepreneurship.⁹⁷ The Act deals with horizontal agreements; mergers/takeovers; vertical restraints; and abuse of dominant position.⁹⁸

Concerning Kenya, under the East African Community Treaty Kenyan government has committed itself to prohibit any practice that adversely affects the objectives of free and liberalized trade. Further, the Kenya government, as a member of COMESA, has through Article 55 of the COMESA treaty agreed to the prohibition of any practice which negates the objective of free and liberalized trade.⁹⁹ Moreover, Kenya is a signatory to WTO Agreement which included reducing trade barriers further. These demonstrate that the government of Kenya is committed to the promotion of competition internally and internationally.¹⁰⁰ The Restrictive Trade Practices, Monopolies and Price Control Act (Chapter 504 of the laws of Kenya) commenced on 1st February, 1989.¹⁰¹ Except exemptions provided under Section 5 of the Act, Section 73 of the Kenya's Competition law states that the law is applicable to all sectors including state enterprises. The main areas covered by the Kenya's competition law are restrictive trade practices; mergers and takeovers; control of unwarranted concentrations of economic power; and control and display of prices.¹⁰²

To sum up, these denote that these countries taking account of their development goals adopt competition law to control anti-competitive practices which adversely affect competition and thereby aiming to achieve economic values and/or other non economic values.

⁹⁵ Ibid

⁹⁶ UNCTAD, Supra note 42

⁹⁷ Ibid

⁹⁸ Ibid

⁹⁹ Peter Muchoki Njoroge, Supra note 13

¹⁰⁰ Ibid

¹⁰¹ UNCTAD, Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries: Thailand, Lao, Kenya, Zambia, Zimbabwe. at www.uctad.org/templates/download.asp?docid=6470&lang=1, visited on 10/12/2010.

¹⁰² Peter Muchoki Njoroge, Supra note 13

2.3.4. Scope of Application

The scope of competition law specifies the entities (enterprises, natural persons etc.) to which the law applies to. It can also specify any exclusion from the law.¹⁰³ Competition law is an essential part of economic constitution of a free market economy.¹⁰⁴ Thus competition law should be a general law application which is applicable to all sectors and to all economic agents in an economy engaged in the commercial production and supply of goods and services. In this regard, both private and public (i.e. State) owned and operated enterprises should be subject to the same treatment.¹⁰⁵ In other words, competition law should, as much as possible, apply to all market transactions and all entities engaged in commercial transactions irrespective of ownership or legal form.¹⁰⁶ It should apply as broadly as possible: "Eliminate sectorial gaps in coverage of competition law, unless evidence suggests that compelling public interests cannot be served in better ways."¹⁰⁷ This does not mean that only competition matters. Rather, tolerating monopoly or collusion instead of competition calls for justification.¹⁰⁸ In most industrial countries competition legislation is a general law that applies to all economic activities and sectors unless specific exemptions are granted.¹⁰⁹

There are fundamental legal and economic reasons to uphold the view that competition law should be generally applicable. Entities engaged in the same or similar lines of activity should be subject to the same set of legal principles and standards to ensure fairness, equality and non-discriminatory treatment under the law.¹¹⁰ Such an approach will result in greater predictability and consistency in the interpretation and application of the law, and promote more transparency, accountability and confidence in the legal and other institutions responsible for the implementation of the law. It should foster "due process" under the law.¹¹¹

Even if competition law should be applicable to all sectors and firms in the economy engaged in commercial economic activity, in practice various types of exemptions and exceptions are granted for social, economic, and political reasons.¹¹² Regulations may encourage, or even require, conduct or conditions that would otherwise be in violation of competition law.¹¹³ Generally speaking, exemptions tend to be broader in scope, as is the case with sectoral or industry examples, whereas exceptions tend to be more narrowly focused, often determined on a case-by-case basis, applying a

¹⁰³ Cassey Lee, Model Competition Laws: The World Bank-OECD and UNCTAD Approaches Compared, Faculty of Economics & Administration University of Malaya, 19 July 2004, at www.competition-regulation.org.uk/conferences/southafrica04/lee.pdf, visited on 06/08/2011

¹⁰⁴ The World Bank and OECD, Supra note 17

¹⁰⁵ R. Shyam Khemani, Application of Competition Law: Exemptions and Exceptions, at [www.unctad.org/en/docs/ditccclpmisc25_en\[1\].pdf](http://www.unctad.org/en/docs/ditccclpmisc25_en[1].pdf), visited at 10/12/2010.

¹⁰⁶ The World Bank and OECD, Supra note 17

¹⁰⁷ OECD, Supra note 45

¹⁰⁸ Ibid

¹⁰⁹ Ibid

¹¹⁰ R. Shyam Khemani, Supra note 105.

¹¹¹ Ibid

¹¹² Ibid

¹¹³ OECD, Supra note 45

rule-of-reason approach.¹¹⁴ All exceptions to the application of the law should be explicitly identified in pertinent legislation.¹¹⁵ The term “exemption” refers to “excused or free from some obligation to which others are subject”. An exception is to be “excluded from or not conforming to a general class, principles, rules, etc.” However, it may be noted that while the terms “exemption” and “exception” (also “exclusion”) have specific meanings within the context of particular national legal systems, they are often used interchangeably.¹¹⁶ Therefore the general applicability of competition law does not preclude a country to make exemptions or exceptions where the law is not applicable.

As to exemptions, the economic activities that are generally granted or eligible for exemptions can be said to fall into at least four categories:¹¹⁷

1. Exemptions aimed at balancing unequal economic or bargaining power; e.g. workers' collective bargaining activities; agriculture, dairy, fishing, and forestry sectors; small and medium-sized firms, and purchasing or buying groups.
2. Exemptions aimed at addressing information, transaction costs and “collective action” problems; e.g. collection and exchange of statistics and credit information, and development and adoption of standards; intellectual property rights; learned professions such as lawyers, physicians and accountants.
3. Exemptions that reduce risk and uncertainty; e.g. insurance, investment brokerage and banking services; research and development (R & D) cooperatives.
4. Special sector and interest ground demands; e.g. “special” sectors such as energy, liner shipping, air, trucking, professional sports, small business and government enterprises.

Finally, the scope of application of competition law may also provide for the extra-territorial jurisdiction of the law. In this respect, the extra-territorial element in the WB-OECD model law is an interesting one.¹¹⁸

2.3.5. Anti-Competitive Practices

Anti-competitive practices may restrict, limit and/or distort competition and constitute an obstacle to the achievement of economic development (growth). Therefore, competition law has to control anti-competitive agreements, abuse of dominant market position and mergers which are anti-competitive. It is important to consider these anti-competitive practices one by one.

A. Anti-competitive agreements.

Agreements between competitors may adversely affect competition, but not all agreements between competitors hurt competition. Competition laws prohibit agreements which are anti-competitive. Agreements could be classified as “horizontal” agreements and “vertical” agreements. Horizontal agreements are those concluded between enterprises in broadly the same activities, i.e.

¹¹⁴ R.Shyam Khemani, Supra note 105.

¹¹⁵ The World Bank and OECD, Supra note 17

¹¹⁶ R.Shyam Khemani, Supra note 105.

¹¹⁷ Ibid

¹¹⁸ Cassey Lee, Supra note 103

between producers or between wholesalers or between retailers dealing in similar kinds of products,¹¹⁹ which restrict these trade actors' capacity to act independently. Vertical agreements are those between enterprises at different stages of the manufacturing and distribution process, for example between manufacturers of components and manufacturers of products incorporating those goods; between producers and wholesalers, or between producers, wholesalers and retailers.¹²⁰ Competition laws of different countries define and provide for lists of anticompetitive agreements based on their specific realities. In this respect, UNCTAD Model Law on Competition enumerates restrictive agreements or arrangements such as price fixing; collusive tendering; market or customer allocation; restraints on production or sales, including by quota; concerted refusals to purchase; concerted refusals to supply; collective denial of access to an arrangement, or association, which is crucial to competition. These agreements are unambiguously harmful; some may be prosecuted as crimes.¹²¹ Many countries competition laws outwardly prohibit these anti-competitive agreements. Thus to promote and maintain competition, competition law must be enforced against these agreements effectively.

However, competition laws' prohibition against some of these agreements is balanced by a scheme of exceptions and exemptions that incorporates policy considerations other than competition. Based on once country's development needs, anti-competitive agreements are treated under per se rule or rule of reason. A rule of reason approach is (case-by-case analysis) while per se approach is unconditional prohibition by competition legislation. A rule of reason approach is complex to enforce and per se approach is relatively easy to enforce.¹²² The rule of reason is essentially a rule of construction, while 'per se' rules are rules of evidence.¹²³ This concerns the burden of proof in a competition case. The distinction between the two rules lies principally in the burden of evidence each imposes on the parties to the litigation. Under the per se rule, the plaintiff need only demonstrate that the defendant engaged in proscribed conduct, whereas under the rule of reason, a further argument must be made that the conduct hurt the plaintiff or society.¹²⁴ For instance, in the WB-OECD model law, horizontal restrictive agreements (i.e. agreements between competitors) that are subjected to per se illegality include: price fixing; quantity fixing; market allocation; refusal to deal; collusive bidding/tendering; and elimination of actual or potential sellers or purchasers from the market. Restrictive agreements other than these listed are subjected to rule of reason. The application of rule of reason comprises two elements: a threshold criteria and a cost-benefit comparison.¹²⁵ In UNCTAD's model competition law, there is list of restrictive agreements that are prohibited but any of those may be exempted or authorized if it can be shown that it will produce

¹¹⁹ UNCTAD, Supra note 72

¹²⁰ Ibid

¹²¹ The World Bank and OECD, Supra note 17

¹²² Bahaa Ali El Dean and Mahmoud Mohieldin, Supra note 3

¹²³ A.D. Neale, The Antitrust Laws of the United States of America, (Cambridge at the University Press, 2nd, 1970), p. 27-28

¹²⁴ Ping Lin, Supra note 8

¹²⁵ Cassey Lee, Supra note 103



'net public benefit'.¹²⁶ The American antitrust law distinguishes between restrictive practices that are per se illegal and those that are subject to rule of reason analysis in which the merits are weighed up.¹²⁷ Under EU competition law, the rule of reason appears in Commission decisions, notably in connection with joint ventures.¹²⁸ This competition law has an automatic prohibition against anticompetitive practices and agreements. But this prohibition may be lifted in specific circumstances.¹²⁹ In European Union, price-fixing is per se illegal and subject to criminal penalties. Under Indian and Zambian competition law, the "rule of reason" approach prevails regarding the assessment of the anti-competitive effects of restrictive practices.¹³⁰ In South Africa, restrictive horizontal practices (cartels) which are per se illegal are price-fixing, division of markets, and collusive tendering.¹³¹ In general, restrictive horizontal agreements tend to be considered more serious than restrictive vertical agreements.¹³²

On the other hand, it has been cogently argued that emerging economies, which have no real experience of competition regulation and face all sorts of difficulties in obtaining accurate data and records, should start off with per se rules rather than a complex rule of reason analysis. Only when the competition agency has acquired the necessary expertise should it consider converting to a rule of reason regulatory approach.¹³³

B. Abuse of a Dominant Position

A dominant market position of a firm is not a threat to competition in itself. The EU Court of Justice defines a dominant position as:¹³⁴

A position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers.

A firm may acquire legitimately a dominant position in a market. The lawful acquisition of a dominant position is not within the prohibition of competition law. Countries set a market share of a concerned firm in a relevant market to determine whether that firm possesses dominant market position or not.¹³⁵ Based on the turnover or assets of a firm, countries define a threshold below which the abuse of dominance prohibitions does not apply.

In treating dominance, there are two approaches-quantitative and qualitative. The WB-OECD model law has quantitative dimension in their approach to dominance while UNCTAD adopts an entirely

¹²⁶ Ibid

¹²⁷ MARTIN BRASSEY, Supra note 27, p. 120

¹²⁸ Ibid

¹²⁹ D.M. Raybould and Alison Firth, Supra note 79, p.199

¹³⁰ Adam Torok, Competition Policy Reform in South Africa Towards the Mainstream CP Model for 'transition' Economies in the Third World, at http://www.iwh-halle.de/projects/competition_policy/sa_country_study.pdf, visited no 15/9/2010.

¹³¹ MARTIN BRASSEY, Supra note 27, p. 120

¹³² Cassey Lee, Supra note 103

¹³³ Pin Lin, Supra note 8

¹³⁴ John Fairhurst and Christopher Vincenzi, Supra note 84, p.470

¹³⁵ For instance, U.S.A., EU, and South Africa are countries which set market share to determine dominance.

qualitative approach. In defining dominance, the WB-OECD model law adopts 'a necessary but insufficient condition' in a form numerical market threshold of 35 percent. In contrast UNCTAD merely defines 'dominant position of market power' as "a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services".¹³⁶ Competition law prohibits abuse of a dominant position in the market. So some countries provide for non-exhaustive lists of acts or behavior which constitute abuse of a dominant position in a market under their competition laws. Abuse of dominant position manifests itself in acts or behavior such as excessive prices, price discrimination, tie-ins, refusal to deal, predatory pricing, and raising rivals' costs.¹³⁷ For instance, Art 82 of EC Treaty provides an indicative and not exhaustive list of acts or behavior constituting abuses such as the imposition of unfair purchase or selling prices, exclusive supply, tied sales, and refusal to supply. The WB-OECD model law does not specify a list of behavior that constitutes abuse of dominance but makes distinction between exploitative abuses and exclusionary abuses.¹³⁸ The UNCTAD model law provides a list of abuse of dominance behavior but does not make a distinction between the classes of abuse of dominance behavior.¹³⁹ Considering their own needs, countries adopt rule of reason prohibition or per se prohibition against these acts or behavior constituting abuse of a dominant position. Even if acts or behavior constituting abuse of dominant position are prohibited under competition laws of different countries, these laws do also provide for exceptions and/or exemptions for the non-applicability of the same to promote certain goals which may not necessarily concern competition.

C. Mergers

A firm may acquire market power and substantial economic size through mergers and takeovers. A "merger" is defined as the direct or indirect acquisition or establishment of direct or indirect control by one or more firms over the whole or part of the business of another firm.¹⁴⁰ A merger may be achieved in any manner, including in particular, through the purchase or lease of shares, interest, or assets of another firm or the amalgamation or combination with another firm.¹⁴¹ Mergers are customarily classified as horizontal, vertical or conglomerate.¹⁴² A horizontal merger occurs when two firms at the same level of production or supply of goods or services merge. A vertical merger is where two firms at different levels in the chain of supply, as manufacturer and retailer, coalesce. Mergers involving neither a horizontal nor a vertical relationship between firms

¹³⁶ Cassey Lee, Supra note 103

¹³⁷ The World Bank and OECD, Supra note 17

¹³⁸ Cassey Lee, Supra note 103

Exploitative abuses-in which a firm takes advantage of its market power by charging excessively high prices to its customers, discriminating among customers, paying low prices to suppliers, or through related practices. Exclusionary abuses-in which a firm attempts to suppress competition-for example, by refusing to deal with a competitor, raising competitors' costs of entering a market, or charging predatory prices.

¹³⁹ Ibid

¹⁴⁰ J NEETHLING, Supra note 9, p. 10

¹⁴¹ Ibid

¹⁴² D.M. Raybould and Alison Firth, Supra note 79, p. 152.

concerned are usually described as conglomerate mergers.¹⁴³ The effect of a horizontal merger is that 'whatever competition previously may have existed in that market between the parties to the merger is eliminated'.¹⁴⁴ In other words, horizontal acquisitions are clearly the type of activity which contributes most directly to concentration of economic power and which is likely to lead to a dominant position of market power, thereby reducing or eliminating competition. And horizontal acquisitions of control are not limited to mergers but may also be effected through takeovers, joint ventures or interlocking directorates.¹⁴⁵ On the other hand, in competitive terms, a vertical merger does not increase market concentration in either the market of the acquiring or the acquired firms. Nor is there necessarily any impact upon the competitors of either firm.¹⁴⁶ But it is stated that, even if vertical acquisitions control involves enterprises at different stages in the production and distribution process, it may entail a number of adverse effects.¹⁴⁷ In USA, few cases of a vertical merger were identified as the anti-competitive potential.¹⁴⁸ As to the effects of conglomerate acquisitions, they are more difficult to deal with, since it could appear apparently that the structure of competition in relevant markets would not change.¹⁴⁹ The most important element to be considered in this context is the additional financial strength which the arrangement will give to the parties concerned. A considerable increase in the financial strength of the combined enterprise could provide for a wider scope of action and leverage vis-à-vis competitors or potential competitors of both the acquired and the acquiring enterprise and especially if one or both are in a dominant position of market power.¹⁵⁰

For these reasons, UNCTAD Model Law on Competition provides that mergers, takeovers, joint ventures or other acquisitions of control, including interlocking directorships, whether of a horizontal, vertical or conglomerate nature, should be prohibited when: ¹⁵¹

1. The proposed transaction substantially increases the ability to exercise market power e.g. to give the ability to a firm or group of firms acting jointly to profitably maintain prices above competitive levels for a significant period of time; and
2. The resultant market share in the country or any substantial part of it, relating to any product or service will result in a dominant firm or in a significant reduction of competition in a market dominated by very few firms.

Finally, competition laws of different countries do provide for merger control system. Depending on the degree of experience of the competition authorities and varying from one jurisdiction to another, the test of legality of a merger is derived from the laws about dominance or a restraints or

¹⁴³ Ibid

¹⁴⁴ Ibid

¹⁴⁵ UNCTAD, Supra note 72

¹⁴⁶ D.M. Raybould and Alison Firth, Supra note 79, p. 163

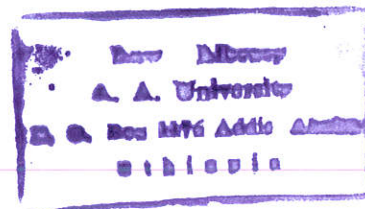
¹⁴⁷ UNCTAD, Supra note 72

¹⁴⁸ D.M. Raybould and Alison Firth, Supra note 79, p. 163

¹⁴⁹ UNCTAD, Supra note 72

¹⁵⁰ Ibid

¹⁵¹ Ibid



a separate test is developed and phrased in terms of measures of the actual or potential effect on competition and the competitiveness. Most merger control systems apply some form of market share test, either to guide further investigation or as a presumption about legality.¹⁵² Under Art 10 of Armenian law, it is noted that the main indicators used for examining such concentration of economic power are market shares, total annual turnover, number of employees and total assets. The factors, including the general market structure, the existing degree of market concentration, barriers to entry and the competitive position of other enterprises in the relevant market, as well as the advantages currently enjoyed and to be gained by the acquisition are also taken into account in assessing the effects of an acquisition.¹⁵³ Of course merger control requires a multi-factor analysis to approve or disapprove the intended merger.

As to the notification process, some countries provide for mandatory pre-merger notification. Some countries have retained a mandatory system of notification after consummation of the merger and a few countries have submitted control only to a voluntary notification process. Based on the turnover or level of concentration of the merger, they set thresholds above which notification is mandatory.¹⁵⁴ Therefore, competition law must effectively address mergers which are anti-competitive.

2.4. Are Competition Policy and Law Necessary for all Countries Equally?

Historically, Canada and United States were among the first countries to introduce competition law, in 1889 and 1890 respectively. Many European countries introduced competition laws in the 1950s, after World War II. Most developing and transition countries did not introduce competition laws until the 1990s.¹⁵⁵ Though competition law has a history of more than 100 years, which has seen over 100 countries enacting competition laws, the adoption of a comprehensive competition policy by some countries is relatively a recent phenomenon.¹⁵⁶ Many other developing countries are in the process of enacting legislation and establishing competition authorities. Much of this activity can be traced to global trends towards the liberalization of markets and the privatization of government utilities.¹⁵⁷

While there is growing consensus that competition laws and policies are necessary for sound economic development, there is still disagreement on how to achieve this objective.¹⁵⁸ Competition

¹⁵² Ibid

¹⁵³ UNCTAD, Supra note 72

¹⁵⁴ Ibid

¹⁵⁵ World Bank, Supra note 26

¹⁵⁶ Rijit Sengupta & Cornelius Dube, Supra note 55

¹⁵⁷ Kathryn McMahon, Supra note 70

¹⁵⁸ Lucian Cernat, UNCTAD, Supra note 28

policy is conducive to economic growth.¹⁵⁹ An OECD paper based on a survey of members and non-members who participated in the 2002 Global Forum on Competition concluded that:¹⁶⁰

“There are strong link between competition policy and numerous basic pillars of economic development ... There is a persuasive evidence from all over the world confirming that rising levels of competition have been unambiguously associated with increased economic growth, productivity, investment and increased average living standards.”

Moreover, a study of 53 countries found a strong correlation between the effectiveness of competition policy and law and growth.¹⁶¹ Dutz and Hayri concluded that the effect of competition policy on growth is strong and goes beyond that of trade liberalization, institutional quality and a generally favorable policy environment.¹⁶² Even in the presence of more liberal trade policies, an effective competition policy is a highly desirable ingredient since private sectors, fearful of the consequences of trade liberalization and stronger competition, may be inclined to protect their interests and market shares by introducing cross-border anti-competitive practices, such as international cartels, abuse of dominance, and abuse of intellectual property.¹⁶³ In countries where there is no competition law, the benefits of trade liberalization could be lost through such anti-competitive conduct in the domestic market.¹⁶⁴ On top of that, countries that do not have a domestic competition law will be the prime victims of international anti-competitive practices.¹⁶⁵ It is also argued that an economy that has implemented an effective competition law is in a better position to attract foreign direct investment (FDI) than one that has not.¹⁶⁶

Thus, in the international arena, researchers and readers have generally acknowledged that competition policy and law is required for all countries regardless of their level of economic development.¹⁶⁷ Competition policy and law can benefit all countries, whatever their size and level of development, but the law must be appropriate to their needs.¹⁶⁸ As Joseph Stiglitz said: “Strong competition policy is not just a luxury to be enjoyed by rich countries, but a real necessity for those striving to create democratic market economies”.¹⁶⁹

So “spoke people of developing countries often express the need for an antitrust paradigm different from that of the developed world. Spoke people for the developed world tend to argue for universal

¹⁵⁹ Kathryn McMahon, Supra note 70

¹⁶⁰ John Preston, Supra note 40

¹⁶¹ Ibid

¹⁶² Ajit Singh and Rahul Dhumale, COMPETITION POLICY, DEVELOPMENT AND DEVELOPING COUNTRIES, at http://www.gina.gov.gy/epalink/TRADE_RELATED_AGENDA_25.pdf, visited on 7/9/2010

¹⁶³ Lucian Cernat, UNCTAD, Supra note 28

¹⁶⁴ Ibid

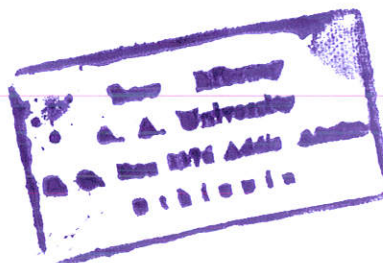
¹⁶⁵ Ibid

¹⁶⁶ Ibid

¹⁶⁷ Ajit Singh and Rahul Dhumale, Supra note 162

¹⁶⁸ John Preston, Supra note 40

¹⁶⁹ Ibid



norms, which may apply differently when facts are different. Moreover, they commonly describe antitrust as 'for efficiency'.¹⁷⁰ Development goals of developed and developing countries might require a different kind of competition laws.¹⁷¹ While adhering to universally valid principles, competition policy should be applied with flexibility in light of specific circumstances of individual countries, and taking into account the need to balance "consumer welfare" and "efficiency considerations" as well as the need to win the confidence of the public and the business community.¹⁷² Every country needs to tailor its competition law to its own specific set of circumstances.¹⁷³ Therefore competition law should be subject to appropriate adaptation depending on local needs, aspirations and socio-economic, cultural and legal conditions.¹⁷⁴ The Western conceptions of competition law models focus on efficiency and consumer welfare. But the developing countries competition law models should focus on development goals and non economic considerations.¹⁷⁵

Furthermore, developing countries maintain that at their stage of industrialization they prefer a competition policy which protects, and thereby permits, the development of national champions: larger firms which can take advantage of economies scale and productive efficiencies so that they are better prepared to eventually compete on the international market.¹⁷⁶ Equally, developing countries competition law and policy should also provide the necessary incentive for foreign and domestic investment.¹⁷⁷ As Fox concludes, developing economies require a competition policy which is mindful of "opacity, blockage and political capture of ... [their] markets, and includes some measure of helping to empower people economically to help themselves".¹⁷⁸ As to the state intervention, a model consistent with development economies is not one where the role of the state is very much a residual one confined to regulating instances of 'market failure'.¹⁷⁹ The competition policy and law of LDCs should address the economic challenges faced by these LDC economies.¹⁸⁰

This shows the uniformity of competition laws across countries is in question. Harmonizing competition laws or policy in the foreseeable future is impractical and, moreover, probably undesirable. The rejection, primarily by developing countries, of proposals to negotiate competition disciplines in the (WTO) World Trade Organization's Doha Round demonstrates that the world is not ready for multilateral competition rules. There are simply too many jurisdictions with too many

¹⁷⁰ Dr.Mor Bakhoun, A dual language in modern competition law? "efficiency approach" versus "development approach" and implications for developing countries, at www.compcom.co.za/.../Competition.../Bankhoum-draft-paper-Comp-Conf-South-Africa.pdf, Visited on 6/5/11

¹⁷¹ Ibid

¹⁷² UNCTAD, Supra note 42

¹⁷³ Pradeep S.Mehta, Supra note 53

¹⁷⁴ Ibid

¹⁷⁵ Dr.Mor Bakhoun, Supra note 170

¹⁷⁶ Kathryn McMahon, Supra note 70

¹⁷⁷ Ibid

¹⁷⁸ Subhadip Ghosh and Thomas W. Ross, Supra note 89

¹⁷⁹ Ibid

¹⁸⁰ Ajit Singh and Rahul Dhumale, Supra note 162

differences in levels of economic development, legal systems, histories, and cultures to envision a unified worldwide competition system any time soon. Moreover, such rules would be static, while competition policy is evolving dynamically.¹⁸¹ At the same time, however, leaving every jurisdiction to develop and apply its competition laws and policies in a vacuum would likely be a way for chaos.¹⁸² Recognizing the different circumstances in developing, as opposed to industrialized, countries and among nations with newer competition regimes, “no one size fits all” is an oft-repeated mantra. The challenge is to seek convergence toward identified best practices.¹⁸³ Nonetheless, there are some central precepts of modern antitrust common to most if not all efforts to impart sound competition policy to newer agency.¹⁸⁴ To this end, international agencies such as the OECD, World Bank and UNCTAD have come up with model competition laws that serve as templates for the drafting competition law statute for developing countries. That was aimed to create models for convergence in the competition laws of the world nations. Convergence in competition law is now-days associated with International Competition Network (ICN) which is considered as the forum where “best practices” in competition law emanate. There is also the African Competition Forum (ACF) which is an “African driven” still in a design stage.¹⁸⁵ Of course it would be erroneous generalization to conclude that there is no convergence at all. There is convergence between developed and developing countries around the goals such as ensuring an effective competitive process, enhancing efficiency and protecting consumer welfare; and substantive competition rules such as banning cartels, pursuing efficiency and regulating merger. But still there is a difference in enforcing these goals and substantive rules of competition laws of these countries.¹⁸⁶

2.5. Consumer Protection

In regulatory terms, consumer protection refers to the set of laws and policies aimed at ensuring social justice, equity and fairness in the relationships between producers and consumers.¹⁸⁷ The major problems consumer protection seeks to address include imperfect information about product attributes, imperfect information about prices, consumer costs of obtaining market information, supplier costs of advertising, and consumers possessing imperfect information about their own needs.¹⁸⁸ Consumer policies and laws thus deal with duress and undue sales pressure; information problems pre-purchase and undue surprises post-purchase.¹⁸⁹

¹⁸¹ CUTS (2003): Pulling Up Our Socks. A Study of Competition Regimes of Seven Developing Countries of Africa and Asia under the 7-Up Project. CUTS Centre for Competition, Investment and Economic Regulation, Jaipur, India, at <http://cuts-international.org/pulling.pdf>, visited on 9/10/2010

¹⁸² Ibid

¹⁸³ Ibid

¹⁸⁴ Ibid

¹⁸⁵ Dr.Mor Bakhoun, Supra note 170, This Forum was initiated in year 2010.

¹⁸⁶ Ibid

¹⁸⁷ Michelle C.Goddard, Designing A Consumer Policy Framework For Small States, CUTS Briefing Paper No.9, 2008, at www.cuts-international.org/pdf/CC1ER-6-2008.pdf, visited on 20/9/2010

¹⁸⁸ Mark Armstrong, Interactions Between Competition and Consumer Policy, Munich Personal RepEc Archive, MPRA Paper no.7258, February 2008, at <http://mpa.ub.uni-muenchen.de/7258/>, visited on 03/05/2011

¹⁸⁹ Ibid

In a number of countries, consumer protection legislation is separate from restrictive business practices legislation. In some countries, however, the competition law contains a chapter devoted to consumer protection.¹⁹⁰ Undoubtedly, competition issues are closely related to protection of consumers' economic interests.¹⁹¹ Competition laws of some countries contain regulations on unfair trade practices, provisions relating to misleading advertising and deceptive marketing practices, basic uniform and accurate information on certain consumer productions and to avoid deceptive and false representations; consumer welfare such as the public health, the standards, the sales, Hire purchase.¹⁹² However, the present trend in countries adopting such legislation seems to be the adoption of two separate laws, one on RBPs or competition, and the others on consumer protection. Nevertheless, because of the links between the two bodies of laws, the administration of these laws is often the responsibility of the same authority.¹⁹³ The Comprehensive Guidelines adopted by United Nations General Assembly Resolution on Consumer Protection in 1985 includes, *inter alia*, measures devoted to the promotion and protection of consumers' economic interests, along with standards for the safety and quality of consumer goods and services; distribution facilities for essential consumer goods and services; measures enabling consumers to obtain redress; education and information programmes, etc.¹⁹⁴ As noted already, one of the aims of maintaining and promoting fair competition is promoting consumer welfare. So competition laws sometimes include provisions related to consumer protection and unfair business practices.¹⁹⁵ To reduce the potential for overlap with other statutes, these provisions should be as focused as possible on preserving fair competition.¹⁹⁶

2.6. Enforcement

2.6.1. General

The making of laws is not enough in itself. There is no substitute to effective, strong institution to implement laws and supervise business conduct.¹⁹⁷ Enforcement of the law is good for growth and development for many reasons.¹⁹⁸ Enforcement issues, however, represent the main difficulty in introducing competition law.¹⁹⁹ In adopting the law, enforcement capabilities must be taken into account.²⁰⁰ It is counterproductive to introduce a sophisticated piece of legislation that is difficult or

¹⁹⁰ UNCTAD, Supra note 72

¹⁹¹ Ibid

¹⁹² Ibid

¹⁹³ Ibid

¹⁹⁴ United Nations General Assembly, The UN Guideline for Consumer Protection, resolution 39/248/, 1985, at www.crcp.org.pk/un_guide.htm, visited on 15/8/2011

¹⁹⁵ Ibid

¹⁹⁶ Ibid

¹⁹⁷ Teshome Beyene, Business Code of Practice and Competition, (Submitted at the Symposium on Trade, June 1995), p. 18

¹⁹⁸ Taimoon Stewart, Julian Clarke and Susan Joekes, supra note 60

¹⁹⁹ Bahaa Ali El Dean and Mahmoud Mohieldin, Supra note 3

²⁰⁰ Ibid

impossible to implement by the existing competition agency.²⁰¹ There is no guarantee that good legislation will meet its aims if it is not backed with effective enforcement of that legislation.

Therefore one of the pre-requisites to the maximization of benefits from competition is the enforcement capacity.²⁰² There is still evidence that the application of competition policy enforcement has had a positive economic impact, both in specific cases and by having a more deterrent effect, helping to create a climate favorable for competition.²⁰³ Enforcement of competition policy protects consumers against anti-competitive practices. It may also act as a crucial ingredient in a successful developmental strategy concerning country's international competitiveness.²⁰⁴ In addition, competition law enforcement enables a country to deal with adverse consequences of mergers and acquisitions by Multinational Corporations (MNCs). It is also argued that an economy that has implemented an effective competition law is in a better position to attract foreign direct investment (FDI) than one that has not.²⁰⁵ Moreover, benefits from trade reform, deregulation, and privatization will not be realized without the potential for active and effective enforcement of competition law. The appropriate enforcement of competition law adds transparency to a nation's commercial landscape which, in turn, attracts foreign direct investment.²⁰⁶ In many developing countries, however, the benefits of competition have yet to emerge visibly, because enforcement has been hampered by lack of resources, reliable data, or sufficient information about production costs, market shares and consumer behavior.²⁰⁷

Since a collusive business practices can be exclusionary or exploitative, or both, the rewards of competition law enforcement make a contribution to what could be called 'economic democracy', a term coined by David Lewis, Chair person of South Africa Competition Tribunal.²⁰⁸ The concept of economic democracy has two main fields of application in this context. First, it speaks to direct social welfare effects of competition law. Competition law promotes sovereignty of the consumer by maintaining competitive prices and improving consumer choices, and thereby enlarges citizen's economic power in their capacity as consumers. Secondly, when firms' exclusionary behavior is directed at rivals, it either depresses the profits of incumbent firms or erects entry barriers to new firms. Removal of entry barriers allows new firms to flourish wherever persons with entrepreneurial flair can identify profitable opportunities.²⁰⁹ In electoral democracies, citizens can only occasionally express their political opinions through the ballot box. By contrast, as David Lewis noted, economic democracy made real through competition law enforcement, is a continuous

²⁰¹ Ibid

²⁰² UNCTAD, Supra note 42

²⁰³ Lucian Cernat, UNCTAD, Supra note 28

²⁰⁴ Ibid

²⁰⁵ Ibid

²⁰⁶ Simon J. Evenett, Supra note 61

²⁰⁷ Lucian Cernat, UNCTAD, Supra note 28

²⁰⁸ Taimoon Stewart, Julian Clarke and Susan Joeckes, supra note 60

²⁰⁹ Ibid

process.²¹⁰ Michal Gal points out that in most developing countries consumer groups are very weak or non-existent, and that society is riddled with corruption and lack of transparency and inadequate judicial systems.²¹¹ So she argued that the successful implementation of competition policies in developing countries will depend on the “ecology of antitrust”. If not part of a well-coordinated set of legal and economic institutions, the impact of competition policy on productive capacities and in favor of more competitive economies is likely to remain minimal.²¹²

The international trade system is nowadays concerned as much with domestic policies and measures of countries as with border measures. The effective application of competition policy would put African countries in a better position to fulfill their trading obligations under various bilateral and multilateral agreements, such as GATT and the WTO.²¹³ As already noted, the development concerns of developed and developing countries require different competition laws. Even if there is convergence on certain goals and substantive rules of competition laws but the way these competition laws are enforced might be different. Under EU competition law, more economic approach dominates the enforcement of the law. Currently, the efficiency based analysis prevails the enforcement of competition rules in the EU and the US.²¹⁴ In some developing countries competition laws, the inclusion of non economic goals has its own impact in the enforcement approach which is not only taking account of efficiency enforcement approach advocated in developed countries.²¹⁵ In the developing countries, goals and preoccupations that go beyond a mere consideration of efficiency could lead to clash when enforced. Thus the enforcement standards are different if we consider the western approach which is economic focused, and the fact that developing countries include non economic goals in their competition laws.²¹⁶ As such, a word of caution is necessary as regards adoption of competition policy and law by African countries should opt for “gradualism” because of the “uncertainty” surrounding the possible impact implementation of “competition policy” at an international level would have on African economies. These concerns pertain to: the possibility that although trade competition could certainly lead to restructuring and efficiency, there is also the possibility that it, could wipe out domestic industry in some African countries; and concerns that advanced countries may not necessarily be following the logic of competition.²¹⁷ Regarding a small developing economy, in the initial stage of the development of a competition regime, it is also suggested that, [progressive implementation periods] allowed a country to build for a firm foundation for the competition regime by fully assimilating one aspect of competition rules before progressing to the next.²¹⁸ In this regard, the

²¹⁰ Ibid

²¹¹ Ibid

²¹² Lucian Cernat, UNCTAD, Supra note 28

²¹³ UNCTAD, Supra note 42

²¹⁴ Dr.Mor Bakhoun, Supra note 170

²¹⁵ Ibid

²¹⁶ Ibid

²¹⁷ UNCTAD, Supra note 42

²¹⁸ Taimoon Stewart, Julian Clarke and Susan Joeke, supra note 60

proper inclusion of provisions concerning “exceptions” and “exemptions” in the law is also proposed as an option.

Nonetheless, there are factors affecting the effective enforcement of competition policy. The United Nations paper in 2004 and the Economic Commission for Africa paper in 1999 lists the problems and constraints that African countries and other Least Developing Countries (LDCs) experience. While some of them are unique to LDCs, others are also experienced in other countries.²¹⁹

A. Conflict with Other Policy Objectives.

Governments in Africa tend to be opposed to the idea of implementing competition policy for they believe that this does unnecessarily constrain the ability of the governments to achieve other “genuine” policy objectives. For example, they are protecting small and medium enterprises from foreign competition. Of course, the present view is implementing competition policy considering the country’s development concerns.

B. Resistance from Vested Interests.

This refers to resistance to competition from both business firms and politicians in Africa. Opening up borders to competition is seen as dangerous for the survival of national firms.

C. Lack of Good Governance.

One of the reasons that the governments of many African LDCs do not implement competition policy measures is the lack of good governance. Governments provide concentrated benefits to a small favored organized group of the population; in small economies, even to relatives, friends, and cadres. Corruption and politics-business relations also distort good governance. These days, corruption in developing countries as a whole declined and the quality bureaucracy improved.

D. Tension with Sector-Specific Regulators.

The conflict between the powers of competition authority with those of sector-specific regulators has the adverse effect on the effective enforcement of the competition law. In case there is conflict between competition authority and other regulators, a general competition authority and sector specific regulator is often entered into a Memorandum of Understanding (MOU). This aims to ensure that an industry is not subjected to duplicative or conflicting intervention by regulators.

E. Capacity Constraints.

Capacity constraints seem to accelerate some of the challenges faced by LDCs in implementing competition policy. This is exacerbated by financial crises facing these countries and lack of political backing of competition policy. Because competition regulators are exclusively dependent on state for funding, competition authorities’ independence is undermined.

F. Lack of Political Will and Independence.

Political will is necessary every step of the way, from the conception of a coherent competition policy to the design and execution of a competition law. Competition law will not be broadly

²¹⁹ Louise Due Plessis and Charles Mabuza, Free Trade and Competition Policy in Africa, at <http://www.essa.org.za/download/2005Conference/Mabuza.pdf>, visited on 14/8/2010

accepted or fully enforced unless key leaders in government have adopted market principles as the underpinning of economic development—and as the foundation of the government's economic policy.²²⁰ The absence of political support and interference on the activities of competition authorities undermines the institution's independence as custodians of competition.

G. Lack of a Competition Culture.

Enforcement of Competition Law in the developing world is a very lonely profession, especially for decision makers. Competition is a fairly new phenomenon. As long as there are competing manufacturers, wholesalers, retailers etc., many people will think that there is adequate competition. As a new phenomenon competition has not been understood well.²²¹

H. Persistence of Natural Monopolies.

By regulating mergers, competition policy aims to reduce concentration and market power. However, a simultaneous implementation competition policy and trade liberalization may at times inhibit LDCs ability to achieve minimum efficient scale. Therefore, the use of interventionist policy should be allowed to a certain extent to help so-called economies of scale. Lachmann is of the view that "the initial costs of protection [not competition] will be outweighed by the long-run benefits of increasing competitiveness and participation in international trade".²²²

I. Low Participation in Multilateral Trading Negotiations.

While Multilateral Trading Negotiations (MTNs) have facilitated radical improvements in international trade relations; there are arguments that Africa's participation in these forums has been minimal. Unity amongst Africans countries themselves would give them the authority to influence deliberations within various international forums.²²³

Therefore to enforce competition policy and law effectively, a concerned country has to properly address these factors in the necessary policies to alleviate their impact on the enforcement of the same.

2.6.2. Competition Authority

Establishing a competition agency is an integral part of introducing competition law.²²⁴ Given its key role, the establishment of an efficient agency is imperative if competition law is to be introduced, as it is the enforcement policy that will determine the practical impact of the legislation.²²⁵ In order to implement and enforce competition policy and law effectively, competition agency must be equipped with proper powers and duties. It is this agency which conducts investigations into suspected competition violations (proprio motu or at the behest of the injured party), issues rulings, assesses penalties, monitors the market and studies prevailing

²²⁰ Taimoon Stewart, Julian Clarke and Susan Joekes, *supra* note 60

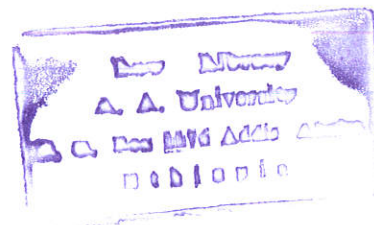
²²¹ Louise Due Plessis and Charles Mabuza, *Supra* note 219

²²² *Ibid*

²²³ *Ibid*

²²⁴ Bahaa Ali El Dean and Mahmoud Mohieldin, *Supra* note 3

²²⁵ *Ibid*



conditions in the search for price irregularities.²²⁶ It also advises the government on the sale of state owned enterprise and on the overall soundness of the competition environment.²²⁷

Moreover, the competition office should have the power to make recommendations or presentations, and in some situations to intervene when government bodies are making decisions affecting competition policy. Through intra- and inter-governmental participation in the development of public policies and by making submissions and interventions in regulatory proceedings, competition authority can wield influence favoring market- determined solutions.²²⁸ The competition law should empower the competition agency, to give prohibition and remedial orders for the violations of the law, impose fines and penalties against the violator, to give interim injunctions to preserve the status quo pending investigation, to publish enforcement guidelines and advance rulings, investigatory powers, and to impose duty to protect confidential information and avoidance of conflict of interest.²²⁹

In order for competition agencies to be effective in implementing competition policy and law, they need to possess certain key characters. These are clarity of mandate, functional authority, necessary enforcement powers and the requisite resources.²³⁰ In this regard, there are factors which have an impact in implementing competition policy and law by competition authorities.

A. Lack of political independence

The competition authorities must have political independence. The complete political and professional independence of competition authorities requires it that their expenditures be in no way related to (or depend on) the amount of direct payments by firms entering in contact with competition policy.²³¹ In this regard, CUTS (2003b), among others, lists the following criteria for independence:²³²

1. Legal independence, whereby members cannot be removed without proper justification and the competition agency is not a part of any government department.
2. Financial independence.
3. De facto independence, whereby the competition agency would have the support of other government agencies to enforce its decisions.

B. Lack of a Competition Culture

A 'culture of competition' is the desirable situation that exists within a country when the rules and benefits of competition are widely known and supported, and where serious consideration of the likely impact of actions and regulations on competition forms a natural part of the background for decisions by firms and governments. Competition must be 'mainstreamed' in all sectors. In this

²²⁶ Ibid

²²⁷ Ibid

²²⁸ The World Bank and OECD, Supra note 17

²²⁹ Ibid

²³⁰ Rijit Sengupta & Cornelius Dube, Supra note 55

²³¹ Adam Torok, Supra note 130

²³² Ajit Singh and Rahul Dhumale, Supra note 162

aspect, advocacy is needed for a new competition regime to succeed.²³³ The enforcement agency has to educate the public, enable the consumers to know what the agency can do for them and how they can file complaints, and issue guidelines to signal its enforcement intentions.²³⁴

C. Appoint and encourage strong leadership in Competition Authority

It is important that the competition authority lives up to its title and commands authority in the public's eye. A key determinant is the personality of the authority's director who should be strong, fearless in pursuing the goals of the authority and very active.²³⁵ Leading a competition authority, especially in its early years, demands determination, independence and a tireless facility for public engagement. Competence is crucial to sustainable leadership. Appointments to competition authority leadership positions should be non-partisan both in process and outcome; appointees should be chosen for their abilities, not their connections.²³⁶

D. Recruit the Diverse and Expert Staff

New competition authorities need to have varieties of staff required to meet the institution's range of obligation-policy advocacy, investigation, economic analysis, litigation, media relations, public outreach and much more.²³⁷ Investigations of competition issues tend to be fact intensive, and the staff will need to be large enough to gather and assess these facts.²³⁸ The employees should be well paid to reduce problems with corruption.²³⁹

E. Prosecutorial Discretion

In order to gain a reputation for effectiveness, and to win credibility with the private sector and consumers, new Competition Authorities should exercise prosecutorial discretion. In investigating and prosecuting cases, they must opt for cases which have public appeal, i.e., which have impact on the average consumer's pocket, can be easily understood, and can be easily won.²⁴⁰

F. Adequate and Independent Financial Resources

Without adequate financial resources, competition authority is unable to function effectively. The operational revenue needs also to be independent of politicians or ministries, so that they are not able to influence decisions or control activities of the authority.²⁴¹ In developing and less developed countries, Competition Authorities are not accorded adequate financial resources.²⁴²

G. Legal Enforcement Tools

This concerns the importance of ensuring that the draft law adheres to general legal principles, such as separating out the investigative and adjudicative responsibilities of the competition

²³³ John Preston, *Supra* note 40

²³⁴ David Smith and Su Sun, "Introducing Competition Policy into Developing Economies: A Summary of Lessons Learned," *Perspectives* 2(4), Overseas Young Chinese Forum, 28 February 2001, at http://www.oycf.org/perspectives/10-022801/introducing_competition_Policy_html, visited on 02/8/2009

²³⁵ Taimoon Stewart, Julian Clarke and Susan Joekes, *supra* note 60

²³⁶ *Ibid*

²³⁷ *Ibid*

²³⁸ David Smith and Su Sun, *Supra* note 234

²³⁹ *Ibid*

²⁴⁰ Taimoon Stewart, Julian Clarke and Susan Joekes, *supra* note 60

²⁴¹ *Ibid*

²⁴² Peter Muchoki Njoroge, *Supra* note 13

authority.²⁴³ This is referring to the need to have checks and balance system on the decisions of competition authority.

H. Sanctions

An important tool for achieving compliance is the perception that fines are sufficiently high to make it unattractive for firms to engage in anticompetitive conduct. Perceptions depend on both level of fines and the real payment rate.²⁴⁴

Thus as much as possible, competition authorities must be equipped with key characters; necessary powers and adequate resources to implement the law effectively.

To note competition authorities of some countries, in U.S.A., the Federal antitrust laws are generally enforced by the Antitrust Division of the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"), although individuals may also have private rights of action for damages suffered as a result of the antitrust violations.²⁴⁵

In Europe, the EU Commission plays a pervasive role in both the formulation and execution of, not only competition, but also general economic policy in the common market (subject, of course, to member state control).²⁴⁶ The Commission may open investigations, inspect books, take decision, and impose fines.²⁴⁷ And India's Competition Act, Section 7 creates the Competition Commission of India (CCI), the new national antitrust agency charged with both enforcement and advocacy functions.²⁴⁸ In this respect, in South Africa, the Competition Act establishes an independent competition authority comprising a Competition Commission, a Competition Tribunal and a Competition Appeal Court for the resolution of competition matters or disputes.²⁴⁹ Finally, competition cases in Kenya are handled by four principal institutions. These are Legislature (Parliament), Office of the Minister in-charge of Finance, the Office of Commissioner for Monopolies and Prices, the Restrictive Trade Practices Tribunal and the High Court of Kenya. Each one of these institutions has its functions, responsibilities and powers clearly spelt out in the legislation.²⁵⁰

It is also important to look at the recent trends in this respect. As noted earlier, competition policy and law can benefit all countries, whatever their size and level of development, but the law must be appropriate to their needs. And goals of competition law inform the substantive rules, the

²⁴³ Taimoon Stewart, Julian Clarke and Susan Joekes, *supra* note 60

²⁴⁴ *Ibid*

²⁴⁵ Alan S. Gutterman, Innovation and Competition Policy: A Comparative Study of the Regulation of Patent Licensing and Collaborative Research and Development in the United States and the European Community, Kluwer Law International, 1997, p. 71

²⁴⁶ Symposium on Enterprise Law of the 80's, *Supra* note 80, p. 39-40

²⁴⁷ *Ibid*

²⁴⁸ Subhadip Ghosh and Thomas W. Ross, *Supra* note 89

²⁴⁹ J NEETHLING, *Supra* note 9, p. 44

²⁵⁰ Peter Muchoki Njoroge, *Supra* note 13

enforcement orientation and institutional design.²⁵¹ This denotes the development needs of a concerned country determine the institutions entrusted with the enforcement of the competition law. As already discussed, because of the development goals to be pursued by developed and developing countries the competition laws are different and the institutions to enforce them are also different. There is also an overall agreement that “no one size fits all’ is oft-repeated mantra” and “context matters” in designing and applying competition law and its supporting institutions for developing countries.²⁵² Hence, institutions that fit the developed economies are different from that that fit economic environments of developing countries.²⁵³

As WTO paper in October 2001, more than 90 countries had adopted competition laws. However, the overall existing institutional environment in majority of developing countries made the enforcement of the law relatively less successful that it prevented them from enjoyed the benefits of such law.²⁵⁴ Therefore, transitional economies need new forms of institutions that are not necessarily those adopted by industrialized countries and that are needed to ensure the well functioning of their infant market economies.²⁵⁵ There is no blue print for institutional development across all countries. In other words, there is no agreed upon sequence of institutional development and that each country should follow its own priorities and taking in consideration the differences in constitutional orders, cultural endowments, and inherited institutional arrangements – the facts that imply that institutional reforms are certainly path dependant.²⁵⁶

Moreover, recognizing these realities, UNCTAD states that recent trends in different countries point towards the creation of new bodies for the control of restrictive business practices, or changes in the existing authorities in order to confer additional powers on them and make them more efficient in their functioning.²⁵⁷ In some cases, different bodies have been unified into one empowered with all functions in the area of restrictive business practices, consumer protection or corporate law. Consequently, it is not possible to indicate which should be the appropriate authority. It is also not possible to lay down how the administering authority should be integrated into the administrative or judicial machinery of a given country. So this is a matter for each country to decide.²⁵⁸ The present UNCTAD Model Law has been formulated on the assumption that probably the most efficient type of administrative authority is one which is a quasi autonomous or independent body of the government, with strong judicial and administrative powers for conducting investigations, applying sanctions, etc., while at the same time providing for the possibility of recourse to a higher

²⁵¹ Dr.Mor Bakhom, Supra note 170

²⁵² Ibid

²⁵³ Ahmed Farouk Ghoneim, Competition Law and Competition Policy: What Does Egypt Really Need? , Working Paper 0239, August 1998, at www.mafhoum.com/press5/158E13.pdf , visited on 06/8/2011

²⁵⁴ Ibid

²⁵⁵ Ibid

²⁵⁶ Ibid

²⁵⁷ UNCTAD, Supra note 72

²⁵⁸ Ibid

judicial body.²⁵⁹ The trend in most of the competition authorities established in the recent past (usually in developing countries and countries in transition) is to award them as much administrative independence as possible. This feature is very important because it protects the competition authority from political influence.²⁶⁰ The WB-OECD model law suggests that the enforcement agency should be independent from any government department and should receive its budget directly from (and report to) the legislature.²⁶¹

Even if establishing the competition authority is a matter left to a concerned country, it was suggested that in order for competition authorities to enforce competition law the necessary and right powers should be allocated to them. Broadly these powers can be separated into investigative and adjudicative powers.²⁶² Whether these powers are completely separated between various institutions or not varies from country to country. These arrangements may depend on the specific judicial framework of each of the countries.²⁶³ In some countries, the competition authorities have both investigative and adjudicative powers e.g. Federal Trade Commission of US, Fair Trade Commission of Sri Lanka, Competition Commission of India and the EU's Directorate General for Competition. The bundling of both investigative and adjudicative powers in one competition authority is criticized for there are not enough checks and balances in the system.²⁶⁴

Some countries empower the competition authorities with investigative powers only e.g. Competition Commission of South Africa and Antitrust Division of Department of Justice of US. And some countries give the adjudicative powers to the competition tribunal; appeal to the competition appeal court and finally appeal to the higher judicial body e.g. South Africa Competition Act. In some countries, the adjudicative powers are given to the court of laws e.g. Zambian Competition Act. A 'self-contained' separate judicial system for competition cases is recommended by the World Bank-OECD Model Law. However, such a set up might not be constitutional in some countries, which provide for final jurisdiction of apex court in all cases for instance India and South Africa.²⁶⁵ To sum up, countries set up competition authorities and provide them with necessary powers as per their own priorities, political and economic costs and concerns.

2.6.3. Private Enforcement

Private enforcement of antitrust laws has a long history. The U.K, Statute of Monopolies, enacted in 1623, provided that an individual, financially injured in his business or property by a restraint of trade, could bring suit and, if successful, collect treble the amount of his damages from the

²⁵⁹ Ibid

²⁶⁰ Ibid

²⁶¹ CUTS (2003), Supra note 181

²⁶² Ibid

²⁶³ Ibid

²⁶⁴ Ibid

²⁶⁵ Ibid

perpetrator of the anti-competitive activity.²⁶⁶ However, the courts proved more willing historically to apply the doctrine of the right of private parties to maintain tort actions to the activities of trade unions than to business firms conspiring to eliminate competitors through boycotts or other forms of predatory behavior.²⁶⁷ In some countries private actions for redress of injury resulting from violations of the competition law may be instituted before an appropriate court or tribunal by people harmed.²⁶⁸ Such private actions have at least two benefits: they supplement and reinforce public enforcement of the competition law, and they free the competition authority from having to obtain such redress on behalf of private parties.²⁶⁹ The U.S.A., from the origin of its antitrust law in 1890, has provided for an expansive role for private actions for violations through treble damages remedies, class action procedures, one-way cost rules, contingent fees, and civil injury trials.²⁷⁰ Thus in US, the private suit for damages is one means of enforcing the antitrust laws.²⁷¹ To sustain a treble-damage action there must be an antitrust offence in the public sense-one which is a significant restraint of trade or which threatens substantially to injure competition in general and the offence must have had the effect of damaging the plaintiff.²⁷² Under the Sherman Act and Section 16 of the Clayton Act persons injured by violations may sue for threefold damages.²⁷³ Thus defeat in public cases may lead to further penalties by inviting the initiation of private suits for triple damages.²⁷⁴

In Australia, prior to 1974, private statutory rights of action for breach of prohibited restrictive practices were not recognized. However, the Trade Practices Act 1974 provides that private parties may bring proceedings before the Federal Court relating to restrictive trade practices under Part IV of the Act. Remedies available to private litigants include single damages; injunctions (except for mergers); divestiture orders for mergers only; and other orders. The Federal Court of Australia Act 1976 also permits a person to bring a representative or class on behalf of others.²⁷⁵

In Canada, the Combines Investigation Act, enacted in 1889, provided for no private rights of action and recognized no such rights until the Act was amended in 1976. However, the courts from an early date recognized that an agreement in violation of the Act was invalid and unenforceable as between the parties, and much more recently, they have recognized that violations of the criminal

²⁶⁶ Kent Roach and Michael J. Trebilcock, Private Enforcement of Competition, www.ohlj.ca/archive/articles/34_3_roach_trebilcock.pdf, p. 464

²⁶⁷ Ibid

²⁶⁸ The World Bank and OECD, Supra note 17

²⁶⁹ Ibid

²⁷⁰ Kent Roach and Michael J. Trebilcock, Supra note 266

²⁷¹ Symposium on Enterprise Law of the 80's, Supra note 80, p. 219

²⁷² A.D. Neale, Supra note 123, p. 396-397

²⁷³ Clair Wilcox, Supra note 10, p. 97

²⁷⁴ Ibid

²⁷⁵ Kent Roach and Michael J. Trebilcock, Supra note 266

provisions of the Competition Act may provide the basis for common law tort actions for conspiracy or unlawful interference with economic or contractual interests or relations.²⁷⁶

In Europe, private enforcement of the EC competition rules via damages claims or applications for injunctive relief has been leading a shadowy existence for a long time in the European Community as well as in the majority of its Members States.²⁷⁷ While Public Enforcement by competition authorities punishes breaches of competition law, compensation of victims can only be obtained via national courts in accordance with national rules on civil liability and civil procedure. The European Court of Justice (ECJ) has consistently stated that, Member States must ensure adequate protection for those who have suffered a loss due to a violation of EC competition law.²⁷⁸ In 2008, the EU Commission White Paper Proposal is designed to create 'an effective system of private enforcement...that complements, but does not jeopardize, public enforcement.' But the White Paper is still being discussed and neither the Member States nor the EU Commission has taken concrete steps to implement the EU Commission's Proposals.²⁷⁹ Private enforcement has as such is not an isolated issue; it is an integral part of the whole EC competition law system and needs to be viewed in its interaction with public EC competition enforcement. Although public and private enforcement of Article 81 of the EC Treaty, in principle, serve the same aims, only private damages actions provide a direct and immediate remedy for victims. Private enforcement serves a dual process of:²⁸⁰

- a) Allowing victims of infringements of EC competition law to obtain compensation, and
- b) Creating an additional incentive for undertakings to respect EC competition rules. Thus private enforcement of EC competition rules becomes an important tool to broaden the scope of enforcement of Article 81 of the EC Treaty.

In South Africa, to claim civil damages, the parties who have suffered will have recourse to the civil courts only after the competition authorities have ruled on their findings. Damages could be awarded in excess of the 10% turnover of the Respondent as restricted by the Competition Act's administrative penalty. However, it should be noted punitive damages are not awarded in South Africa.²⁸¹

To sum up, private enforcement of competition law contributes important role to public enforcement of competition law. Thus, to facilitate private rights of action, provisions should be added to the competition law.

²⁷⁶ Ibid

²⁷⁷ Kasturi Moodaliyar, James F. Reardon and Sarah Theuerkauf, *The Relationship between Public and Private Enforcement in Competition Law, (A Comparative Analysis of South Africa, the European Union, and Swiss Law)*, at www.compcom.co.za/.../The_Relationship_between_Public_and_Private_Enforcement_of-Competition-Law-SA-EU-CH.pdf, visited on 10/12/2010

²⁷⁸ Ibid

²⁷⁹ Ibid

²⁸⁰ Ibid

²⁸¹ Ibid

2.6.4. Judiciary Body

The effectiveness of the competition law in addressing anti-competitive practices depends on the actual degree of enforcement action by competition authorities and the role of the courts or the judiciary in the enforcement of the competition law. In most countries the judiciary is involved with enforcing competition laws. The competition authority may be required to apply to the courts for orders that would implement its decisions.²⁸² Most commonly, the competition agency's decisions may be appealed to the courts by the parties involved.²⁸³ If private parties have the right to institute compensation cases, these cases may be brought before courts.²⁸⁴ This shows that the role of the judiciary in the enforcement of competition law is so immense. Judging a competition case requires some training in economic analysis, which judges usually lack. In the judiciary, judges should have competition law skills. The quality of judgments in review of decisions of the authority affects the legitimacy of the authority.²⁸⁵

When establishing a new competition law it is generally best not to rely on existing courts for enforcement.²⁸⁶ The current judges will typically not have the experience or expertise needed to deal with the esoteric issues raised in these proceedings.²⁸⁷ Ideally, the new adjudicating body would consist of a panel of experts who specialize in competitive matters.²⁸⁸ Both lawyers and economists should sit on this panel.²⁸⁹ They should be adequately compensated, operate in open sessions to the extent practical, and write opinions that can be publicly evaluated to ensure transparency.²⁹⁰ Therefore, considering the role of judiciary in the implementation of competition law, it is so important to establish specialized court or competition court which has qualified lawyers and/or economists in the areas of competition issues to adjudicate competition matters by adopting procedures and rules of evidence that suit competition cases.

As to the recent trends, in case, an appeal is allowed to the ordinary court from the decisions of the competition authorities or tribunals, the power of the ordinary court to review these decisions needs consideration. For instance, in Tanzania, decisions of the Fair Trade Practice Tribunal can be appealed in the ordinary judicial system, but such appeals are limited to judicial review.²⁹¹ On the other hand, taking every case to the court might diminish the competition authority's effectiveness since litigation is usually a long and onerous process. It is, therefore, necessary that a balance be

²⁸² The World Bank and OECD, Supra note 17

²⁸³ Ibid

²⁸⁴ Ibid

²⁸⁵ Taimoon Stewart, Julian Clarke and Susan Joeke, supra note 60

²⁸⁶ David Smith and Su Sun, Supra note 234

²⁸⁷ Ibid

²⁸⁸ Ibid

²⁸⁹ Ibid

²⁹⁰ Ibid

²⁹¹ UNCTAD, Supra note 72

The limitation to "judicial review" means that the 'ordinary' judicial system cannot review the 'facts' and 'merits' of a case, but can only review the Tribunal's interpretation of the law and whether it has upheld the proper procedures



found between the flexibility needed to properly enforce the competition law on the one hand, and the obligation to prevent prejudice and arbitrariness in the outcome on the other hand.²⁹² Considering the American experiences, it would be beneficial to transitional economies to adopt a system in which a specialized agency or court makes the determinations of violations, rather than a court of general jurisdiction. Separating the decisional authority from the investigation and prosecutorial functions may be most appropriate.²⁹³ Many of the transitional economies allow their reviewing courts to make findings of the fact and law in addition to, or independent of those made by the agency below.²⁹⁴ There are distinct benefits provided by judicial review of agency decisions, but equally strong reasons to limit of reviewing powers of courts regarding issue arising out of competition law.²⁹⁵ The benefit of having a centralized development of competition law is likely to be endangered if courts can routinely take new evidence and make new findings of fact and law.²⁹⁶ The principle of judicial deference to competition agencies is well established and ought to be adopted by transitional economies.²⁹⁷

²⁹² CUTS (2003), Supra note 181

²⁹³ Kenneth M. Davidson, Creating Effective Competition institutions: Ideas for Transitional Economies, Asian-Pacific Law & Policy Journal; vol.6, Issue 1 (Winter 2005), at www.hawaii.edu/aplpj/articles/APLPJ.06.1-davidson.pdf, visited on 10/12/2010

²⁹⁴ Ibid

²⁹⁵ Ibid

²⁹⁶ Ibid

²⁹⁷ Ibid

CHAPTER THREE

The Legal Framework of the Ethiopian Competition Law and its Enforcement

In this chapter, the legal framework provided under the Ethiopian competition law (the Proclamation) and its effectiveness in the enforcement of the law will be critically analyzed. In particular, the analysis focuses on competition in the Ethiopian context, the rationales and objectives of the Ethiopian competition law, the key substantive provisions of the law and sanctions under Ethiopian competition law to clarify the weakness and strength of the law and thereby address the impact of this legal framework from the perspective of effective enforcement of Ethiopian competition law.

3.1. Introduction

In this introductory part, the discussion concerns issues related to competition and competition law in Ethiopia with object of viewing the past.

PRE-1991

The Haile Sellassie era (Imperial era), in economic terms, the policy pursued allowed considerable latitude for the development of private enterprise. Moreover, a concerted effort was made to attract foreign capital. Indeed, the role played by external capital was significant; especially in manufacturing.¹ To this end, the Commercial Code of 1960 of Ethiopia was adopted to regulate commercial activities and to combat unfair commercial competition (Arts. 132-134). Thus, the Haile Sellassie era economic policy was encouraging market competition.

After the fall of the Imperial regime, the military government Derg came to power and implemented the nationalization of land, and urban property interests-including foreign capital. In economic terms, the policy that eventually crystallized can be described as socialization.² This meant giving priority to state and cooperative forms of ownership and an attempt to run the economy on the basis of central planning. Accordingly, the state's role in the economy was highly expanded; as a corollary, private enterprise was seen as an adversary to socialist construction and therefore kept on short leash.³ In general, there was an all-out effort to run a command economy. The participation of the private sectors in the economy was curtailed for this was viewed negatively. Therefore, there was no role for market competition in the economy.

The Derg regime, in its last days, introduced some reforms in the economy such as liberalization; and at the end, mixed economy. Some of the major restrictions on private enterprise were removed, state enterprises were to be given greater autonomy and they were to be judged by the criterion of profitability. However, the military government was collapsed before these measures to show effects; in fact, they were stillborn in conception.⁴

POST-1991

Politically, with the fall of the Derg regime, the era of centralization was ended. The Transitional Government of Ethiopia, based on the principle of unity within diversity, came up with a new pattern of relationship between the central government and the regions; and took measures to create a democratic society.⁵ However, the post- Derg regime inherited a command economy.

¹ Proceeding of the 6th Michigan State University Conference on North Africa, Compiled by John T. Hinnant and Assisted by Beth Finne, April 23-25, 1992, Holiday Inn. East Lansing, P.81-82

² Ibid

³ Ibid

⁴ Id. p. 83

⁵ Id. p. 84

After the down fall of the Derg regime, those participant forces of the transitional period adopted the Transitional Period Charter of Ethiopia in 1991. The participant forces which formed the Transitional Government adopted the Transitional Period Economic Policy of Ethiopia in November 1991 to overcome the imbalances, inefficiencies, crisis and failures exhibited in the wrong economic policy of the Derg regime; and to have economic policy which fit the new democratic system.⁶

This economic policy envisaged the adoption of free market economy. The Transitional Government Economic Policy aimed to change the role of the state in the economy radically and to encourage the role of the private sector. The economic policy underlined the need to promote private sector and stated measures to be taken.⁷ To this end, the economic policy envisaged privatization of some state enterprises, removal of entry barriers for new private undertakings, deregulation of the economy and withdrawal of the special privileges to state enterprises so that private enterprise can compete with them without its hands tied. The government operates only those sectors which are decisive for fast growth; and where the private sectors cannot have capacity to undertake or cannot be profitable. If the government participates in the economy through some public enterprises, they would be given greater autonomy and guided by the principle of profitability and free market competition. The policy encourages market competition among business community in the market.⁸

Furthermore, one of the objectives of the FDRE Constitution is to establish and sustain 'one economic community' in Ethiopia (Preamble and Article 55(6)).⁹ But the constitution does not define the term 'one economic community'. On the other hand, the Document Matters for Building Democratic System of Ethiopia provides for decisive measures to create 'one economic community'.¹⁰ Some of these measures are free movement of goods, services, capitals and labor. The document underlines that the existence of plural private capitals is the characteristic of free market economy. It also states that private capital should be prosperous and beneficiary in the market only based on the principle of free market competition. Moreover, the Document Rural Development Policies, Strategies and Methods¹¹ also provide the need to promote competition among private sectors in the agricultural sector.

⁶ The Ethiopian Transitional Period Economic Policy, November 1991, p. 15

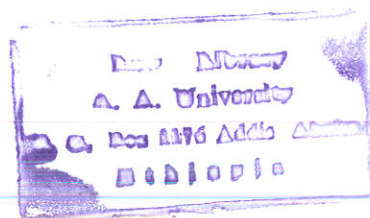
⁷ Id. p. 18

⁸ Id. p. 29

⁹ A Proclamation to Pronounce the Coming into Effect of the Constitution of Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Federal Negarit Gazeta, (1st year No. 1, 21st August, 1995)

¹⁰ The Document Matters for Building Democratic System of Ethiopia, Ministry of Information, May 2002, p. 201-203; This document set the policy direction of Ethiopia about the kind of democracy Ethiopia needs; individual rights and democratic system; rights of nations/nationalities and democracy; and rights of nations/nationalities and the purpose to create 'one economic community'.

¹¹ Federal Democratic Republic of Ethiopia, The Document Rural Development Policies, Strategies and Methods, November 2001/2002, p. 202; this document explains the reasons why the development of the country has to center on agriculture and rural and how to achieve the expected benefits there from.



The Industrial Development Strategy¹² firmly underlines the need to have strong market competition in the economy. The strategy states strong market competition enables free market economy to play its role in fastening the economic development (growth). It notes that strong market competition serves fair distribution of economic resources; and it rewards good performing private capitals and penalize poor performing private capitals. Thus, strong competition enables to secure development (growth). The strategy provides that the government has to take legal, economic and administrative measures to eliminate factors which limit, impede or restrain strong market competition. The government is to provide legal and institutional framework to promote competition. Moreover, the government is to set up administrative and justice system which enables the effective enforcement of the law. To this end, Ethiopia took various policy reforms and measures of which adopting competition law is one. Of course, there are various social and economic policies such as industrial policy, trade policy, regulatory policy, investment policy, labor policy, development policy, etc. which affect competition and implementation of competition law. Therefore the effectiveness of the competition law will depend on the extent to which it is coordinated with other policies.

3.2. The Legal Framework

To make the undertaking of trade practices in line with free market economy, the government of Ethiopia adopted its competition law named "Trade Practice Proclamation No. 329/2003 on April 17, 2003 as one of its economic regulations.¹³ This proclamation was repealed and replaced by the newly adopted Proclamation which is named as "Trade Practice and Consumers' Protection Proclamation No. 685/2010 (hereinafter called "Proclamation").¹⁴ This Proclamation No.685/2010 came into force as of 16th of August, 2010. From now on, the term "Proclamation" is referring to "Proclamation No.685/2010". With regard to the naming of such laws, there is no common rule for the title of Restrictive business Practices (RBPs) laws. The different titles adopted generally reflect the objectives and hierarchy of the law, as well as the legal traditions of the countries concerned.¹⁵

3.2.1. The Preamble of the Proclamation

In its introductory part, Proclamation No.685/2010 provides for the rationales for which the law is promulgated. The fundamental reasons for which this law is adopted are:

- To ensure that commercial activities are undertaken in accordance with appropriate practices based on free-market economic policy of the country;
- To regulate anti-competitive and unfair market practices in order to protect business community;
- To regulate misleading market conducts in order to protect consumers;
- To establish a system that is conducive for the promotion of competitive market;

¹² Federal Democratic Republic of Ethiopia, the Document Industrial Development Strategy, Ministry of Information, August 2002, p. 189-194; this document points to the industrial policy of Ethiopia and the role of private capitals in the economic development of Ethiopia.

¹³ Trade Practice Proclamation, Proclamation No. 329/2003, Federal Negarit Gazeta, (9th Year No. 49, Addis Ababa, 17th April 2003).

¹⁴ Trade Practice and Consumers' Protection, Proclamation No.685/2010, Federal Negarit Gazeta, 16th Year No. 49, Addis Ababa 16th August, 2010.

¹⁵ UNCTAD, MODEL LAW ON COMPETITION, Geneva, 2000, at <http://r0.unctad.org/en/subsites/cpolicy/docs/Modelaw04.pdf>, visited on 10/9/2010

- To ensure goods produced and services delivered are not dangerous to health and well being of consumers, and their safeness and suitability to human health;
- To create the possibility that consumers get goods and services equivalent to the price they pay;
- To determine the powers and duties of organs that will be in charge of the responsibility to carry on executive and judiciary activities to ensure the implementation of this Proclamation.

It is important to explain the rationales of this Proclamation briefly. The consideration of these rationales denotes the Proclamation has not only economic goals but also non-economic goals such as social justice, public health and fairness. One of the rationales of this Proclamation is consumers' protection. In chapter two, the definition and scope of consumers' protection policies and law were discussed. Some countries treat consumers' protection under distinct legislation while others govern consumers' protection thorough their competition laws. Competition benefits consumers thorough lower prices, best possible choice of qualities and quantities of goods and services. One of the benefits of competition is consumer welfare. Similarly, the consumer protection law also has the object to secure these benefits to the consumers. These are the common goals of both competition and consumers' protection law. Thus whether to have separate consumers' protection law or embodying it in the competition law depends on once country policy choice and concerns. In Ethiopia, the Proclamation also governs areas of consumers' protection. Since it is beyond the coverage of this thesis, issues related to consumers' protection will not be discussed.

As already noted, for free-market economy to play its role in economic development (growth), competition must be maintained and promoted. Competition is the basis for free-market economy. The economic system devoid of competition is not designated as free-market economy. On the other hand, competition law is so essential in a free market economy. It is the competition law which subjects commercial activities to the rules of a free-market economy. This requires Ethiopia to assess and restructure the existing legal and institutional arrangements to create the system or institutional framework which favor and promote competitive process in the economy. This, in turn, plays necessary role in creating and maintaining 'one economic community' in Ethiopia.

As already noted, leaving competition to itself may not be advisable. It may be abused by private practices of firms. If competition is abused by private practices of trade actors it may result in market failures which are designated as anti-competitive practices and which have the effect of limiting, restricting and impeding competition unduly. This, in effect, would deny the benefits of free competition to the public; and result in the mal-functioning of the whole economy. Thus the Proclamation envisages the need for governmental intervention or public control in the market. The Proclamation states that the government intervenes in the market through this Proclamation to combat anti-competitive and unfair market practices with the purpose to protect the business community. This rationale of the Proclamation seems to limit the objective of regulating anti-competitive and unfair market practices to the protection of "the business community". However, in most jurisdictions, one of the objectives of competition laws is to regulate business restraints to promote and maintain competition and competitive process in the markets (See chapter two). And they do protect and sustain competition not for the sake of competition only, but to secure other economic, social and cultural objectives. Even if competition demands the existence of plural competitors and protecting competitors is also one of the purposes of regulating restrictive business practices, the objectives of controlling business restraints surpass protecting competitors. Therefore the positive interpretation of this rationale should be made in connection with the rationale and part two of the Proclamation to ensure commercial activities are conducted as per rules of a free-market economy where competition is the rule of the game.

The other rationale of the Proclamation is to establish a system that is conducive for the promotion of competitive market. This envisages the need to reorganize or restructure the existing legal and institutional framework and/or establish new one in the way it fits for the promotion of competitive market. Finally, without having effective enforcement mechanism, simply adopting competition law has no use. To this end, the Proclamation has the rationale to determine the powers and duties of the organs responsible for enforcement of the Proclamation to implement the same effectively.

Therefore, since the Preamble of the Proclamation serves in interpreting provisions of the same where there is ambiguity or gaps; in enforcing every provision of this Proclamation, the enforcement authorities must take note of the rationales of this Proclamation.

3.2.2. Objectives of the Proclamation

Setting clear objectives for any proposed legislation is obviously important. As such, Ethiopia sets objectives of her competition law under this Proclamation. Pursuant to Article 3 of the Proclamation, the objectives are:

1. Protecting consumers' rights and benefits;
2. Ensuring the suitability of the supply of goods and services to human health and safety and installing a system of follow up;
3. Ensuring that manufacturers, importers, service dispensers and persons engaged in commercial activities in general carry on their activities in a responsible way;
4. Preventing and eliminating trade practices that damage the interests and goodwill of the business persons;
5. Accelerating economic development.

As noted in relation with rationales of this Proclamation, one of the objectives of the Proclamation is also consumers' protection (protecting consumers' rights and benefits). Since it falls outside the scope of this thesis, the discussion does not cover those provisions of the Proclamation devoted to consumers' protection.

As noted earlier, competition law should address the local needs, aspirations and socio-economic, cultural and legal conditions of a concerned country. This could be achieved by including these specific development goals as the objectives of the competition law. Moreover, as already discussed, as in other jurisdictions, the Proclamation, (in its objective provision), does not provide that the law is to protect and promote competitive process by striking down any business restraints which adversely affect competition and competitive process, and thereby to secure benefits of competition to the public. The benefits of competition include efficient allocation of society's scarce resources, increased consumers welfare, rising of dynamic economic efficiency and progress, forcing businesses to move closer to a policy of long-run profit maximization, fairness, innovation, good governance, and distribution of social power among business units. It is not clear why the Proclamation is not boldly proclaiming that the objective of the law is to control anti-competitive practice to sustain and promote competition and competitive process. This might have its own negative impact in the effective enforcement of the Proclamation. In this respect, it is stated, the difficulty is that if a competition law does not adequately protect the competitive process, the country's overall economic development suffers as a result of those distortions which the law has failed to remedy; if the competition legislation is overzealous, it ends up restricting the freedom of businesses to adopt beneficial practices and organizational forms, and thus cripples the economy.¹⁶

¹⁶ Bahaa Ali El Dean and Mahmoud Mohieldin, "On the Formulation and Enforcement of Competition Law in Emerging Economies: The Case of Egypt," Working Paper 60. The Egyptian

However, since the Proclamation has to be applied in its entirety, considering the Preamble of the Proclamation, it should be presumed that the Proclamation has the objectives of subjecting commercial activities to the rules of free-market economy; regulating anticompetitive and unfair market practices to protect business community; and promotion of competitive market.

Article 3(3) of the Proclamation provides that it has the objective to ensure business persons engaged in the commercial activities undertake their activities in a responsible way. The Proclamation does not give a clue as to what does that mean doing commercial activities in a "responsible way". It was already noted that it is the concern of the specific country to set the economic and non-economic goals of its competition law taking regard to its own development needs. As per this provision of the Proclamation, it seems Ethiopia is to promote not only economic goals but also other non-economic goals through this law. However, the duty to conduct commercial activities in 'a responsible way' is nowhere provided in other jurisdictions. This duty seems to refer to the social obligations or responsibility not as such exactly to obligations of business persons or private legal entities governed under the competition law. This might cause confusion in the interpretation of the law and thereby negatively affects effective enforcement of the Proclamation. This may require the amendment of the law. But for the time being, for the purpose of implementation of this Proclamation, the phrase 'doing commercial activities in a responsible way' should be interpreted to mean "business persons must not conduct commercial activities in violation of the provisions of the Proclamation to secure benefits prohibited by this Proclamation".

The Proclamation under its title and Part two employs the term 'trade practices'. But this term is nowhere defined in the Proclamation. This might create confusion as to whether this term is similar with the term "commercial activity" as defined under the Proclamation and as to what are the 'prohibited trade practices'. For instance, under *Zambian Competition and Fair Trading Act of 1994*, Section 2 defines "trade practice" as 'any practice related to the carrying on of any trade and includes anything done or proposed to be done by any person which affects or is likely to affect the method of trading of any trader or class of traders or the production, supply or price in the course of trade of any goods, whether real or personal, or of any service'. This shows the scope of the term 'trade practices' covers wider range of trading activities than the term 'commercial activity' designated under the Proclamation. Thus the term 'trade practices' should be interpreted to refer to commercial activity and the production, supply and trading of other goods and services as noted under the Proclamation. On the other hand, to identify as to what the term "prohibited trade practices" referring to, Art 2(18) of the Proclamation defines the term "anti-competitive or acts restricting market competition" as acts (acts listed under the provision or acts prohibited under Part two of the Proclamation) limiting the competitive capacity of other business persons in the commercial activities and limiting the choices of the consumers or users. In the Preamble of the Proclamation, the prohibited acts are named as "anti-competitive and unfair market practices". And Part two of the Proclamation is designated as "trade practices" and it covers prohibited acts like abuse of market dominance, anti-competitive agreements, merger and unfair competition. Squeezing these all together, the term "prohibited trade practices" under the Proclamation should be considered to refer to "anti-competitive and unfair market practices or acts restricting market competition". After saying this, Article 3(4) of the Proclamation stipulates that it has the objective to "prevent and eliminate trade practices that damage the interests and goodwill of business persons". This provision also employs the term "trade practice". It prohibits these practices with the

view “to protect interests and goodwill of the business persons”. The objective of the Proclamation here seems to regulate areas of unfair competition. The other difficulty with this provision is that what are “the interests and goodwill” of business persons? Moreover, should both “interests” and “goodwill” of the business persons” be damaged cumulatively for the acts to be prohibited by the Proclamation? Thus the “interests and goodwill” of the business persons should be taken to refer to the “interests and goodwill” of the business persons protected under the Proclamation which have an impact on the “competitive capacity” of the business persons.

Finally, Art 3(5) of the Proclamation provides that the Proclamation has the objective to “accelerate economic development”. As already discussed, there have been strong debates as to whether there is a link between competition policy and law, and economic development (growth). As noted in chapter two, an OECD paper denotes that there are strong link between competition policy and numerous basic pillars of economic development (growth) ... A study of 53 countries found a strong correlation between the effectiveness of competition policy and law and growth. Ethiopia does not open a door for such debates whether there is a link between competition policy and law, and economic development (growth). Therefore, the Proclamation confirms that there is a clear link between competition law and economic development. It proclaims that the Proclamation is to speedup economic development.

3.2.3. The Scope of Application of the Proclamation

Determining the scope of application of competition law is very crucial issue for the effective enforcement of the law and thereby to secure benefits of competition. As already noted, competition law is necessary for sound economic development (growth).¹⁷ It is required for all countries regardless of their level of economic development.¹⁸ This denotes competition law should be a general law application. It should, as much as possible, apply to all market transactions and all entities engaged in commercial transactions irrespective of ownership or legal form. As discussed earlier, there are fundamental legal and economic reasons to apply this law to all trade actors and economic activities. In addition to these, a uniform application of competition rules has various advantages and fundamental to the effective implementation of competition rules in the country. The advantages include:¹⁹

- The protection and promotion of the competition process throughout the country to safeguard against misallocation of resources and inefficiency, which adversely affect the economic development in the country and the welfare of the citizens.
- Exemptions from competition law can be discriminatory and inequitable as between market operators.
- The efficiency justification for uniform application of competitive market rules in the country is particularly important in view of the recent globalization of the markets.

However, competition law must take note of the specific needs of the concerned country. It has to be subjected to appropriate adaptation depending on local needs, aspiration and socio-economic, cultural and legal conditions of the concerned country.²⁰ One way to approach this matter is the

¹⁷ Kathryn McMahon, DEVELOPING COUNTRIES AND INTERNATIONAL COMPETITION LAW AND POLICY, at http://papers.ssrn.com/so13/papers.cfm?abstract_id=1523143.pdf, visited on 5/9/2010

¹⁸ Ajit Singh and Rahul Dhumale, COMPETITION POLICY, DEVELOPMENT AND DEVELOPING COUNTRIES, at http://www.gina.gov.gy/epalink/TRADE_RELATED_AGENDA_25.pdf, visited on 7/9/2010

¹⁹ UNCTAD, Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries: Thailand, Lao, Kenya, Zambia, Zimbabwe, at www.uctad.org/templates/download.asp?docid=6470&lang=1, visited on 10/12/2010.

²⁰ Pradeep S.Mehta, Competition Policy In developing Countries: An Asia-Pacific Perspective, at http://www.usescap.org/drpad/publication/bulletin_2002/ch7.pdf, visited on 12/8/2009

inclusion of provisions concerning exceptions and exemptions in the law.²¹ The matter of exclusion from the application and scope of competition law is of great importance from both competition and a trade perspective. In order to gather consensus and acceptability for the introduction of competition legislation, it was necessary to introduce certain sectorial exclusions and exemptions.²² The definitions of the terms “exemption” and “exclusion” are provided in chapter two. There are basically two categories of exceptions and exemptions:²³

1. Explicit exemptions: These are given in Legislation and Regulations.
2. Implicit exemptions: These are when the application of competition law is displaced by industry-specific-regulatory regimes or other manifestations of the state ownership or direction.

The exemptions and exclusion provisions are necessary for furthering the objective of the competition law. The amount of exemptions in the competition laws of developing countries such as South Africa, India, or Zambia is significantly greater than that of United States, the European Union, or the European transition economies. A “blanket clause” kind of discretionary element of general exemption is included in each system.²⁴ The greater amount of exemptions made it necessary to categorize them: the 7-Up Project distinguishes between practice specific, enterprise specific, and sector specific exemptions.²⁵ Some of these exemptions are related to export promotion, social issues, and labor relations; trade union activities, activities of professional associations; professional associations; small and medium enterprises; exempting enterprises depending on the security of the state or the public interest; and enterprises performing sovereign functions on behalf of the government.²⁶

In Ethiopia, Article 4(1) and (2) stipulates that the law is applicable to all persons carrying on commercial activities and to any transaction in goods and services within the Federal Democratic Republic of Ethiopia; and commercial activity conducted outside Ethiopia if its outcome has effect in Ethiopia. This shows that the Ethiopia’s competition law is a general law application. However, in order to accommodate the specific needs of the country, the Proclamation provides for the exemptions and exceptions where the law has no applicability. Art 4(3) states that the Proclamation shall not apply to:

- a) The sovereign act of the state which is exclusive of public enterprises;
- b) Basic utilities;
- c) Basic goods and services that are subject to price regulations.
- d) Collective agreements applying to employer and employee relationships.

Art 4(3) (a) of the Proclamation provides that the sovereign act of the state which is exclusive of public enterprises is removed from the ambit of the competition law. Here the act of the state refers to act done by the Federal and regional government organs in discharging their governmental duties and responsibilities, and enterprise performing sovereign functions on behalf of the government if any. However, public enterprises are subjected to the application of the Proclamation. The question is what the competition authority should have to do in case the acts of the government hamper competition process. The Trade Practice and Consumers’ Protection

²¹ CUTS (2003): Pulling Up Our Socks. A Study of Competition Regimes of Seven Developing Countries of Africa and Asia under the 7-Up Project. CUTS Centre for Competition, Investment and Economic Regulation, Jaipur, India, at <http://cuts-international.org/pulling.pdf>, visited on 9/10/2010

²² UNCTAD, Supra note 19

²³ Id. p. P.212-213

²⁴ CUTS (2003): Supra note 21

²⁵ Ibid

²⁶ Ibid

Authority ('the Authority') has the power to take various measures. The Authority may participate in the formulation of the country's economic policies, which may adversely affect competition process. In addition, the Authority should also play the role of competition advocate to minimize acts of the government which unduly affect competition and create necessary work relationship with the concerned government organs. The Proclamation extends its application to acts committed outside Ethiopia which have negative effect on competition in Ethiopia; and this gives the Proclamation extra-territorial jurisdiction application. This jurisdiction is based on "effects doctrine".

To note experiences of other jurisdictions in this respect, UNCTAD Model Law on Competition provides that the law does not apply to the sovereign acts of the states itself, or to those of local governments, or to acts of enterprises or natural persons which are compelled or supervised by the State or by local governments or branches of government acting within their delegated power.²⁷ On the other hand, the Law on the Protection of Competition (1998) of Bulgaria, under Art 2 states that the law shall apply to authorities of the executive branch and of local government, if they expressly or tacitly prevent, restrict, distort or might prevent, restrict or distort the competition in the country; and undertakings to which the State has assigned the provision of services of public interest, in so far as the observance of the law does not render the fulfillment of those tasks impossible and the competition in the country is not affected to a significant extent. Moreover, in South Africa, the Competition Act applies to the state itself, and thus government-owned entities are fully subject to it.²⁸ These government-owned entities are referring to entities like South African Airlines, Transnet a parastatal whose Portnet divisions owns and controls the nations' ports.

Art 4(3) (b) of the Proclamation also exempts the basic utilities from the application of the law. Art 2(2) defines "basic public utilities" as utilities such as water, electricity, telephone and the like. The natural monopolies control these utilities. This provision provides for non-exhaustive list of basic public utilities. These natural monopolies are governed by their own regulation or law that competition law has no applicability. In providing these basic public utilities to the public, the natural monopolies might cause barriers to competition in the market. The Authority should make cooperation agreements with these natural monopolies which serve as guidelines concerning their relationships in the area of competition and issues related to the Proclamation; and to lobby these natural monopolies to design their sector regulatory framework in a way it promotes competition. Gradually, if possible, the Authority should be given upper hand in cases concerning competition matters.

In a number of jurisdictions, exemptions are granted for "special" sectors such as energy, liner shipping, air, trucking, professional sports, small business, and government enterprises. It is stated that developments in technology, organizational methods and applied economics suggest that alternative pro-competition approaches to the sectors are feasible.²⁹ In Zambia, the competition law grants implicit exemptions to these special sectors such as banking, communication, water and sanitation, energy and electricity which are governed by their own law and having specific sector regulatory framework. As to the application of competition law, they have concurrent jurisdiction power to enforce competition.³⁰

²⁷ UNCTAD, Supra note 15

²⁸ OECD, Competition Law and Policy in South Africa, An OECD Peer Review, May 2003, at <http://www.oecd.org/dataoecd/52/13/2958714.pdf>, visited on 16/9/2010

²⁹ R. Shyam Khemani, Application of Competition Law: Exemptions and Exceptions, at [www.unctad.org/en/docs/ditccpmisc25_en\[1\].pdf](http://www.unctad.org/en/docs/ditccpmisc25_en[1].pdf), visited at 10/12/2010.

³⁰ UNCTAD, Supra note 19

Art 4(3) (C) of the Proclamation denies the application of the Proclamation to basic goods and services that are subjected to the price regulation. This non-applicability of the law has to do with consumers' protection. Art 2 (1) of the Proclamation defines "basic goods and services" as 'goods and services related to daily need of consumers, the shortage of which in the market may lead to unfair trade practices'. The Proclamation does not provide list of basic goods and services. But they include edible oil, sugar, food items, etc. The prices and distribution of these basic goods and services are regulated by the Ministry of Trade. Pursuant to Art 46 of the Proclamation, the Ministry, when deemed necessary, submits to the council of Ministers its study on basic goods and services that shall be subject to price regulation and upon approval publish their list and prices in public notices. Moreover, as per Art 47 the Ministry in consultation with other government organs may determine the conditions of distribution, sale and movement of basic goods and services and, as may be necessary, order business person to replenish the stock of the same. With regard to regulation of these basic goods and services, the Proclamation does not explicitly empower the Authority. This may tend to mean whatever the conditions of competition of these areas are; the Authority might not have any saying over these competition matters. Therefore, the exclusion of basic goods and services from the domain of the Proclamation should be carefully scrutinized and applied in such a way it promotes competitive process in those areas. Of course, Art 4(4) provides that the non-applicability of the law in relation with basic utilities and basic goods and services does not concern matters stated in the Proclamation in connection with consumers; that means; the Proclamation is applicable to matters concerning the protection of consumers' interests as provided in the Proclamation.

Art 4(3) (d) of the Proclamation stipulates that the law shall not apply to collective agreements applying to employer and employee relationships. In Ethiopia, the employer and employee work relationship is governed as per Labor Proclamation No. 377/2003. Art 124 and the following provisions of this proclamation govern the collective agreement to be concluded between the employer and employee. The collective agreement covers matters provided under Art 129 of Proclamation No. 377/96 concerning employment relationships. However, the Authority should undertake thorough study about collective agreement whether there is a risk of limiting competition unduly and denies benefits of competition to the public; and thereby designs mechanism to avert that danger.

For examples, in U.S.A. and Canada, labor relationships are also exempted from the application of the competition laws. Art 1(3) of Estonia's Competition Act (2001) states that the Act does not regulate relationships in the labor market. And Art 3(1) of South Africa's Competition Act (as amended in 2000) provides that the Act shall not apply to a collective bargaining and collective agreement. Moreover, in Zambia, Art 3(b) and (c) of the Competition and Fair Trading Act (1994) states that collective bargaining and activities of trade unions to advance the terms and conditions of employment of their members are exempted from the application of the Act. As already noted, the exemption of labor relationships fall under the categories of exemptions aimed at balancing unequal economic or bargaining power. Several jurisdictions exempt workers' collective bargaining activities to form unions or group together to negotiate wages and other employment conditions. Such an exemption is aimed at counterbalancing the superior economic power and bargaining position which most firms/employers have vis-à-vis individual workers, and preventing exploitation of labor.³¹ However, the exemption of collective bargaining may cause risks such as increased wage of costs of collective bargaining activity may raise costs of production; labor may demand delay of efficient methods of production such as adoption of new machinery, technology

³¹ R.Shyam Khemani, Supra note 29

and organizational methods; and it may be abused by trade unions which adversely affect competition. Therefore, competition authorities need to be cognizant of such risks and prevent the misuse of the collective bargaining exemptions.³²

Art 4(5) of the Proclamation provides that the Proclamation does not prevent consumers' rights of private action on matters of extra-contractual liabilities under the civil code. It is not clear whether this provision is to encourage private enforcement of the competition law or what kind of exemption it is referring to.

Finally, Art 4(6) of the Proclamation exempts matters with regard to supervisory activities and measures undertaken in accordance with the Food, Medicine and Health Care Administration and Control Proclamation No. 661/2009. However, the Authority should closely check these areas whether competition is adversely affected, and thereby result in mal-functioning of the economy in those areas.

3.2.4. Anti-Competitive Practices

As already noted, competition law has the aim to control anti-competitive practices in order to promote and sustain competitive process. Anti-competitive practices restrict, limit, impede and/or distort competition denies the benefits of competition to the public. Under the repealed proclamation, Proclamation No.329/2003, anti-competitive practices are anti-competitive agreements, abuse of dominance and unfair competition (Part two). Under the present Proclamation, Proclamation No. 685/2010, considering Art 2(18) and Part two, anti-competitive activities include abuse of market dominance; agreements, concerted practices and decisions of associations of business persons; merger; and unfair competition.

A. Abuse of Market Dominance

The Proclamation prohibits the direct or indirect abuse of market dominance. Article 5 of the Proclamation states: 'No business person, either by himself or acting together with others, may carry on commercial activity by openly or dubiously abusing the dominant position he has in the market'. The Proclamation uses the term 'business person' rather than the ordinary term 'trader'. Under Art 5 of the Commercial Code of 1960 of Ethiopia and the repealed Trade Practice Proclamation No.329/2003 Art 2 (10), the law employs the term 'trader'. Art 2 (5) of the Proclamation No.685/2010 defines the term "business person" as 'any person who professionally and for gain carries on any of the activities specified under Article 5 of the Commercial Code, or who dispenses services, or who carries on those commercial activities designated as such by law'. The Proclamation No.685/2010 provides similar definition for the term 'business person' as that of the term 'trader' provided under the above mentioned laws. It seems that the legislature is opting to use the modern language 'business person' than the ordinary language 'trader'. The Proclamation also provides for the definition of "dominant market position". Under Art 6 of the Proclamation, the 'dominant market position' is defined as "A business person either by himself or acting together with others in a relevant market, is deemed to have a dominant market position, has the actual capacity to control prices or other conditions of commercial negotiations or eliminate or utterly restrain competition in the relevant market".

To look at the ingredients of this definition, the Ethiopia's competition law contains the concept of 'single dominance' and 'joint dominance', which involves multiple business persons. The Proclamation prohibits both acts by one or more business persons which constitute abuse of a dominant market position. Such concepts of dominant market position and prohibition are, for

³² Ibid

example, provided under the competition law of Zambia.³³ The Proclamation denotes "actual dominant market position". And this actual dominant market position must enable the business person or business persons to control prices or other conditions of commercial negotiation or eliminate or utterly restrain competition in the relevant market. In US too, "actual monopoly power" is defined as "the power to control prices or exclude competition".³⁴ This is not to mean the concept of "actual monopolization in US" and "actual dominant market position in Ethiopia" is similar. Under Art 4(2) of the Competition Act (2002) of India, dominant position enables an enterprise to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favor. Under the Competition Act of South Africa, 'market power' means the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers.

In Ethiopia, the business person or business persons must have actual dominant market power in the "relevant market". In assessing the dominant position of a business person(s), identifying the "relevant market" is so crucial. The Proclamation does not define the term "relevant market" under the definition part. But it defines the "relevant product market" and "relevant geographic market" under Art 7. Thus the "relevant market" under the Proclamation comprises both "relevant product market" and "relevant geographic market". Art 7(2) of the Proclamation provides that the "relevant product market" is the market that comprises goods or services that actually compete with each other or fungible goods or services that can be replaced by one another. And Art 7(3) states that the "relevant geographic market" is the area in which the conditions of competition are sufficiently homogeneous and can be distinguished from the conditions of the competition in neighboring areas. The Proclamation provides for workable components of the relevant market in assessing the dominant market position.

In other jurisdictions, for instance, in U.S.A., to establish actual monopolization the relevant market must be defined. The Courts, in their analysis of the term 'any part of the trade or commerce' under Section 2 of Sherman Act, denote the relevant market comprises the product and geographic markets. As to product market, the Court, rejecting any requirement that only product that are fungible or are physically identical products are to be considered as constituting the relevant market, concluded: 'In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up' relevant market.³⁵ As to relevant geographic market, it is stated that 'This is the geographic area of effective competition in which the defendant firm sells the product and the area in which buyers look for their supplies.'³⁶

In Europe, under Art 82 of EC Treaty, the three key elements are a dominant position; an abuse of that position; and the abuse must affect trade between Member States. Art 82 is aimed at the position and conduct of one undertaking. Essentially, Art 82 is not concerned with the fact of monopoly power in the Community, but with abuse of that monopoly or dominant position. In this

³³ UNCTAD, Supra note 19

³⁴ D.M. Raybould and Alison Firth, Law of Monopolies, Competition Law and Practice in the USA, EEC, Germany and the UK, 1991, Graham and Trotman, p. 102.

³⁵ Id. p. 103-104

³⁶ Id. p. 106



respect, the relevant market must be taken into account.³⁷ The relevant market refers to the relevant product market and relevant geographic market. As to relevant product market, demand-side substitutability determines which products compete with each other from the perspective of the consumer. The geographic reference market shall consist of the area in which the undertakings concerned are involved in the supply and demand of products and services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because, in particular, conditions of competition are appreciably different in those areas.³⁸

In India, Section 4 of the Competition Act deals with abusive behavior by dominant firms.³⁹ A dominant position is defined in terms of a 'position of strength' enjoyed by an enterprise in the relevant market in India.⁴⁰ Under Art 2(r) of the Competition Act of India, the "relevant market" means market to be determined with reference to the relevant product market or the relevant geographic market or with reference to both markets. Even the factors to be taken into account to consider what is a relevant product and geographic market of any good or service have been laid down in the Act.

In Ethiopia, to assess whether a business person possesses a dominant market position or not, the Proclamation requires the determination of the relevant market. In addition to this, the Proclamation employs criteria provided under Art 7(1) to assess the existence of dominant market position. It provides criteria such as market share of the business person, or capacity of business person to set entry barriers, or other appropriate factors, or a combination of these factors. One of the criteria provided under this provision to assess dominant position is the determination of the "market share" of business person. The Proclamation denotes that "dominance" is not condemned status. This is not to mean the Proclamation is not taking guard of dominant market position. Because the existing dominant market power may be utilized to control, prices or exclude competition when it is desired to do so. Holding a substantial percentage of "market shares" by a business person in the relevant market is a primary indication of the existence of dominant market position. So determining the percentage of "market share" of a business person is important to assess existence of dominant market power. However, the Proclamation does not set the mathematical formula to determine the percentage of market share of a business person in the total relevant market. Of course, Art 7(4) of the Proclamation states that the Council of Ministers may determine by regulation the numerical expression of the degree of market dominance. In this case, in defining dominant market position, the Proclamation adopts quantitative approach like that of the WB-OECD Model Law. The other criteria set under this provision such as capacity to set entry barriers or other factors could be employed to assess dominant market power. These factors may also serve as a prima facie for the existence of abuse of dominant market power.

In USA, under Section 2 of the Sherman Act, the emphasis is upon activity rather than the status; the Section uses the verbs 'monopolize', 'attempt' and 'conspire'.⁴¹ In general it would follow from this that size is not unlawful per se and that there is a broader scope for the rule of reason under Section 2 than under Section 1.⁴² While size is an earmark of monopoly power, a substantial part of the market must be controlled by the monopolist to enable the raising and lowering of prices and the

³⁷ John Fairhurst and Christopher Vincenzi, Law of the European Community, (Pearson Ongman, Fourth Edition, 2003), p.469

³⁸ Id. p. 470-472

³⁹ Subhadip Ghosh and Thomas W. Ross, India's New Competition Law: A Canadian Perspective, at http://www.csgeb.ca/files/2007_ghosh.pdf, 14/9/2010

⁴⁰ Ibid

⁴¹ D.M. Raybould and Alison Firth, Supra note 34, p.99

⁴² Ibid

undue restriction of competition. Of nine cases condemning monopolies under Section 2 of the Act the percentage of market share ranges from 70 per cent in the *United States v Paramount Pictures* to 100 per cent in the *United States v Pullman Co.*⁴³ In India, under the Competition Act, there is no mathematical or statistical formula is adapted to “measure” dominance.⁴⁴

In South Africa, dominance is defined in terms of market share and market power (Sec. 7).⁴⁵ Any firm that is actually has market power is considered dominant, regardless of its market share (Sec. 7(c)).⁴⁶ A firm with a market share over 45% is conclusively considered dominant. A firm with a market share between 35% and 45% is presumed to be dominant, but the firm may rebut that presumption by showing it does not have market power. If the firm’s share is below 35% the enforcer has the burden of showing that it has market power.⁴⁷ The Act employs both per se rule and a rule of reason considering on the kind of prohibited practices. Dominance is defined in terms of particular, defined markets, not in terms of firm size alone.⁴⁸

In Kenya, the competition law requires the Minister in-charge of Finance to keep the structure of production and distribution of goods and services in Kenya under review to determine where concentrations of economic power exist whose detrimental impact on the economy outweighs the efficiency advantages, if any, of integration in production and distribution.⁴⁹ The Competition Authority undertakes sectoral in a bid to consummate this legal mandate. Where necessary the Minister may make an order directing any person whom he deems to hold an unwarranted concentration of economic power in any sector to dispose of such portion of his interests in production or the supply of services as the exigency of the situation may deem necessary to remove the unwarranted concentration.⁵⁰

As noted earlier, in Ethiopia, under the Proclamation, dominant market position is not a condemned status by itself but the misuse (abuse) of such market power is prohibited. However, the Proclamation does not opt to define the term “abuse” rather it prefers to list acts constituting abuse of dominant position. Thus Art 8 of the Proclamation stipulates the non-exhaustive list of acts whose occurrence is presumed to constitute abuse of dominant market position. In this case, in defining the dominant market position, the Proclamation adopts the qualitative approach like that of UNCTAD Model Law. The abusive acts listed under this provision are limiting production, hoarding or diverting or preventing or withholding goods from being sold in regular channels of trade; predatory price; causing the escalation of the costs of a competitor; preempt inputs or distribution channels; directly or indirectly imposition of unfair purchase or unfair selling prices; refusal to deal; denying access to essential facility; imposition of discriminatory prices or other conditions between customers; unduly restraining or eliminating competition; tied selling and supply; imposition of restrictions on the distribution or manufacturing of competing goods or services; and imposition of restrictions on the resale of goods and services. Therefore, pursuant to

⁴³ Ibid

⁴⁴ Subhadip Ghosh and Thomas W. Ross, *Supra* note 39.

⁴⁵ OECD, *Supra* note 28

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Peter Muchoki Njoroge, ENFORCEMENT OF COMPETITION POLICY AND LAW IN KENYA INCLUDING CASE STUDIES IN THE AREAS OF MERGERS AND TAKEOVERS, PREVENTION OF POSSIBLE FUTURE ABUSE OF DOMINANCE AND COLLUSION/PRICE FIXING, at <http://www.ifc.org/ifcext/fias.nsf/Attachments.pdf>, visited on 10/9/2010

⁵⁰ Ibid

this Proclamation, in defining the dominant market position, Ethiopia employs both qualitative and quantitative approach.

In most jurisdictions also dominant position is not condemned status but its abuse. In Hoffman-La Roche, the European Court refers to 'distorting competition' and to consolidating the position of the dominant firm.⁵¹

"The concept of abuse is an objective one relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

As already noted, in Europe, Art 82 of EC Treaty provides an indicative and not exhaustive list of acts or behavior constituting abuses of dominant position. In India, Art 4(2) of Competition Act lists 5 categories of abuse of dominance such as imposing unfair/discriminatory conditions in purchase or sale of goods, or imposing unfair/discriminatory prices in purchase or sale (including predatory price) of goods or service; limiting or restricting the production of goods or services or of technical or scientific development relating to goods and services (to prejudice of consumers); adopting practices that deny market access; making conclusion of contracts to other parties accepting obligations having no connection with the subject of the contracts; and using a dominant position in one market to enter into or protect another market. In South Africa, the law about single-firm conduct is based on abuse of dominance, but it also includes a rule about price discrimination. Abuse of dominance is dealt with mostly through a list of prohibited practices. Art 8 of the Competition Act provides for list of abusive practices.⁵²

However, in cases involving abuse of dominance or monopolization it is essential to ensure that application of the law does not inadvertently curb efficient business practices.⁵³ It is important to recognize that firms may achieve legitimately a dominant position in a market (for example, through innovation, superior production or distribution methods, or greater entrepreneurial efforts). Moreover, many practices that appear anti-competitive (such vertical market restraints as tying or exclusive dealing requirements) can serve legitimate pro-competitive purposes in some circumstances (for instance establishing a network of exclusive dealers—to better control costs and, as a result, expand sales relative to smaller; the prevention of free riding).⁵⁴ Consequently, investigating alleged abuses of a dominant position will require a careful rule-of-reason analysis, in which possible anticompetitive harm is weighed against possible efficiency benefits.

Under Ethiopian competition law, abuse of dominant market position is not treated under per se prohibition but rule of reason prohibition. Thus the Proclamation excludes and exempts certain acts from the prohibition made against abuse of dominance. Under Art 9 of the Proclamation, a business person has the right to raise the 'legitimate business purposes' as a defense. Particularly, he has to prove to the satisfaction of the concerned enforcement authority that to secure the

⁵¹ Id. p. 337

⁵² OECD, Supra note 28

⁵³ The World Bank and OECD, A Framework for the Design and Implementation of Competition Law and Policy, (The World Bank and OECD, 1999), at

<http://rru.worldbank.org/Documents/PapersLinks/2427.pdf>, visited on 7/10/09

⁵⁴ Ibid

intended business his acts are indispensable, decisive by their nature and cannot be achieved otherwise. In such case, if the defense is confirmed the acts of that business person would be excluded from the prohibition. The provision provides for the non-exhaustive list of acts which deserve exceptions from prohibition. These acts are maintenance of quality and safety of goods; leveling with prices or benefits offered by a competitor; and achieving efficiency and competitiveness. Moreover, Art 10 of the Proclamation provides that Council of Ministers may specify by regulation those activities which may be exempted from prohibition under chapter one, when it deems such activities are "vital in facilitating economic development". The Proclamation does not give a clue as to those trade activities which are deemed "vital in facilitating economic development". As already noted, the advantages of these exemptions and exclusions must be weighed with the fundamental legal and economic reasons or benefits accruing to a country from the uniform application of this Proclamation to all business persons and commercial activities and its impact on the effective implementation of the Proclamation. Moreover, one of the objectives of the Proclamation is "accelerating economic development (Art 3(5)). So the exemption to be granted under Art 10 should convincingly exceed this objective of the Proclamation "to accelerate economic development". Furthermore, the Authority has to get a chance to air its view in favor of the competitive process.

B. Anti-Competitive Agreements, or Concerted Practice or a Decision by an Association

The Trade Practice and Consumers' Protection Proclamation also prohibits agreements which have anti-competitive effect. Art 11 of the Proclamation states that 'any agreement or concerted practice or a decision by an association is prohibited if it has the object or effect of preventing, restricting or distorting competition'. The Proclamation also defines these terminologies.

The term agreement includes mutual understanding, written or oral contract and operational procedures, whether or not legally enforceable (Art 12(1)). And Art 12(2) of the Proclamation states that 'concerted practice means a unified or cooperative conduct of business persons depicted in a way that does not look an agreement and done to substitute individual activity'. However, the Proclamation does not define "a decision by an association of business persons". In this regard, it will be of help to look at the EU and Zambian competition laws. The Proclamation prohibits any agreement and operational procedures whether they are written, oral, formal, informal; or concerted practices which do not amount to agreement but manifesting unified or cooperative conduct of business persons to substitute individual activity. Thus this provision prohibits multiple possibilities that go beyond agreements. This provision prohibits these agreements, whether or not legally enforceable. It seems agreements or concerted practices in contravention of this Proclamation are void from the outset. If a party to these agreements seeks for performance, would a court enter an order for the enforcement of such agreements is the point which needs consideration.

In this regard, in US, Section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies in restraint of trade or commerce between the several states or with foreign nations. 'Contract' clearly extends to formal legal arrangements but contracts do not have to be evidenced by written agreement. In modern case, the term 'combination' was applied to a loose-knit association in which a publisher hired a circulation sales company to solicit customers from his distributor's route and obtained another distributor to sell newspapers to those customers who were successfully solicited. A 'conspiracy' is an agreement by two or more persons, evidenced by either words or conduct, to do an unlawful act or to use unlawful means to do a lawful act. This has been characterized as follows:⁵⁵

⁵⁵ D.M. Raybould and Alison Firth, *Supra* note 34, p. 14

"where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangements, the conclusion that a conspiracy is established is justified."

In Europe, the prohibition under Art 81 EC Treaty is applicable only if there is an 'agreement', a 'decision' by an association of undertakings', a 'concerted practices'. Agreements are not confined to binding contracts of whatever kind, but include understandings and 'gentlemen's agreements'. Moreover, the 'agreement' does not have to be voluntary. A decision is referring to that of a trade association which lays down standards for the activities of its members. Concerted practice means some kind of coordinated action which, although it may fall short of an agreement, knowingly substitutes practical cooperation for competition.⁵⁶

Art 2(b) of Indian competition Act states that "agreements" including any arrangement or action in concert, -- whether or not, such arrangement, understanding or action is formal or in writing; or whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings. And Art 1(b) of South Africa's competition Act (2000) provides that 'agreement', when used in relation to a prohibited practice, include a contract, arrangement or understanding, whether or not legal enforceable. Moreover, pursuant to Art 1(vi), 'concerted practice' means co-operative, or coordinated conduct between firms, achieved through direct or indirect contract, that replaces their independent action, but which does not amount to an agreement.

In Zambia, agreement includes agreements whether legally enforceable or not, written or oral; it includes so-called "gentle men's agreements". There does not have to be a physical meeting of the parties for an agreement to be reached: an exchange of letters or telephone calls may suffice if a consensus is arrived at as to the action each party will, or will not, take. The fact that a party may have played only a limited part in the setting up of the agreement, or may not be fully committed to its implementation, or participated only under pressure from other parties does not mean that it is not party to the agreement. A decision may cover the constitution or rules of an association, decisions, which are binding on its members and recommendations. And a concerted practice may exist where there is informal cooperation without any formal agreement or decision.⁵⁷

Thus the competition laws of these jurisdictions provide wide meaning for agreement to cover multiple possibilities. As already noted, in Ethiopia too, agreement is given wide coverage. The difficulty is the proof of these agreements and concerted practices. In case, an agreement is in a written form the burden of proof, at least, as to its existence is simple. In case of informal or oral agreements or concerted practices the proof has to indicate that there is communication or shared knowledge of business decisions among enterprises, leading to concerted action or parallelism of behavior on their part. In such cases, the proof could be made based on circumstantial evidence and the direct testimony of witnesses.⁵⁸ In Zambia, to establish the existence of concerted practices, the Commission may consider factors such as:⁵⁹

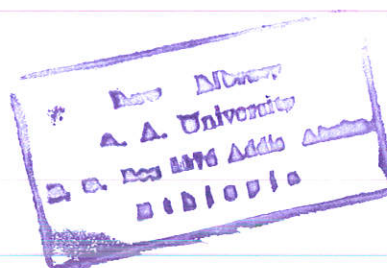
- Whether the parties knowingly enter into practical cooperation;
- Whether behavior in the markets is influenced as a result of direct or indirect contact between undertakings;
- Whether parallel behavior is a result of contact between undertakings which leads to conditions of competition which do not correspond to normal conditions of the market;

⁵⁶ John Fairhurst and Christopher Vincenzi, Supra note 37, p. 443-445

⁵⁷ UNCTAD, Supra note 19

⁵⁸ UNCTAD, Supra note 15

⁵⁹ UNCTAD, Supra note 19



- The structure of the relevant market and the nature of the product involved;
- The number of undertakings in the market, and where there are only a few undertakings whether they have similar cost structures and outputs.

In Ethiopia, the Proclamation prohibits agreements or concerted practices or decisions by associations of business persons in a horizontal relationship (Art 13(1) (a)). Horizontal relationship is deemed to exist between competing business persons in a certain market (13(2)). The law prohibits horizontal agreements or concerted practices or decisions by associations of business persons which have the object or effect directly or indirectly fixing prices; collusive tendering; allocating customers, or marketing territories or production or sale by quota. The list of these prohibited acts should not be considered exhaustive but indicative list. And Art 13(1) (b) of the Proclamation also prohibits 'agreement between business persons in a vertical relationship that has an object or effect of setting minimum retail price'. This is the prohibition against the vertical agreements. Vertical relationship is deemed to exist between business persons and its customers or suppliers or both (Art 13(2)).

Art 13 of the Proclamation employs per se prohibition against these acts. They are per se illegal. Once the existence of such prohibited acts is proved, they automatically fall under per se prohibition. But the Proclamation does not indicate to what extent these acts should have to cause adverse effect on competition (the degree of adverse effect on competition) that they deserve prohibition. Of course, Art 14 of the Proclamation provides for exceptions that the business person accused of violating this prohibition can justify his act by proving that "the technological or efficiency or other pro-competitive gains of the agreement or the concerted practice or the decision by association outweigh the detriments of the prohibited acts". This makes the Proclamation to treat these prohibited acts under the rule-of-reason approach.

Since the Proclamation has not provided the definitions or explanations for these prohibited acts, it would be of help to see explanations provided under UNCTAD Model Law on Competition. UNCTAD Model Law on Competition provides for non-exhaustive list of restrictive agreements or arrangements such as agreements fixing prices or other terms of sale, including in international trade; collusive tendering; market or consumer allocation; restraints on production or sales, including quota; concerted refusals to purchase; concerted refusal to supply; collective denial of access to an arrangement, or association, which is crucial to competition.⁶⁰

"Price fixing" is a term generically applied to a wide variety of actions taken by competitors having direct effect on price. It can occur at any level in the production and distribution process. It may involve agreements as to prices of primary goods, intermediary inputs or finished products. It may also involve agreements relating to specific forms of price computation, including the granting of discounts and rebates, drawing up price lists and variations there from, and exchange of price information. Price fixing is considered as per se violation in many countries.⁶¹

Collusive tendering is inherently anti-competitive, since it contravenes the very purpose of inviting tenders, which is to procure goods or services on the most favorable prices and conditions. It may take different forms; namely: agreements to submit identical bids, agreements as to who shall submit the lowest bid, agreements for the submission of cover bids (voluntary inflated bids), agreements not to bid against each other, agreements on common norms to calculate prices or terms on bids, agreements to "squeeze out" outside bidders, agreements designating bid winners in

⁶⁰ UNCTAD, Supra note 15

⁶¹ Ibid

advance on a rotational basis, or on a geographical or customer allocation basis. Such agreements may provide for a system of compensation to unsuccessful bidders based on a certain percentage of profits of successful bidders to divide among unsuccessful bidders at the end of a certain period.⁶²

Customer and market allocation arrangements among enterprises involve the assignment to particular enterprises of particular customers or markets for products or services in question. Such arrangements are designed in particular to strengthen or maintain particular trading patterns by competitors forgoing competition in respect of each other's customers or markets. Such arrangements can be restrictive to a particular line of products, or to a particular type of a customer.⁶³

As to restraints on production or sales, including quota, market-sharing arrangements may also be devised on the basis of quantity allocations rather than on the basis of territories or customers. Such restrictions are often applied in sectors where there is surplus capacity or where the object is to raise prices. Under such schemes, enterprises frequently agree to limit supplies to a proportion of their previous sales, and in order to enforce this, a pooling arrangement is often created whereby enterprises selling in excess of their quota are required to make payments to the pool in order to compensate those selling below their quotas.⁶⁴

Moreover, to see some jurisdictions, in South Africa, the Competition Act's first rule about horizontal restraints is a prohibition based on the rule of reason.⁶⁵ These agreements are prohibited if they have the effect of substantially lessening or prohibiting competition in a market.⁶⁶ The prohibition can be overcome by a showing that pro-competitive gains outweigh the anti-competitive effect. There are also agreements which are prohibited per se, without requiring a showing of actual harmful effect or permitting a showing of net efficiency.⁶⁷ There is the exemption process under Sec. 10 which permits consideration of the Competition Act's other social or economic policies, notably the promotion of small business competitiveness.⁶⁸ Under South Africa's statute, a vertical agreement is prohibited if it has the effect of substantially preventing or lessening competition in a market (rule of reason), unless a party can prove that any technological, efficiency, or other pro-competitive gain resulting from that agreement outweighs the anti-competitive effect (Sec. 5(1)).⁶⁹

In India, the law prohibiting anti-competitive agreements is contained in section 3 of the Competition Act (2002).⁷⁰ Section 3(1) of the Act states that "enterprises, persons or associations of enterprises or persons, including cartels, shall not enter into agreements in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which cause or are likely to cause an "appreciable adverse effect on competition" (AAEC) in India.⁷¹ Section 3(2) prohibits such agreements. This section covers both horizontal and vertical agreements. Presumably, these agreements are treated on the basis of a rule of reason.⁷²

⁶² Ibid

⁶³ Ibid

⁶⁴ Ibid

⁶⁵ OECD, Supra note 28

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ Ibid

⁷⁰ Subhadip Ghosh and Thomas W. Ross, Supra note 39.

⁷¹ Ibid

⁷² Ibid

Finally, the prohibition provided under the Proclamation almost resembles that of other jurisdictions. Therefore in enforcing this prohibition against agreements, or the concerted practices or the decisions by association the Authority may consider the experiences of these countries.

C. Merger, Concentration

Concentration of economic power occurs *inter alia* through mergers, takeovers, joint ventures and other acquisitions of control, such as interlocking directorates. Mergers that are in unusually concentrated markets, or that create firms with unusually high market shares, are more likely to affect competition.⁷³ In Ethiopia, the repealed Proclamation had no provisions to govern merger, acquisition and takeover. Companies were simply merging as per the provisions of the Commercial Code of 1960 and other proclamation without further requirements by the Ministry of Trade and Industry as to their impact on competition.⁷⁴ Fortunately, the new Proclamation No.685/2010 governs mergers. The Proclamation defines merger under Art 16. As such, merger is deemed to have occurred when two or more business organizations previously having independent existence amalgamate or when such business organizations pool the whole or part of their resources to carry on a certain business purpose (Art 16(1)). In such case the formerly independent business organizations lost their personalities and become one entity (merger or amalgamation). Moreover, merger also occurs by directly or indirectly acquiring shares or securities or assets of a business organization by a person or group of persons jointly or the business of another person through purchase or any other means (16(2)). This is referring to acquisition or takeover. And it gives the power to control the acquired business organization and thereby empower to influence the decision making in the affairs or in the administrative activities of a business organization or a business Art (16(3)). To address areas of mergers comprehensively, this provision should be broadly interpreted to cover all kinds of mergers, takeovers, acquisitions. The provisions controlling merger and takeover are referring to the term 'business organization' which has not been defined in the Proclamation. The Proclamation is employing the term 'business person' rather than 'business organization'. This requires looking at the Ethiopian commercial code of 1960 to find out what 'business organization' is.

The provisions of the Proclamation regulating merger and acquisition do not make distinction among horizontal merger, vertical merger and conglomerate merger. As discussed in chapter two, even if there is an argument as to which merger should the law control, the competition law has to regulate all kind of mergers if they restrict or eliminate competition unduly. Hopefully, the Proclamation is regulating all sorts of mergers which have adverse effect on competition. The Proclamation must be viewed to regulate a 'merger situation' in a very wide manner and covers several different kinds of transactions and arrangements. Art 15(1) of the Proclamation states that 'merger is prohibited if the Authority decides that it causes or is likely to cause a "significant" restriction on competition or eliminates competition'. For a merger to be prohibited, it has to "significantly" restrict or eliminate competition (the degree of adverse effect on competition). The Proclamation, however, does not provide for the thresholds which manifest the "significant" adverse effect of merger on competition.

In this respect, in India, "combinations", as defined in Section 5 of the Competition Act, include mergers, amalgamations, acquisition of the shares and acquisitions of control, when these are above specified size thresholds. Section 5 states that combination that exceeds the threshold limits specified in the Act in terms of assets or turnover, which causes or is likely to cause an appreciable

⁷³ UNCTAD, Supra note 15

⁷⁴ Interview Held on November 25/ 2009 with Ato Nasir Mereba, Senior Expert at Department of Business License and Registration Of Ministry of Trade and Industry.

adverse effect on competition (AAEC) within the relevant market in India, can be scrutinized by the Competition Commission of India (CCI).⁷⁵ And in South Africa, the legal standards for merger control are general and evidently permissive. The competition policy standard, which must be assessed first, is whether the merger “is likely to substantially prevent or lessen competition”. That determination requires a multi-factor analysis, set out in the statute, to assess the probability that firms will compete or co-operate after the merger. Factors to consider include import competition, ease of entry, tariff and regulatory barriers, concentration, any history of collusion, countervailing power, dynamic characteristics such as growth, innovation, and product differentiation, vertical integration, business failure, and removal of an effective competitor (Sec. 12A(1)).⁷⁶ Moreover, in Kenya, mergers and takeovers between two or more independent enterprises are prohibited per se unless they are authorized in accordance with the law. The Commission for Monopolies and Prices is of view that some sort of a threshold be introduced.⁷⁷ Mergers and takeovers effected without an authorizing order from the Minister are illegal *ab initio* and not justiciable.⁷⁸

In Ethiopia, Art 17 of the Proclamation adopts a mandatory pre-merger notification process. The government office which has power of commercial registration and any person who is a party to the intended or proposed merger must notify to the Authority before the consummation of the proposed merger. A proposed merger cannot be consummated or implemented without the approval of the Authority. If the proposed merger is implemented without the permission of the Authority it is void before the law; but entailing administrative and/or civil sanctions under this Proclamation. And as per Art 18 of the Proclamation the Authority has the power to approve, disapprove, or approve the merger with conditions or modifications, and communicate this in writing to the applicant. The Authority has the power to demand additional information or documents from the applicant before it approve, disapprove or amend the proposed merger. The criteria for the Authority to approve, disapprove or approve with amendment the intended merger are whether “the acts of merger cause or likely to cause a ‘significant’ restriction on competition or eliminate competition” (Art 18(1)). This coincides with what is provided under Art 15(1) of the Proclamation. However, the Proclamation does not set the degree of restriction on competition or eliminating competition which is deemed to be “significant”. It seems this is left to the discretion of the Council of Ministers. Art 18(5) provides that the Council of Ministers may specify by regulation those acts of mergers that are subject to supervision. “The acts of merger that are subject to supervision” must refer to “acts of merger that cause or likely to cause a significant restriction on competition or eliminate competition”. This seems to have the object to set thresholds based on turnover or assets of the combined merger or takeover, or other criteria. This denotes that not all mergers, acquisitions or takeovers undergo the mandatory pre-notification process. In issuing this regulation, the Council of Ministers has to critically balance the advantage of maintaining and promoting competitive process against the danger of discouraging business persons from undertaking pro-competitive activities or securing capacity to compete in the world markets.

⁷⁵ Subhadip Ghosh and Thomas W. Ross, *Supra* note 39.

A merger is a consolidation of the business of two or more companies into a single corporation which may or may not be one of the two original companies. Acquisition involves the purchase of the shares in or assets of a company by a second corporation. A takeover bid is used to refer specifically to an offer by one company to the shareholders in another to purchase their shares in exchange for stock or cash.

⁷⁶ OECD, *Supra* note 28

⁷⁷ Peter Muchoki Njoroge, *ENFORCEMENT OF COMPETITION POLICY AND LAW IN KENYA INCLUDING CASE STUDIES IN THE AREAS OF MERGERS AND TAKEOVERS, PREVENTION OF POSSIBLE FUTURE ABUSE OF DOMINANCE AND COLLUSION/PRICE FIXING*, at <http://www.ifc.org/ifcext/fias.nsf/Attachments.pdf>, visited on 10/9/2010

⁷⁸ UNCTAD, *Supra* note 19

As to notification process, many States, in controlling mergers and other forms of acquisition of control, have established a system of notification prior to consummation of mergers such as in the US and the EU. Some countries have retained a mandatory system of notification after consummation of the merger and a few countries have submitted merger control only to a voluntary notification process.⁷⁹ For most countries, notification is mandatory only when the enterprises concerned have, or are likely to acquire, a certain level of concentration.⁸⁰

From this perspective, the main indicators used for examining such concentration of economic power are market shares, total annual turnover, number of employees and total assets. The other factors, including the general market structure, the existing degree of market concentration, barriers to entry and the competitive position of other enterprises in the relevant market, as well as the advantages currently enjoyed and to be gained by the acquisition, are also taken into account in assessing the effects of an acquisition.⁸¹

In India, Section 6(2) of the Act, after the Amendment Bill (2007) makes it mandatory (it was voluntary in the 2002 Act) to the person or enterprise proposing to enter into a combination to give notice to the CCI of such intention, providing details of the combination (mandatory notification). The CCI may, after due deliberation, approve the combination, or direct that the combination shall not take effect, or propose modifications. However, public financial institutions, foreign institutional investors, banks or venture capital funds which are contemplating share subscription financing or acquisition pursuant to any specific stipulation in a loan agreement or investor agreement are not required to approach the CCI for this purpose.⁸² And in South Africa, based on the threshold set on the basis of combined turnover or assets, mergers are classified as "small" merger, "intermediate" merger, or "large" merger. This determines the duty and the procedure to notify merger. Intermediate and large mergers must be notified in advance to the Competition Commission. The Competition Act says that parties may not "implement" a merger until it is approved (Sec. 13A (3)). Small mergers ordinarily need not be notified to the Competition Commission. But the Commission may require notification within six month.⁸³ In Kenya, in order to implement mergers and takeovers, notification process is also compulsory. ⁸⁴ Finally, in Zambia, the Competition Law is one of those which require pre-merger notification, that is, notification of intent to merge in advance of consummation.⁸⁵

Finally, with regard to the prohibition of mergers which have anti-competitive effect, the Proclamation employs the rule of reason approach. As per Art 19 the Authority has the power to exclude the merger which has anti-competitive effect, if the applicant proves that 'gains in this respect cannot be obtained without restricting competition, and technology, efficiency and pro-competitive gains resulting from the merger outweigh its anticompetitive effects'. In this respect, in Namibia, as to the proposed merger, the Namibian Competition Commission (NaCC) determines the proposed merger by considering the benefits likely to arise from a merger and asserting whether these effectively outweigh any anticompetitive effect. Under Sec.47 (2) of the Namibian Competition Act of 2003 set the criteria to weigh the benefits and the disadvantages of the proposed merger. Some of these criteria are the benefits to the public; and benefits relating to

⁷⁹ UNCTAD, Supra note 15

⁸⁰ Ibid

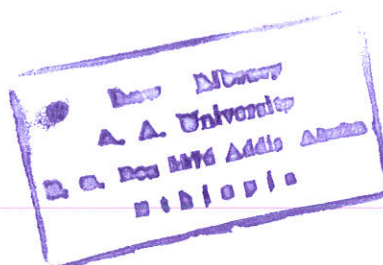
⁸¹ Ibid

⁸² Subhadip Ghosh and Thomas W. Ross, Supra note 39.

⁸³ OECD, Supra note 28

⁸⁴ Peter Muchoki Njoroge, Supra note 77

⁸⁵ UNCTAD, Supra note 19



research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets. In South Africa, in order to approve or disapprove the proposed merger multi-factors have to be analyzed. Pursuant to Sec.12A (1) (a) (i) of the Competition Act of South Africa it has to be determined whether technological efficiency, or other pro-competitive effect and would not likely be obtained absent merger. And as per Sec.12(A)(1) (a) (ii), public interest grounds such as effect on a particular sector or region, employment, international competitiveness of south Africa industries, or the ability of small business or firms controlled by historically disadvantaged persons to become competitive. Moreover, the republic of Bulgaria, Law on the Protection of Competition of 1998, under Art 28 (2) provides that the Commission for Protection of Competition may authorize a concentration which, besides creating or strengthening a dominant position, aims at modernization of production or of economy as a whole, improvement of the market structures, attraction of investments, increasing the competitiveness on external markets, creation of new jobs, better satisfying of the interests of consumers, and on the whole outweighs the negative impact on competition on the relevant market. However, the Authority has to set clear and transparent guidelines to grant exceptions for this affects equality before the law and adversely affects competition and economic development. In Ethiopia too, the Authority might take into account the public interest and development needs of the country to weigh the advantages and disadvantages of approving merger which has anticompetitive effect. In addition to exceptions, the Proclamation provides for exemptions to remove certain mergers from the ambit of application of provisions regulating mergers for better economic reasons or other reasons. In this regard, Art 20 stipulates that the Council of Ministers has the power to exempt those trade activities it deems are "vital in facilitating economic development" from the application of provisions regulating mergers" by regulation. The Council of Ministers has to provide clear analysis of those trade activities deemed to be "vital in facilitating economic development" to enable the stakeholders to understand that this truly outweighs the benefits of competition. Moreover, the advantages of these exemptions and exclusions must be weighed with the fundamental legal and economic reasons or benefits accruing to a country from the uniform application of this Proclamation to all business persons and commercial activities and its impact on the effective implementation of the Proclamation.

D. Unfair Competition

The Proclamation also prohibits any act or practice of unfair competition which adversely affects business interest of a competitor. The Proclamation defines "unfair competition" as 'any act or practice carried out in the course of trade, which is dishonest, misleading, or deceptive and harms or is likely to harm the business interest of a competitor' (Art 21(1)). This definition of "unfair competition" covers wide ranges of acts which amounts to unfair competition and properly address the issue of unfair competition. Art 21(2) (a)-(f) of the Proclamation provides for non-exhaustive or illustrative list of acts which constitute unfair competition. These acts should be evaluated against "honest commercial practice". In the past, issues related to acts of unfair competition were regulated as per the Commercial Code of 1960 as a private dispute which should be litigated among private disputants (Arts 132-134). Under the repealed proclamation No. 329/2003, acts of unfair competition were prohibited as per Art 10. Under the repealed proclamation there were acts which could not be covered under acts of unfair competition such as antidumping issue and trading in goods imported into Ethiopia for humanitarian purpose, without authorization by the Ministry. But the present Proclamation repealed these provisions and limited the prohibition to acts of unfair competition proper.

The application of prohibition of unfair competition differs from jurisdictions to jurisdictions. In USA, Section 5(a) (1) of the FTC Act states:⁸⁶

⁸⁶ D.M. Raybould and Alison Firth, Supra note 34

'Unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.'

There are two basic aspects of Section 5, 'unfair methods of competition', which is the antitrust arm, and 'unfair or deceptive acts or practices', which has increasingly been used by the Commission as an instrument of customer protection.⁸⁷ Unfair methods of competition includes actual and incipient antitrust abuses under the Sherman and Clayton Acts but the concept has been extended to cover activities not normally considered to fall within the letter or spirit of the antitrust statutes.⁸⁸

The Competition Act of Estonia, under chapter 7 governs unfair competition. Sec. 50(1) defines "unfair competition" as 'dishonest trading and acts which are contrary to good moral practices, including: publication of misleading information, presentation or ordering of misleading information for publication, or disparagement of a competitor or the goods of the competitor; misuse of confidential information or of an employee or representative of a competitor. As per Sec. 50(2) of the Act unfair competition is prohibited. With regard to advertisement, the Act refers to the provisions of the advertising Act. In Estonia, unfair competition is considered as private dispute. As such, Sec. 53 of the Act states that the existence or absence of unfair competition shall be ascertained in a dispute between parties held pursuant to civil procedure. Moreover, Sec. 54(1) provides that the Competition Board shall exercise state supervision over implementation of this Act, except implementation of the provision of chapters 6 and 7. So the state supervision does not extend to unfair competition. And the Law on the Protection of Competition (1998) of Bulgaria also prohibits unfair competition. Art 30 of the Law defines "unfair competition" as 'any action or inaction in the course of the performance of economic activities which contravenes to good-faith commercial usage and impairs or might impair the interests of competitors in their mutual relations or in their relations with consumers'. Under the Competition and Fair Trading Act (1994) of Zambia, Sec. 12 of the Act prohibits certain acts of unfair competition from the perspective of consumer welfare.

Clustering all these together, in Ethiopia, the new Proclamation provides for comprehensive coverage of acts of unfair competition. As already discussed, in some jurisdictions like India, Kenya, South Africa, and others, unfair competition is not considered as the substantive issue of the Competition Laws. Even if the inclusion of prohibition of unfair competition in the Ethiopian competition law is not act to be condemned, but the whole resources and time of the public enforcement should not be devoted only to combat acts of unfair competition. This is because even the private parties can litigate issues related to acts of unfair competition. Under the repealed proclamation, in practice, almost all cases entertained by the Trade Practice Investigation Commission (TPIC) were cases of unfair competition particularly infringement of trademarks and trade names.⁸⁹

E. Sanctions

In Ethiopia, the Proclamation provides for the ways to conduct commercial activities and ways to compete without breaching the provisions of the Proclamation. It provides for prohibitions which any business person or other individual should not trespass in conducting business or participating in business. The Proclamation, after giving warnings or notices not to contravene the provisions of the same to a business person or other individual, if violation is committed the Proclamation sets

⁸⁷ Ibid

⁸⁸ Ibid

⁸⁹ Interview Conducted on November 17, 2002 E.C. with Ato Biru Olbama, Secretary to the Trade Practice Investigation Commission, and could be gathered from other data of cases available at TPIC.

sanctions against the violators (perpetrators). Generally, the sanctions provided under the Proclamation are administrative, civil and criminal sanctions (Art 35(1) and Art 49). Of course, the violator has the duty to make good the damages sustained by the victim by paying compensation. These sanctions enable, to secure respect for or compliance with the provisions of the Proclamation by the business persons and the general public, effective enforcement of the Proclamation, and have strong deterrent effect against the violators.

As per Art 35(1) of the Proclamation, if there is violation of the Provision of the Proclamation the Authority has the power to set administrative and civil sanctions, and get the victims compensated for damages they incurred. And these administrative and civil sanctions (measures) include (Art 35(3)):

- a) Order the discontinuation or injunction of the act pronounced inappropriate;
- b) Order the payment of compensation to the person affected by the act including taking any other appropriate measure that enables to reinstate the victims competitive position;
- c) Suspend or cancel business licenses;
- d) Order the payment of compensation to consumers for damages they have sustained;
- e) Order the seizure and/or selling of goods.

In the past, one of the defects of the repealed proclamation was that it did not explicitly empower the Trade Practice Investigation Commission (TPIC) to adjudicate matters concerning compensating the victims of the violation of the proclamation. Fortunately, the new Proclamation has made a big progress that it explicitly empowers the Authority to adjudicate and decide compensation for the victims. Pursuant to Art 50 of the Proclamation, in assessing the administrative or civil measures to be imposed on the violator, the Authority has to take note of and critically analyses factors listed under this provision. As to the payment of compensation to the victim, the Proclamation does not seem to intend to compensate the victim triple damages or punitive damages as in U.S.A., but single damages as in South Africa. In assessing the payment of compensation to the victim, in addition to considering factors enumerated under Art 50 of the Proclamation, the Authority may reflect on relevant principles underlying compensation for damage as provided under Arts 2090ff of the Civil Code of Ethiopia.

As to the criminal sanctions, in Ethiopia, the Proclamation considers breaches of the provisions of the Proclamation as criminal offences and imposes criminal sanctions. As per Art 35 (4) of the Proclamation, when the Authority knows or believes the commission of offences provided under the Proclamation, it shall, together with its evidential findings and opinion (recommendation), submit to the prosecutor in charge of examining and determining the case. It is only the courts of law which have jurisdiction to adjudicate criminal offences provided under the Proclamation. The criminal prosecution of these offences, considering the provisions of the Proclamation, should be conducted as per principles and rules of Ethiopian Criminal Code of 2004 and Criminal Procedure Code of 1960. Criminal sanctions, under the Proclamation, comprise fines and imprisonment penalties. These criminal penalties are imposed against any person who has violated the provisions of the Proclamation. Pursuant to Art 49(1) of the Proclamation, any business person who violates prohibitions concerning abuse of dominance (Art 8) shall be punished with a fine of 15% of his annual income or where it is impossible to determine the amount of his annual income with fine from birr 500,000 to birr 1,000,000 and with rigorous imprisonment from 5 to 15 years. If a person other than business person participates in violating prohibitions against abuse of dominance he shall be punished with fine from birr 200,000 to 400,000 and with rigorous imprisonment from 3 to 5 years (Art 49(7)). With regard to prohibitions against agreements, or concerted practices or decisions by associations of business persons (Art 13(1) (a) and (b)), any business person who violates these prohibitions shall be punished with a fine of 20% of his annual income or where it is impossible to determine the amount of his annual income with fine from birr 1,000,000 to

2,000,000 and with rigorous imprisonment from 5 to 10 years. And as to prohibitions against unfair competition, Art 49(3) provides that any business person who violates these prohibitions shall be punished with a fine of 10% of his annual income or where it is impossible to determine the amount of his annual income with fine from birr 300,000 to 600,000 and with rigorous imprisonment from 3 to 5 years. Finally, Art 49(8) provides that any business person or any person other than business person who violates other provisions of the Proclamation other than those mentioned under sub-art 1-6 or provisions of relevant regulations or public notices shall be punished with fine from birr 30,000 to 50,000 and with rigorous imprisonment from 2 to 4 years. The Proclamation does not explicitly condemn violation of prohibitions concerning mergers as criminal offences. However, should violation of provisions regulating mergers be considered as criminal offence pursuant to Art 49(8) of the Proclamation? Hopefully, this provision should not be interpreted to cover violation concerning provisions regulating mergers. The Proclamation provides for serious criminal sanctions both fines and imprisonment. Obviously, this is important to secure effective compliance of business persons and the general public to the provisions of the Proclamation, and has strong deterrence effect. But these criminal sanctions should be carefully implemented not to deter business persons from competing which is clearly the opposite of what is intended. Even if it does not actually discourage competitive behavior, the threat of fines may significantly increase compliance costs for business seeking to ensure that they do not inadvertently step over the line.⁹⁰ Particularly, with regard fines to be imposed against business person (company), care should be taken not get the company bankrupt and penalize other innocent employees.

Some jurisdictions consider violation of the competition laws as criminal offences and impose criminal sanctions. In the United States, criminal sanctions only apply to “hard-core” cartel behavior.⁹¹ The EU competition law does not impose criminal sanctions for its violations. And the lack of criminal sanctions is identified as a serious weakness of the EU competition law. Obviously an EU Criminal Code is some way away and it is unrealistic to expect that such provisions would be put in place to deal with cartels. Regulation /1/2003 by providing for the decentralized application of EU competition law and allowing Member States to apply it using their existing national law procedures means that individual Member States may impose such sanctions. Of course having criminal sanctions in only some Member States inevitably limits the deterrent effect of such sanctions.⁹² Under the Competition Act (2002) of Ireland, an agreement, a decision by an association of undertakings, or a concerted practice; or abuse of dominance in violation of the Act are considered as an offence subject to criminal sanctions. Thus the 2002 Act provides breaches of Art 81 and 82 of EC Treaty constitute criminal offences.⁹³

Moreover, in France, pursuant to Article L. 420-6 commercial code, any individual who has fraudulently taken a personal and decisive part in anticompetitive practices faces up to four years imprisonment and a fine of up to EUR 75,000.⁹⁴ In U.K, if individual is found guilty of the Enterprise Act 2002 Section 190 cartel offence, criminal sanctions can be imposed-unlimited fines and imprisonment for up to 5 years. In Bulgaria, anticompetitive practices, cartel infringements and abuse of dominance are not criminalized under the law. However, breaches of Bulgarian Protection

⁹⁰ Patrick Massey, Criminal Sanctions for Competition Law: A Review of Irish Experience, at www.compecon.ie/Classf%2004.pdf, visited on 10/12/2010

⁹¹ Ibid

⁹² Ibid

⁹³ Ibid

⁹⁴ Romain Maulin and Harshita Mathur, Concurrences Review of Competition Laws, at www.concurrences.com/bulletin_auteurs.php3?lang=en, visited on 10/12/2010

of Competition Act committed by physical persons may constitute certain types of crimes (e.g. forgery of documents, perjury, fraud, etc.).⁹⁵ In Italy, no criminal sanctions for antitrust infringements are provided for by the Italian legal system.⁹⁶ Finally, in Sweden, there is no criminal sanction for any violation of the competition Act.⁹⁷ This shows treating violations of competition laws as criminal offences depend on the concerned countries' preference and existing specific realities but no common rule for countries to adopt in this regard.



⁹⁵ Ibid

⁹⁶ Ibid

⁹⁷ Ibid

CHAPTER FOUR

The Institutional Framework of the Ethiopian Competition Law

This chapter deals with the institutional framework provided under the Ethiopian competition law (the Proclamation) to enforce the law effectively to attain the intended goals. In this part, whether or not the Proclamation grants necessary powers to the enforcement institutions to enforce the Ethiopian competition law effectively; whether or not the Proclamation confers independence to the Authority as an institution and to members of the Authority personally; accountability of the Authority; whether or not effective private enforcement of the Proclamation is provided; and the merits and demerits of reviewing decisions of the Authority by the ordinary judicial body will be critically assessed. As such the enforcement mechanisms will be analyzed to point out lacunae in the Proclamation from the perspective of effective enforcement and to suggest possible recommendations.

4.1. Introduction

The passing of the competition law does not guarantee an effective competition regime.¹ This denotes having a competition policy and law is one thing, its proper implementation and enforcement is quite another.² Implementation and enforcement of competition law is pivotal to the success of a competitive environment.³ In introducing the competition law, its enforcement mechanism must also be well designed. Enforcement issues are the difficult aspect of introducing the competition law.⁴ The substantive approach of the law must take note of the available enforcement capabilities. For a good legislation to meet its aims there has to be effective implementation of the competition law and a supportive policy environment.⁵ Without effective enforcement institution, competition law is simply a tiger on a paper. In connection with enforcement issues, let me have a privilege to cite an Ethiopian traditional saying, “a lion with no tooth”. Therefore, the writer would say ‘having competition law without effective enforcement institutions’ resembles “a lion with no tooth”. This is simply to stress that effective enforcement institution for competition law is equally important as having effective competition law.

Furthermore, in order to attain the objectives and goals enshrined in the competition law and accrue benefits of competition to the public, competition law must be enforced effectively. As already noted, the implementation of competition law contributes to “economic democracy”, has a positive economic impact, creates a climate favorable for competition, protects consumers from anti-competitive practices, creates international competitiveness, and enables a country to alleviate impact of anti-competitive practices by Multinational Corporations (MNCs) and many other benefits. In short, the effective implementation of the competition law enables a country to secure sound economic development.

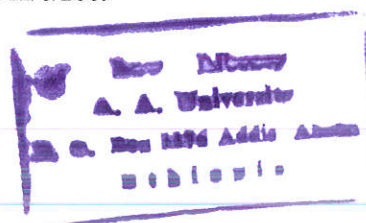
¹ Ping Lin, The Evolution of Competition Law in East Asia, at, <http://www.In.edu.hk/econ/staff/plin/ch2plin-proof.pdf>, visited on 10/9/2010

² CUTS (2003): Pulling Up Our Socks. A Study of Competition Regimes of Seven Developing Countries of Africa and Asia Under the 7-Up Project. CUTS Centre for Competition, Investment and Economic Regulation, Jaipur, India, at, <http://cuts-international.org/pulling.pdf>, visited on 9/10/2010

³ Ibid

⁴ Bahaa Ali El Dean and Mahmoud Mohieldin, “On the Formulation and Enforcement of Competition Law in Emerging Economics: The Case of Egypt,” Working Paper 60. The Egyptian Center for Economic Studies, Cairo, September 2001, at <http://www.eces.org.eg/Downloads/ECESWp60.pdf>, visited on 20/9/2009

⁵ Pradeep S.Mehta, Competition Policy In developing Countries: An Asia-Pacific Perspective, at http://www.usescap.org/drpad/publication/bulletin_2002/ch7.pdf, visited on 12/8/2009



In order to implement competition law effectively, those factors which unduly affect the implementation of the law and enforcement by the competition authority, as noted in chapter two, must be well resolved to the extent possible. As already noted, “no one size fits all” is oft-repeated mantra” and “context matters” in designing and applying competition law and its supporting institutions for developing countries. It was noted that the development goals of developed and developing countries are different that competition laws and enforcement institutions they need are quite different. And the enforcement procedures vary from country to country.⁶ Nevertheless, in this respect, whatever differences might exist among developed and developing countries, the competition authority has to possess key characters such as clarity of mandate, functional authority, necessary enforcement powers and the requisite resources (see chapter two). A qualified, independent enforcement agency is crucial for the rigorous and effective enforcement of competition policy.⁷ Moreover, the conditions to be fulfilled by a modern institutional system of competition policy included the highest possible degree of independence from politics, the separation of the investigative and adjudicative functions, and a convenient solution for dealing with appeals ensuring the necessary combination of competition policy competence and legal accountability.⁸ The institutional solution chosen by most transition economies in Europe, and also by a string of developing countries is usually described as a “tripartite” model having its origins in UK.⁹ This is called the “three pillar model”. It means that the interplay of the three different institutions ensures the appropriate quality of transparency, professional competence and policy implementation at the same time- the first pillar refers to a government body, the second is the organization for analytical work (competition authority), and the third is adjudicatory organ or appellate court.¹⁰ However, establishing effective competition authority is not a simple task to accomplish shortly. In other words, establishing an independent, impartial and transparent body entrusted with the administration of competition law will be difficult for several reasons, including the novelty of the institution.¹¹

Coming to Ethiopia’s instance, the Proclamation, from its preamble to specific provisions, proclaims the need to establish enforcement institutions and determine their powers and duties accordingly. Of these enforcement institutions, this sub-topic focuses on the Trade Practice and Consumers’ Protection Authority (the Authority). The Trade Practice and Consumers’ Protection Proclamation No. 685/2010 establishes and determines powers and duties of this Authority.

4.1.1. Establishment of Trade Practice and Consumers’ Protection Authority

Art 31 of the Proclamation states that the Authority is established as an autonomous federal government organ having its own legal personality. The Authority is established as a body corporate which is an autonomous statutory authority. This is a big achievement brought by this Proclamation in comparison with the repealed proclamation which almost made the Trade Practice Investigation Commission as a department to the Ministry of Trade and Industry. This does also have positive implication on the independence of the Authority. The Proclamation primarily entrusts the enforcement and implementation of the same to this Authority. The Authority exercises powers and discharge functions as are conferred on it by this Proclamation. And the

⁶ Ping Lin, Supra note 1

⁷ Ibid

⁸ OECD, Competition Law and Policy in South Africa, An OECD Peer Review, May 2003, at, <http://www.oecd.org/dataoecd/52/13/2958714.pdf>, visited on 16/9/2010

⁹ Adam Torok, Competition Policy Reform in South Africa Towards the Mainstream CP Model for ‘transition’ Economies in the Third World, at, http://www.iwh-halle.de/projects/competition_policy/sa_country_study.pdf, visited no 15/9/2010.

¹⁰ Ibid

¹¹ Bahaa Ali El Dean and Mahmoud Mohieldin, Supra note 4

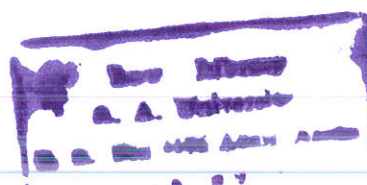
Authority shall be governed by this Proclamation. As to the accountability, the Authority is accountable to the Ministry of Trade and Industry. However, as of September 2010, the Ministry of Trade and Ministry of Industry has become distinct federal government organs; and the power to regulate trade sectors is given to the Ministry of Trade. Thus the Authority is accountable to the Ministry of Trade. As to its site, the Authority's head office is in Addis Ababa and where necessary branches may be established elsewhere in the country (Art 32). Finally, the Authority has the power to own property, enter into contracts, sue and be sued in its name (Art 34(13)). This is also an important power which enables the authority to conduct any juridical acts on its own. In other jurisdictions too, recent enactments of legislative amendments in different countries show trends towards the creation of new bodies for the control of restrictive business practices, or changes in the existing authorities in order to confer additional powers on them and make more efficient in their functioning.¹²

4.1.2. Appointment of Director General and Judges

As to its structure, the Authority shall have a Director General, the necessary judges and staff (Art 36). Pursuant to Art 36(1) of the Proclamation, a Director General is appointed by the Prime Minister upon the recommendation of the Minister of Trade. Here the Proclamation does not set for the required qualifications or criteria to be nominated as a Director General of the Authority. This is left to the discretion of both the Prime Minister and the Minister of Trade. This is one of the gaps in this Proclamation which might have negative implication on the independence of the Authority. The Director General is the chief executive of the Authority who has the powers and duties to organize, direct and administer the activities of the Authority; and especially ensure the execution of powers and duties of the Authority as conferred on it under Arts 34 and 35 of the Proclamation (Art 37). It seems that the Proclamation envisages there is one Director General to the Authority; and there is no possibility of appointment of the Deputy Director General. This might also have a negative consequence on the Authority in discharging its duties in case for various reasons the Director General is not available. Moreover, the Proclamation does not provide for the tenure in office of the Director General which might endanger the independence of the Authority.

As to the appointment of judges, Art 38(1) of the Proclamation stipulates 'Each division of the adjudicative tribunal of the Authority shall have one presiding and two other judges to be appointed by the Prime Minister'. In the appointment process of the judges to the Authority, the Prime Minister is the only person who is in charge without legally the need for the recommendation of the Minister of Trade and Industry. The judges have to fulfill the requisite professional qualification, educational background and experience required for the post (Art 38(2)). This is another good progress that this Proclamation has come up with i.e., the Proclamation at least sets the general perimeters which exclude the political background to be a judge. Nonetheless, the general (broad) qualifications set for eligibility as a judge should be supported by clear specific guidelines in order to have confident judge and achieve transparency; and thereby build the public confidence. The Proclamation envisages the possibility of having more than one division (bench) of the adjudicative tribunal of the Authority; and the number of judges to be appointed depends on the number of divisions to be set up. For instance, if there are two divisions, presumably, there will be six judges who function in the adjudicative tribunal of the Authority. Furthermore, the Proclamation states that these judges shall be governed by the federal government civil service laws (Art 38(3)). They are considered as civil servants. So the term of their office may be determined as per these laws.

¹² UNCTAD, The Model Law on Competition, at, <http://www.unctad.org/en/docs/tdrbpconf5d7.en.pdf>, visited on 10/9/2010



Under the repealed proclamation No. 329/2003, the members of the Trade Practice Investigation Commission (TPIC) including the chairman shall be, selected from government, private organs and consumers association and recommended for appointment by the Ministry of Trade and Industry (MTI), and appointed by the Prime Minister (Article 13). The composition of TPIC aims to include the vested groups in the decision-making of the TPIC. The law leaves the selection, recommendation and appointment of the members of the TPIC to the highest government authority. The Proclamation does not set the qualifications that any person should have in order to become a member of the TPIC and the term of their office. It is left to the discretion of the MTI and Prime Minister. In practice, however, the members of the TPIC were high-level government officials. They were H.E. Ato Harka Haroye... chairman (former Head of Ministry of Justice, H.E. Ato Newayekirstos G/ab... member (special economic advisor to PM office), H.E. Ato Teklewold Atnafu... member (Governor of National Bank of Ethiopia), and Ato Mesay Girma... Member (The Director General of the Quality and Standards Authority of Ethiopia). Ato Haile Gebre was also a member. This limited the purpose of the Proclamation to make the composition of TPIC broad based in decision-making. These members of the TPIC were discharging the duties of TPIC on party-time base.¹³

In many countries, the law leaves to the highest authority the appointment of the chairman and the members of the Commission.¹⁴ In other countries, a high governmental official is designated to occupy the post by the law. In a number of countries the legislation states that the persons in question should not have interests which would conflict with the functions to be performed.¹⁵ The number of members of the Administering Authority differs from country to country. In some legislation the number is not fixed and may vary within a minimum and maximum number; in others the exact numbers of members are fixed; and other countries have left to the appropriate authority the choice of the numbers of members.¹⁶

For instance, in Zambia, the Board of Commissioners which is the adjudicating body of the Competition Commission consists of persons from government and non-government organizations (NGOs).¹⁷ All prominent trade and professional associations in the country are represented on the Board. This was a deliberate policy by government to allow maximum participation in decision-making. It provides the necessary key linkages with government, industry and civil society.¹⁸ The Competition and Fair Trading Act of Zambia provides for the terms of appointment, remuneration, removal of members, resignation, and validity of determinations.¹⁹ In Brazil, Law # 8884 (1994) under Art 4 provides that CADE Board shall be composed of a President and six Board members chosen from among citizens older than thirty years of age reputed for their legal or economic knowledge and unblemished reputation, duly appointed by the President of the Republic after their approval by the Senate; and the term of office is two years with one time re-election. In Bulgaria, Law on the Protection of Competition (1998), Art 4 also provides that the Commission shall consist of eleven members---seven lawyers and four economists, for a five years' term of office and chance for reelection for another five years. The Chairman must be qualified lawyer, with practical

¹³ Interview Conducted on November 17, 2002 E.C. with Ato Biru Olbama, Secretary to the Trade Practice Investigation Commission. Moreover, these could be gathered from decisions and Pamphlets of the TPIC.

¹⁴ UNCTAD, Supra note 12

¹⁵ Ibid

¹⁶ Ibid

¹⁷ UNCTAD, Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries: Thailand, Lao, Kenya, Zambia, Zimbabwe, at, www.uctad.org/templates/download.asp?docid=6470&lang=1, visited on 10/12/2010.

¹⁸ Ibid

¹⁹ Ibid

experience in his specialty not less than ten years and who meets requirements set for members. The members of the Commission shall be Bulgarian nationals who have university degree in law or economics and a practical experience in their specialty not less than five years, with high professional and moral standing not sentenced to imprisonment for intentional indictable crimes. They may not occupy any other paid positions, save for the exercise of scientific or teaching activities. Furthermore, in Chile, Rules for the Defense of free-competition-Decree Law No. 211 of 1973 as revised in 1980, Art 10 states that the Central Preventive Commission will be composed of two university professors, a lawyer and a commercial engineer representative. Under draft COMESA competition regulations (2002), it is stated that the Director of the Commission shall have suitable qualifications and experience in law, economics, commerce, industry or public administration; the Director shall hold office for a term of five years and shall be eligible for re-appointment only for one further term of five years. Finally, in South Africa, the term of office in the Competition Commission is 5 years (Competition Act, Sec.22).²⁰ The members of the Administering Authority are appointed in Australia and Italy for 7 years, in Hungary for 6 years, in Algeria for 5 years, in Argentina for 4 years, in Canada for 10 years, and in India for 5 years.²¹ These all indicate that even if it varies from jurisdiction to jurisdiction, some jurisdictions determine the number of members of the competition authorities, their necessary qualifications and the term of their office.

4.1.3. Removal of Director General and Judges

In Ethiopia, the Proclamation does not provide for the tenure in office, remuneration, procedure and reasons for removal, and resignation of the Director General of the Authority. This might be one of the defects of the institutional framework provided by this Proclamation. As to the removal of judges, since the Proclamation refers to federal government civil service laws, the procedures and the reasons for removal of the judges may be covered therein. For example, under the Federal Civil Servants Proclamation No. 515/2007, the grounds for termination of service are provided pursuant to Arts 78-86. Some of these grounds are resignation, termination due to illness, inefficiency, retrenchment, disciplinary grounds, retirement, and death.

In several countries legislation provides an appropriate authority to remove from office a member of the Administering Authority that has engaged in certain actions or has become unfit for the post.²² In India, the members of the Administering Authority are removed for becoming physically incapable, becoming bankrupt, failing in the obligations that one acquires as a member of the Administering Authority. In Mexico, they can only be removed if they are charged and sentenced for severe misdemeanor under criminal or labor legislation, abusing one's position and acquiring other interests.²³

In South Africa, the Commissioner may only be removed for cause, that is, for serious misconduct, permanent incapacity, or engaging in activity that may "undermine the integrity" of the Commission.²⁴ Under draft COMESA competition regulations some of the grounds to remove the Director and commissioners of the Commission are unreasonable absent for three consecutive meetings, lawful detention for a period exceeding six months, undischarged bankrupt, unsound mind, permanently incapacitated, serious misconduct, or engaging in activity which undermine his integrity (Art 10 and 14). In Brazil, CADE members may be removed on grounds such as

²⁰ Adam Torok, Supra note 9

²¹ UNCTAD, Supra note 12

²² Ibid

²³ Ibid

²⁴ Adam Torok, Supra note 9

unappealable criminal sentencing for malicious crime; disciplinary action; receiving fees, percentages or other compensation in any way or on any pretext; acting as a self-employed workers; or participating as controlling parties, officers, managers, agents or attorneys in fact—in any civil, commercial or like companies. Finally, in Bulgaria, the chairman and members of the commission may be removed on grounds such as resignation, sentenced to imprisonment for intentional crime, or a grave breach of the competition law and oath. In Ethiopia, the Proclamation should have clearly provided, within itself, procedures and reasons to remove members of the Authority from office. This might have its own negative impact on the independence of the Authority.

4.1.4. Staff of the Authority

In Ethiopia, the Proclamation provides that in order to enable the Authority to discharge its functions and responsibilities properly it shall have adequate staff. It is under the power of the Authority to determine the employment, administration and dismissal of the staff of the Authority in accordance with federal civil servants Proclamation (Art 34(15)). Thus the Authority governs the employment relationship of the staff members as per the Federal Civil Servants Proclamation No. 515/2007. These staff members of the Authority have the status of civil servants equal to the judges of the Authority. This is another important progress made by this Proclamation than the repealed proclamation where the hiring, administering and firing of staff is not explicitly given to the Trade Practice Investigation Commission. The present Proclamation enables the Authority to have power to hire staff members necessary to discharge its duties, administer them and fire as per the law where they are not fit to the post without any interference from other government organs. It seems that the staff members of the Authority do not have role in the adjudicatory power of the Authority. They seem supporting staff to the Authority. Moreover, it seems that they are not expected to be qualified professionals in field of law and economics. That is why, it seems the Proclamation does not provide for the qualifications or conditions of employment for the staff members which enable them to discharge functions entrusted to the Authority (particularly competition issues). Of course this is also left to the discretionary power of the Authority.

However, in other jurisdictions, the staff members of the competition authority have a role in investigation and/or adjudication of cases related to competition matters. In this respect, it is stated that when staffing the enforcement agency, it will be important to consider the backgrounds of the potential employees. The suggestion was made that they could be hired by the new competition enforcement agency.²⁵ Under circumstances like these, it is especially important to resist political pressures and staff the enforcement agency with properly trained employees.²⁶ Drafting and implementing competition laws mainly requires the involvement of economists and lawyers. Only lawyers who have had training in the field of competition will do: “Any lawyer involved in competition law should acquire basic understanding of how markets work and of pricing theory; the competition lawyer of the future will need to possess a hybridised skill combining elements of both law and economics”.²⁷ In other words, competition law enforcement requires both legal and economic expertise, so the staff must have lawyers trained in competition law, and economists, preferably with training in industrial organization.²⁸

²⁵ David Smith and Su Sun, “Introducing Competition Policy into Developing Economies: Perspectives, Vol. 2, No. 4, at, http://www.oycf.org/perspectives/10-022801/introducing_competition_Policy_hm1 (2001), visited on 20/8/09

²⁶ Ibid

²⁷ Ibid

²⁸ Taimoon Stewart, Julian Clarke and Susan Joeke, *COMPETITION LAW IN ACTION, Experiences from Developing Countries*, at, <http://www.idrc.ca/en/eu-111739-201-1-Do-Topic.html1>, visited on 25/8/2010

However, attracting high quality staff is very difficult.²⁹ To minimize this problem, the proposed remedies are providing scholarship with minimum number of years of services, good salary should be paid. To avoid being limited by the salary structure in the civil service, the authority could possibly be granted special status with independent terms and conditions of employment. This enables to avoid the staff turn-over and expert in the area of competition.³⁰ Methods of staff training include sending staff on internships to more mature authorities, in-house training, and asking more mature authorities to send staff to their authorities.³¹ But hybridised skilled lawyer is rare in most emerging economies, whose educational programmes and professional practices tend to separate law and economics. The absence of this special breed of lawyers makes it all the more necessary to formulate competition legislation which can initially be managed by relying on local talent for these economies.³²

Under the Singapore Competition Act (2004), as to the appointment of the chief executive and other employees of the staff of the competition commission, Art 10(1) states that the commission shall, with the approval of the Minister, appoint a chief executive on such terms and conditions as the commission may determine; and Sub-art. 5 provides that the commission may, from time to time appoint and employ on such terms and conditions as the commission may determine such officers, employees, consultants and agents as may be necessary for the effective performance of its functions and discharge of its duties. Moreover, in South Africa, concerning the staff of the Competition Commission, Art 25 provides that the Commissioner may appoint staff, or contract with other persons, to assist the Commission in carrying out its functions; and in consultation with Minister and Minister of Finance, determine the remuneration, allowances, benefits, and other terms and conditions of appointment of each member of the staff. The experiences of these countries reveal that to attract qualified staff to the competition authority it is preferable to provide them with special treatments and benefits. Considering the experiences of these countries, in Ethiopia, since the staff members of the Authority are not necessarily qualified professionals who have skill in law and economics, and have no role in the adjudication of competition matters, governing them as per the federal civil servants proclamation might not cause any problem.

4.1.5. Functions and Powers of the Authority

In order to implement and enforce the Proclamation effectively, Art 34 and 35 of the Proclamation provide for the functions and powers of the Authority. In this respect, it is stated that for the competition authorities to function properly it is important that they are allocated the necessary and right powers (i.e. not just any broad power but those tailored to deal with competition) to enforce the competition law.³³ The functions and powers of the Authority are discussed as follows:

A. Competition Advocacy Work

Competition advocacy work is one of the functions and powers given to the Authority. The Authority is empowered with various responsibilities to undertake the competition advocacy work. This is an important power which enables the Authority to secure compliance to the provisions of the Proclamation by the business community and the general public. Under the repealed proclamation No.329/2003 the power to conduct competition advocacy work was given to the secretariat not to the Trade Practice Investigation Commission (Art 18 (1D)). As to the competition advocacy work, pursuant to Art 34(1) of Proclamation No.685/2010, the Authority is responsible to

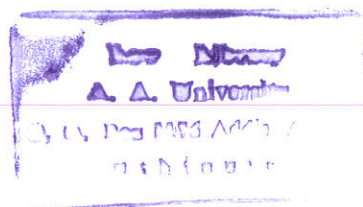
²⁹ Ibid

³⁰ Ibid

³¹ Ibid

³² David Smith and Su Sun, Supra note 25

³³ CUTS (2003): Supra note 2



take appropriate measures to increase market transparency. This has to do with making the system or mechanism through which the market works easily understandable to business community and the general public. But the Proclamation has not provided for the definition of “market transparency”. “Market transparency” refers to promoting market awareness. Moreover, the Authority is responsible to take appropriate measures to develop public awareness on the provisions of this Proclamation and its implementation (Art 34(2)). This provision is also pointing to the competition advocacy work of the Authority. It has the purpose to increase knowledge of rights and obligations of the public under the Proclamation, increase the public understanding about the Authority’s enforcement rules and procedures and contribute in enhancing the development of a competition culture in the country. In this respect, the Authority has the responsibility to make study and research in connection with commercial competition and consumer interests and rights; organize various education and training for and provide education and training in order to enhance the awareness of consumers; establish relationship and cooperation with national, continental and international bodies having similar objectives; initiate policy issues, participate on policy and strategy drafting undertakings by other organs of government, and perform other duties necessary to accomplish competition advocacy duty (Sub-arts 4, 5, 6, 11, 12, 14, and 16 of Art 34). The Authority may make use of the advocacy service to make the business community and the public aware about market competition, market interventions, prohibitions, pre-merger notifications, functions and objectives of the Authority, consumers’ rights, etc. To accomplish these tasks the Authority may employ mass media, annual report, guidelines, various publications, seminars/workshops, studies papers, etc. Moreover, the Authority is empowered to create work relationship with other countries competition authorities; and link with international institutions such as INC, OECD, UNCTAD, and etc. to get technical and other assistances. Cooperation with other competition agencies can be useful, not only for training and capacity building purposes, but also in dealing with cross-border issues.³⁴ The Authority also has the power to initiate policy issues and participate in the policy and other strategy drafting undertakings by other government organs. This enables the Authority to lobby other government organs in order to have policies and strategy which favor market competition. Thus the Authority is empowered to discharge vast responsibilities to conduct competition advocacy work. And the Authority has to effectively utilize these competition advocacy tasks to develop competition culture throughout the country and thereby secure voluntary compliance of the provisions of the Proclamation by the business community and the general public. Finally, the Authority also has a duty to provide necessary advice and support to the branches (Art 34(11)).

Advocacy, as the term implies, is an effort at education and persuasion rather than an exercise of law enforcement powers.³⁵ Thus competition advocacy refers to those activities to the promotion of a competitive environment for economic activities by means of a non-enforcement mechanism, mainly through its relationship with other governmental entities and by increasing public awareness of the benefits of competition.³⁶ To note experiences of other jurisdictions, in South Africa, under Art 21(1), (a) and (b) of the Competition Act (as amended in 2000) states that the Competition Commission is responsible “to implement measures to increase market transparency” and “to develop public awareness” of the Competition Act. In Zambia, under Section 6 of the Competition Act, the Competition Commission is empowered to undertake competition advocacy task. The Commission issues many publications to meet this purpose. This enables it to increase voluntary compliance among the general public and within the business community.³⁷

³⁴ Ibid

³⁵ UNCTAD, Supra note 17

³⁶ Ibid

³⁷ Ibid

take appropriate measures to increase market transparency. This has to do with making the system or mechanism through which the market works easily understandable to business community and the general public. But the Proclamation has not provided for the definition of "market transparency". "Market transparency" refers to promoting market awareness. Moreover, the Authority is responsible to take appropriate measures to develop public awareness on the provisions of this Proclamation and its implementation (Art 34(2)). This provision is also pointing to the competition advocacy work of the Authority. It has the purpose to increase knowledge of rights and obligations of the public under the Proclamation, increase the public understanding about the Authority's enforcement rules and procedures and contribute in enhancing the development of a competition culture in the country. In this respect, the Authority has the responsibility to make study and research in connection with commercial competition and consumer interests and rights; organize various education and training for and provide education and training in order to enhance the awareness of consumers; establish relationship and cooperation with national, continental and international bodies having similar objectives; initiate policy issues, participate on policy and strategy drafting undertakings by other organs of government, and perform other duties necessary to accomplish competition advocacy duty (Sub-arts 4, 5, 6, 11, 12, 14, and 16 of Art 34). The Authority may make use of the advocacy service to make the business community and the public aware about market competition, market interventions, prohibitions, pre-merger notifications, functions and objectives of the Authority, consumers' rights, etc. To accomplish these tasks the Authority may employ mass media, annual report, guidelines, various publications, seminars/workshops, studies papers, etc. Moreover, the Authority is empowered to create work relationship with other countries competition authorities; and link with international institutions such as INC, OECD, UNCTAD, and etc. to get technical and other assistances. Cooperation with other competition agencies can be useful, not only for training and capacity building purposes, but also in dealing with cross-border issues.³⁴ The Authority also has the power to initiate policy issues and participate in the policy and other strategy drafting undertakings by other government organs. This enables the Authority to lobby other government organs in order to have policies and strategy which favor market competition. Thus the Authority is empowered to discharge vast responsibilities to conduct competition advocacy work. And the Authority has to effectively utilize these competition advocacy tasks to develop competition culture throughout the country and thereby secure voluntary compliance of the provisions of the Proclamation by the business community and the general public. Finally, the Authority also has a duty to provide necessary advice and support to the branches (Art 34(11)).

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³⁴ Ibid

³⁵ UNCTAD, Supra note 17

³⁶ Ibid

³⁷ Ibid

Moreover, in this regard, it is also stated that:
The mandate of the competition office extends beyond merely enforcing the competition law. It must also participate more broadly in the formulation of its country's economic policies, which may adversely affect competitive market structure, business conduct, and economic performance. It must assume the role of competition advocate, acting proactively to bring about government policies that lower barriers to entry, promote deregulation and trade liberalization, and otherwise minimize unnecessary government intervention in the marketplace.³⁸

Therefore, in Ethiopia too, the Authority has to utilize effectively this power of competition advocacy work to secure voluntary compliance to the provisions of the Proclamation by the business community and the general public without employing its adjudicatory power.

B. Adjudicatory Power

1. Receiving complaints

As already noted, the competition authority should have necessary powers such as investigative and/or adjudicative powers to enforce competition law effectively. The competition authorities of various jurisdictions have investigative powers and/or adjudicatory powers. Some jurisdictions provide both investigative and adjudicatory power to a single competition authority with right to recourse to higher judicial body. This is criticized for it does not entertain checks and balances in the system. Some jurisdictions empower the competition authority with investigative power only and the Authority has adjudicatory power. This Authority is a kind of adjudicative tribunal which adjudicates competition matters and other issues related to the Proclamation brought to it. There is an adjudicative tribunal of the authority with one or more divisions (benches) to adjudicate complaints submitted to it by the complainants. The Authority exercises this adjudicatory power on exercise its adjudicatory power, the Authority receives complaints and adjudicates them as per civil and criminal procedure laws of the Federal Democratic Republic of Ethiopia (Art 40) and relevant laws. The Proclamation³⁹ also specifies the party who has locus standi to apply or file applications to the Authority (Art 41(1, 2, and 3)). Pursuant to these provisions, the Proclamation indicates that victim of the violation of the Proclamation, consumer, any person, or the Ministry of Trade has the locus standi as a plaintiff to institute suits against the violator of the Proclamation at the adjudicative tribunal of the Authority. The Proclamation broadens the parties who can institute actions against the violator rather than limiting it to the vested interested party in the subject-matter of the suit as provided under Art 33(2) of the Civil Procedure Code of 1965 of Ethiopia. This, in turn, broadens the enforcement of the Proclamation. In order for a person to institute actions at the Authority, except the government, is required to pay service fees to be prescribed by Council of Ministers (Art 52). The problem with the payment of service fees, however, may be what if the applicant is any person other than the victim as per Art 41(3) of the Proclamation. Wouldn't this discourage any person in the street other than the victim to apply to the Authority for the violation of the Proclamation in favor of competitive process in the country? I consider it would have an impact on the enforcement of this Proclamation. The Proclamation also sets the period of limitation within which the complaints have to be instituted at the Authority (Art 41(5) (6)). If the suit concerns consumers' rights, it must be

³⁸ The World Bank, OECD: A Framework for the Design and Implementation of Competition Law and Policy, Chapter 6, at 93, 1998, at www.oecd.org/dataoecd/52/42/32033710.pdf, Visited 16/01/2011

³⁹ Trade Practice and Consumers' Protection, Proclamation No.685/2010, *Federal Negarit Gazeta*, 16th Year No. 49, Addis Ababa 16th August, 2010.

instituted within one month from the happening of the cause of action. On the other hand, if the suit concerns other matters under the Proclamation other than consumers' rights, it must be instituted within six months from the happening of the cause of action. In this respect, it is not clear the rationale behind fixing this shorter period of time to institute action against the violator of the provisions of the Proclamation. Probably, this might be because of the fact that since violations of the provisions of the Proclamation has economic effect, if they are not litigated within a short period of time, the law prefers to maintain them. The other problem with this provision is that what if the complainant knows the commission of the violation of provision of the Proclamation after the specified time was lapsed. I think, in relation with this period of limitation, the Proclamation should also have taken into account the knowledge of the complainant about the date of commission of the violation.

2. Contents and Forms of Complaints

As to the forms of applications to be instituted at the adjudicative tribunal of the Authority, they have to fulfill requirements provided under the Civil Procedure Code of Ethiopia. They have to be written pleadings. The written pleadings to be instituted by the plaintiffs are called statement of claims. The written pleadings to be brought by the defendants are called statement of defence. The statement of claim or defence shall contain a statement of material facts on which a party relies for his claim or defence. The statement of claim must fulfill requirements provided under Arts 222-228 of the Civil Procedure Code of Ethiopia. And the statement of defence must fulfill requirements provided under Art 234 of the Civil Procedure Code of Ethiopia. Of course in order for the Authority to secure personal jurisdiction over the defendant, it has to duly notify the defendant that there is a suit against him at the Authority through service process (summons) as provided under the Civil Procedure Code of Ethiopia. However, the issue which may require consideration in connection with applying the strict rules of the existing procedural laws would be whether or not they fit for disputes related to competition matters arising under the Proclamation? Through time, the Authority has to work out whether it is necessary to have special procedural law for competition cases.

3. Ruling on Preliminary Objections and Hearing

Then the adjudicative tribunal of the Authority conducts the proceedings (hearing) as provided under the Civil Procedure Code of Ethiopia. The tribunal has to conduct this proceeding in an open court except in rare case adjudication be in camera. The tribunal has to first rule on the preliminary objection (if any) as per Arts 244 and 245 of the Civil Procedure Code of Ethiopia. In the hearing process the Authority has to perform what is provided under Art. 241 of the Civil Procedure Code of Ethiopia. If the suit is not dismissed for the reason of preliminary objection, the tribunal goes on to hold full-scale trial where evidence would be examined to render the final judgment.

4. Examination of Evidence and Decision

With regard to securing relevant evidence, the Proclamation gives important powers to the Authority. The Authority has the power to commission any person for the submission of information and documents that are necessary to conduct its adjudicative duty; and summon witnesses to appear and testify before the adjudicative tribunal (Art 35(2) (b) (c)). The Authority also has the power to take affidavits or verifications and make examination accordingly (Art 35(2) (d)). The adjudicative tribunal conducts this process as per the Civil and Criminal Procedure Code of Ethiopia. The tribunal has to protect the confidentiality of documents or information submitted to it by the business persons and takes care of issues related to self-incrimination in examining a person. Then the adjudicative tribunal renders its judgment as per Arts 180-184 of the Civil Procedure Code of Ethiopia. Thus the Authority has the power to impose administrative and civil

sanctions against any violator of the provisions of the Proclamation; and decide compensation for the victim of the violation of the Proclamation (Art 34(10) and 35(1)).

5. Execution

Furthermore, the Authority has the power to execute its civil and administrative decisions. The execution of the decisions is to be made pursuant to Arts 378ff of the Civil Procedure Code of Ethiopia. In the process of execution, the Authority has the power, where necessary, to order police and any appropriate organ to effect this execution. It does not seem this includes the court of law for it contravenes the constitution.

6. Receiving Pre-merger Notifications

Finally, the Authority is responsible to receive pre-merger notifications to approve, disapprove and approve with modifications the intended mergers (Art 34(3)). But to reduce the work load of the Authority clear guideline is necessary to note threshold below which pre-merger notification is not required for it does not have significant adverse effect on competition or the kind of mergers which do not require notification and otherwise.

C. Relationship between the Authority and Other Government Organs

In Ethiopia, the Proclamation also governs the relationship between the Authority and other government organs. This is one of the criteria to test the effectiveness of the competition authority and the competition regime at the international level. Thus this Proclamation has made a big achievement aspiring to govern the relationship between the Authority and other government organs which enables it to live up to the international standard. By the way, there was no such thing under the repealed proclamation. Under Art 43 of the Proclamation No.685/2010, it is provided that where there is overlap of duties in the implementation of the provisions of this Proclamation with duties incumbent upon other government organs by law, the Authority shall have relationship based on cooperation and agreement with these organs. In making an agreement, the Authority shall always take into account the objectives of this Proclamation. Failing to reach an agreement, the matter shall be decided by the Council of Ministers. Hopefully, the Council of Ministers may also decide in favor of maintaining and promoting competition process if other public interest is not at stake. If possible, it would be better if the Council of Ministers come up with clear guidelines in this area to develop transparency. The Authority has to create wisely harmonious working relationship based on the spirit of cooperation and agreement with these government organs that they always take actions and make decisions favoring the competitive process, the rationales and objectives of the Proclamation. This is a very important power conferred upon the Authority by the Proclamation to broaden the enforcement of the Proclamation through these government organs. The Authority is one of the federal government organs that it has to create smooth work relationship with the rest of government organs to implement the Proclamation effectively. Instead of creating conflicts or fighting for competition with other government organs and reaching deadlock which negatively affect the proper enforcement of this Proclamation and its future destiny, the Authority has to first focus on inspiring these government organs about the fact that competition is for common good (acceleration of economic development and other benefits).

One important requirement for maintaining competition in the economy vis-à-vis the services sectors is to ensure that there is good amount of coordination between the Competition Authority and other sectoral regulators. A failure to achieve that leads to suboptimal regulatory outcomes.⁴⁰ The competition authority has the most direct overlap with regulators governing key utility sectors that usually have the mandate to create, promote and protect competition in these industries.⁴¹

⁴⁰ CUTS (2003): Supra note 2

⁴¹ Ibid

Sectoral regulators are established where there is a natural monopoly of typically the possibility of market failure is high.⁴² The idea is to regulate firms in these industries in such a way that even when a competitive market cannot be ensured, the outcome in terms of prices and output will be nearly the same as if the market has been competitive.⁴³ The boundaries between the roles of the sectoral regulators and the competition authority are difficult to define and in many countries the issues remains unsolved. The competition authority should have upper hand in competition matters.⁴⁴ There is a range of possible divisions of responsibility between sector regulators and the competition authority for decision on competition issues. Whatever structure is adopted, there should be an effective working relationship between the regulators and the competition authority to assist regulators to apply sound competition principles.⁴⁵ This is also employed as a criterion to assess the effectiveness of competition regimes in the 7-Up Project countries.⁴⁶

At the policy level, the relevant officials of all government branches and agencies need to understand why the competition law needs to be central in drafting other laws, and certainly in the conduct of other government operations, such as privatization.⁴⁷ The conflicts between sector specific regulators and competition authorities are more common. Thus to avoid accusations of meddling and threats of withdrawal of its powers by other national regulatory agencies and ministries, the authority should consider initiating tactical alliance-building discussions with other government bodies in sectors and on issues where the introduction of greater competition would contribute to the other body's professed objectives.⁴⁸ It should initiate confrontation only where there is evidence of egregious anticompetitive conduct, especially where they can be demonstrated to be harmful to the other institution's own policy objectives.⁴⁹

The competition authority should also create work relationship with institutions such as Media-Television, radio, newspapers, magazines, the World Wide Web and special-interest journals can be powerful allies in improving public awareness of competition law and in securing enforcement.⁵⁰ Other allies of the authority are consumer organizations and non-governmental organizations (NGOs), the latter being very important if there are no consumer organizations. These organizations can represent the "person in the street" and can be the ears and eyes for the authority on the concerted price hikes or anticompetitive behavior of dominant firms. The research community-academics and research analysts can be a valuable ally to the authority.⁵¹

To note experiences of some jurisdictions, to avoid the conflict between Competition Commission and other regulators, in South Africa, a "regulator's Forum" is being established to implement this provision; under this provision, the Commission is responsible to 'negotiate agreements with any regulatory authority to coordinate and harmonize the exercise of jurisdiction over competition matters within the relevant industry or sector'.⁵² And in India, there is no clarity. But the regulatory laws do not have provisions to deal with anticompetitive practices and hence competition issues

⁴² Pradeep S.Mehta, Supra note 5

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ John Preston, Implementing Competition Policy in Developing Countries: The Role of Donors, at, <http://www.businessenvironment.org/dyn/be/docs/80/session3.4prestonDoc.pdf>, visited on 5/9/2010

⁴⁶ CUTS (2003): Supra note 2

⁴⁷ Taimoon Stewart, Julian Clarke and Susan Joeekes, , Supra note 28

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ Ibid

⁵² CUTS (2003): Supra note 2

may be kept outside the purview of the regulators.⁵³ Finally, in the UK, since the sectoral regulators can enforce UK, Competition Act (1998), in the sector under its purview concurrent with the Office of Fair Trade (OFT). To ensure consistency between the OFT and the sectoral regulators a 'Concurrency Working Party' has been set up. The arrangement aims to prevent both forums shopping as well as 'double jeopardy'. At the same time, the staffs of all authorities have a common training programme.⁵⁴

Therefore, it is noted that creating smooth working relationship based on cooperation and agreement between the competition authority and other regulatory organs enables to secure enforcement of competition law and thereby build effective competition regime. Thus in Ethiopia, the Authority has to create common understand with these government organs to enable them to reorganize their activities and actions taking competition as the central pillar of their mission. To this end, considering the experiences of South Africa and UK, the Authority may establish some kind of "Common Forum" with these government organs where competition matters are better discussed to create awareness and to enforce the Proclamation effectively.

4.1.6. Autonomy, Independence, Accountability of the Authority

A. Autonomy and Independence

In Ethiopia, as to the autonomy of the Authority, the Proclamation declares that the Authority is autonomous entity having distinct legal personality (Art 31(1)). This denotes that the Authority is not part of any government organ. Thus the Authority is de jure autonomous. This is one of the important requisites to have effective competition authority. This de jure autonomy of the Authority enables it to discharge its duties and functions at most possible efficiency without interference from other government organs.

As to the independence of the Authority, the Proclamation states that 'the Authority shall be free from any interference or direction by any person with regard to the cases it adjudicates' (Art 33). The law prohibits any intervention with the adjudicatory power of the Authority. The Authority is empowered to conduct adjudication of cases only as per this Proclamation and relevant laws without any interference from any person or organ (government or non-government). The Proclamation confirms the de jure independence of the Authority. This shows that the Authority is legally independent as an institution. This is also another important factor which enables the Authority to adjudicate cases submitted to it without any sort of influence from any person. It is also important to look at other factors which fall within the institutional independence of the Authority. This refers to the Director General and judges of the Authority. Normally, the institutional independence of the Authority encompasses the independence of the Director General and judges personally. If we are talking about the de jure independence of the Authority in effect we are also referring to the personal independence of the Director General and judges of Authority. If there are factors which threaten the independence of the Director General and the judges of the Authority the de jure independence of the Authority falls under question.

As to the Director General of the Authority, as noted earlier, the Proclamation does not provide for the required qualifications to be eligible to the post (Art 36 (1)). And the Proclamation does not set the tenure in office, procedure and reasons for removal of the Director General from office. Moreover, the Proclamation does not give clue as to the salary, remuneration, allowances, benefits and other incentives of the Director General. This might threaten the independence of the Director General personally. Therefore, this, in turn, might negatively affect the de jure independence of the Authority. Anyhow, this will be tested by the de facto commitment of the government in practice. So

⁵³ Ibid

⁵⁴ Ibid

from this perspective, time will reveal what will happen to the de jure independence of the Authority.

As to the appointment of the judges, the criteria to be appointed to the post are so general that it will be difficult to know the exact required qualifications. In addition, the Proclamation states that these judges shall be governed by the federal government civil service laws. Here the problem is that to what extent subjecting judges of the Authority to federal civil service laws preserves their independence personally. The work relationship, salary, benefits, removal, annual leaves, etc. of the judges will be governed by these laws. But pursuant to Art 2(1) (c) of Federal Civil Servants Proclamation No. 515/2007, civil servant does not include federal judges and prosecutors. How far subjecting judges of the Authority to federal civil service laws is attractive to get experienced professionals in the field of law and economics to the Authority? The judges of the Authority will be subject to administrative tribunal established by these laws to adjudicate disciplinary issues. So this might endanger the personal independence of the judges of the Authority. Therefore, these factors which might affect the personal independence of the judges might, in turn, affect the de jure independence of the Authority. But the de facto commitment of the government also matters in this respect. Finally, both for the Director General and judges, the Proclamation does not provide for immunity against prosecution or any claim relating to the performance of their duties or discharge of their functions. It would have been better if the Proclamation has provision in this regard too.

From budgetary independence perspective, the Proclamation stipulates that the government shall allocate the budget of the Authority (Art 54). In this case, the problem is if the government allocates meager budget to the Authority this might affect the budgetary independence of the Authority. However, what matter is whether or not an adequate size of budget is apportioned to the Authority which enables it to discharge its duties and responsibilities. The de facto commitment of the government, in practice, determines the budgetary independence of the Authority. Of course, in this respect, the WB-OECD model law suggests that the enforcement agency should receive its budget directly from (and report to) the legislature.⁵⁵ In South Africa and Zambia too, the Competition Commissions receive funds from parliament and court fees.⁵⁶

With regard to cooperation with other government organs, the Proclamation provides the Authority with full power to create work relationship on the basis of cooperation and agreement with these organs where there are concurrences of duties (Art 43). This also assures the de jure independence of the Authority. However, this will also depend in practice that whether or not the other government organs cooperate with the Authority in the enforcement of this Proclamation.

To note some general views, it is well recognized that the autonomy of the Competition Authority is an important determinant of its efficiency and effectiveness. The Competition Authority being de jure autonomous of course does not necessarily mean that it will enjoy de facto autonomy.⁵⁷ Regulatory independence is one of the most important prerequisites of broad-based institutional development.⁵⁸ The principle of independence should be about building an enforcement agency that is willing, has the capacity, and can be seen to act independently.⁵⁹ To make the notion of independence operational, the relevant literature identifies four broad dimensions of independence

⁵⁵ CUTS (2003): Supra note 2

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Intergovernmental Group of Experts on Competition Law and Policy, Independence and Accountability of Competition Authorities by Pakistan, Geneva (2008), at, www.unctad.org/Templates/Download.asp?docid=10136&lang=1... Visited 16/01/2011

But it is stated the views expressed are those of the author and do not necessarily reflect the views of UNCTAD.

⁵⁹ Ping Lin, Supra note 1

that would apply in most countries: regulatory, supervisory, institutional, and budgetary. The regulatory and supervisory dimensions form the core, while institutional and budgetary independence are essential to support the execution of the core functions.⁶⁰

1) Regulatory Independence

Regulatory independence refers to the ability of the agency to have an appropriate degree of autonomy in setting (technical) rules and regulations for the sectors under its supervision, within the confines of the law.

2) Supervisory Independence

Safeguarding the integrity of the supervisory function is a key element in ensuring the soundness of the overall corporate sector from the standpoint of competition. It is vulnerable to interference which can take many forms and can often be very subtle including the use of the media as an anti-competition propaganda vehicle.

3) Institutional Independence

Institutional independence refers to the status of the agency as an institution separate from the executive branch of government. The agency that forms part of the executive branch typically lacks independence. In this regard, there are three critical elements of institutional independence:

- The terms of appointment and removal of its senior personal.
- The agency's governance structure. Ideally, representatives of specific ministries should not be members.
- The openness and transparency of decision-making.

4) Budgetary Independence

Budgetary independence refers to the role of the executive in the determination of the size and use of the agency's budget, including staffing of the agency and salary levels. Supervisors who can independently decide over the sources, size and use of their budget in support of their mission are better equipped to withstand political interference (e.g. pressure through the budget), to respond more quickly to newly emerging needs in the area of supervision and to ensure that competent staff is hired. Supervisory agencies that are funded through a ministry that exercises oversight of their operations, or directly from the budget, may be open to political interference of different sorts.

Moreover, it is clear that a competition authority's independence depends on a combination of factors and that each of these factors individually do not guarantee independence.⁶¹ First of all it is important that an authority is *de jure* independent. Second the authority should also be financially independent. Finally the authority's independence and credibility also depend on the automatic cooperation of government agencies in enforcing its decisions, thus making it *de facto* independent. It is also stated that competition authority should be independent of government in its day-to-day decisions. This has implications for the selection of people to be appointed to the authority. The authority should have adequate budget, and should be staffed by competent officials.⁶²

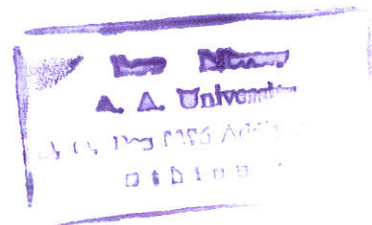
From the list of African countries with competition policy such as South Africa, Zambia, Kenya, Malawi, Tanzania, and Botswana; the only two countries with autonomous competition regulatory bodies are South Africa and Zambia. The remaining countries have non-autonomous regulatory bodies. The autonomy of a competition authority ensures that the institution is immune from political intervention.⁶³ Stephen Weymouth, to measure the effectiveness of the competition

⁶⁰ Intergovernmental Group of Experts on Competition Law and Policy, Supra note 58

⁶¹ CUTS (2003): Supra note 2

⁶² John Preston, Supra note 45

⁶³ Louise Due Plessis and Charles Mabuza, Free Trade and Competition Policy in Africa, at <http://www.essa.org.za/download/2005Conference/Mabuza.pdf>, visited on 14/8/2010



agency, employs the indexes de jure independence and de facto commitment. De jure independence captures institutional features relating to the legal independence of the regulatory body based on the law; de facto commitment measures resource allocations, expert assessments, and actual regulatory decisions.⁶⁴

B. Accountability

As to the writer's view, "independence without accountability is considered as the horse without bit into its mouth to control it". Independence and accountability are the two sides of the same coin. With independence there must be accountability which refers to checks and balances on activities of the competition authority to enjoy public confidence and create accountability within democratic process. Accountability here is taken in its widest significance wherein the competition authority is answerable to all its stakeholders and not merely to the country's legislative body.⁶⁵ Agency independence cannot bring the benefits and achieve the goals that it is supposed to deliver if it is not accompanied by properly structured accountability arrangements. More specifically, accountability needs to ensure the independent regulators:⁶⁶

- a) communicate regularly with other institutions and stakeholders;
- b) avoid the trap of capture by powerful groups;
- c) do not create new institutional rigidities;
- d) avoid the tendency of over-regulation that may lead to additional costs for the corporate sector;
- e) do not slow down structural adjustment in the sector; and
- f) evolve as competition emerges and develops.

In Ethiopia, the Proclamation states that 'the Authority shall be accountable to the Ministry of Trade'. Setting the accountability of the Authority pressures the Authority to discharge its duties and functions effectively. However, the Proclamation does not explain what this accountability includes. The Proclamation does not indicate as to what the Authority should have to do to confirm to the Ministry and other stakeholders about its accountability. On the other hand, the Proclamation provides that the Authority owns property; but it does not provide how it has to handle this property. The Proclamation even does not provide for budget and fiscal year of the Authority. On the other hand, the criminal penalties provided under Art 49(9) of the Proclamation against a judge or Director General or another employee of the Authority or the Ministry or the bureau or judges of the regional judicial bodies may positively contribute to the assurance of the accountability of these individuals. But it should be carefully applied not to endanger the independence of these individuals in discharging their responsibilities. The Authority might, to some extent, ensure its accountability through its advocacy work by presenting its activities to the concerned organs and the general public. Moreover, the Authority has to keep full and accurate accounts of its expenditure and property which enables it to prepare financial statements and balance sheet to be submitted to the Ministry. The Authority should also prepare annual report which assesses its performance including selected elements of the implementation process of the Proclamation; annual report of its internal functioning; annual advocacy report; and these reports have to be submitted to the Ministry; and then the Ministry may table them to the Parliament. In addition, the books of account and all the financial affairs of the Authority must be audited annually by the Auditor General. By doing these activities, the Authority may prove its accountability to the public, stakeholders and government. Moreover, the procedures and grounds to grant exceptions and exemptions under the Proclamation must be objectively applied by the Authority or the Council of Ministers for these may

⁶⁴ Stephen Weymouth, *Competition Politics: A Political Economy of Antitrust Regulation in Developing Countries*, at www.papers.ssrn.com/so13/papers.cfm?abstract_id=1434226, Visited 16/01/2011

⁶⁵ Intergovernmental Group of Experts on Competition Law and Policy, *Supra* note 58

⁶⁶ *Ibid*

affect the transparency, accountability and confidence of the public and business community concerning these organs in the implementation of this Proclamation.

Furthermore, the other mechanism of ensuring the accountability of the Authority could be achieved by reviewing the decisions of the Authority through the court of law. This is one way to keep checks and balance on the works of the Authority. Any person who is not satisfied by administrative and civil decisions, and compensation decided by the Authority has the right to lodge appeal to the Federal High Court (Art 53). This enables the court to review the decisions of the Authority which is also a means to ensure accountability of the Authority.

Finally, accountability is needed to make independence work. The higher the degree of independence is the greater the need for proper accountability arrangements. Monitoring of agency behavior can be performed by a range of other bodies, both governmental and non-governmental, including the private sector and, indeed, by the public at large.⁶⁷ To extent that a regulatory agency is subject to monitoring, it is required to provide an account of its decisions or actions, to explain and justify them, and, where necessary, to take responsibility and adopt remedial actions. The key is to establish a framework within which such scrutiny, explanation and justification can take place according to clearly established rules.⁶⁸ In a crucial way advocacy is a facet of accountability. By presenting its case to interested parties the competition authority invites extra scrutiny.⁶⁹

4.2. Ministry of Trade

In Ethiopia, as provided under Art 42 of the Proclamation, the Ministry of Trade or regional bureau conducts investigation in connection with the implementation of this Proclamation on complaints or on its own initiative. The Ministry or the bureau conducts investigation through its “investigation officer” (Art 42(2)). It is not known who this “investigation officer” is. This “investigation officer” does not seem a department but a single individual person. The Proclamation does not provide for the qualifications of the “investigation officer” to undertake this investigation. It is not clear on what grounds a person would be appointed as “investigation officer”. In the process of investigation, the Ministry or the bureau may order the forces under the Federal Police Commission or the regional state police respectively (Art 42(3)). As already noted, the investigatory power of the competition authority is one of the most important powers to implement competition policy or law. In this respect, the independence of the competition authority is also necessary. It is through the process of investigation that the competition authority uncovers anticompetitive practices which substantially restrict, impede or eliminate competition. However, in Ethiopia, the Proclamation gives this power to the Ministry of Trade or regional bureau which is a government organ but not a competition authority. As noted earlier, the competition authority which has the power to adjudicate or investigate into the violations of the provisions of the competition laws must be independent from the government organ. But in the case of investigation officer to be appointed by the Ministry or bureau it is impossible to talk about both *de jure* independence and *de facto* independence. This depends on the *de facto* commitment of the government (Ministry or bureau) in practice.

To note experiences of other countries, investigation capacity of the competition authority is one of the important aspects of competition law enforcement in a country. The powers given to the competition authorities to enforce competition law can broadly be separated into “investigative” and “adjudicative” powers. Whether these powers are completely separated between various

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ Ibid

stitutions or not varies from country to country.⁷⁰ In the United States the FTC has both investigative and adjudicative functions with rights of appeal to the courts. The Antitrust Division of the Department of Justice has only investigative and prosecutorial powers and has to go to court for adjudication of cases. On the other hand, the EU's Directorate General for Competition (DG-COMP) performs both investigative and adjudicative functions and these functions are only separated at the appellate level (Court of First Instance or European Court of Justice).⁷¹ In South Africa, the Competition Commission has the power to investigate violations of the competition law, and to commence investigations on its own, receive complaints; and to take litigation action.⁷² It is also stated that the Administering Authority may conduct investigation on its own initiative, or following certain indications that the restrictive practice exists – for example, as a result of a complaint made by any person or enterprise. The Authority would need to have power to initiate proceedings.⁷⁴ In Turkey, under Art 27 of Law of the Protection of Competition (1994), law gives the investigatory power to the Competition Board to investigate competition matters. In Estonia, Art 55 of the Competition Act (2001) gives the investigatory power to Competition Board concerning competition issues.

Therefore, the experiences of these countries reveal that the competition authorities are properly empowered to conduct investigation into the alleged violations of the provisions of the competition laws. However, it is only under the Ethiopian institutional arrangement that the Authority is denied the investigatory power to conduct investigation into violation of provisions of the Proclamation. The other point is, it seems so difficult for a single investigation officer to effectively investigate into the violations of the Provisions of the Proclamation particularly anticompetitive practices which are so complex and fact intensive. So this might affect the effective enforcement of the Proclamation.

To add some points, investigations necessarily centre on the search for evidence of a breach, regardless of whether subsequent action involves litigation or some alternative strategy. Resource constraints demand cost effective remedies and processes.⁷⁵ A new competition authority needs to prioritize its work carefully. A good rule of thumb, at least initially, is to concentrate on cases where entry barriers seem high, where prices seem high, and where consumers will benefit most. These initial targets should include those with the least substantial vested interests that would oppose change. That is, to improve support from consumers and politicians for the new competition law, the competition authority should choose early "winners".⁷⁶ However, in the process of investigation, the general principles and rules of due process of law, which in many countries is a constitutional mandate, must be duly observed. ⁷⁷ For instance, in Zambia, the Zambia Competition Commission (ZCC) has established a 'fast track' strategy to stop offending conduct quickly and cost effectively and achieve satisfactory outcomes for consumers.⁷⁸ The 'fast track' process will normally begin with a letter of demand or verbal complaint, setting out the alleged breaches of the Act and remedial action. Common requirements are cessation of the conduct, corrective advertising, recompense to consumers or businesses for losses and the establishment of a trade practices

⁷⁰ CUTS (2003): Supra note 2

⁷¹ Ibid

⁷² OECD, Supra note 8

⁷³ UNCTAD, Supra note 17

⁷⁴ UNCTAD, Supra note 12

⁷⁵ UNCTAD, Supra note 17

⁷⁶ John Preston, Supra note 45

⁷⁷ UNCTAD, Supra note 12

⁷⁸ UNCTAD, Supra note 17

compliance program.⁷⁹ For competition authority, the available 'tools' in addition to litigation are varied- administrative settlement, adjudication, promotion of self-regulation, compliance programs, information and liaison.⁸⁰

In Ethiopia, the Ministry or Bureau through investigation officer conducts investigation as per the Criminal Procedure Code of Ethiopia. The investigator or investigation officer needs to have letter of authorization from the Ministry or Bureau to effect this investigation. The purpose of this investigation is to secure relevant evidence to prove the alleged violation of provisions of the Proclamation. This investigation includes various activities.

Search and Seizure

One of the powers of the investigation officer in effecting investigation in connection with the implementation of this Proclamation is the power to search and seizure. Search and seizure are related issues, because one almost always follows the other. The "investigation officer" conducts search and seizure in the process of investigation pursuant to the relevant provisions of the Criminal Procedure Code (Art 42(4)). Under Art 32 of the Criminal Procedure Code, the law empowers the police officer or member of the police to conduct criminal offences investigation. However, the Proclamation empowers the "investigation officer" to effect search and seizure in relation with competition matters and consumers protection. Pursuant to Art 26 of the Constitution of the Federal Democratic Republic of Ethiopia, the principle is the right to privacy. This right of a person shall include the right not to be subjected to searches of his home, person or property, or the seizure of any property under his personal possession. It is under exceptional circumstances that this right may be restricted e.g. to safeguard national security or public peace, prevention of crimes or the protection of health, public morality or the rights and freedoms of others. This indicates in order for the "investigation officer" to conduct search and seizure it must be considered within the framework of this constitutional right to privacy. Thus the rights of the party under search should be protected as provided in the Constitution and Criminal Procedure Code. So the "investigation officer" must be well trained personnel to conduct this search and seizure.

As already noted, for an investigation officer to conduct search and seizure, this officer has to possess authorization letter which should precisely specify property to be searched and seized. This letter should not be "general" one for this may violate right of privacy unduly. In searching and seizing property there should be independent witnesses with the officer to check and sign list of property seized (Art 33(3) of Crim.P.C.). In case where there is denial of access to premises the investigation officer may authorize the police to use reasonable force to effect entry (Art 33(4) of Crim.P.C.). As to the time-limit for search, it must be carried out between the hours of 6 A.M. and 6 P.M. (Art 33(5) of Crim.P.C.). The Proclamation does not indicate the chance for search and seizure without the authorization letter; and it is not clear whether this search extends to the body search of the suspect. In effecting search and seizure, the investigation officer may enter into, search, seal, order the opening of containers in, take samples of goods or other materials necessary for the investigation or seize documents from, copy the documents on papers or electronically from, seize or take copies of information contained on tape recorders or any other equipment or seize or keep goods that are believed to be necessary for the investigation from, the business of the business person against whom application is filed or the business warehouse or any other premise in which goods are stored or services are delivered or related building of any business person necessary for the investigation (Art 42(5) of the Proclamation). This also shows a search is not necessarily limited to the premises of the suspect; any premises can be searched if specifically indicted in the authorization letter. However, diplomatic immunities must be observed. In conducting

⁷⁹ Ibid

⁸⁰ Ibid

investigation, the investigation officer has the power to request cooperation and assistance of the owners or officials or employees of the business establishments (Art 42(6)). However, the Proclamation does not explicitly empower the investigation officer to summon or to request the owner, officials or employees of the business establishments to appear before the investigation officer to give explanations or information, or to deliver materials, or to give explanations on spot or site in connection with the alleged violation of the Proclamation. In other jurisdictions, the competition authorities, in the investigation process, have the power to request these individuals to appear at the authorities to give explanations or information or to deliver materials or give explanations on spot. For instance, Estonian Competition Act (2001) Arts 57-60, Brazil Law #8884 (1994) Art 7, and Bulgarian Law of the Protection of Competition (1998) Art 51 empower the competition authorities with these powers. These laws also impose duty to protect business secrets or confidential information on the competition authorities. But in Ethiopia, the Proclamation is silent about the duty of the investigation officer to preserve the business secrets or confidential information of the suspected business person.

Finally, the Proclamation does not indicate what the Ministry would do with the final result of the investigation or after the completion of the investigation. The Proclamation does not also give clue as to whether the investigator of the Ministry could take any administrative measure or temporary injunctions against the suspect to stop from continuing with the anticompetitive acts under investigation or not. Of course after completion of the investigation process or on the process of investigation, the Ministry has the power to institute action against the violator of the provisions of the Proclamation at the Authority for administrative or civil measures to be taken (Art 41(3). And upon completion of the investigation or when deemed necessary, the Ministry or the bureau, may cause the return of goods or other materials seized in connection with the investigation to the owner (Art 42(7)).

4.3. Judiciary

In Ethiopia, the Proclamation recognizes the role of the judiciary in the implementation of this Proclamation. Art 48 denotes that both Federal and Regional state courts do have responsibilities and functions in the enforcement of this Proclamation. The Proclamation indicates that it is the courts of general jurisdiction which adjudicate disputes related to the Proclamation. But the Proclamation injects some form of modification that matters related to this Proclamation will be adjudicated by special divisions which are designated as Trade Practice and Consumer Protection Divisions. The purpose of organizing these special divisions to adjudicate matters related with this Proclamation at the Federal and Regional state courts is to expedite the trade practice and consumer protection activities. This should not only be taken to refer to the speedy justice from time aspect but also expertise and knowledge it creates in the areas of competition and consumer protection. Moreover, it is the exclusive jurisdiction of these special divisions which have the power to adjudicate and pronounce judgment concerning acts designated as criminal offences under the Proclamation (Art 48(2)). Under the repealed proclamation no. 329/2003,⁸¹ there were no such special divisions in the courts to adjudicate matters concerning that proclamation.

4.3.1. Federal High Court

In Ethiopia, appeal against any judgment or decision of a competent court is a constitutional right (Art 20(6), 78 and 80 of the FDRE constitution). The adjudicative tribunal of the Authority has the power to render administrative and civil decisions on matters governed under the Proclamation. And any person dissatisfied with the decisions of the Authority as the right to lodge an appeal to the

⁸¹ Trade Practice Proclamation, Proclamation No. 329/2003, *Federal Negarit Gazeta*, (9th Year No. 49, Addis Ababa, 17th April 2003).

Federal High Court within sixty (60) days from the date of the decisions of Authority. The appeal procedure from the decisions of the adjudicative tribunal of the Authority is governed as per Civil Procedure Code of Ethiopia (Art 40 of the Proclamation). The memorandum of appeal must fulfill requirements provided under Art 327 of the Civil Procedure Code.

The Proclamation envisages the ordinary appeal. For this reason, the jurisdiction of the Federal High Court in reviewing this appeal is as any ordinary appeal. The court has the power to review the appeal both on issues of facts and law. The appeal is governed by the rules of Civil Procedure Code. The Federal High Court may reject the appeal without calling on the respondent to appear, if it agrees with the decisions of the Authority as per (Article 337 of Civil Procedure Code). After the court has heard the parties, it pronounces the judgment (Article 347 of the Civil Procedure Code). The Federal High Court has the power to confirm, vary or reverse the administrative and civil decisions of the Authority from which appeal is lodged (Article 348(1) of Civil Procedure Code). Under the repealed proclamation No. 329/2003 similar jurisdiction was given to the Federal High Court. As per this repealed proclamation, in practice, in appeal case No.59096, M.A. Sherif P.L.C.V. Tais P.L.C.,⁸² the Federal High Court has reversed the approved decision of the Commission on the lack of jurisdiction. Furthermore, if the Federal High Court confirms the decisions of the adjudicative tribunal of the Authority, the appellant has the right to apply to the Federal Supreme Court Cassation Division. If the Federal High Court reverses the decisions of the adjudicative tribunal of the Authority, the appellant has the right to take appeal to the Federal Supreme Court. In other jurisdictions too, for example, in India, Austria and Peru appeals from the Competition Commission directly go to the High Court.⁸³

To note some general views, according to the conventional definition, the duty of the judiciary is to apply the law impartially objectively to a given state of facts. In reality, this means either settling disputes between two economic operators on the basis of competition law or reviewing prohibitions, injunctions or penalties imposed on the operator by the competition authority, in other words, determining whether procedural due process has been observed and whether the substantive law has been applied correctly.⁸⁴ Therefore, the function of the judiciary in competition cases is twofold: i) to resolve disputes between undertakings on the basis of competition law, awarding damages or issuing injunctions, i.e. imposing civil penalties on practices detrimental to the economy, and ii) to rule on appeals against injunctions or penalties imposed by the competition authority, i.e. to review administrative sanctions against behavior that is detrimental to the economy.⁸⁵

Seen in this light, the responsibility of the judicial system could be summed up in following two premises.⁸⁶ The first is that the judiciary reviews the legality of the acts of the economic authority, i.e. the market regulator, in enforcing its policy. It checks that the regulator has observed the rules of procedure and evidence: in other words, it determines whether the regulator has observed procedural due process and the presumption of innocence principle. This is the judiciary's traditional function reviewing application of the law. The second premise is that judges construe the law--the objective of which to enforce economic policy--in the light of a given factual and

⁸² Federal High Court, M.A. Sherif P.L.C. v Tais P.L.C., File No. 59096, Decided on 05/10/2000 EC.

⁸³ Uganda Law Reform Commission, A Study Report Competition law, (Kampala, Uganda, 2004), at www.ulrc.go.ug/rep&pubs/studyReps/Competition%20Law%20Yaif.pdf, Visited 16/01/2011

⁸⁴ OECD, Judicial Enforcement of Competition Law, (1996), at <http://www.oecd.org/dataoecd/34/41/1919985.pdf>, Visited 16/01/2011

⁸⁵ Ibid

⁸⁶ Ibid

economic context. Therefore, in interpreting economic legislation the courts give it a meaning which has an effect on its intent, i.e. which can qualify, bias, pervert or otherwise conflict with the economic policy that the law is actually intended to implement.⁸⁷ And the regulatory authority has to comply with procedural safeguards that necessarily have an impact on its effectiveness. The more procedural safeguards there are, the greater the risk of hampering action by the authority. Judges therefore have to balance the level of safeguards against the effectiveness of (legal) action by the authority.⁸⁸

In this regard, in the United States, federal district courts of general jurisdiction have jurisdiction over cases concerning competition laws. Yet, one of the problems with having courts of general jurisdiction resolve competition issues with a newly passed law is great amount of time required to develop a coherent set of competition rules.⁸⁹ In contrast, a specialized court or agency will have greater knowledge of prior decisions and related policies. For example, the Federal Trade Commission in the United States illustrates the effectiveness of a specialized agency. As illustrated by the American experience, it would be beneficial for transitional economies to adopt a system in which a specialized agency or court makes the determinations of violations, rather than a court of general jurisdiction.⁹⁰ Furthermore, staggered terms are essential to preserve the procedural and substantive knowledge of the decision making.⁹¹ In South Africa too, the Competition Act establishes an independent competition authority comprising a Competition Commission, a Competition Tribunal and a Competition Appeal Court for the resolution of competition matters or disputes.⁹² These show, in South Africa, there are specialized agency and court to determine competition matters. On the other hand, it is stated that the efficiency of the judicial system highly depends on legal base regulating the relations in the competition sphere, absence of blanks in the legislation, clearness of basic concepts and definitions of the regulating legislation.⁹³

To sum up, it is clear that the courts have a role in the implementation competition law having first instance jurisdiction or appellate jurisdiction. As already noted, in Ethiopia, according to the institutional framework established by the Proclamation the Authority which is an adjudicative tribunal has the first instance jurisdiction in adjudicating matters related to the Proclamation. It is possible to call the Authority as a specialized agency. The Authority has the power to adjudicate matters submitted to it and render administrative and civil decisions as provided under the Proclamation. As discussed earlier, the Proclamation allows recourse from the decisions of the Authority to the higher judicial body for review. That means any party dissatisfied with the decisions of the Authority has the right to take an appeal to the Federal High Court which is the general jurisdiction court. But the Proclamation envisages the establishment of special divisions named as Trade Practice and Consumer Protection Divisions to adjudicate matters related to the Proclamation. Under the Proclamation, the Federal High Court has the power to review decisions of the Authority both on issues of facts and law as any ordinary appeal. It was noted that the benefit of

⁸⁷ Ibid

⁸⁸ Ibid

⁸⁹ Kennet M. Davidson, Creating Effective Institutions: Ideas For Transitional Economies, at www.hawaii.edu/aplpj/articles/APLPJ_0 , Visited 16/01/2011

⁹⁰ Ibid

⁹¹ Ibid

⁹² J NEETHLING, VAN HEERDEN-NEETHLING *Unlawful Competition*, (Pretoria, 2nd Edition, October 2007), p.1

⁹³ Fifth UN Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable principles and Rules For the Control of Restrictive Business Practices, The Role of the Judiciary in Competition Law Enforcement in Russia, Submission by the Russian Federation, (Antalya, Turkey, 2005), at www.unctad.org/templates/Download.asp... Visited 16/01/2011

having a centralized development of competition law is likely to be endangered if courts can routinely take new evidence and make new findings of fact and law. For this reason, for instance, under Tanzania's competition law, the ordinary appellate court has the power to judicial review on the interpretation of law not on the facts and merits of the decisions of Fair Trade Practice Tribunal. In Ethiopia, there is no such limitation that the Federal courts can review decisions of the Authority not only on the interpretation of the law but also on merits and facts of the decisions. Hopefully, judges who are adjudicating on the special divisions of the ordinary courts are expected to be experienced professionals in law and economics specially in competition matters to minimize the impact of ordinary courts reviewing the decisions of specialized tribunal in matters related to the Proclamation. Moreover, in Ethiopia, it might not be possible to have the institutional framework where the competition tribunal and competition appellate court only adjudicate matters related to the Proclamation without recourse to ordinary courts. This is because the Constitution of FDRE Art 80 (3A) stipulates that the Federal Supreme Court Cassation Division has the power to review any final court decisions containing basic error of law. So the ordinary court is at the apex. Under the existing realities, it will be better if the special divisions to be set up at the Federal Courts are manned with experienced professionals in the areas of competition matters or issues related to the Proclamation.

4.4. Private Enforcement

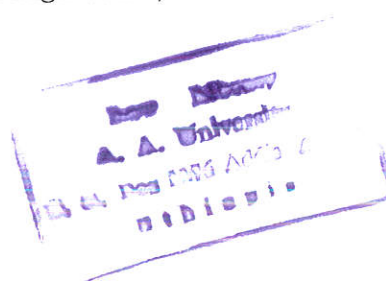
As already noted, in some jurisdictions, private enforcement serves as one enforcement mechanism of the competition laws. Private actions for redress of injury resulting from violations of the competition law may be instituted before an appropriate court or tribunal by people harmed. The private suit for damages is one important means of enforcing the antitrust laws. Thus, to facilitate private rights of action provisions should be added to the competition law.

In Ethiopia, before the adoption of the repealed Trade Practice Proclamation, the aggrieved party, for the violation of provisions of the Commercial Code which concern goodwill and unfair Commercial Competition-Arts 130-134, has right to sue the violator at court to secure remedies under Art 134 of Commercial Code, Arts 2120 and 2122 of the Civil Code, and to claim damage under Art.2057 of the Civil Code. For example, in the case, National Alcohol Factory V. Asnake Alcohol Drinks Industry, the Federal Supreme Court decided that if the respondent uses "Baron's Type Dry Gin" trade mark it would confuse the Consumers and affect the goodwill of the appellant and become case of unfair competition contrary to Art 133 (2) (A) of the Commercial Code against the appellant whose trade mark is "Baron's Dry Gin".⁹⁴

After the adoption of the repealed Trade Practice Proclamation in 2003, the aggrieved party has the right to sue or to submit his complaints to the TPIC against the violator of the provisions of the proclamation to secure remedies in the form of administrative measures as provided under Art 25 of that proclamation. The aggrieved party has a major role in the enforcement of that proclamation. So under the repealed proclamation, to sue for the violation of the provisions of the proclamation is left to the aggrieved party. Of course, the aggrieved party is not required to pay service fees. However, the Proclamation does not give clue as to how the aggrieved party may claim compensation for damage against the violator. Ato Yosef Ahimiro, the judge to the Federal High Court, said that one of the problems with the TPIC was that it was not awarding compensation for the victims of the violations of the proclamation.⁹⁵

⁹⁴ Federal Supreme Court, National Alcohol Factory v Asnake Alcohol Drinks Industry, File No. 40/87, Decided on 06/02/93 EC.

⁹⁵ Interview held with Ato Yosef Ayimiro, the judge to the Federal High Court, on 02/04/2002 EC.



In practice, under the repealed proclamation, the aggrieved party, after obtaining decision against the violator of the provisions of the proclamation at the TPIC, based on that decision, sued the violator for damage in the court which had material jurisdiction to adjudicate the case. In that case, the court was not going to establish, for example, whether there was act of unfair competition committed against the aggrieved party. It took the decision of the TPIC as conclusive evidence on that point. The court was requiring aggrieved party to prove the damage he has sustained. For example, Shchuwan Huwajing Guwamah Industrial company V. Miss Chen Chun Yun and Chen Chun Yun P.L.C.⁹⁶ at Federal High Court, the same parties⁹⁷ at Federal Supreme court and the same parties⁹⁸ at Federal Supreme Court Cassation Bench. In that case, the Cassation Bench stated that since the TPIC had decided against the applicants that they committed act of unfair competition, their responsibility to pay damage sustained by the respondents would not be arguable. But the aggrieved party has to prove the damage he sustained. Art 134(1) (A) of the Commercial Code provides that the aggrieved party who has sustained damage because of unfair Competition should be paid compensation. However, the Commercial Code does not indicate how to assess the amount of damage. Since Art 1 of the Commercial Code refers to the Civil Code, the amount of damage must be actual damage sustained by the aggrieved party as per Arts 2090(1) and 2091 of the Civil Code. Thus, the Cassation Bench reversed the judgment of the Federal High Court and the Federal Supreme Court, and remanded the case to the Federal High Court pursuant to Art.343(1) of the Civil Procedure Code stating that the actual damage should be proved.

Under the present Proclamation No. 685/2010 also the aggrieved party or private party not only has a role in private enforcement of the competition law by claiming compensation for damages but also contributes in the public enforcement of the Proclamation by suing the violator of the Provisions of the Proclamation. As per Art 41 of the Proclamation, the aggrieved party has the vested interest to institute suits against the violators of the provisions of the Proclamation which has a good role in public enforcement of competition law. In this regard, since investigation into commission of anticompetitive practices requires high expertise and knowledge in the field of competition matters how far the private party would be able to establish his case with relevant evidence is the point which needs consideration. Moreover, the aggrieved party has the right to claim compensation for damages against the violator of the provisions of the Proclamation. The Authority also has the power to decide compensation for damages in favor of the victim of the violation of the Proclamation (Art 35(1)). This enables the aggrieved party to sue the violator of the Proclamation to obtain administrative and civil decisions and compensation at the Authority cumulatively. This is also another important achievement made by this Proclamation to enforce the law in better manner. In assessing compensation to be paid to the victim, the Authority must consider factors provided under Art 50 of the Proclamation and actual damage sustained by the victim as per the relevant Arts 2090 and 2091ff of the Civil Code. However, in Ethiopia, compensation to be paid to the victim must be equal to actual damage sustained by the victim. This payment of compensation has no purpose of punitive measure as for example in U.S.A.

⁹⁶ Federal High Court, Shchuwan Huwajing Guwamah Industrial company V. Miss Chen Chun Yun and Chen Chun Yun P.L.C., File No. 47012, Decided on 29/04/2000 EC.

⁹⁷ Id. Federal Supreme Court, File No. 35995, Decided at 19/02/2001 EC.

⁹⁸ Id. Federal supreme Court Cassation Division, File No. 42835, Decided on 24/02/2002 EC.

Conclusion and Recommendation

As already noted, competition is the cornerstone of a free-market economy. Competition promotes the common good. It is also a potential legal tool to fight poverty and to promote economic development in general. Thus there are so many benefits of competition to the public. But competition requires public control. Recognizing this, Ethiopia has adopted her competition law called the Trade Practice and Consumers' Protection Proclamation No 685/2010 in August 2010. The Preamble of the Proclamation provides for the rationales of having this law. Leaving issues related to consumers' protection aside, the Proclamation provides for comprehensive rationales of having this law in the free-market economy with the purpose of maintaining and promoting competitive markets. The Proclamation also has the objectives which are to some extent support the rationales of the Proclamation as provided in the Preamble. The Proclamation clearly indicates the objective of competition law is accelerating economic development. But the Proclamation does not clearly proclaim in its objective provision that its purpose is to promote competition and competitive process by striking down anticompetitive practices to enable the public to secure the benefits of competition. It rather aims to fight acts of unfair competition to protect the interests and goodwill of business persons. So in implementing this Proclamation, the rationales provided in the Preamble and the objective provision and part two of the Proclamation should be seen together to get the full picture about the purpose of this law. Moreover, in the objective provisions Ethiopia also seems to promote her development concerns which are not necessarily the competition issue (Art 3 (3)). This indicates Ethiopia is tailoring competition law to her own specific circumstances. However, the duty of the business person to conduct commercial activities in a responsible way might include social obligations that these may create confusion as to the interpretation of the law and negatively affect the effective enforcement of the law. Therefore, this may require the amendment of the law to set the obligations of the business person as per the basic principles of the competition law.

With regard to the legal framework provided under the Proclamation, the Proclamation is so comprehensive that it covers all substantive provisions of competition law. However, the exceptions and exemptions provided under the Proclamation must be applied strictly not to defeat the purpose of uniform application of the law across all the business persons; and there should be specific guidelines as to their enforcement to develop transparency and accountability. Therefore, as much as possible, this Proclamation must be enforced effectively.

Concerning the institutional framework, the Proclamation establishes the Trade Practice and Consumers' Protection Authority which is legally autonomous and independent statutory authority. This shows the Authority is not part of any government organ and independent from any sort of influence from any person (individual, government or non government) in adjudicating cases submitted to it. This is an important achievement made by this Proclamation to enable this Authority to enforce the law effectively. But there are factors which negate this independence of the Authority in relation with the Director General and judges of the Authority. As to the Director General, the Proclamation does not provide for the required qualifications to the post; it does not provide the salary, remuneration, and benefits to the Director General, and it does not also provide for terms in office and grounds for removal. As to the judges, the requisite criteria are so general that it is difficult to know the exact qualifications needed to the post; and they are subjected to the federal civil service laws. Moreover, the Proclamation is silent about the immunity of both the Director General and judges of the Authority. These all factors threaten the personal independence of the Director General and judges in discharging their duties. Therefore, this demands in the short term the de facto commitment of the government to properly address these matters; and in the long run, I suggest, the amendment of this law to solve these problems.

As to the budgetary independence, the Proclamation provides that it is the government which allocates budget to the Authority. So the government is expected to apportion enough budgets to the Authority to enable the Authority to discharge its functions properly. However, in the future, the law should be amended to allow the Authority to receive budget from (and report to) the parliament.

As to the powers of the Authority, the Proclamation empowers the Authority with vast responsibilities to undertake competition advocacy work which enables the Authority to secure voluntary compliance to the provisions of the Proclamation by the business community and the general public. So the Authority has to effectively utilize this competition advocacy work. Moreover, the Proclamation grants the Authority with adjudicatory power. The Authority receives complaints submitted to it by the complainants who are not necessarily the aggrieved party and render decisions which are administrative and civil sanctions. But the Authority has no power to conduct investigation into anticompetitive practices and any violation of the provision of the Proclamation. This might limit the Authority to uncover violations of the provisions of the Proclamation on its own initiative while the investigations into anticompetitive practices demand public enforcement. And since having sufficient evidence to prove the commissions of anticompetitive practices require intensive investigation by qualified professionals in area the of competition matters, it would be difficult to rely only on complaints from these groups to fight anticompetitive practices. This might also affect the effective enforcement of the Proclamation. Therefore, this might require the amendment of the law to properly empower the Authority with this function.

In adjudicating cases, the Authority is required to apply strict rules of civil procedure code and criminal procedure code of Ethiopia. However, the Authority has to thoroughly consider whether these procedural rules fit to cases concerning competition matters.

As to the investigatory power, the Proclamation gives the investigatory power to the Ministry of Trade and Industry and Regional Bureau which are the government organs. These government organs conduct investigation into the violations of the provisions of the Proclamation through their "investigation officer". So it is the government organs which are conducting investigation into anticompetitive practices and any violation of the provision of the Proclamation but not the competition authority. Here it is not possible to talk about the de jure independence or the de facto independence of the "investigation Officer". It is not clear why the legislature opt for this kind of institutional arrangement. It would have been better if the competition authority investigates into commissions of anticompetitive practices. Therefore, for the time being the government should be able to conduct investigation into violations of the Proclamation particularly anticompetitive practices effectively; in the long run this might also require amendment of the law to give this power to the competition authority.

Finally, it was noted that the role of the judiciary in the enforcement of this Proclamation is so immense. The Federal and Regional Courts adjudicate issues related to this Proclamation through the special divisions which are designated as Trade Practice and Consumer Protection Divisions. And the Proclamation states that appeal from the decisions of the Authority could be lodged to the Federal High court which reviews these decisions. Therefore, this Proclamation will be better enforced if the special divisions to be set up at the Federal Courts are manned with well experienced professionals in the areas of law and economics particularly competition matters or issues related to the Proclamation.

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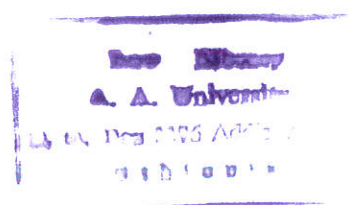
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